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## *DeFunis*, The Equal Protection Dilemma: Affirmative Action and Quotas

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A relatively unknown suit reached a temporary conclusion in March, 1973 when a decision was handed down by the Washington State Supreme Court. Obscure though it may have been, *DeFunis v. Odegaard*<sup>1</sup> parallels another initially obscure case, *Brown v. Board of Education*.<sup>2</sup> Its final determination by the United States Supreme Court will set a pattern for generations to come, relative to "reverse discrimination" as a constitutional method of dealing with de facto disadvantage caused without state connivance.

The events which led to this suit began in 1970 when Mr. Marco DeFunis applied for admission to the class of 1973 at the University of Washington's Law School at Seattle, Washington. By objective standards, his high expectations of an invitation to matriculate appeared not unwarranted. His grade point average (GPA) had been 3.62 on a 4.0 scale for his four undergraduate years at the University of Washington;<sup>3</sup> he had graduated in June 1970 with high honors (Phi Beta Kappa and Magna Cum Laude) and had scored 668 in his third and

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1. 82 Wash. 2d 11, 507 P.2d 1169 (1973).

2. *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For the purposes of this article, unless otherwise indicated, the term "*Brown*" will refer to both cases as an integrated unit.

3. The data supplied here comes from the Brief for Respondents & Brief for Appellants, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

last Law School Admission Test (LSAT). Included with this score were two previous LSAT results so that he had an overall average of 582. By these criteria, his potential for a successful performance at the University of Washington Law School in the study of law was high.

Like its counterpart in many law schools, the University of Washington Admissions Committee ranked individual applicants on the basis of the projected first year average (PFYA). This is determined by a formula which includes, in this situation, the objective variables of junior-senior GPA (in Mr. DeFunis' case 3.71) and LSAT score, or average score if more than one LSAT examination was taken within a specified period. These factors gave Mr. DeFunis a projected first year average of 76.23. At the University of Washington Law School, a PFYA of 77 or above meant automatic or nearly automatic acceptance. A PFYA of 74.4 or below meant automatic rejection. Applications with a PFYA in the brackets between 74.5 and 76.99 were held aside for further consideration by the committee.

The University of Washington, like most law schools throughout the country, was experiencing a substantial increase in the number of applicants and thus was forced to make various subjective decisions for some individuals in order to limit the entrants to the first year class from the many eligible candidates. Marco DeFunis was among those rejected. Thereupon, according to him, the university suggested he reapply for the class which would commence study in the fall of 1971 (the graduating class of 1974).

During the period between his denial of admission to the class of 1973 and the decision on his application for the class of 1974, Mr. DeFunis engaged in twenty-four hours of graduate study in another discipline. At the same time, he was employed in a full-time job during the day. He achieved 21 credit hours of "A," and 3 credit hours of "Inc." This information was forwarded to the Admissions Committee as further evidence of his superior academic ability. Apparently, however, it was not persuasive, for he was notified in August that he had again been refused admission to the law school. Previous to this second rejection, or shortly thereafter, he became aware of the Council of Legal Education Opportunity (CLEO) program for admission of minority students to the university's law school.<sup>4</sup> This program was the

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4. CLEO is made up of representatives from the American Bar Association (ABA), American Association of Law Schools (AALS), National Bar Association (NBA), and Law School Admission Test Council (LSATC). See 1 COUNCIL ON LEGAL EDUC. 1 (1968).

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product of the affirmative action efforts endorsed by the United States Department of Health, Education and Welfare<sup>5</sup> (HEW) pursuant to executive order,<sup>6</sup> to afford individuals of designated minority groups equalizing opportunities to enter various occupations.

The underlying CLEO philosophy, with respect to admissions criteria, contends that objective standards are not truly indicative of potential performance in law school for individuals from culturally deprived and/or oppressed minorities. The CLEO program is geared towards providing legal education, which might otherwise be denied to members of these minorities if determinations were made solely on the basis of the usual objective information. Thus, when a member of the designated minority groups is an applicant, his record is given special attention beyond the undergraduate GPA and LSAT score to find other evidence of potential success in law school—subjective criteria.

The compensatory admissions policies of the University of Washington Law School act in favor of four denominated groups: Blacks, Chicanos, American Indians, and Filipinos.<sup>7</sup> Any individual who is within one of these groups automatically has his application set aside for special consideration by the use of so-called subjective factors:

In assessing qualifications we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.<sup>8</sup>

An applicant's ability to make significant contributions to law school and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.<sup>9</sup>

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5. See Raab, *Quotas by Any Other Name*, 54 COMMENTARY 41 (Jan. 1972); *Can All Americans Be Made "Equal"?*, *U.S. News & World Report*, Apr. 9, 1973, at 39; *Memorandum to Colleges & University Presidents*, from J. Stanley Pottinger, Director of the Office for Civil Rights, H.E.W. (Oct. 1972).

6. Exec. Order No. 11246, 3 C.F.R. 339 (Supp. 1965).

7. Brief for Appellants at 5, Brief for Respondents at 4, *DeFunis v. Odegaard* 82 Wash. 2d 11, 507 P.2d 1169 (1973).

8. *DeFunis v. Odegaard*, 507 P.2d 1169, 1173 (Wash. 1973).

9. *Id.* at 1174.

Thus, the University sought to achieve a reasonable representation within the student body of persons from these groups which have been historically suppressed by encouraging their enrollment within the various programs offered at the University. Policies for admission of minorities throughout the University recognized that the conventional "mechanical" credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the University.

The Law School sought to carry forward this University policy in its admission program, not only to obtain a reasonable representation from minorities within its classes, but to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system. In doing so, the Admissions Committee followed certain procedures which are the crux of plaintiff's claimed denial of equal protection of the laws.<sup>10</sup>

There is no way of knowing what these factors are, since they are the personal reactions of the committee members to some random or chance item in the application, but are generally called extracurricular.<sup>11</sup> In any event, it is not unfair to say that the "subjective criteria group" is qualified by considerations of race and national origin.

Upon inquiry, Mr. DeFunis discovered that of the initial invitees, 44 were of the designated minority status. Of these 44 invited, 6 had a higher PFYA than he, whereas 38 had a lower PFYA. Some of these scores were in fact as low as 67.61. Of the entire class of the 275 invited, 74 had a lower PFYA than DeFunis, 36 of these 74 were of the designated minority classes. Twenty-two of the remaining 38 were previous admittees who had had their admissions to the law school delayed due to military service. The remaining 16 were found worthy based on additional information in their file.<sup>12</sup>

These figures firmed up DeFunis's hypothesis that the only reasons that particular minority group members with lesser credentials were admitted and he was not were the color of his skin and the spelling of his last name. He saw himself as being denied acceptance to the law school because he was Caucasian and not a member of an officially

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10. *Id.* at 1175.

11. *Id.* at 1187, 1193-96.

12. *See* note 3 *supra*.

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designated priority background. Based on this premise, he initiated legal action and obtained an order from the Washington court directing the President of the University and the Dean of the law school to admit him to the class entering in the fall of 1971.

The court order was based on the finding that DeFunis had been denied equal protection under the fourteenth amendment because he was white, and not of a designated minority, and the view of the district judge that the Constitution is colorblind.<sup>13</sup> This lower court's decision was appealed by the state and the university to the Supreme Court of the State of Washington.

Although Mr. DeFunis was in law school when the appeal reached the Supreme Court of the State of Washington, it elected to hear the matter because of the importance of the issues involved.<sup>14</sup>

On March 8, 1973, the Washington Supreme Court concluded that the state had in fact classified on race, color, and national origin bases, and that Mr. DeFunis had been the object of discrimination because of his race (or non-race).<sup>15</sup> Therefore, the scheme fell into a constitutionally suspect classification. It was necessary for the State to prove not only the rational basis, but further, a compelling state interest. By concentrating on the implied purpose of bringing the races together, the court was easily satisfied that the compelling state interest had been successfully proven.<sup>16</sup> Thus, the result and the philosophy of the lower court were reversed.

This decision clearly placed a stamp of approval on a matter on which the Supreme Court of the United States has never ruled. It has become a convenient vehicle for a Supreme Court ruling on the constitutionality of preferential affirmative action for minorities,<sup>17</sup> *i.e.*, "reverse discrimination."<sup>18</sup>

While *Brown* decreed discriminations and classifications based on race to be illegal, the Washington Supreme Court now claims that racial and ethnic discriminations against the non-official priority groups are legally acceptable so long as the discrimination is designed to assist in

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13. 507 P.2d at 1178.

14. *Id.* at 1177 n.6.

15. *Id.* at 1177.

16. *Id.* at 1181.

17. *Id.*

18. See note 5 *supra*. See also Cook, *School Segregation: To Brown and Back Again—The Great Circle*, 23 BAY. L. REV. 398 (1971); McAuliffe, *School Segregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65 (1971); Comment, *Increasing Minority Admissions in Law School—Reverse Discrimination?*, 20 BUFF. L. REV. 473 (1971).

a blending of the races.<sup>19</sup> That view is a gross over-simplification to the point of misrepresentation. The statement can only mean that such racial discrimination is legally acceptable when it acts in favor of those certain officially designated priority groups and against the officially non-designated object group.

It may be of value to pause and reflect on how the group obtained such official standing to serve as a basis for a compelling state interest. In the *DeFunis* situation, the University Law School Faculty merely voted to carve out such a group and decided the appropriate benefit.<sup>20</sup> Since the law faculty was at a state institution, the state supreme court in effect considered this faculty action to be state action, then went forward to find a compelling state purpose.<sup>21</sup>

*Brown* may have intended to equalize the races in the eyes of the law, but it decreed only educational segregation based on race to be unconstitutional.<sup>22</sup> The Department of Health, Education and Welfare decided to equalize the races by the issuance of numerous "regulations" which were designed and implemented to force equalization, by force or coercion.<sup>23</sup> Then, by adoption of the term "affirmative action," state and private concerns were "induced" to accept racial and ethnic quotas.<sup>24</sup>

HEW then moved into racial quotas at educational institutions under threat of withdrawal of HEW funds, the lifeline of many private institutions.<sup>25</sup>

The concept of affirmative action was developed from the practice of the judiciary in de jure discrimination cases to impose racial quotas on students and faculty in the desegregation process and to avoid further racial harm in those de jure cases.<sup>26</sup> Those same courts have been careful to avoid judicial intervention in cases of de facto segregation where there had been no finding of de jure segregation.<sup>27</sup>

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19. 507 P.2d at 1181. It has been suggested that there is a duty on state law schools to follow the *DeFunis* theory. See Comment, *Increasing Minority Admissions in Law School—Reverse Discrimination?*, 20 BUFF. L. REV. 473, 486 (1971).

20. Brief for Appellants at 4, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

21. In fact, there was no issue of state action as all parties had conceded it to be such. 82 Wash. 2d 11, 507 P.2d 1169 (1973).

22. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

23. See UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HIGHER EDUCATION GUIDELINES (Oct. 1972).

24. Seabury, *H.E.W. & The University*, 54 COMMENTARY 30 (Feb. 1972).

25. *Id.*; *Can All Americans Be Made "Equal"?*, U.S. NEWS & WORLD REPORT, Apr. 9, 1973, at 39.

26. *Green v. County School Bd.*, 391 U.S. 430 (1968); *Griffin v. County School Bd.*, 377 U.S. (1964); *United States v. Jefferson City Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966).

27. *Spencer v. Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972); Bell

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The new HEW affirmative action demands racial quotas and compensatory action without any finding of de jure segregation. In effect, this type of compensatory action is now legislation by regulations created by any state agency and given judicial sanction as state action and a compelling state interest.

