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EDITOR'S NOTE: The following two articles constitute a discussion of the question whether the Supreme Court of the United States should have ruled on the merits in *DeFunis v. Odegaard*, deciding the constitutionality of racially preferential admissions programs. Professor O'Neil argues that the Court was correct in ruling the case moot and deferring decision until a better case is presented to the Court for decision. Professor Baldwin urges that the need for express constitutional sanction of preferential programs is so great that decisions should not have been delayed.

AFTER *DEFUNIS*: FILLING THE CONSTITUTIONAL VACUUM

ROBERT M. O'NEIL*

Perhaps it is just as well the Supreme Court did not reach the merits of the *DeFunis* case. Even though the legal issues were fully briefed and argued and great expectations had built up around the case in both legal and higher education circles,¹ the facts of the case surely did not present an ideal vehicle for adjudication of the extremely delicate and sensitive constitutional issues raised by preferential admissions. Even less was this an appropriate case in which to determine the over-all constitutionality of affirmative action programs. A decision on the merits would probably have been unsatisfying and might well have created more problems than it would have solved.

Had the Court decided in Mr. DeFunis' favor, one could have distinguished the case on several grounds. At the time the critical admissions decision was made in 1971, the University of Washington lacked a clearly articulated policy on preferential admissions, for no specific criteria warranting departure from the numerical ranking of applicants had been developed.² Moreover, no basic record was ever made on the "compelling interests" that the Washington

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1. See, e.g., Totenberg, *Discriminating To End Discrimination*, N.Y. Times, April 14, 1974, §6 (Magazine) at 7, which appeared on the eve of the Supreme Court decision and like most of the contemporary newspaper and magazine commentaries assumed that a judgment on the merits would soon be forthcoming.

2. Throughout the litigation the University relied rather heavily upon a statement made by the University's president in 1959 and reaffirmed by him at the trial. Originally, the University's position had been simply one of "nondiscrimination" in regard to admissions, employment, and other matters. Gradually during the 1960's, however, the University came to realize that mere "nondiscrimination" would not increase the representation of minority groups in a state with a relatively small minority population. Thus, the need for more active recruitment measures was recognized, and it became a part of the University's affirmative action program shortly before the development of this lawsuit. See Brief for Respondents at

supreme court found sufficient to sustain the preferential policy; resort to judicial notice, legal writings, demographic data, and the like plugged the gap in this case, but such proof might not have satisfied a less sympathetic state court. Even the particular admissions process utilized by the University of Washington could have been faulted in certain respects, as the dissenting justices in the state supreme court and some of the amici briefs stressed.³ Clearer articulation of the preferential policy has been accompanied by a more efficient procedure for the review of minority applications. Thus, if the same case arose today, the substantive issues would no longer be obscured by arguably deficient procedures.

Had DeFunis prevailed on the merits, there would have been one other possible basis for distinction: the Washington Law School's minority goals, which some have quite unfairly called "ethnic quotas,"⁴ actually exceeded the minority population of the state. Indeed, rough proportionality for black students already existed in the law school before the preferential policy was adopted.⁵ To the extent that race-conscious admissions decisions can be justified by minority underrepresentation and a resulting quest for proportionality, Washington's remedy arguably might have surpassed its needs.

On the other hand, had the Supreme Court sustained the University's position on the merits, the scope of the judgment might also have been limited. There was always the lingering issue of standing, stemming from the fact that DeFunis would probably not have been admitted even in the complete absence of a minority preference.⁶ In a later case challenging the preferential admission policy of the University of California (Davis) Medical School, the trial court did in fact invoke just such a bar.⁷ Despite a finding that the ad-

39-40 & n.26, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The University of Washington Law Faculty adopted a new and much more detailed statement of admissions policies on December 4, 1973. It now effects a useful model for other institutions practicing preferential admissions. These policies are set forth in an Appendix to the dissenting opinion of Mr. Justice Douglas, *DeFunis v. Odegaard*, *supra* at 345. Especially pertinent is §6: "Because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem."

3. *E.g.*, *DeFunis v. Odegaard*, 82 Wash. 2d 11, 45, 507 P.2d 1169, 1189 (1973) (Hale, C.J., dissenting).

4. *See, e.g.*, Drucker, *Reverse Discrimination? The Supreme Court on Quota Systems*, COLLEGE, April 1974, at 17.

5. *See* Brief for Anti-Defamation League of B'nai B'rith as Amicus Curiae in Support of Jurisdictional Statement at 14, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Relatively little was made of this issue during the course of the argument, however. There is no evidence of proportionality at any time for other preferred minority groups.

6. According to the response to interrogatories propounded by the plaintiff in superior court, on the basis of all predictive factors reviewed by the Admissions Committee, DeFunis had been placed in the lowest quartile of the waiting list. It was thus extremely unlikely that he would ever have been admitted, with or without a special minority admission program. *See* Single Appendix in the Supreme Court of the United States, at 27, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

7. *Bakke v. Regents of the Univ. of Cal., Davis*, No. 31,287 (Yolo County Super. Ct., Nov. 28, 1974).

missions program was unconstitutional because it denied equality to whites, relief was withheld from the particular plaintiff who ranked too far down the waiting list to be considered in any event. Such a disposition, though not inevitable, would have been appropriate in *DeFunis*, for there would have been something unseemly about deciding the constitutionality of preferential admissions at the request of a person who would not have been helped by its absence. Ironically, in fact, it was only the *existence* of the minority admissions program, as the catalyst for the lawsuit, that gave DeFunis even the slightest chance of getting into the law school of his choice.⁸

Another distinguishing feature of the *DeFunis* case is the extent and scope of the law school's departure from strict numerical ranking of applicants. For example, a substantial number of returning veterans received a sort of "preference" over persons with higher test scores and grades. In addition, admissions decisions within preferred groups reflected emphasis upon nonquantitative predictors of law school performance and professional potential.⁹ Many minority applicants were rejected, and those accepted were taken not in strict rank order, but on the basis of intangible as well as numerical indicia of promise. Finally, the Washington admissions policy involved no quota or fixed enrollment; rather, broad minority admission ranges were set, with the number of students actually enrolled dependent upon the availability of qualified minority applicants and the rate at which they accepted. Thus, a decision in favor of this particular form of preferential admissions would have fallen far short of what many journalists and other lay observers believed to be the central issue in the case — the constitutionality of ethnic quotas or absolute racial preferences.

Finally, the very strength of the state court's decision would have lessened the impact of a Supreme Court affirmance. Since the Washington court took as the appropriate constitutional test the presence or absence of a "compelling state interest,"¹⁰ the decisive recognition of such an interest by a state court passing upon the state university's admissions policies would surely have been entitled to some deference. Had the Washington court reached the opposite result, or had the case come up through the federal courts, or had a different constitutional test been applied, a cleaner slate might have been presented to a Supreme Court desirous of reaching the merits.

In short, the *DeFunis* case became a *cause célèbre* for reasons only remotely related to its facts. A major constitutional decision would surely have been possible, but the avoidance of that decision may prove at least a partial blessing. We now have an opportunity to address the issues once again in a case that will provide a more suitable vehicle for constitutional adjudication. The focus of this article will be on that "next case," of which there are several

8. It is true that DeFunis, once admitted under court order, not only survived the first year but graduated in good standing. That fact, however, does not undermine the original decision to reject his application. The satisfactory academic performance of an applicant well down on the waiting list proves, instead, that many who are rejected, as well as those who are accepted, by law schools in these highly competitive days are "qualified" to do the work.

9. See note 2 *supra*.

10. *DeFunis v. Odegaard*, 82 Wash. 2d 11, 32, 507 P.2d 1167, 1182 (1973).

examples already in process.¹¹ As this analysis proceeds, it might be well to keep in mind the most difficult of all cases — the hypothetical suggested by Mr. Justice Douglas in his *DeFunis* dissent. Suppose the rejection by the University of Washington of an Asian student from a low-income background, whose education has been impaired by language barriers¹² and by overcrowded, under-supported schools, but who is not included among the preferred “minorities.” If such an applicant were close enough to the admission borderline that (unlike *DeFunis*) he would almost certainly have been admitted but for the preferential program, his case would raise much more starkly both the constitutional and public policy issues of preferential admissions. Yet if the decision to reject *DeFunis* was defensible, that same rationale should sustain the rejection of the disadvantaged Asian.

The necessary starting point is to identify the proper constitutional standard. Once that determination has been made, the implications of that standard must be reviewed with an eye to the kind of record that might be built. As suggested earlier, such a record was not required by the Washington supreme court because that court believed the requisite support for the University's policies to be virtually self-evident. Other courts are likely to be more demanding.

THE CONSTITUTIONAL STANDARD

Clearly, the constitutionality of preferential admissions policies arises under the equal protection clause of the fourteenth amendment. Such identification of the basic constitutional constraint does not answer, but only poses the threshold question of the standard of equality against which a preferential admissions policy is to be judged. Because different classifications are judged by markedly different standards of equality, three possible formulations might be applied to a governmental practice such as the preferential admission of minority students: (1) the use of race as a basis of classification is per se invalid regardless of the purpose or effect of the classification; (2) like other classifications, racial preferences would be valid if a “rational basis” for them could be found; and (3) the use of race would be permissible only if it served a “compelling state interest” and survived “rigid scrutiny” — either because the use of race is “inherently suspect” or because the classification affects some “fundamental interest.” Each of these three options must be examined in turn, since all three are superficially applicable to the preferential admission problem.

11. *E.g.*, *Bakke v. Regents of the Univ. of Cal.*, Davis, No. 31,287 (Yolo County Super. Ct., Nov. 28, 1974).

12. *See* 416 U.S. at 332, 338-40 (Douglas J., dissenting). The equities of such a case may well be enhanced by the Supreme Court's decision, earlier in the same term, in *Lau v. Nichols*, 414 U.S. 563 (1974). The Court there held that the San Francisco public school system had violated title VI of the Civil Rights Act of 1964 by failing to provide supplemental English instruction to those students who did not speak English. The decision strongly implied that where language barriers impede equal access to educational programs and benefits, the district incurs an affirmative duty to surmount those barriers through supplemental instruction.