If employees<sup>28</sup> of any governmental unit can merely design a regulation and implement their guidelines by calling it a compelling state interest, then such employees are not only making law (legislating) but may now make any law they choose, as long as they can convince the judiciary that it is for a good purpose. If the judiciary likes the idea, it will merely make a finding of a compelling state interest. One constitutional lawyer may suggest it is a combination of administrative and ad hoc state and federal agencies and employees joining with a sympathetic judiciary to ignore or replace articles I and II of the United States Constitution.<sup>29</sup> Another constitutional lawyer may just as rationally view this as proper functions of administrative agencies being properly supported by a strict constructionist judiciary. These views are on a collision course and may be considered as the irresistible force meeting the immovable object—only one can conceptually survive.

The principal concern of this article is the other legal issue involved. Pre-*Brown* law held discrimination against non-whites as permissible. *Brown* held no racial discrimination in education is permissible where state action is involved. *DeFunis* now holds that discrimination against whites is permissible as long as it is in favor of the "official" designated priority groups. The interesting and critical legal point is whether this type of "reverse discrimination" is contrary to *Brown*, or whether it is merely an appropriate implementation of *Brown*.

### I. EQUAL PROTECTION

#### A. *Prior to Brown v. Board of Education*

The natural starting point for any discussion of the equal protection clause of the fourteenth amendment (applicable to education) is *Plessy v. Ferguson*,<sup>30</sup> decided in 1896. There, the basic issue was: "May a State

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v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

28. Whatever else the faculty of a state university may be, they are at least *employees* of the state as opposed to *agents* of the state.

29. U.S. CONST., arts. I-II.

30. 163 U.S. 537 (1896).



classify and separate its citizens on the basis of their race or color?" The factual background showed that the plaintiff had been assigned to the "Colored Peoples' " car by train officials pursuant to a state law which required segregation of the races on public transportation.<sup>31</sup> Plaintiff's refusal to move from the "White coach" led to his arrest, ejection from the train, and imprisonment in the parish jail to await trial for violation of the Louisiana statute.

Plaintiff's first allegation was that the decision classifying him as "Colored" was erroneous as he was seven-eighths White.<sup>32</sup> The Supreme Court, holding that the mathematics of color was exclusively a state concern, refused to consider this point. His second allegation was that even if he had been correctly classified, the process itself, in reality the Louisiana statute, was void as it violated the equal protection clause of the fourteenth amendment.<sup>33</sup> The Supreme Court held that the Louisiana statute was valid in that the state could classify its citizens by race and then physically separate them on public transportation facilities as long as the separate facilities were equal.<sup>34</sup> Any feeling of inferiority that may have resulted, stated the Court, was by the Negro's own inference, and was not in the statute by implication.<sup>35</sup>

Thus, the doctrine of "separate but equal," and the state's right to classify by race received the approval of a post fourteenth amendment Supreme Court. Though the facts in *Plessy* pertained to railroad passenger classification and separation, the doctrine was all that was necessary to permit the continuation of "Jim Crow" laws vitally affecting the black (or at least non-white) American citizen.<sup>36</sup> Even a cursory knowledge of subsequent American history shows the emphasis on the separation rather than the "equality." Practically, the doctrine meant continued second class citizenship; in its application to the educational field it left little or no real opportunity for self improvement.

The *Plessy* decision was not without its critics. On the Supreme Court itself, Mr. Justice Harlan wrote a vigorous dissent:

But in view of the Constitution, in the eye of the law there is in this country no superior, dominant, ruling class of citizens. There

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31. *Id.* at 538-39.

32. *Id.* at 541.

33. *Id.* at 542.

34. *Id.* at 544.

35. *Id.* at 551.

36. *Cf. Lane v. Wilson*, 307 U.S. 268 (1939); *Gong Lum v. Rice*, 275 U.S. 78 (1927).

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is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the DRED SCOTT CASE.<sup>37</sup>

This ringing affirmation of a faith was addressed to the nation in 1896. A procession of cases gradually eroding the central doctrine of *Plessy* has confirmed the soundness of Harlan's belief in its potential evil and the basic unconstitutionality of state classification and discrimination based on race.

Once the "separate but equal" justification for state racial classification was accepted by the Supreme Court, it was inevitable that it be extended to the field of public education. Not surprisingly, when the time for Supreme Court challenges to the separate but equal doctrine finally arrived, they centered on the graduate and professional levels where facilities were more limited, inequality more obvious, and the Non-whites less submissive.

In 1938 the Supreme Court decided the case of *Missouri ex rel. Gaines v. Canada*.<sup>38</sup> The state of Missouri had segregated educational facilities for the races through the graduate level, but had failed to provide a law school for Blacks. Those desiring an education in the professional field were barred from the "White only" schools. To avoid the charge of unequal opportunity, the legislature created a plan whereby a Negro who wanted a legal education could attend a law school in some other state that would accept him, and the state of Missouri would pay his tuition.<sup>39</sup> Missouri argued that this plan conformed to *Plessy*, because it provided "equality" in that both races had access to legal education, albeit in separate states.

Notwithstanding the benevolent offer of the taxpayers' money for

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37. 163 U.S. at 559.

38. 305 U.S. at 337 (1938).

39. *Id.* at 342-43.

going elsewhere, Mr. Gaines felt that his rights, under the equal protection clause of the fourteenth amendment, were being violated. The United States Supreme Court agreed. It held that a state may not require one of its citizens who seeks a state-sponsored legal education to go outside its boundaries merely because of his race. To force him to do so was a denial of equal educational opportunities.<sup>40</sup> The Court carefully avoided the race issue, and relied on equality among citizens, not races. This decision was by 1938 criteria, a revolutionary decision — by 1974 standards, an evasion of the real issue.

The Supreme Court continued on this path of full educational opportunity at the law school level when in 1948 it decided the case of *Sipuel v. Board of Regents*.<sup>41</sup> There a black female had been denied admission to the University of Oklahoma, the state's only law school, because of her color. In a per curiam decision, it was stated that the petitioner was entitled to secure a legal education which had been denied to her while it was afforded to others during the same period.<sup>42</sup> This was a violation of the Constitution as the ". . . state must provide it for her in conformity with the equal protection clause . . . and . . . the same as it [the state] does for applicants of any other group."<sup>43</sup> It will be noted that in both the *Gaines* and *Sipuel* cases there were no separate law school facilities available for the plaintiffs. Those within the state were for Whites only.

Perhaps if these states had foreseen the impact of these decisions they would have provided separate facilities and avoided those confrontations which later became a social and legal base for *Brown*.<sup>44</sup>

Events now moved more swiftly as an increasing number of Blacks sought higher education. In the case of *Sweatt v. Painter*,<sup>45</sup> another *Plessy*-type issue was brought to the Court in 1950. Plaintiff, a black citizen of Texas, desired to attend the University of Texas Law School. At that time, there was a proposal for a separate law school for Blacks within the framework of the University of Texas. Sweatt was therefore denied admission to the existing (white) law school on racial grounds, though he was otherwise qualified.<sup>46</sup> Texas had obviously learned the

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40. *Id.* at 349-50.

41. 332 U.S. 631 (1948).

42. *Id.* at 632-33.

43. *Id.* at 631.

44. *Cf. Wrighten v. Board of Trustees*, 72 F. Supp. 948 (E.D.S.C. 1947).

45. 339 US. 629 (1950).

46. *Id.* at 631.

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lessons of *Gaines* and *Sipuel*, but was not yet prepared to take the next logical step.

While the suit wound its way toward the Supreme Court, Texas abandoned its plan for a black division at the University of Texas and created, on paper at least, a state supported law school for Blacks called the Texas State University for Negroes.

The Supreme Court took a hard cold look at reality and the intangibles of "equality" when they compared the facilities available for Whites and for Blacks. For the former, at the University of Texas, there was a full time faculty of 15 professors, a student body of 850 and over 65,000 volumes in the library; for the latter, there were only 5 full time professors, a student body of 23, and less than 17,000 volumes in the library. Further, the "Black School" lacked accreditation and had only one alumnus.<sup>47</sup> In terms of these tangibles the University of Texas was superior, but the court delved even deeper.

The University of Texas had a faculty of high reputation, an experienced administration, influential alumni, and traditions of standing and prestige. The new law school for "Blacks only" lacked any of these intangible qualities. The obvious inequalities were summarized by Chief Justice Vinson when he stated, "It is difficult to believe that one who had a free choice between these law schools would consider the question close."<sup>48</sup> The Court ordered that the plaintiff be admitted to the University of Texas.<sup>49</sup>

On the same day that it decided *Sweatt*, the Supreme Court also held in *McLaurin v. Oklahoma State Regents for Higher Education*<sup>50</sup> that once a Black had been admitted to a state university he must be afforded equality *within* the institution. Mr. G. W. McLaurin had been admitted to the University of Oklahoma in pursuit of a Doctor of Education degree, but once there he was subjected to certain practices of segregation. He was assigned a special seat in the library separate from facilities open to white students; he could wait in the cafeteria lines with white students, but he had to remain apart while eating. Initially he had to sit alone in the classroom behind a rail which bore a sign reading "Reserved for Colored"; later, the rail was removed and he was the sole occupant of a row of seats reserved for "colored students"; in some instances he was even forced to sit outside the door.<sup>51</sup>

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47. *Id.* at 632-33.

48. *Id.* at 634.

49. *Id.* at 642.

50. 339 U.S. 637 (1950).

51. *Id.* at 641.

Chief Justice Vinson noted that such restrictions “. . . impair and inhibit [plaintiff's] ability to study, to engage in discussion and exchange views with other students, and, in general to learn his profession.”<sup>52</sup> He went on to point out that the nation was in need of trained leaders, especially in education. Inevitably, (and perhaps incidentally to McLaurin's rights) in these circumstances “those who will come under his guidance and influence must be directly affected by the education he receives.”<sup>53</sup> The conclusion was inescapable. The total treatment was unequal and thus unconstitutional. Through *Sweatt* and *McLaurin* the Court had demonstrated that “separate but equal” was a very difficult concept to maintain, at least in the field of education.

In its holding, the Court took notice of the social problems that individual Blacks might face and, referring to *Shelley v. Kramer*,<sup>54</sup> recognized a constitutional difference between attitudes of social groups and state enforcement of those attitudes. However powerless the Court might be as to the former, it could and would prohibit the latter when, as state action, it constituted a violation of the fourteenth amendment.<sup>55</sup>

A hint of things to come was the reference in these two cases to the fact that a significant proportion of the population had been systematically denied the opportunity for higher education.<sup>56</sup> This 1950 Court had completely negated *Plessy* in the field of higher education. It required no great gift of prophecy to foresee the eventual application of the principle of these cases to elementary and secondary education. *Brown* was only three years away.

### B. *Brown v. Board of Education*<sup>57</sup>

The issue of “separate but equal” as applied in education was finally met head-on in May, 1954, when the Supreme Court handed down its

52. *Id.*

53. *Id.*

54. 334 U.S. 1 (1948).

55. *Id.* at 13-14.

56. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 641 (1948); *Sweatt v. Painter*, 339 U.S. 629, 633 (1948).

57. 347 U.S. 483 (1954). It is not the purpose of this article to exhaustively discuss pre and post *Brown*, but only to highlight the aspects of those cases as they may be relevant to *DeFunis*. For further investigation and/or background there are a number of excellent books and articles in the area; see generally A. B. BLAUSTEIN & C. FERGUSON, JR., *DESEGREGATION & THE LAW* (2d ed. 1962); L. FRIEDMAN, *ARGUMENT* (1969); B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* (1968); UNITED STATES COMMISSION ON CIVIL RIGHTS, *EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION* (reprint 1968); Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. L.Q. 479; Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. REV. 157 (1963).