A "Per Se" Test

The Supreme Court has always stopped short of holding that any use of race for any purpose is per se violative of the equal protection clause. Even where a particular use of race harms the very groups for whose protection the fourteenth amendment was designed, a per se holding has been avoided.¹³ Where the use of race is designed to benefit such groups, or remove barriers that separate racial groups, the Court has seemingly sanctioned recognition of race. In the North Carolina school desegregation cases, for example, the Court declared that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."¹⁴

The inappropriateness of a per se test would be clear were it not for several passages in Mr. Justice Douglas' dissenting opinion in *DeFunis*. While recognizing the validity of ameliorative steps to offset possible bias in admission criteria, Douglas seemed to question the validity of race or ethnic group as the basis of dispensation. At one point he cautioned: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."¹⁵ Even more explicitly, he observed: "So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view 'invidious' and violative of the Equal Protection Clause."¹⁶ Moreover, Justice Douglas warns of the hazards of permitting even those racial distinctions and preferences that meet a "compelling interest" test because "[t]o many, 'compelling' would give members of one race even more than pro rata representation."¹⁷ Throughout the Douglas opinion runs a deep ambivalence between a desire to sanction the end sought by preferential admissions and an apprehension of sanctioning the use of race or ethnic status as the selective criterion. One might, therefore, read Justice Douglas to say that explicitly *racial* classifications are per se unconstitutional, though their goals and aims may be achieved through nonracial means.

There are, however, several reasons for doubting that a majority of the Court would foreclose explicitly race-conscious remedies. Although the Court has not sustained a racial classification since the Japanese relocation cases,¹⁸ it has also scrupulously avoided sweeping pronouncements in cases striking down

13. *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964), where the Court struck down a state miscegenation law imposing stricter criminal penalties on interracial relationships. The invitation to declare such a law invalid, per se, because of its obvious racial bias, must have been strong but was avoided.

14. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971). *See generally* for discussion of these cases and related issues, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 *YALE L.J.* 699, 707-09 (1971).

15. *DeFunis v. Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting).

16. *Id.* at 343-44.

17. *Id.* at 341.

18. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). In *Hirabayashi* the Court did indicate the danger of such classifications on explicitly ethnic lines: "Distinctions between citizens solely because of their race are by their very nature odious to a free people whose institutions are founded upon the doctrine of

discriminatory measures.¹⁹ There would have been no reason to approach the issue so gingerly unless the Court anticipated the kind of issue that *DeFunis* presented; surely the present Court is not keeping the issue open in order someday to reapprove wartime internment camps. One could argue the Court has reserved this issue to allow certain neutral uses of race for purely statistical reasons — like the racial listing on Virginia divorce decrees upheld in *Tancil v. Woolls*.²⁰ But it seems unlikely that so major and obvious an exception would be perpetuated for so modest a goal, particularly during a period of frontal assault on racial segregation and discrimination. Hence the clear and conscious avoidance of a *per se* test probably anticipated the preferential situation — whatever implication to the contrary one finds in Justice Douglas' dissent.

There is another and equally persuasive reason for the Court's reluctance to impose a *per se* standard. Within the past three or four years the lower federal and state courts have increasingly relied upon race as a remedial canon. Race-conscious decrees have been most prominently used in public school desegregation cases²¹ and public employment litigation,²² but have also played a role in urban renewal,²³ broadcast license,²⁴ and other matters. The school desegregation cases have left no doubt about the propriety of fashioning remedies on the basis of race — not only in the South, where the legacy of *de jure* segregation provides special extenuation, but also in the North and West where racial imbalances have less malignant origins.²⁵ Courts have been increasingly bold about ordering desegregation plans, which obviously must take race into account. Although the Supreme Court has not expressly validated such remedies where evidence of *de jure* segregation is lacking,²⁶ the direction and tone of its decisions leave little doubt about their propriety.²⁷

It is in the public employment area that the use of race-conscious remedies has been most marked. Scarcely three years ago a federal court of appeals up-

equality." 320 U.S. at 100. See generally Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945).

19. *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964).

20. 379 U.S. 19 (1964). This is at best marginal precedent; the Supreme Court in a brief *per curiam* order affirmed a complex district court judgment that had invalidated some racial delineations in local records, and sustained at least one racial distinction. The case was argued and briefed on the merits, but drew relatively little attention from the Court and the legal community.

21. *E.g.*, *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

22. *E.g.*, *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1971); *Erie Human Relations Comm'n v. Tullio*, 357 F. Supp. 422, *motion to modify denied*, 360 F. Supp. 628 (W.D. Pa. 1973), *modified*, 493 F.2d 371 (3d Cir. 1974).

23. *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968).

24. *TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C. Cir. 1973).

25. *E.g.*, *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967).

26. *Keyes v. School Dist. No. 1*, 413 U.S. 921 (1973), appears to undermine the importance of the *de jure-de facto* distinction, but does not reach the question of remedies appropriate to a purely *de facto* situation. See also *Milliken v. Bradley*, 94 S. Ct. 3112 (1974).

27. *E.g.*, *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

held the controversial Philadelphia Plan requiring private contractors doing government work to adopt goals for minority employment.²⁸ Since that time matters have proceeded apace, and a number of other affirmative action requirements in both the public and private sectors have been sustained against both constitutional and statutory challenges.²⁹ Even more remarkable are the recent decisions compelling quota hiring of qualified minority applicants on a numerical ratio basis, in order to ensure significant nonwhite representation in the labor force.³⁰ While the United States Supreme Court has never sustained such an order, it has denied certiorari in enough cases³¹ to suggest that Mr. Justice Douglas' concern about the use of explicit racial preference is not universally shared.