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decision in *Brown v. the Board of Education*.<sup>58</sup> The holding stated: "we conclude that in the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."<sup>59</sup> Although later cases assumed it contained a more sweeping mandate, *Brown* was in fact limited to the field of public education.<sup>60</sup> For purposes of the *DeFunis* issue, the *Brown* decision is important for what it said, and even more important for what it did not say. The decisions of the subsequent two decades have gone beyond the language of *Brown* to close gaps left by the decision.

Under the general heading of *Brown* there were four cases from various parts of the country concerning the doctrine of "separate but equal" in elementary and secondary education.<sup>61</sup> The *Brown* Court looked beyond the tangibles to the intangibles, a device that had been introduced a few years before in *Sweatt* and *McLaurin*. It noted that the history of the fourteenth amendment does not indicate that there was any expressed intention to affect public education. Then it went on to weigh the six cases that had been decided since *Plessy* and their handling of "separate but equal." Each of those cases had skirted around the basic issue of whether the "separate but equal" doctrine applied to education. This was accomplished by finding other ways to rationalize the result without actually disturbing *Plessy*.

This Court elected to look to the effect of segregation itself on public education. The issue as stated by the Court was: "Does the segregation of children in public schools, solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the minority group of equal educational opportunity?"<sup>62</sup>

The Court noted in its answer to that question many considerations which are important for a realistic understanding of the roles of state and local government in education, which was duly indicated as one of the most important functions of those bodies. The Court stated, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he or she is denied the opportunity of an education . . . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their

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58. 347 U.S. 483 (1954).

59. *Id.* at 495.

60. *Id.* at 494-95.

61. Besides *Brown* there was *Briggs v. Elliott*, from the Eastern District Court of South Carolina, *Davis v. County School Bd.*, from the Eastern District Court of Virginia, and *Gebhart v. Belton*, from the Supreme Court of Delaware. See 347 U.S. 483 (1954).

62. 347 U.S. at 493.

status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>63</sup> The Court went on to hold "that the Plaintiffs . . . [were] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>64</sup>

Realizing the importance of their decision and the awesome impact it would have on educational systems of the nation, the Court invited a number of state attorneys-general, as well as other interested parties, to appear as amici curiae on how to enforce what became known as *Brown I*.<sup>65</sup> The basic decision which emerged as *Brown II* was to remand the cases to the lower courts from which they came with instructions to use equitable principles in enforcing the transition to racially non-discriminatory schools.<sup>66</sup>

Thus the local federal district courts were given a mandate by the Supreme Court to do away with public schools maintained on a segregated basis and, by utilizing equitable principles, to establish unitary school systems.<sup>67</sup> Cases following the *Brown* decisions dealt with allegations of practical barriers to immediate desegregation,<sup>68</sup> judicial decrees designed to force recalcitrant school districts to accept *Brown* or to assist cooperative educational authorities,<sup>69</sup> to investigate and stop the various schemes employed by school authorities to avoid the *Brown* mandate,<sup>70</sup> and methods by which the school authorities might or must implement the letter and spirit of *Brown*.<sup>71</sup> It is in this latter area that the issues for the *DeFunis* dilemma were being nurtured. The methods utilized to create the unitary school system evolved into what is called, by the plaintiff in *DeFunis*, a new form of denial of equal protection, that of "reverse discrimination." It is important to determine whether this allegation is a frustration of the "equitable principles" proposed

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63. *Id.*

64. *Id.* at 495. The *Brown* opinion, it should be noted, confined its abrogation of the *Plessy* doctrine to the field of education alone. Other applications of the doctrine were untouched by this 1954 decision.

65. *Id.* at 495-96.

66. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

67. *Id.* at 300.

68. See *Keyes v. School Dist.*, 396 U.S. 1215 (1969); *Alexander v. Holmes*, 396 U.S. 19 (1969); *Green v. County School Bd.*, 391 U.S. 430 (1968).

69. See *Jefferson Parish School Bd. v. Davis*, 404 U.S. 1219 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958).

70. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970); *Keyes v. School Dist.*, 396 U.S. 1215 (1969); *Green v. County School Bd.*, 391 U.S. 430 (1968).

71. See *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972); *Bradley v. School Bd.*, 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972); *Mapp v. Board of Educ.*, 329 F. Supp. 1374 (E.D. Tenn. 1971), *aff'd*, 447 F.2d 851 (6th Cir. 1973).

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by *Brown*, or merely a normal and regular implementation of them. In *DeFunis*, the issue joined on that point.

### C. *Post-Brown*

The activity following *Brown* can be divided into three general phases. The immediate post-*Brown* cases involved a concentration on the elimination of state supported segregated educational institutions by the destruction of excuses for delay. The watch-word was, in effect, "end segregation." *Griffin v. School Board*<sup>72</sup> and *Green v. County School Board*<sup>73</sup> may be considered as the beginning of the second phase: the elimination of the racial segregation effects remaining after *Brown*. This phase was characterized in the lower courts by such devices as open enrollment,<sup>74</sup> re-districting,<sup>75</sup> racial quotas to reflect the general community pattern,<sup>76</sup> and bussing.<sup>77</sup>

The third phase was an outgrowth of the second. It was discovered that the previous concentration on the establishment of "racially non-discriminatory schools"<sup>78</sup> did not solve the problem of individual and group educational disadvantages which had resulted from segregation practices. School systems, recognizing the educational lag, began remedial programs to compensate for the educational disadvantage induced by segregation. These types of programs can generally be called "compensatory education" programs.<sup>79</sup>

The attempts at combining racially (and ethnic) unitary schools and compensatory programs were soon found to be an incomplete solution

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72. 377 U.S. 218 (1964).

73. 391 U.S. 430 (1968).

74. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

75. *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1966), *cert. denied sub nom. Board of Educ. v. United States*, 389 U.S. 840 (1967).

76. *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969). *But see Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972).

77. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970); *Mapp v. Board of Educ.*, 477 F.2d 851 (6th Cir. 1973).

78. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

79. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Keyes v. School Dist.*, 396 U.S. 1215 (1969). *See generally* Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. L.Q. 479; Cook, *School Desegregation: To Brown and Back Again—The Great Circle*, 23 BAY L. REV. 398 (1971); Ijalae, *Concessional Admission of Underprivileged Students*, 20 BUFF. L. REV. (1971); O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 TOL. L. REV. 281; O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971); Preyer, *Beyond Desegregation—What Ought to be Done?*, 51 N.C.L. REV. 657 (1973); Comment, *From Brown to Swann—The New Role of Equity in Integration*, 23 BAY. L. REV. 555 (1971); Note, *Alternatives to Case-by-Case Attacks on School Segregation*, 16 HOW. L.J. 575 (1971).



as they did not, by themselves, open the doors to full and equal employment and educational opportunity. More was needed. The next (and present) phase may be characterized as affirmative action programs. These programs are already in existence, by force of law and administrative fiat, in employment<sup>80</sup> and, unofficially, in educational institutions.<sup>81</sup>

It is a characteristic of affirmative action programs that they do not require any findings of either de jure or de facto segregation on the local scene. It is sufficient that there be a disproportionately small minority representation in a given field at the national level.<sup>82</sup> To qualify as a beneficiary of an affirmative action program, one need only be a member of any of the numerous officially designated "minority groups" without any hint or suggestion of personal disadvantage. Members of these groups—paupers, middle class, and millionaires alike—automatically qualify for affirmative action benefits.

Affirmative action is a positive corrective technique designed to compensate for the results of years of segregation. All "other Whites" (those not included in the priority groups), particularly those in the educational or employment fields, regardless of whether they or their ancestors engage in segregation, are now under some disadvantage due to affirmative action programs. Among others, who throughout the country alleged invidious discrimination due to race by virtue of such programs, was one Mr. Marco DeFunis, an applicant for the University of Washington Law School.

His claim, in effect, is that he was told to step aside; his opportunity for a legal education went to another who had the benefits of affirmative action. Anyone in the DeFunis situation may cry, "Why me? My family never owned slaves. I never discriminated against anyone, why me?"<sup>83</sup> There is no single answer. Justifications given can be appreciated only in the contexts of ends and means in sociology and the law.

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80. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Abrams, *The Quota Commission*, 54 COMMENTARY 54 (1972).

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

82. Raab, *Quotas by Any Other Name*, 53 COMMENTARY 41 (Oct. 1972).

83. See *Mapp v. Board of Educ.*, 477 F.2d 851, 853 (6th Cir. 1973) (Weick & O'Sullivan, JJ., dissenting); *DeFunis v. Odegaard*, 507 P.2d 1169, 1189 (1973) (Hale, CJ., dissenting); McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65, 89 (1971); Raab, *Quotas by Any Other Name*, 53 COMMENTARY 41, 43 (Jan. 1972).

### II. SOCIOLOGY . . .

No one can honestly deny that the designated minority groups have suffered greatly because of past segregation in areas of employment, purchase of real estate, trade and craft unions, and in higher education. It is probable that the less obvious indignities, motivated by traditional ethnic prejudices, have had even more significant psychological impact on the minority individual and group ego image.<sup>84</sup> Although anyone could point to exceptions to this general rule, their visibility only helps to prove the fact.

When he was "desegregated" in 1954, no door of career opportunity swung open for the new "freedman" who was generally unqualified to go on into higher education or become an apprentice in a trade, or enter a profession. The new freedom was not accompanied by any proverbial "forty acres and a mule." For those older minority group members caught in the educational lag, the new freedom proved to be illusory.<sup>85</sup> The admittedly deficient education, which resulted from the segregated schools or from lack of motivation due to frustration, was the very thing that prevented him from competing as an equal in higher education and employment. He is still not able to take advantage of this new opportunity to improve himself. Still not able to engage in upward mobility, he is, in effect, frozen at his present socio-economic level. In the long run, his plight affects not only himself but also his children, who cannot help but be influenced by their socio-economic-cultural environment. In a sense, his former old fashioned personal "box" trap has merely been recognized to be circular in effect.

This circular trap has been the problem with many minorities, particularly Blacks and American Indians. Although legal barriers had been removed, the social and economic barriers remained. There are those who liken this circle to a ring of steel, others claim it to be largely imaginary. Nevertheless, the immobility circle exists, whatever its holding power, as there are large numbers of minority group members of this last generation who are unable to move from their socio-eco-

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84. Note, *DeFacto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304, 308 (1973).

85. Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. L.Q. 479.

nomic substrata. As a means of breaking this circle, the concept of affirmative action was introduced.

The underlying premise of affirmative action is to make the change (from exclusion to inclusion in the main stream in American life) as fast as possible through private and governmental action. It is a policy of correcting the wrongs of centuries by the compensatory actions of today, one which will produce results not merely "with all deliberate speed," but with solutions that will "work and . . . work now."<sup>86</sup> It is a policy of priority considerations to those caught in the relative immobility trap. Among all possible career choices, the legal profession is certainly a most appropriate target of affirmative action, for unlike most other professions, it contains the power and potential for implementation of affirmative action. In the larger field of general law, there is a definite need for inclusion of minority groups, for if minorities are not a part of those making our system of justice work there is little reason for them to think that the law is cognizant of their needs and complaint. Indeed, the reverse is more probable. It is a perfectly understandable reaction of those who see themselves as excluded from participating in the making and enforcing of laws. The "outs" will view that law as the means of oppressing and persecuting them. They will view the legal system as "theirs" rather than "ours."

Nativist Americans to the contrary, the nation today is a blend of many peoples and cultures who have, each in their own time, made their own special contributions. The apparent smoothness of the blend disguises the fact that achieving it was not always an easy process. Any ethnic of the first or second generation (and occasionally some third or fourth) can describe various injustices suffered at the hands of the majority culture during the assimilation period. Further, inter-ethnic group discriminations were possibly just as savage. Usually, however, within three or four generations most ethnics adapted to the environment, became invisible, and thus immune from the consequences of being "different."<sup>87</sup>

The groups now officially called "minority group" ethnics have not been so easily assimilated into the mainstream. Explanations are legion. On one extreme is the view that "they" do not want to join the mainstream, on the other is the view that "they" have been barred from it.

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86. *Green v. County School Bd.*, 391 U.S. 430, 440 (1968), *quoted in DeFunis v. Odegaard*, 507 P.2d 1169, 1180 (1973).

87. *See generally* M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* (1972).

## Equal Protection Dilemma

Unfortunately, the elusive truth is somewhere between these extremes. History has shown the former view to have been popular through the 1930's. Gradually the latter became prevalent, culminating in *Brown*. Which view will prevail in the long run must be left to history.

What is in issue today, particularly in *DeFunis*, is the morality or legality of the present "reverse" discrimination created as an affirmative action device as atonement for past "obverse" discrimination. Past discrimination has been held to be immoral, invidious, illegal and unconstitutional. The present discrimination is held to be moral, non-invidious, legal, and constitutional because it serves a "compelling state interest." A non-pragmatic philosopher or legal scholar may find trouble in a reconciliation of these two views unless he makes a purely subjective choice of a side, and then rationalizes toward his pre-chosen end.

The basic American culture is English. Bits and pieces of other cultures have been engrafted onto or blended into it. On the whole, it is still recognized as basically White Anglo Saxon Protestant (WASP). The WASPS, however, although their culture dominates, do not constitute a numerical majority, they are indeed a minority group!

Who then are "the" minorities? First generation ethnic immigrants? Second generation immigrants? Blacks? Chicanos? Jews? Polish? Hungarians? Italians? Indians? Chinese? In fact, they and many, many more are all members of a minority group. Every "American" belongs to at least one racial or ethnic minority. By chance the only single clearly identifiable numerical majority group in the United States is women, but they too are, for many purposes, a "minority" group!

Due to the reduced number of immigrants and the increase of inter-ethnic and inter-racial marriages, the number of "pure" minorities is diminishing. Oddly, some are increasing as a statistic. If, for example, a white woman married a black man, no one's status would be changed. If, however, she were to marry the Spanish surnamed male, she would be a new addition to that minority group and may now claim her official affirmative action priority. The traditional classification of white and non-white further increases official minority group membership, as all children of inter-racial marriages are classified as non-white, *i.e.*, "minority."

Then of course there is the effect and influence of geographical location. Individuals of Japanese descent may be a recognized "minority" in California and Washington, but not in Hawaii or Montana. French-Canadians may be a "minority" in Maine, but not even a cognizable

group in Idaho. An individual with a Spanish surname may have a different impact and reception in New York depending on whether he is of Puerto Rican or Mexican origin, as compared to his treatment in New Mexico. In Washington, Filipinos are members of the official group, but would not even be considered members in Iowa, for example. One would be surprised if the Iowa Law School declared Filipinos as a disadvantaged minority there; the Iowa Supreme Court would be hard pressed to find a compelling state interest. A few groups have been officially designated by the federal government. They are the fortunate ones, for like St. Paul, they are "Romans"; they carry their minorityship throughout the length and breadth of the realm.

Marco DeFunis has been classified as one who is not a member of an official minority group. This does not mean that he is a member of the majority, rather he is merely a member of a group not entitled to priority or privilege because there is no presumption of a history of discrimination or segregation which adversely affects its members. He is, ironically, Jewish, descendant of a Sephardic Jew<sup>88</sup> whose very existence as a group had its origins in persecution. Thus, he is a minority within a minority, but according to the guidelines of the University of Washington he is not entitled to priorities because membership in that minority is not sufficient. Had he been a Black or Filipino he certainly would have been accepted based on his record. He has thus been impliedly told that Jews as a group do not have a past or current history of discrimination that has resulted in employment or educational deprivations. The American Jew should be relieved to hear that.<sup>89</sup>

The present affirmative action practices present two long-term sociological considerations. First, the present authority of the *DeFunis* case, if followed, permits classification by race and ethnic origins for a compelling state interest. This is a reversion to the 1849 Doctrine of *Roberts v. Boston*<sup>90</sup> (racial classification at the state level for educational purposes). If affirmed by the United States Supreme Court it will also mark another reversion, that of federal approval of state-based racial classification for other purposes, the principal theory of *Plessy* of 1896, which incidentally, cited *Roberts* as precedent.<sup>91</sup> The principle of

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88. Brief for Respondents at 21, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973); Rabinove, *Law School Minorities: What Price Admission?*, AMERICA, Apr. 28, 1973, at 387.

89. See O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Tol. L. Rev. 281, 315.

90. 5 Cush. 198 (Mass. 1849).

91. 163 U.S. at 544.

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state-based racial classifications was also in issue in *Gaines*, *Sipuel*, *Sweatt*, *McLaurin*, and *Brown*. Granted, some may find a justifying distinction between those cases and *DeFunis* in that the position of the races has finally been reversed, or, as has also been advanced; that this reversal merely favors groups which had formerly been disadvantaged.

The reversal has also been justified on the "shackled runner" analogy, which likens the minority group member to the runner who has been competing in a race, but handicapped by leg irons. It is not enough, claim the proponents, to merely strike the manacles. Some type of affirmative action must be introduced to advance the runner to the place where he would have been, absent the shackles. Like most analogies, its argumentative force changes with the substitution of different times, different circumstances and different individuals. Even more significant is the change in impact according to the views of the audience. There are also those who find no justification in reverse discrimination because they do not believe in racial classifications and priorities *at all*. Reverse discrimination has merely reversed the roles of the races and has revived the question of the morality and legality of the principles of racial distinctions and discriminations. From this standpoint, *DeFunis* has the sociological and legal potential to equal or surpass *Brown* in its impact.

Second, America theoretically prides herself on individual achievement based on individual performance, not on membership in a group. Grass-roots America believes this country is basically a meritocracy.<sup>92</sup> This basic grass-roots philosophy was in some measure responsible for *Brown*. Indeed, the "American Dilemma"<sup>93</sup> described by Gunnar Myrdal twenty-five years ago seemed to have been dissolved. At last there could be harmony between the ideal and the real where Blacks were concerned.

There is no evidence, however, that the American Creed (Myrdal's term) is broad enough to encompass "affirmative action." The primary thrust of the civil rights movement to change the law so as to end the dominance of one race over another and to establish equality within the law was in accord with the desire to end the dichotomy between the American Creed and the harsh realities of practice. In *Brown*, Myrdal's American could feel progress had been made. *DeFunis* raises doubts.

Put another way, there is no reason to believe that grass-roots America

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92. See M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* 97 (1972).

93. 2 G. MYRDAL, *AN AMERICAN DILEMMA, THE PROBLEM & DEMOCRACY* (1962).

is ready to accept the policy of affirmative action priority quotas. In fact, there is growing evidence to the contrary.<sup>94</sup> The history of the racial civil rights movements has been to change the law to prevent the dominant status of one race over another race and to establish an equality of legal status. This has ironically created a new intangible power still controlled by Whites in power, who are haunted by "white guilt" and seek to atone with a self-imposed restitution on the group. Fortunately for those in charge of determining the terms of the restitution, payment is to be made by *other* Whites not in power, or unable to enter the power structure because they have been told to stand aside.

As a practical matter, few will quarrel with the righteousness of affirmative action until it hits "me." When "I" am called upon for "my" contribution or sacrifice, my turn to pay the damages, "with a little bit of luck," as the song goes, "I won't be home." When faced with the inevitable, however, some will cooperate and boast of it; most will protest on the meritocracy argument. When fate singled out Mr. DeFunis for his contribution, he protested. This is another side of the *DeFunis* situation.

The affirmative action activist cannot reasonably expect those who have been educated and trained to accept equality to stand silently aside when told that they are now to be deprived of a right or benefit because of mandated affirmative action preferences. Though not in intent, but in operation, affirmative action may rationally be viewed as a superiority granted by the law. This, too, is a sociological aspect of the *DeFunis* dilemma—the elimination of the priorities of the past by creation of new priorities for the present and the future.

Most of the protest and objections to the creation of these new priorities so far have been due to the misapplication of *Brown's* demand for unsegregated (unitary) schools by viewing *unsegregated* as meaning the same as *integrated*.<sup>95</sup> Integration was ordered in a few severe mixed de facto and de jure situations, not in pure de facto situations.<sup>96</sup> Later courts grasped these few hard core decisions and by misunderstanding them, misused them. This misuse led to massive "chromatic cross-

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94. Assuming such magazines as *Readers' Digest*, *Commentary* and *America* to be somewhat attuned to the reflective of grass root sentiments.

95. See *Mapp v. Board of Educ.*, 477 F.2d 851, 853 (6th Cir. 1973) (Weick & O'Sullivan, JJ., dissenting); *DeFunis v. Odegaard*, 507 P.2d 1169, 1189 (1973) (Hale, C.J., dissenting).

96. *Bell v. City of Gary*, 324 F.2d 209 (7th Cir. 1963). *School Comm. v. Board of Educ.*, 277 N.E.2d 729 (Mass. 1967). *But see Keyes v. School Dist.*, 313 F. Supp. 90 (D. Col. 1970), *modified*, 445 F.2d 990 (10th Cir. 1971), *rev'd in part and remanded*, 409 U.S. 818 (1973).

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hauling,"<sup>97</sup> which has obscured the basic constitutional issue of equal protection of the law.

It must be conceded that in many instances the effects of segregation were so severe that forced integration was the only way to begin the desegregation process.<sup>98</sup> It must also be conceded that such use of power, in a governmental form based on the consent of the governed, must be a restrained power.

Integration so far, to the extent that it has been successful when it has been ordered, has worked because there has been basic grass-roots support, and no effective opposition. The war is over. Integration now faces the problem of a few minor skirmishes, but it is essentially directed toward reconstruction and winning the peace. It should be a matter of great concern to all to find the precise point in time where grass-roots support of forced integration and affirmative action will turn to grass-roots opposition. Once the opposition begins to grow there is always the danger of a reaction which may reverse the gains of *Brown* and return America to the "us" and "them" of the pre-*Brown* era. This, too, is a serious sociological aspect of *DeFunis*: whether its existence signals the emergence of a rational opposition to reverse discrimination. It was the influence of sociology that forced the *Brown* decision; it also has the potential to neutralize or reverse *Brown*—something that no one wants.

A new chapter in race relations has begun. The momentum of the affirmative action concept of equality may carry the equality of *Brown* far beyond the grass-roots concept of equality. Obviously, there are conflicting opinions as to the precise meaning of equality in sociology and law. The sociological concept is necessarily subjective; the legal concept must be objective.

Equality in law does not mean social, cultural, and economic equality—homogenization. It does mean equal treatment by the law. The courts have consistently asserted this.<sup>99</sup> It is not the function of the law

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97. *Lovlace v. Leechburg Area School Dist.*, 310 F. Supp. 579, 588 (W.D. Pa. 1970) (dictum).

98. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1970); *Alexander v. Holmes*, 396 U.S. 19 (1969); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Griffin v. County Bd.*, 377 U.S. 218 (1964); *Mapp v. Board of Educ.*, 329 F. Supp. 1374 (E.D. Tenn. 1971).