The public employment and school desegregation decisions actually go beyond preferential admission in three respects. First, these courts have *required* public agencies to prefer minority group members, rather than simply *permitting* the implementation of a voluntary remedial plan. Second, the employment cases have often imposed strict numerical quotas, as distinguished from goals or ranges, although in no case has a court ordered or even condoned the filling of such a quota with persons unqualified for the position. Third, the public employment cases — both those that permit and those that require race conscious remedies — usually cite race as the sole canon of preference, rather than simply as one factor in a complex process. The preferential admission process, on the other hand, may *begin* by setting aside certain applications for special consideration solely on the basis of race, but review and appraisal of individual files involve many other factors not required by courts or agencies in the public employment setting.³²

28. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 584 (1971).

29. *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972). The *Altshuler* case is especially apposite in this context. In the course of sustaining a Massachusetts affirmative action requirement imposed on contractors doing business with and for the Commonwealth, the court expressed this view of race-conscious remedies: "It is by now well understood . . . that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." 490 F.2d at 16.

30. *E.g.*, *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1971). *See generally* Hill, *Preferential Hiring: Correcting the Demerit System*, SOCIAL POLICY, July-Aug. 1973, at 96-102.

31. *E.g.*, *Carter v. Gallagher*, 406 U.S. 950 (1972); *Contractors Ass'n v. Secretary of Labor*, 404 U.S. 854 (1971).

32. *See* the description of the University of Washington's Law School admissions process — even before the recent reforms — in *DeFunis v. Odegaard*, 82 Wash. 2d 11, 14-23, 507 P.2d 1169, 1172-77 (1973). *See also* the extensive discussion of the complexity and multi-faceted nature of the admissions process in the Brief for the President & Fellows of Harvard College as Amicus Curiae at 12-19, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). *See generally* B. THRESHER, COLLEGE ADMISSIONS AND THE PUBLIC INTEREST (1966) (comments of a veteran admissions officer).

It has been suggested that the public employment and school desegregation cases do not apply in the preferential admissions context.³³ Two distinctions have been offered: first, that such decisions emerge from a background of de jure discrimination that permits compensatory use of race; and second, that use of race in the employment and school settings does not disadvantage nonminority groups. Both these distinctions require study.

A background of de jure discrimination, or a court finding of discrimination, does not seem essential to a remedial use of race. While the earlier cases did typically involve prior racial discrimination, more recent decisions in the areas of public employment and public education definitely do not.³⁴ Cities like Boston, Minneapolis, and Philadelphia have hired relatively few minority firemen and policemen, but not because of any explicit policy against employment of blacks or Chicanos. While courts have found evidence of de facto racial *exclusion*, or bias in the effects of standardized tests, the resulting underrepresentation is quite different from the consciously segregationist policies of southern governmental agencies.³⁵ Moreover, the suggestion that racial classification can be used only to overcome the effects of past discrimination would produce bizarre results. The very case of law school admissions highlights the anomaly. Were this test adopted it would mean that those law schools that had once practiced discrimination in their admissions policies could now preferentially admit minority students while other law schools could not. Thus, the law schools of the University of Texas at Austin and the University of Missouri at Columbia — both the targets of successful desegregation suits in the late 1940's³⁶ — would today have a broader choice of remedies because of their past policies than would the newer state law schools at Lubbock and Kansas City. The underrepresentation of minority students and minority lawyers and the need for black and Chicano practitioners, would thus be relevant to the admissions policies of one group of state schools but not to others, solely because of an accident of history. Texas Tech and Kansas City could not give ameliorative consideration to race because they had never in the past used race as a barrier.

The other proffered distinction seems equally tenuous. It is argued that race-based remedies are valid in public employment and school segregation because they help the minority without hurting the majority. Yet the mere fact that white parents have often gone to court to challenge busing programs,³⁷ and that white applicants have sued to enjoin preferential hiring,³⁸ argues strongly to the contrary. As the *DeFunis* brief of Harvard University explains:

33. See Brief for Anti-Defamation League of B'nai B'rith as Amicus Curiae in Support of Jurisdictional Statement at 12-15, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

34. See cases cited notes 21-22 *supra*.

35. See, e.g., *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974) (Alabama Highway Patrol); *Morrow v. Crisler*, 479 F.2d 960 (5th Cir. 1973) (Mississippi Highway Patrol).

36. *Sweatt v. Painter*, 339 U.S. 629 (1950). See Jones, *The Sweatt Case and the Development of Legal Education for Negroes in Texas*, 47 TEXAS L. REV. 677 (1969).

37. Cf. *Milliken v. Bradley*, 94 S. Ct. 3112 (1974), *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

38. Cf. *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1974).

"The disappointments and adverse consequences of assignment to be bused out of one's own neighborhood may be just as serious as those of denial of admission to a particular law school, for both parents and child."³⁹ In fact, the plight of the bused white pupil or the rejected applicant for public employment may be even greater because the preferentially-rejected law student is likely to be more mobile. Marco DeFunis, for example, was accepted by the University of Oregon Law School and presumably could have attended at resident tuition rates because of a reciprocity agreement between the two neighboring states. In view of the low probability that DeFunis would have been admitted to the University of Washington even if no preferential program had existed, it is ironic to argue that courts should look more harshly upon racial classification in his case than in cases involving white firemen in Minneapolis or white policemen in Philadelphia. As the Harvard brief concludes: "The question is not one of relative hardship. If attention to race or color were barred under the Equal Protection Clause by any hard-and-fast rule, it would be as unconstitutional in the one case as the other."⁴⁰

The public school and employment cases thus argue persuasively against a *per se* constitutional standard. It is inconceivable that the Supreme Court would rule out the use of race for all purposes when the lower courts have become so race-conscious, apparently with the high Court's blessing. Were a *per se* test now adopted, hundreds of lower court decisions would have to be undone, and the progress of affirmative action would be seriously retarded. Actually, a *per se* standard would have a far less drastic effect upon higher education than on other sectors, because there is far less exclusive reliance upon race in the admissions process than in other selective procedures. Nevertheless, it would be premature to speculate about the possible implications of a *per se* equal protection standard until the full Court gives some signal it has chosen that direction.