99. See *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1230 (1971) (desegregation-ratios); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1970) (educational balancing-ratios); *United States v. Smith*, 464 F.2d 194 (10th Cir. 1972) (criminal); *Andrus v. Turner*, 421 F.2d 290 (10th Cir. 1970) (habeas corpus-sentencing); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969) (habeas corpus-mental health); *Communist Party v. Austin*, 362 F. Supp. 27 (E.D. Mich.



to force such social-cultural-economic equality, nor can that power be used to create or sanction legal inequality. The Declaration of Independence and the Constitution make reference to all men being equal, but it means in the eyes of the law. Equality has been interpreted as meaning: the condition of possessing substantially the same rights, privileges, and immunities, and being liable to substantially the same duties.<sup>100</sup> No man should be denied the possibility of improving his lot; there ought to be a general condition of openness so that anyone by a conscientious effort may better himself and indeed that there should be no limit for possible improvement, certainly no limit set or supported by law.<sup>101</sup> This latter statement tends to lend credence to the equal protection argument used by plaintiff DeFunis. The decision in *DeFunis* shows that in the name of equality, and in the effort to make manifest that which was quoted above by Jarrett, the opposite has now occurred. There have been limits set for the self improvement of some, limits set and supported by law.

The state of Washington recognized that the availability of equal opportunity for higher education has been the major instrument of social mobility and independence of parental social status.<sup>102</sup> The state correctly recognized a compelling interest to ensure that the citizen who has been wronged in educational opportunity be provided a remedy. The wrong (past discrimination), even though of a social and non-state-sanctioned variety, must be overcome to ensure social mobility and legal equality of all.

To do this, Washington has advanced the principle of remedying a non-legal wrong to a class by imposing a legal disadvantage on another class. This, too, is a major problem in the *DeFunis* issues.

### III. . . . AND THE LAW

The Washington Supreme Court considered three legal issues advanced by the respondent (plaintiff DeFunis) and the appellant (de-

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1973) (access to ballot); *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (voting redistricting); *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1972), *aff'd*, 405 U.S. 970 (1972) (spouse legal name). Although these cases concede that such inequality must be tested against the compelling state interest test, it still leaves open the questions of reverse discrimination as a compelling state interest.

100. BLACK'S LAW DICTIONARY 631 (rev. 4th ed. 1968).

101. JARRETT, *THE MEANING OF EQUALITY*, COMMISSION FOR ECONOMIC DEVELOPMENT, *THE CONDITIONS FOR EDUCATIONAL EQUALITY* 3, 14 (Supp. 1971).

102. *DeFunis v. Odegaard*, 507 P.2d 1169, 1184 (1973).

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fendant President Odegaard *et al.* of the University of Washington), and one additional procedural argument advanced by the appellant. Evidently there were numerous amicus briefs filed on behalf of appellants and from the commentary in respondent's brief they must have been lengthy Brandeis type briefs on sociology and the law.

Appellant's procedural allegation that Mr. DeFunis had no standing to question the university admissions policy was rapidly dismissed by the court, which stated that plaintiff had a "personal stake in the outcome of the controversy."<sup>103</sup> Considering the remainder of the opinion, this could hardly be viewed as a valuable concession to the plaintiff. The court could easily have decided against the plaintiff on this point and voided the original superior court decree. Because of the importance of the issues involved, however, it elected to assume the responsibility of a formal decision based on the merits of the other three legal issues.<sup>104</sup>

Respondent had alleged that the Washington constitution required preference be given to Washington residents.<sup>105</sup> The trial court's view to the contrary was sustained. The dissenting opinion by Chief Judge Hale challenged this as:

. . . another invidious form of discrimination—that against the residents of this state. According to some members of the admissions committee, the school has a goal to become a "national" law school . . .<sup>106</sup>

In spite of the dissent's obvious concern for the Washington taxpayers, this portion of the decision is clearly correct. There were no statutory or constitutional prohibitions on non-resident students except for provisions on tuition. According to the present state of the law it would not be illegal, if, by sheer chance an entering class consisted solely of non-residents. The court held this to be a legislative matter and not an appropriate area for judicial determination or intervention.

The remaining two issues are the heart of the case and the problem. The first was DeFunis' challenge to the procedures as being illegal, and the second was a charge that he had been denied equal protection of the law. The reported decision stated that respondent (plaintiff) had alleged that the ". . . procedures employed by the law school in select-

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103. *Id.* at 1177.

104. *Id.* at 1177 n.6.

105. *Id.* at 1187-88.

106. *Id.* at 1189-90.

ing first year students constitute arbitrary and capricious administrative action . . . ."<sup>107</sup> It further stated that respondent challenged the procedure as arbitrary and capricious because ". . . it deviated from the relative numerical ranking provided by the PFYA's, [and] . . . by taking subjective factors into consideration, and weighing them differently for different applicants, the committee arbitrarily denied him admission,"<sup>108</sup> and because ". . . no inquiry was made into the background of each minority applicant to make certain that the individual was in fact educationally, economically, and culturally deprived."<sup>109</sup>

Therein is an example of the advantage of having the last word on a subject. Respondent's arguments, as reported in the decision, do not match the arguments as presented in his brief. In fact, respondent's brief challenged the procedure as arbitrary and capricious due to the fact that there were *no objective standards*.<sup>110</sup>

Respondent challenged the admissions decisions on two closely related but nevertheless separate bases. First, that the committee was taking into consideration criteria listed as "other things,"<sup>111</sup> with no published standards or guidelines to assist or control the committee in the application of their judgment and discretion (respondent's allegation of *no objective standards*). This has the effect of the committee working with unbridled discretion—the very essence of a charge of arbitrary and capricious state action.

The second challenge was against the use of subjective criteria at all. In short, he evidently suggests that the committee could use only quantifiable data on which all men can agree. The court generally ignored the first challenge and elected to concentrate on the second. Here, respondent's implied suggestion of exclusive use of objective criteria is of course unworkable and undesirable. Even the publishers of objective tests, such as LSAT, caution against exclusive use of test scores. The use of objective criteria cannot per se exclude the use of subjective criteria nor discretion. It is possible that the Supreme Court, the appellant, and the respondent could agree on this.

Respondent's overlooked point was the lack of objective *standards* to guide the admissions committee in its *subjective evaluations* of the

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107. *Id.* at 1185.

108. *Id.* at 1186.

109. *Id.* at 1187.

110. Brief for Respondents at 21, *DeFunis v. Odegaard*, 82 Wash. 2d 11; 507 P.2d 1169 (1973).

111. *Id.* at 19.

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candidates. Without such standards, respondent continued, it may be possible that his rejection (or any one else's) could be due to ". . . the color of his hair, his religion, his political views, or the fact that he was Jewish."<sup>112</sup> He concluded:

There was nothing in the system of student selection that assured equal treatment or equal protection of the laws to those who might offend the prejudices of the selection committee . . . . [T]he failure to have objective standards for the ultimate determination of selection invalidates the whole system.<sup>113</sup>

To answer these allegations, the court elected to look at the "goals of the law school, pursuant to which the policy and procedures of the admissions committee have been formulated,"<sup>114</sup> rather than the state code,<sup>115</sup> which delegated the power and duty to the university to establish entrance requirements.<sup>116</sup> The court went on to discuss those goals, but the explanation is so buried in carefully phrased educational jargon as to be almost meaningless. Within the jumble, however, is the concession that it was the law school's intention to increase the number of minority students in the law school so as to eventually increase the number of minority individuals in the legal profession.<sup>117</sup> Considering the history of minorities and the law, this is certainly a worthwhile objective. As a goal, no one could honestly quarrel with it—not even Mr. DeFunis.

The court answered his objection as to objective criteria by following the *Griggs v. Duke Power Co.*<sup>118</sup> theory on the exclusive use of the LSAT and PFYA—the "game of numbers"—and supported the law school committee's view on the necessity for sensitivity and flexibility.<sup>119</sup> It also approved the committee's consideration of the candidate's racial and ethnic background as a constitutionally valid criterion. The court further found that there was no investigation of the individual's background "to make certain [he] was in fact educationally or culturally deprived,"<sup>120</sup> but seemed to say this investigation may be irrelevant by stating that:

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112. *Id.* at 21.

113. *Id.*

114. *DeFunis v. Odegaard*, 507 P.2d 1169, 1185 (1973).

115. WASH. REV. CODE § 28B.20.130(3) (1970).

116. 507 P.2d at 1172.

117. *Id.* 507 P.2d at 1175.

118. 401 U.S. 424 (1971).

119. 507 P.2d at 1187.

120. *Id.*

... every minority lawyer is critically needed, whether he be rich or poor. A showing of actual deprivation is unnecessary for the accomplishment of the compelling state interest.<sup>121</sup>

It would not be unreasonable to assume that the court, by these comments, is maintaining the appropriate test is not deprivation or disadvantage, but race per se, which is exactly the thrust of respondent's equal protection argument.

The court, in its analysis of the admissions procedure, accepted the view presented by the various appellant witnesses and original defendants, who convinced the court that the process "did employ predetermined standards and procedures in selecting students"<sup>122</sup> and that this process was not "so unreasonable and in disregard of the facts and circumstances as to constitute arbitrary and capricious action."<sup>123</sup>

Dissenting Chief Judge Hale, however, who read the same records, was of the contrary opinion, and submitted portions of the record which indicated to him that "the law school failed to apply even its own vague, loose and whimsical standards."<sup>124</sup>

It would not be unfair to note here that the existence of objective standards and their application were in dispute. Since the majority had already determined that the objective of the admissions policy is "not to separate the races, but to bring them together"<sup>125</sup> and that

... in some circumstances a racial intention may be used—and indeed in some circumstances must be used—by public educational institutions in bringing about racial balance. School systems which were formerly segregated de jure now have an affirmative duty to remedy racial imbalance.<sup>126</sup>

The court, citing as examples the *Green* and *Swann v. Charlotte Mecklenburg Board of Education*<sup>127</sup> cases, used them as precedent for its finding not only of a rational basis, but as satisfying the compelling state interest test.<sup>128</sup> The court, in so leaning, ignored or misunderstood the differences between de facto and de jure segregation. As a rule courts do not interfere where there is only de facto segregation. This court indicated its awareness of this when it cited *Swann's* comment on

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121. *Id.*

122. *Id.* at 1186.

123. *Id.*

124. *Id.* at 1191.

125. *Id.* at 1179.

126. *Id.*

127. 402 U.S. 1 (1970).

128. 507 P.2d at 1184.

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“a remedy to correct past constitutional violations.”<sup>129</sup> *Swann* (and the others) were in fact dealing with a hard core de jure situation, while Washington was at best, if at all, a de facto situation.

The court was not convincing in its reliance on these cases as valid precedent, as they were basic hard core de facto and de jure desegregation cases, while the case in point was a “reverse discrimination” situation. In fact, the court never indicated a finding of de facto segregation in the University of Washington, merely a minority imbalance at the national level.<sup>130</sup>

Considering the number of amicus briefs,<sup>131</sup> and their emphasis on sociological persuasion, it would not be improper to conclude that in response to respondent’s allegations of arbitrary and capricious action the court was willing to accept the questionable admission procedure because it had been persuaded by the briefs and law review articles to adopt the theory of reverse discrimination as compelling. Once accepted as a goal (end), virtually any procedure (means) would have to be acceptable.

The final argument was the conflict between respondent’s allegation of denial of equal protection and the court’s view that reverse discrimination was and is a compelling social reform. The court summarized the essence of plaintiff’s fourteenth amendment arguments:

. . . that the law school violated his right to equal protection of the laws by denying him admission, yet accepting certain minority applicants with lower PFYA’s than plaintiff who, but for their minority status, would not have been admitted.<sup>132</sup>

Respondent’s brief stated it somewhat differently:

Plaintiff was entitled to have his application for law school admission judged on the *same basis* and by the same criteria as all other applicants. The failure to consider all applicants on the same basis was a denial of the equal protection of the laws . . .<sup>133</sup>

In a sense, plaintiff was judged *on the same basis* as other applicants, in that he was judged objectively against other non-minority groups, while the minority students were judged *on the same basis* as against other minority students. The principal problem here was the use of

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129. *Id.* at 1180.

130. *Id.* at 1175.

131. *Supra* note 110, at 36.

132. 507 P.2d at 1178.

133. *Supra* note 110, at 7. Brief for Respondent at 7, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

different criteria for each group, where the groups had been defined by race. As plaintiff expressed it:

. . . the *privilege* of being considered separately and having less emphasis placed on the grade point averages and the LSAT scores than other applicants was made available exclusively to students of certain races.<sup>134</sup>

It may be fair to state the problem as whether different evaluative criteria may be used for groups that have been determined by race.

On the general proposition of whether racial classifications are unconstitutional *per se*, the court stated:

*Brown* did not hold that all racial classifications are *per se* unconstitutional; rather it held that invidious racial classifications—*i.e.*, those that stigmatize a racial group with the stamp of inferiority—are unconstitutional. . . . Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior, nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites.<sup>135</sup>

The court then referred to *Green* and *Swann* as authorities for their position that:

. . . the denial of a "benefit" on the basis of 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.<sup>136</sup>

A search of *Brown*, *Green*, and *Swann* produced no such statement. At best, this view has been "read into" *Brown* by the court, either on its own persuasion, or from the influence of one or more of the sixteen law review articles cited by appellant.<sup>137</sup> Whether these views are sociologically appropriate is not the point; what is important is that they are original in modern *law*.

The court also considered whether the "rational basis" test or the "compelling interest" test is more correct under the circumstances of this case, and concluded, as did respondent, that the latter test is appropriate. It conceded that since it is a racial classification that is involved, the latter test is demanded, and the law school has the burden "to show

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134. *Id.* at 9.

135. 507 P.2d at 1179.

136. *Id.* at 1181.

137. Brief for Appellants at vi-vii, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

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that its consideration of races in admitting students is necessary to the accomplishment of a compelling state interest."<sup>138</sup> In its discussion of this test, the court noted the underrepresentation of minority groups in the law schools and the minority groups' equal participation in the tax support of the law school and determined, therefore, that the state had a compelling interest in eliminating racial imbalance within public legal education.<sup>139</sup>

The court really cannot be criticized for the lack of a legal rationale in its opinion—a legal rationale was never intended. The court was adequately persuaded by the record of the social and moral aspects of imbalance, and decided it must act. It grasped at the available straws to rationalize what it considered a necessary result.

A developmental point which may have escaped notice in the court's reasoning is the inevitable application of the now "*DeFunis* principle" to all public collegiate education, public professional and graduate schools, and possibly public office, including, but certainly not limited to, the Washington judiciary.

The court next answered respondent's charge that there was no finding of any de facto segregation, much less de jure, when it introduced a new twist to that legal distinction:

The de jure-de facto distinction is not controlling in determining the constitutionality of the minority admissions policy voluntarily adopted by the law school.<sup>140</sup>

Apparently, this means that racial classifications, priorities, and discriminations by the state are valid as long as they are voluntary. After these strained exercises in logic, the court eventually admitted the social basis for its decision when it discussed the under-representation of minorities in the legal profession as a result of prior segregation and its after-effects. It asserted that without such a remedial program this underrepresentation might be perpetuated indefinitely, and this ". . . minority admissions policy . . . [is] the only feasible plan that promises realistically to work, and promises realistically to work *now*."<sup>141</sup> The court then concluded that the defendants had shown the necessity for the racial classification to the accomplishment of an overriding state

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138. 507 P.2d at 1182.

139. *Id.*

140. *Id.* at 1183.

141. *Id.* at 1184, citing *Green v. County School Bd.*, 391 U.S. 430, 439 (1968).



interest, and had thus sustained the heavy burden imposed on them by the equal protection provision of the fourteenth amendment.

Although the decision as to the equal protection problem was correct, the analysis of the need was correct, and the need for corrective measures was correct, the court overlooked the major point of the respondent's equal protection argument. Conceding the minorities' constitutional protection from detrimental racial-ethnic classifications, it must also be conceded that Mr. DeFunis, as an individual citizen of the United States, also has the right to constitutional protection from detrimental racial-ethnic classifications. The court has determined the protection of certain minorities *as a class* to be superior to the respondent's right as an individual—or, to put it another way, the court has determined that the Constitution holds all persons to be equal in the eyes of the law, but some are more equal than others, depending on the racial-ethnic classification.

In its correct assessment of the need for *some kind* of remedial or compensatory action, the court overlooked the individual rights of its citizens, conferring a blanket benefit on others which the court admits is inevitably prejudicial ("not benign") for others.<sup>142</sup> The court's opinion, which concentrated on the rights of minorities, virtually overlooked or ignored the rights of this individual respondent and all others similarly affected.

Taken as a treatise on the need for corrective action to remedy the results of ancient wrongs, the court's opinion is an excellent work and quite persuasive, although not as detailed and persuasive as the two law review articles from which it adopted most of its opinion.<sup>143</sup> It did not rely on the law; it created new law based on sociology, much as its predecessor *Brown. Brown*, however, tried to *eliminate* legal racial discrimination; *DeFunis* merely reversed the roles, and justified it. The court has decided to substitute one wrong (racial preferences) for another (racial discrimination) in the name of the Constitution of the United States and on the alleged authority of the Supreme Court of the United States. A very vigorous dissenting opinion stated:

Racial bigotry, prejudice and intolerance will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the

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142. *Id.* at 1182.

143. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 *TOL. L. REV.* 281; O'Neil, *Preferential Admissions: Equalizing The Access of Minority Groups to Higher Education*, 80 *YALE L.J.* 699 (1971).

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inequities from one man to his neighbor. To aggrandize the first will, to the extent of the aggrandizement, diminish the latter. There is no remedy at law except to abolish all class distinctions heretofore existing in law. For that reason, the constitutions are and ever ought to be color blind.<sup>144</sup>

Although this quote sounds like Justice Harlan's dissenting opinion in *Plessy* in 1896, it is in fact from the dissenting opinion of Chief Judge Hale in *DeFunis*, seventy-seven years later!!

### IV. STATE INTEREST—COMPELLING OR STRAINED

The *DeFunis* decision is an excellent sociological analysis of the justification for the original *Brown* orders. Following this unnecessary justification, the court found that the state was compelled to take some kind of compensatory-affirmative action for past segregations and discriminations. In doing so it generally adopted the theories and arguments of the two O'Neil articles<sup>145</sup> submitted by the appellants. This function of state government, easily justified under the blanket of promotion of the general welfare, although not in issue, was given extensive coverage.

A matter that *was* in issue, the resulting benefits to one class of citizens selected by racial-ethnic criteria, and the consequent legal disadvantage to another, chosen by the same criteria, was generally ignored. In partial justification of its view, the court misstated the landmark case of *Brown* and its progeny, and concentrated on the evils of the past racial-ethnic discriminations to permit new racial-ethnic discriminations to be placed on innocent generations to come. It also ignored the rights due an individual citizen in favor of newly created class privileges. Nowhere in the opinion was there due consideration of Mr. DeFunis as a citizen of the United States.

Granted the compelling state interest in preventing invidious racial-ethnic discriminations, there remains a logical non sequitur when that same interest is used to justify a new form of de jure discrimination.

No judge comes to the bench with a mind which resembles a *tabula rasa*. On the contrary, he comes with mental sets, value judgments, and interests. To deny this would be to deny a fact of life. Even our common speech betrays a recognition of that truth. Terms like "conser-

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144. 507 P.2d at 1189. (Hale, CJ., dissenting).

145. See note 143 *supra*.

vative court," "judicial activism," "abuse of discretion," "shock the conscience of the court" and other non-computerable expressions all bear witness to the place of subjectivity in court decisions and opinions.

This subjectivity is the only possible explanation of the *DeFunis* opinion. Certainly, existing law did not mandate it since *Brown*, *Swann* and their progeny did not deal with situations where there was no finding of de jure or de facto segregation. In place of such findings the court relied on recognizing "well known" practices of discrimination in the past against the named groups.<sup>146</sup> It decided that the goal-quota-priority system was a desirable method to remedy those past wrongs. It was desirable, ergo it should be done.

This is not an attempt to discuss the philosophies or merits of judicial activism, but merely an attempt to identify *DeFunis* as one of its vital progeny.

In order to sustain its position of "compelling" and to continue to be logical, Washington must continue the process of identification of any and all racial or ethnic groups that fall within the *DeFunis* test: any racial or ethnic group that shows a current or past history of socio-economic-cultural disadvantage, using their ratio of representation in the various professions as prima facie evidence. This should not be too difficult. Virtually every racial-ethnic group can show a current and/or past history of invidious discrimination due to its race, creed, or national origin.<sup>147</sup> It is merely a question of evidence or a bold positive act. Assuming *DeFunis* is sustained, any law school faculty or government agency who wishes to decree any ethnic group as a priority group just does so; *DeFunis* operates to give that act the force and effect of law.

At this point, another question arises relative to a serious implication in the *DeFunis* decree: that discrimination against Whites is acceptable ("not unconstitutional")<sup>148</sup> and possibly compelling as long as it is in favor of the recognized members of the priority-quota classes. The Washington court noted that the state is compelled to do this in order "to bring the races together."<sup>149</sup> While one may wonder about a judicial decision claiming that state racial classification and discrimination are compelling, one may also wonder about the "togetherness" reactions of the non-priority ethnics in Washington (and the United States, if

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146. 507 P.2d at 1175.

147. See generally M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* (1972).

148. See also *Gonzales v. Fairfax*, No. 494-72-A (E.D. Va., July 27, 1973).

149. 507 P.2d at 1179.

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*DeFunis* is affirmed) when and if this currently insignificant decree becomes officially and judicially implemented on a nationwide scale.<sup>150</sup> In any event, "togetherness" is now a compelling state interest in Washington.

### V. RACIAL CLASSIFICATIONS

From the time of *Brown*, social-economic-educational-legal progress can be identified by specific phases. Since the stages varied by state, target and objective, chronological overlapping prevents any meaningful dating. The phases, however, are readily identifiable: segregation, desegregation, integration, compensatory actions, affirmative action, priorities, and quotas.

*Brown* is an agreed historical starting point for desegregation; *Green*, *Griffin*, and *Swann* introduced positive integration as a corrective device where there was de facto segregation caused by previous de jure segregation activities. Educational institutions began the compensatory programs. The Civil Rights Act of 1964, the directives of the Department of Labor, and President Johnson's Executive Order<sup>151</sup> relative to racial compliance by government contractors can be considered as the start of formal affirmative action. This initial affirmative action, however, was mandatory only as to the *prevention* of discriminatory hiring practices; it was designed to *encourage* compensatory affirmative action in the field of employment practices and did not suggest goals, quotas, or reverse discrimination.

Following the lead, many colleges and universities introduced compensatory affirmative action admissions programs.<sup>152</sup> At the same time, the federal courts were utilizing ratio-quotas of students and faculty based on racial-ethnic classifications in their attempts to "eliminate root and branch" the long term de facto effects of the prior de jure segregation.<sup>153</sup> Affirmative action activists in education soon became impatient with the slow progress of the voluntary compliance program; those in positions of power began to introduce their own brand of

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150. See *Mapp v. Board of Educ.*, 477 F.2d 851, 860 (6th Cir. 1973) (Weick & O'Sullivan, JJ., dissenting); *DeFunis v. Odegaard*, 507 P.2d 1169, 1189 (1973) (Hale, C.J., dissenting).