A "Rational Basis" Test

At the other extreme, it could be argued that benign or ameliorative use of race should be sustained if there is any "rational basis" for its use. The premise of this claim is almost simplistic. The Court has imposed a more rigorous standard in only two contexts: where the classification impairs a "fundamental interest" such as the right to vote or to travel and where the basis of the classification is "invidious." According to this argument, access to education and employment apparently are not fundamental interests that deserve special constitutional protection.⁴¹ The question then remains whether use of race or ethnic status is "invidious" even where the objective is to help groups that have historically been the victims of discrimination. The argument for a "rational basis" test relies heavily upon the consonance of purpose between preferential policies and the equal protection clause, adopted soon

39. Brief for the President & Fellows of Harvard College as Amicus Curiae at 20.

40. *Id.*

41. See, e.g., *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education). For the suggestion that access to public employment enjoys no special constitutional protection, see *Sugarman v. Dougall*, 413 U.S. 634 (1973).

after emancipation of the former slaves, and quickly implemented by expressly race-conscious acts of Congress.⁴² Hence, the argument runs, where it is clear that a governmental policy seeks to enhance or implement the equal protection guarantees, it would be incongruous to regard such a classification as "suspect."⁴³

This claim may have received some unexpected support from a post-*DeFunis* Supreme Court decision. *Morton v. Mancari*⁴⁴ presented for the first time the validity of a statutory preference for Indians in the employ of the Bureau of Indian Affairs.⁴⁵ The Court first held that title VII of the 1964 Civil Rights Act, which forbids discrimination in federally funded programs,⁴⁶ had not superseded the Indian preference law. A variety of special congressional and federal concerns with the Indian tribes justified this conclusion and also helped the Court reach a similar result on the constitutional claim. Opponents had argued that an explicit racial preference for Indians ran afoul of the due process clause of the fifth amendment, citing the District of Columbia school segregation case.⁴⁷ A unanimous opinion for the Court by Mr. Justice Blackmun rejected this claim, citing *inter alia* "the unique legal status of Indian tribes under federal law and . . . the plenary power of Congress . . . to legislate on behalf of federally recongized Indian tribes."⁴⁸ Several explicit constitutional references, and much contemporaneous legislation, supported this view. The Court also suggested that a preference for Indians was not really *racial*, but was based instead on tribal membership and federal solicitude for tribal members: "The preference, as applied, is granted to Indians not as a discrete racial group but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA [Bureau of Indian Affairs] in a unique fashion."⁴⁹ Given this background and context, the Court found the Indian preference valid because it was "reasonably and directly related to a legitimate, nonracially based goal."⁵⁰

Resort to a "rational basis" test in *Mancari* could conceivably support a similar standard in preferential admissions. Evidence of comparable concern for blacks is not hard to find. For example, the Supreme Court recently held that the Civil Rights Act of 1866 carried out the thirteenth amendment by guaranteeing that "all citizens shall have the same right . . . enjoyed by white citizens" to purchase housing.⁵¹ The Congress that proposed the fourteenth amendment also enacted legislation to strengthen the Freedmens' Bureau and confirmed land grants expressly for "heads of families of the African race."⁵² Thus, the historical basis for a looser standard of review of preferential action

42. *E.g.*, Act of July 16, 1866, 14 Stat. 174.

43. *See* Brief for Respondents at 22-26, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

44. 94 S. Ct. 2474 (1974).

45. The preference was created by 25 U.S.C. §472 (1970).

46. 42 U.S.C. §§2000e-2(a) (1970).

47. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

48. *Morton v. Mancari*, 94 S. Ct. 2474, 2483 (1974).

49. *Id.* at 2484.

50. *Id.*

51. 42 U.S.C. §1982 (1972). *See Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968).

52. Act of July 16, 1866, §6, 12 Stat. 175.

benefiting blacks bears some resemblance to the history invoked in *Mancari*.

Yet the analogy seems ultimately unsound. For one thing, this argument proves too little; it would establish one standard for review of classifications that favored blacks and Indians, and another for the Chicanos, Puerto Ricans, and other minority groups. Preferential admission policies seldom differentiate among minority groups in this way; the historic differences between the older and newer minority groups in the United States bear no relationship whatever to their current needs, aspirations, and potential. It would be truly ironic if the recentness of the arrival of Asian and Spanish-speaking groups were both a major source of their special needs and the reason why compensatory benefits available to blacks and Indians were not also available to them.