151. Exec. Order No. 11246, 3 C.F.R. 339 (Supp. 1965); see also UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HIGHER EDUCATION GUIDELINES (Oct. 1972).

152. Seabury, *H.E.W. & The University*, 54 COMMENTARY 30 (1972); *Can All Americans Be Made "Equal"?*, U.S. NEWS & WORLD REPORT, Apr. 9, 1973, at 39.

153. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968).

affirmative action into the educational sphere parallel to those in the employment programs. They took the ratio concept from the de jure-integration decisions and the executive order concept of affirmative action-compliance and, by an amalgam, produced the goal-priority-quota progression.

To implement this they required all federal and state agencies, and all other persons and agencies who do business with the government, to answer a series of particular questions about their racial-ethnic-personnel structure, which of necessity required each employee to have been classified by racial and national origins.

Whatever their purpose, racial-ethnic classifications are here by government action. As with any government function, activity, or agency, it is, or will become, permanent. The goal-quotas concept and the accompanying racial-ethnic classification of all citizens are now in effect in business employment, union membership, government contracts, government employment, and public and private education.

When "minority groups" were originally identified by and for the Department of Labor and HEW, they were essentially Negro/Black, Mexican-American/Spanish surnamed, and American Indian. In the state of Washington, at the law school, by university determination, the "minority" priority groups were: "Black Americans, Chicano Americans, American Indians, and Phillipine Americans."<sup>154</sup>

By October, 1972, the direction of racial-ethnic classification showed itself, and the application of the grow or die principle, in a novel case involving the San Francisco School Board and (approximately) 4,000 of its "Other White" administrative and teaching personnel.<sup>155</sup> The school board had previously adopted a policy of affirmative action, wherein the faculty would "more closely approximate the racial and ethnic distribution of the total school population."<sup>156</sup> Although not reported in the decision, it has been reported elsewhere, that following HEW guidelines "... the San Francisco authorities used nine categories in making their determination: Negro/Black, Chinese, Japanese, Korean, American Indian, Filipino, Other non-White, Spanish speaking/Spanish Surname, and Other-White."<sup>157</sup> Evidently the program was neither protested nor contested during the time of equalization of opportunity, but when that affirmative action turned to a "de-selection"

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154. *DeFunis v. Odegaard*, 507 P.2d 1169, 1174 (1973).

155. *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D. Calif. 1972).

156. *Id.* at 251.

157. Raab, *Quotas by Any Other Name*, 54 COMMENTARY 41 (Jan. 1972).

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(demotion) of "Other White" administrators,<sup>158</sup> the predictable and inevitable explosive reaction sent the school board's program to the United States district court in San Francisco.

As in *DeFunis*, the trial court followed the "Constitution is color-blind" theory, found an invidious racial discrimination against Whites and enjoined the San Francisco School Board from further implementation of its "declassification" plan.<sup>159</sup> In this case, the defendant school board chose not to appeal.

Living things appear to be bound by the principle of grow or die. The same rule can be said to apply to governmental activities, including affirmative action. It would seem safe to predict the expansion or demise of the affirmative action racial-ethnic quota programs. The United States Supreme Court, as it rules on the obviously moot question of whether Mr. DeFunis could be displaced by a minority group member as such, will be charting the more important course of race relationships for the future.

### VI. CLASSIFICATIONS AND DISCRIMINATIONS

The classification of individuals into racial, religious, ethnic, or other demographic categories is a politically and morally neutral act. It is not the act of a demographer or census bureau clerk that causes a person to be Italian, Irish, English, Catholic, Jewish, Negro, Spanish, Oriental, male or female.

The process of classification of individuals by governmental act is of itself innocuous. It is the political consequences of the classification that are best termed as discrimination. Discrimination is the subjective judgmental process whereby the differences and distinctions between the members of the classified groups is (for purposes of this article) governmentally noted for future action. The result is inevitably and eventually a benefit for some and a burden for others.

The assigned benefit or burden is the consequence of the discriminatory act, not the classification act. No great uproar has ever been created as a result of the classification process. When government utilizes its power to note the differences and enacts discriminatory legislation, it may produce mild waves of resentment in totalitarian states, but has always caused resentment and reaction in democratically oriented

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158. 357 F. Supp. at 251-52.

159. *Id.* at 255.

political structures, since the act is so contrary to the essence of the democratic concept.

That is admittedly good theory, but it must be admitted and recognized that compromises have to be made between the ideal and the demands and needs of the political subjects. These compromises are generally made by the legislature, by the process known as legislation. Even this process must be considered as more theoretical than real in this decade as the process of judicial legislation, executive order, and government by administrative board regulations are becoming more common and accepted.

When American governmental units classify and adopt discriminatory legislation, rules, and orders, they become subject to challenges based upon the original Constitution and the first, fifth and fourteenth amendments. In response to those challenges the governmental units must allege compelling state or national interest to justify their invasion of protected areas. Some types of discrimination, such as the granting of titles of nobility, are so repugnant to the American spirit that they have never been attempted. Others have been tolerated until the United States Supreme Court has solemnly declared them to be contrary to the Constitution.<sup>160</sup>

While some forms of racial discrimination were held to be unconstitutional shortly after the Civil War, others hung on until the *Brown* decision led the way to wholesale invalidations of ordinances, statutes, and rules which adversely affected people because of their race or ethnic origin. From the time of *Brown*, it has been repeated doctrine that as to the law, "our Constitution is color blind."<sup>161</sup> The generations from *Plessy* on labored to have the Constitution be applied as if it were colorblind. The generation from *Brown* has labored mightily to have

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160. As examples of groups discriminated against until the United States Supreme Court acted are: servicemen, *O'Callaghan v. Parker*, 395 U.S. 258 (1969); atheists, *Torcaso v. Watkins*, 367 U.S. 488 (1961); ex-soldiers, *Toth v. Quarles*, 350 U.S. 11 (1955); military dependents, *Reid v. Covert*, 345 U.S. 1 (1957); aliens, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); ex-confederates, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 356 (1867). Some of these issues were mixed with others such as jury trial and bills of attainder, but the common thread is the singling out of the group for different and discriminatory treatment.

161. *United States v. Jefferson City Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 840 (1967), *cert. denied sub nom. Caddo Parish School Bd.*, 389 U.S. 840 (1967); *DeFunis v. Odegaard*, 507 P.2d 1169, 1180 (1973); McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65 (1971); Comment, *Increasing Minority Admissions in Law School-Reversed Discrimination?*, 20 BUFF. L. REV. 473, 481 (1971); see also O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

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color blindness in education, employment, unions, law, business, industry, realty, recreation and sociology. Today there are forces which claim that this same Constitution can continue to be color blind only if it is color conscious<sup>162</sup> or perhaps better stated, that colorblindness is now immoral. The sophistication of the distinction is irrelevant since *DeFunis* claims that it is now constitutionally permissible to classify and discriminate on the basis of race and ethnic background when it serves a compelling state interest.

Whatever rationale is expounded, the fact cannot be ignored that the doctrine is, purely and simply, just another invidious discrimination based on race. It cannot be avoided or denied—it is inescapable. Merely because the Washington Supreme Court sanctioned the practice does not change the fact that they have judicially authorized a preferential treatment based not only on race, but ethnic background.

In the religious discrimination cases, especially those relative to the establishment clause, the theme has been repeated so often as to sound like a litany, that the Constitution is not concerned with the *degree* of encroachment, it prohibits any encroachment *at all*.<sup>163</sup> It insists that "Congress shall make *no law*."<sup>164</sup>

So too as to the discriminations based on race, either they are prohibited or not. If the former, then the *DeFunis* decision is wrong and must be reversed. If the latter, then discrimination based on race is not wrong, if for a good purpose. In that event, discrimination based on creed, national origins, and previous conditions of servitude should not be wrong, so long as it is for a good purpose. It may be a situation such as *Walz v. Tax Commissioner*,<sup>165</sup> where the Supreme Court noted that as to these strict constrictions, there may "be room for play in the joints."<sup>166</sup> Applying the *DeFunis* theory, the government must find various poverty or disadvantaged pockets, determine the race or ethnic origin and decree that ethnic, race or religious group to be a disadvan-

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162. *Taylor v. Board of Educ.*, 294 F.2d 36, 50 (2d Cir. 1961); McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65, 80 (1971); Rabinove, *Law School Minorities: What Price Admissions?*, AMERICA, Apr. 28, 1973 at 387.

163. See *Sloan v. Lemon*, 93 S. Ct. 2982 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973); *Levitt v. Committee for Pub. Ed. & Religious Liberty*, 93 S. Ct. 2814 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

164. U.S. CONSR. amend. I.

165. 397 U.S. 664, 669 (1970).

166. *Id.* at 669.



tagged group and therefore entitled to protection. This concept is neither new nor startling.<sup>167</sup> Ethnic groups are already protected by law:

Whoever, whether or not acting under color of law, by force or threat of force, wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . . (2) any person because of his *race, color, religion or national origin* . . . .<sup>168</sup>

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations, as defined in this section, without discrimination or segregation on the ground of *race, color, religion, or national origin*.

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.<sup>169</sup>

This same proscription is repeated a number of times in 42 U.S.C. § 2000ff (1970). It may be of interest here to indicate a statement on this view which was made before the Civil War by one fighting for what eventually became the Civil Rights Act of 1866:

He may be poor, weak, humble, or black—he may be of caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts, all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English, or Irish; he is a MAN, the equal of all his fellowmen.<sup>170</sup>

The unfortunate aspect of any governmentally sponsored benefit program is the natural tendency of everyone to demand benefits from

167. See *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Mapp v. Board of Educ.*, 477 F.2d 851, 855, 859-60 (6th Cir. 1973) (Weick & O'Sullivan, JJ., dissenting); *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248, 249-50 (N.D. Cal. 1973); *Auerbach v. African Teachers Ass'n*, 356 F. Supp. 1046 (E.D.N.Y. 1973); Cook, *School Desegregation: To Brown and Back Again—The Great Circle*, 23 BAY. L. REV. 398 (1971); McAuliffe, *School Desegregation: The Problem of Compensatory Discrimination*, 57 VA. L. REV. 65 (1971); Comment, *From Brown to Swann—The New Role of Equity in Integration*, 23 BAY. L. REV. 555 (1971). See generally Abrams, *The Quota Commission*, 54 COMMENTARY 54 (Oct. 1972); Raab, *Quotas by Any Other Name*, 53 COMMENTARY 41 (Jan. 1972); Rabino, *Law School Minorities: What Price Admission?*, AMERICA, Apr. 28, 1973 at 387; Ross, *Why Quotas Won't Work*, 102 READERS DIGEST 51 (1973).

168. See 42 U.S.C. § 2000a (1970).

169. *Id.*

170. 2 WORKS OF CHARLES SUMNER 341 (1874), as reported in Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 WASH. L.Q. 421, 437 n.39 (emphasis added).

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the largesse. No doubt every racial and ethnic group can find some disadvantage, organize, and then demonstrate for recognition. Political expediency will require the acceptance of those demands and the granting of the appropriate benefits based on that discrimination. If the legislatures do not act, the courts, to be consistent, must act. And so the list will grow.

### VII. "NATURAL AND PROBABLE CONSEQUENCES:" RACIAL-ETHNIC QUOTAS AS A POLITICAL NECESSITY

The present listing of "minority" racial-ethnic categories has been expanded to include at least nine classifications. There is also the additional classification of sex-affirmative action for females. Somewhere in government files is another special category of disadvantaged Whites, generally labeled "Appalachians," for which there is some priority benefit.