Quite recently a different defense of the "rational basis" test has emerged. In one of the earliest post-*DeFunis* commentaries, Professor John Ely has argued that "benign" racial classifications should be permitted where it is clear that the majority has inflicted the consequences of such classifications upon itself.⁵³ Specifically, Ely suggests "that 'special scrutiny' is not appropriate when White people have decided to favor Black people at the expense of White people. . . . [I]t is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself."⁵⁴ While such a standard would avoid some of the problems posed by a more rigorous analysis, it would introduce other complications. For example, it is hard to describe a policy developed by the law faculty of the University of Washington Law School as being "imposed by the majority upon themselves." Indeed, it is most unlikely that a vote of the people of the State of Washington, overwhelmingly White-Anglo, would have supported preferential admissions at the University's graduate and professional schools. As a practical matter, if Ely's "benign" standard really operates only when a racial classification can be characterized as truly "self-imposed," it is hard to imagine a benefit of any importance to which it would apply. Moreover, the determination of "majority" and "minority" for this purpose may be more difficult than the standard suggests. There are many urban communities in which whites still constitute a majority of the total population but are outnumbered by minorities in the public schools. In such a city, would a school busing program or an affirmative action plan for hiring teachers be imposed for the benefit of the majority or the minority? What of classifications that relate to county-wide or metropolitan government in areas where blacks are the majority in the city but not in the county as a whole? It would appear that these and similar questions could be resolved only by resort to motive or purpose — a process against which no constitutional scholar has warned more forcefully than Professor Ely himself.⁵⁵ The "benign classification" test therefore has some appeal, but in its present form does not offer a path out of the maze.

The "rational basis" test and its variations should be rejected on broader,

53. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

54. *Id.* at 727.

55. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 77 YALE L.J. 1205, 1207-12 (1970).

philosophical grounds as well. Racial classifications are inherently divisive and should be used most sparingly if at all.⁵⁶ Racial differences are immutable and indelible, and should be recognized and reinforced by government only to the degree that is absolutely necessary to serve some vital public purpose. Ethnic classifications should not only be limited in coverage, they should also continue no longer than is absolutely necessary. Preferential admissions, for example, must be regarded as a temporary and transitional device to be abolished when the need no longer exists.

Validation of racial classifications under a rational basis test would impose no time limit on their use. Even more important, governmental power to classify on the basis of race or ethnic groups is dangerous, no matter how benign the goals. Today's minority may become tomorrow's majority, and the group that one day needs protection could later become the oppressor. Because racial information gathered for ameliorative purposes could be used detrimentally, it is better simply not to have the information in the first place if it can possibly be withheld.⁵⁷

Finally, resort to the rational basis standard would imply a clear and sharp distinction on the basis of legislative motive between "invidious" and "benign" classifications. Such probing of legislative motive is perilous, as the Supreme Court has warned.⁵⁸ For all these reasons it seems wiser to judge the validity of all racial classifications — those that help minority groups as well as those that hurt — by the same basic constitutional standard.

A "Compelling Interest" Standard

One need not look far for an appropriate uniform standard. In several relevant cases the Supreme Court has spoken of a "compelling state interest," which must be found in areas to sustain a "suspect" classification. The origins of that standard are somewhat obscure, however, leaving considerable doubt about its definition and meaning. In the *DeFunis* case itself, the Washington supreme court rejected the alternative constitutional tests and concluded without elaboration: "The burden is on the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest."⁵⁹ The origins of this phrase are apparently traceable to the Japanese relocation cases — in which the waging of war against a foreign enemy was held a sufficient "interest" to justify explicitly racially discriminatory measures.⁶⁰ More recently, the Court has used slightly different language: "At the very least," said the majority in the miscegenation cases, "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' and if they are ever

56. See generally Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 375-78 (1966); cf. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970).

57. See O'Neil, *supra* note 14, at 710-11.

58. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904); Ely, *supra* note 55.

59. 82 Wash. 2d at 32, 507 P.2d at 1182.

60. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."⁶¹ Here the requisite state interest is merely "permissible," not necessarily "compelling," although presumably the meaning is substantially the same. Surprisingly, the North Carolina school cases shed no additional light on the scope of this phrase, although they contain the Supreme Court's only recent sanction of explicitly race-conscious remedies.⁶² Against the background of earlier Southern school cases, there is a strong suggestion that meaningful relief from segregation can come about only through consideration of the race of students; perhaps the presence of a compelling governmental interest is so obvious that any elaboration of the standard of review would appear gratuitous. Thus, the Supreme Court decisions, which might have illumined the "compelling interest" standard, lie at opposite poles — in the school desegregation cases the compelling nature of the governmental interest was obvious, while no substantial interest could be found to support the miscegenation laws. Because of the easy disposition of both types of constitutional claims, the Court was simply not called upon to articulate criteria covering subtler, intermediate problems.

Preferential admission lies somewhere between these two extremes. To apply the "compelling interest" test in this more difficult context, a clear understanding of the meaning of that test is needed. All that exist to date are examples — cases holding, for example, that where use of race is necessary to accomplish an objective compelled by the Constitution or by federal and state laws, then such a compelling interest is present.⁶³ What is lacking in such holdings is any indication of the process or the criteria by which the Court reached that conclusion. In fashioning a comprehensive test that will help determine the validity of preferential admissions, it is necessary to look further.

At least four elements seem to comprise the "compelling state interest test":

(1) A racial classification must be consistent with the objectives of the Equal Protection Clause. Thus, a governmental use of race that is harmful to minority groups either in intent or in effect would be unconstitutional — not because it is *racial*, but because it uses race in a way that thwarts the goals of the fourteenth amendment. A racial classification with essentially neutral effects would presumably pass this first test. For example, the racial data on Virginia divorce records,⁶⁴ or measures to achieve racial balance in juries in nonracial cases,⁶⁵ would be consistent with the Equal Protection Clause even though not designed to *aid* minorities. Where the purpose or effect is to enhance minority group interests or opportunities — whether or not at the expense of the majority — the classification would a *fortiori* survive this initial test.

61. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

62. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

63. See cases cited notes 61-62 *supra*.

64. *Tancil v. Woolls*, 379 U.S. 19 (1964).

65. *Cf. Swain v. Alabama*, 380 U.S. 202 (1965), wherein the Supreme Court seemingly allowed the use of the prosecution's peremptory challenge to exclude black jurors for discriminatory objectives. Arguably this decision would support nonintervention, if not positive

(2) The governmental interest must be substantial and central to the goals of the governmental unit employing the classification. A program designed to enhance educational or employment opportunities, for example, would appear to serve a substantial and valid end.⁶⁶ If, however, a racial classification were used simply to increase the popularity of the governmental unit, its validity would be in some doubt. This is not the place to define a hierarchy of governmental interests, but simply to establish the need for substantiality.

(3) The classification must be rationally related to the governmental interest. Once a valid interest has been identified, at least a rational relationship between end and means should be established. In the Florida miscegenation case, for example, the Court accepted the state's claim that prevention of promiscuity and extramarital intercourse represented a valid state interest. But the use of race for this purpose — making interracial cohabitation an especially serious criminal offense — was impermissible because the race of the parties was irrelevant to the government's conceded interest in sexual propriety.⁶⁷ In the school desegregation cases, by contrast, courts have often stressed the close relationship between racial classification of students and the elimination of racial isolation.⁶⁸

(4) Finally, a racial classification should be used only where nonracial approaches or standards would not serve the governmental interest equally well. In other contexts — notably constraints upon freedoms of expression — the courts have insisted on the use of a "less onerous alternative" if one is available to meet the same end.⁶⁹ Although no court has extended the requirement to the racial classification, such an extension would appear appropriate. In order to meet the "compelling state interest" test, in other words, it must be shown that the valid governmental objective cannot be achieved without resort to race.

The validity of preferential admissions turns essentially on the second and fourth of these criteria. Four asserted governmental interests will now be explored, any one of which might possibly support use of ethnic preferences. Then, because the briefs in the *DeFunis* case were replete with suggestions of ways in which minority access to the legal profession could be enhanced without preferential admission, the alternatives will be examined.

PROVING A COMPELLING STATE INTEREST

If the framework just described is an appropriate one for constitutional analysis, it does suggest several plausible state interests. Four specific interests have emerged from the litigation over preferential admissions. First, the state

approval, of such de facto racial classifications in other contexts, although it has never been so used. See also Viera, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1590 (1960).

66. See text accompanying notes 72-75 *infra*.

67. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

68. *E.g.*, *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Morean v. Board of Educ.*, 42 N.J. 237, 200 A.2d 97 (1964); *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964). *Cf.* *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), allowing a school board to bypass the regular promotion schedule in selecting principals, in order to increase the minority group representation at the administrative level. *But cf.* *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972).

69. *E.g.*, *Shelton v. Tucker*, 364 U.S. 479 (1960); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). See generally Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

may have an interest in alleviating the underrepresentation of minority groups in law schools and in the legal profession. Second, there is an arguable state interest in offsetting, or compensating for, the effects of traditional, quantitative admissions criteria — standardized tests and undergraduate grades — which have excluded substantial numbers of minority applicants from graduate and professional schools. Third, the state might assert an interest in remedying the effects or consequences of segregation, discrimination, and racial bias in other sectors of American life by favoring those groups that had in the past been victims of such practices. Finally, a state might justify preferential admissions on educational grounds, as a way of making the student bodies of its universities more representative of the total community and thus enhancing the experience of the nonminority students. Each of these four theories should be examined separately.

Preference To Remedy Underrepresentation

There is little doubt that minority groups have been, and continue to be, seriously underrepresented in the legal profession. The relevant data, which have been reviewed at length elsewhere,⁷⁰ and need only be summarized here, show that prior to the institution of preferential admission programs scarcely one per cent of the Bar was black, while blacks comprised eleven or twelve per cent of the national population.⁷¹ The effects of such severe underrepresentation are only partly quantitative. There are important human dimensions as well, which are vital to a finding of a compelling governmental interest.

It is not quite accurate to say that minorities are served by a profession only to the extent they are represented in the profession. Clearly it is not always true that a black citizen's chance of getting to see a lawyer is only one-tenth as great as that of a white person of the same socio-economic class.⁷² But the *quality* of the minority community's legal representation does appear to be strongly affected by the number of its members engaged in the practice of law. Consider, for example, the role that the minority attorney may play in the vital relationship between the legal system and the minority community. Mr. Justice Brennan has observed that black lawyers "most clearly understand the problems and difficulties found by members of the Negro community."⁷³ The Kerner report and other studies have noted a deep distrust of the entire legal system in the minority community⁷⁴ — a distrust that may be bridged

70. See, e.g., Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. TOL. L. REV. 281; Reynoso, *La Raza, the Law, and the Law School*, 1970 U. TOL. L. REV. 809; Note, *The Negro Lawyer in Virginia: A Survey*, 51 VA. L. REV. 521 (1965).

71. 1 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, *Report of the Advisory Committee for the Minority Groups* 160 (1967).