There is certainly a rational basis for these classifications for which some compensatory affirmative action benefit would appear appropriate. Each constitutes a class of persons who have suffered educational or occupational disadvantages through no fault of its own. It may be from race, creed, color, national origin, accident of birth, geographic location, or economic disaster. This type of classification is unobjectionable in that government is coming to the aid of its citizens who are, or have become, disadvantaged. Indeed, this is a legitimate and proper function of government.

American governmental units have properly elected to assist those in need to obtain a better job, job training or education. They have applied the test of need to a group or class of persons who have a past or present history of negative discrimination. For twenty years they have attempted to remedy the racial-ethnic wrongs and make restitution to the extent that any government can. They have, however, stopped short of the goal by limitation of the groups to only the very obvious. Had they continued to apply the test, they would have found many other group disadvantage situations on a local or national scale. Every state or city has groups of citizens in disadvantaged pockets which are readily identifiable by race, culture, or national origin—"Ethnics." Now, to provide equal protection of the laws, one of the most basic of the democratic tenets, and to maintain consistency, the test must be applied to all races and all ethnics if it is to be applied at

all. The "colorblind constitution" demands it, Congress demands it, the courts have demanded it, and the increasing numbers of individuals adversely affected by affirmative action will demand it. Then the more serious problem is inevitable. As each new group is added to the preferential minorities list, the non-preferential ethnics will have their share of educational and employment opportunities decreased, which in turn will stimulate them to get on the other (priorities) list.

The next step is political. Once any ethnic group has organized and shown its qualifications, politics would require governmental acceptance of this new group. What political candidate of the future would dare to follow the usual practice of whirlwind tours through the ethnic neighborhoods, eating their kielbasi, pizza, strudels, or stuffed cabbage in return for their votes, without a promise of equality of treatment for that ethnic group. Carrying out such promises can only be done by specific legislative enactment. Vote swapping and horse trading will produce the appropriate legislation. Either ethnics will be added, or the programs will terminate. The latter is politically inexpedient—rather, political suicide. So the list grows.

Obviously, it is only a question of time before everyone will declare an ethnic identity in order to get priorities. Within a very short period, the only group without priorities will be the WASPs, who by then should be sufficiently *legally* disadvantaged to qualify as members of a legally disadvantaged minority group, so they too, will be finally declared a disadvantaged minority. The effective result here will be that 100 per cent of the population will eventually belong to the priority group. At this stage, priorities will no longer resolve the problem of the disadvantaged, as priorities for all are no longer priorities. Another more permanent remedy will have to be found. The government must either abandon the whole program of priorities or adopt a formal racial-ethnic quota program.

With what frequency does any well established government agency-program voluntarily decide, on an altruistic basis, that its job is done, the agency should be disbanded, and the employees let go? In fact, terminations of such programs take positive action by the legislative or executive branches—a political (not managerial) decision. By what stretch of the imagination will the minorities who have been granted priorities by law, based on racial or ethnic considerations, voluntarily surrender their advantages?<sup>171</sup>

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171. "Once you grant people a special privilege, you can as easily take it back from

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No matter the approach, the final decision will have to be legislative or executive. One could not conceive of any chief executive choosing voluntarily to end his political career by terminating a benefit for any power group of his electorate. Such suicide is a rare political act.

So far as the legislature is concerned, it is faced with the same political expediency or death problems as the executive branch. Expediency for individuals of both branches will demand inclusion of ethnics (although there may be the occasional politician who has a masochistic complex). Assuming no mass political suicide, it may be assumed there will be no political termination of the racial-ethnic priorities. Thus, the only possible alternative must prevail as each group finds in the end that there are no real priority advantages to mere membership in an official minority group. Their individual and group survival will depend upon an allocation of priority chits to their particular group. The allotment will have to be a fixed number, most likely in proportion to its membership in the total structure. This is, in fact, the essence, if not necessarily a definition of, quotas.

It is the contention of the authors that the natural and probable consequences of affirming *DeFunis* are ethnic and racial quotas as an inevitable national policy in at least employment and education.

### VIII. CONCLUSIONS

The United States Supreme Court has been challenged by the *DeFunis* dilemma. A decision to reverse *DeFunis* may cause the unfortunate and premature termination of compensatory affirmative action programs. This country has not yet reached the point of maturity and sophistication such that the ideal of equal opportunity, irrespective of race or ethnic origin, is possible and probable without governmental intervention and coercion. Choosing this horn of the dilemma would result in maintaining the status quo on racial-ethnic assimilation.

An election to *affirm DeFunis* is to choose the other horn, government sponsored and directed racial-ethnic quotas. This result can only prove that democracy, as we know it, cannot work in a heterogeneous racial-ethnic population, and the resulting internecine struggles will be destructive of this experiment in democracy.

The attacks on the University of Washington procedure, as blessed

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them as take back meat from a tiger." Quote of Milton Himmelfarb in Glazer & Himmelfarb, *McGovern & the Jews: A Debate*, 54 COMMENTARY 43, 49 (Sept. 1972).

by the Washington Supreme Court, are on two grounds, due process and equal protection. Predictions are generally risky enough, but here, where the legal issues may be obscured by deep seated emotional involvement, they are even more difficult.

In the due process issue, appellant's<sup>172</sup> argument that the committee cannot use any subjective criteria whatever, must be rejected, since there are few, if any, human activities which can be totally quantified. However, appellant's complaint of the lack of express guidelines for making judgments (objective standards), where state action, denial of a benefit and racial classifications are involved, is a valid issue and must be answered by the Court. Even though the Court's ultimate evaluation of the university's procedural due process is contingent on the equal protection outcome, appellant is correct on the absence of guidelines for the committee ("no objective standards") as resulting in unbridled discretion or at least arbitrary and capricious acts, and it must be so ruled.

To satisfy the demands of equal protection in due process, the admissions procedure may use any job or performance-related criteria it chooses,<sup>173</sup> but such combination of subjective and objective criteria must be available to every individual irrespective of class membership. Once these valid criteria are published (notice), then those portions of the due process demands will be satisfied. In operation, assuming some degree of express justification of the results of the subjective evaluations, the emphasis would have to shift from arbitrary and capricious evaluations, to evaluation on constitutionally permissible criteria, and once again, the races have equal opportunity. The present writers are not so naive as to imagine that manipulation of these criteria is not possible, particularly where subjective judgments are to be made, but the policing of administrative boards is not too high a price to pay to avoid the inherent evils of racial-ethnic discriminations.

The equal protection clause has its own separate demands. The issue here is whether, assuming no violation of due process, a state may establish different criteria for groups defined by race or ethnic origin. The Court has faced this problem many times since *Brown*, which emphatically ruled against racial classifications in education. This landmark

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172. "Appellant" refers to DeFunis' status before the United States Supreme Court.

173. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). See also Note, *Civil Rights—Educational and Testing Requirements—Employment Tests Not to be Given Controlling Force Unless They are Demonstrably a Reasonable Measure of Job Performance*, 40 *FORDHAM L. REV.* 350 (1971).

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decision was followed by the civil rights acts which emphasized the same principle, and expanded it to include not only race and color, but religion, national origin, and later, sex.<sup>174</sup> The Court cannot ignore its own pronouncements, and those of Congress, that such classifications are prohibited. Granted the novelty of the Washington decree that claims these prohibitions are less than absolute when there is a "good purpose," such as "bringing the races together," it is important to note that this is Washington law, and a rationalization, not the law of the United States. The United States Supreme Court cannot accept this verbal subterfuge.

The Supreme Court has often spoken on the use of racial *ratios* in public schools and has approved them for students and teachers in public education. These directions, however, were a basic *redistribution* of the races designed to provide a racial balancing where the imbalance had been directly or indirectly caused by state action. These ratios did not cause any student to lose his educational opportunity, nor deprive him of a free exercise of personal control of his ultimate vocational choice. The ratios were not *designed* to cause any teacher unemployment, but to provide merely a new teaching assignment.<sup>175</sup> As a practical solution to a highly emotional and explosive situation, they helped to keep the peace even though neither side was satisfied.

The affirmative action *priority-goal-quota* progression is markedly different from the educational ratio in that the effect of the former is displacement or, better, exclusion of someone from an educational or employment opportunity solely because of his or her racial-ethnic origin. This is positive governmental activity limiting the availability of educational opportunity and consequent vocational choices on bases other than ability.<sup>176</sup> In short, it is governmentally created inequality in the competition for careers, and that intervention is based upon the race of those affected. Just as the Court has said that criminality of an act cannot be based on the race of the actor,<sup>177</sup> so it should say that neither can opportunity be based on the race of the candidates.

The Court faced the problem of racial-ethnic priorities once before,

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174. Presently pending is the equal rights amendment.

175. The writers emphasize the word *designed*, as they are aware of the number of cases from *Brown* to the present, where school officials misused the integration of faculty orders as an excuse for wholesale and individual dismissals of black teachers.

176. *DeFunis v. Odegaard*, 507 P.2d 1169, 1200 (1973) (Hunter, J., dissenting).

177. *McLaughlin v. Florida*, 379 U.S. 184, 185 (1964).

in *Hughes v. Superior Court*,<sup>178</sup> when it sustained the state of California's injunction against picketing the Lucky stores to force a certain racial quota hiring. It quoted with approval the California Supreme Court decision:

It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the *Marinship* case . . . . The fact that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object.<sup>179</sup>

The United States Supreme Court then went on to add its own language:

These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law.<sup>180</sup>

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178. 339 U.S. 460 (1950).

179. *Id.* at 463-64 (citations omitted).

180. *Id.* at 464. It should be noted that this case was decided unanimously with one Justice not participating in the consideration or decision (Douglas), and except for Justice Vinson and Justice Jackson, this was the same Court that decided *Brown* four years later.

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In a more recent case, *Griggs v. Duke Power Co.*,<sup>181</sup> the Court again faced the question of preferences for members of a race *as* members of a race. The Court, construing a federal statute, stated:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.<sup>182</sup>

In both *Hughes* and *Griggs* the Supreme Court, while not specifically discussing constitutionality, spoke out against racial-ethnic priority practices. In *DeFunis*, it must do no less.

In spite of the sophistry of the Washington court, racial and ethnic classifications are invidious *per se*, and there is no interest so compelling to warrant a breach of this constitutional prohibition. Although this Supreme Court, which decided *Swann*, may feel that there are grounds for "a little play in the joints," there could never be an interest so compelling as to warrant the formal establishment of government sanctioned or directed racial-ethnic priorities.

The principal issue that would affect the original plaintiff, Mr. DeFunis, was moot when it was before the Washington Supreme Court, which would make a remand unnecessary. It is only the constitutional principle that must be decided.

The Supreme Court must be careful not to terminate existing or proposed *compensatory* programs for disadvantaged individuals irrespective of class. It must, however, reverse *DeFunis* in such a way as to terminate the Washington brand of unconstitutional racial-ethnic priorities based on class membership. Class distinctions and privilege have no place in America.

### IX. EPILOG . . . AND PROLOGUE

On April 23, 1974, the Supreme Court decided that the *DeFunis* case was moot, although it conceded that the issues were not, and that they will not go away.<sup>183</sup>

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181. 401 U.S. 424 (1971).

182. *Id.* at 431.

183. *DeFunis v. Odegaard*, 42 U.S.L.W. 4578 (U.S. April 23, 1974).



It remains for another frustrated law or medical school applicant to present them in so timely a way that the Court will be forced to decide the course of affirmative action for the next century.

Only Justice Douglas, in his separate dissent, elected to specifically comment on the merits.<sup>184</sup>

The nation must now await "*DeFunis II.*"

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184. *Id.* at 4580.