72. Indeed, various governmentally supported programs have disproportionately aided the minority community because of their income ceilings and the location of neighborhood law offices and medical clinics.

73. Quoted in Brief for the Board of Governors of Rutgers — the State University of New Jersey as Amicus Curiae at 17, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

74. See Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973).

only by someone who knows and is accepted and trusted by the community. There are also some practical considerations. Where the case is a controversial one, white or Anglo attorneys may simply be unwilling or unable to take on the assignment even if they are generally available to the community. Such a lawyer is far less likely than the native of the ghetto or *barrio* to be able to understand the background of the case, to locate and interview witnesses, to reconstruct events, and to gather other necessary evidence. Where the language of parties and witnesses is Spanish, the manifest cultural and racial limitations facing the nonnative attorney are still further compounded and the case for minority representation is enhanced.⁷⁵ Thus, the effects of underrepresentation cannot be measured in purely quantitative or representational terms. The human and intangible dimensions are critical.

Most of the foregoing analysis would apply equally well to many 'serving' professions — medicine, social work, accounting, banking, and others. However, several factors generate special concern about minority representation in the legal profession. One factor surely is the dominant role of lawyers at all levels of government — in Congress, in state legislatures and city councils, and in regulatory agencies. There is evidence that a major cause of minority frustration and even aggression against the predominantly white governmental system is a feeling of exclusion from the decisionmaking process.⁷⁶ To the extent that substantial increases in the minority bar would alleviate this feeling of exclusion, it might also enhance participation and thus improve relations in ways that access to no other profession could accomplish. Meanwhile, substantial opportunities for minority groups in the legal profession may suggest to young blacks and Chicanos that there are ways of "making it" and of changing the system without resort to violence or self-help. The success that minority persons realize through this channel should afford both a model and an avenue of advancement for others.

There is also a deeply moral responsibility for the Bar. Least of all professional groups can lawyers condone the continued exclusion of minority groups from their own profession. A commitment to apply the Constitution and the laws to other sectors clearly mandates an equal commitment to equality. It would be intolerable, for example, if bar associations expelled members or removed officers in a summary manner while calling upon other groups to observe due process. The argument for equality of access to the profession seems no less compelling than the case for procedural fairness. In the North and West, at least, it is true that the Bar is no longer racially segregated, and law schools there have never denied admission on racial grounds. But the continued need for black organizations such as the National Bar Association and such local affiliates as the Cook County and Wolverine Bar Associations attest to the relative recency of a truly "integrated" bar. Thus, the extreme degree of underrepresentation of minority groups poses for the legal profession a particularly acute dilemma.

A further effect of minority underrepresentation is to make professional services more remote for members of the minority community. The disparities

75. See O'Neil, *supra* note 70, at 297-98.

76. See Bell, *supra* note 74.

are quite striking. Throughout the United States there is one white lawyer for every 631 white persons, the proportion of black citizens to black attorneys is nearly 6,000-1. In many parts of the country the ratio is even worse. In Georgia there is one black lawyer for every 37,500 black citizens; in North Carolina 1-16,000; in Louisiana 1-38,500; in Alabama 1-40,500; and in South Carolina 1-75,400.⁷⁷ Moreover, a disproportionate number of black lawyers in the South appear to be in state and federal government legal jobs, and are thus unavailable to serve private clients.⁷⁸

For other minority groups the situation is surely no better and may be worse, though the data are sketchier. The most recent survey of the California Bar shows that the ratio of Anglo lawyers to population is about 1-530; but for the Spanish-speaking or Chicano community (the largest minority group in the state), the comparable ratio is 1-9,482.⁷⁹ New Jersey, which now has a Spanish-speaking population of roughly 300,000, appears to have only three Puerto Rican lawyers.⁸⁰ Similar underrepresentation exists for other minority groups; throughout the country there is only a handful of American Indian and Eskimo lawyers to serve populations that are geographically scattered, and disadvantaged in other ways as well.⁸¹

The State of Washington provides a microcosm of the national problem. The black population is small in absolute numbers — about 71,000 according to the 1970 census. But there appear to be only 15 black attorneys admitted to practice in the state, so the ratio of lawyers to population is 1-475 — compared to a white ratio (close to the national average) of 1-654.⁸² The number of black attorneys in Washington would have to triple before it would reach even the national level of one per cent of the Bar.

Largely as a result of aggressive recruitment, preferential admission and special financial aids, the numbers of minority law students have dramatically increased since 1968. Indeed, the number of black students now enrolled in accredited law schools actually exceeds the total number of black lawyers cur-

77. See Brief for the Board of Governors of Rutgers—the State University of New Jersey & the Student Bar Ass'n of Rutgers School of Law at Newark as Amicus Curiae at 14-16, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

78. *Id.*

79. Reynoso, *supra* note 70, at 816.

80. Cabranes, *Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education*, 25 J. LEGAL ED. 447, 450-51 (1973).

81. Information about representation from these groups in the legal profession is much more difficult to gather. As of 1968 no American Indian had ever received a law degree from the universities of Arizona, New Mexico, or Utah despite the large Indian populations in those states, and no American Indian was practicing in New Mexico or Arizona. University of New Mexico Law School, Special Scholarship Program in Law for American Indians (1968) (brochure). The situation has improved considerably since that time; during the 1973-1974 academic year there were reported to be 222 American Indian students enrolled in accredited law schools. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1973 SURVEY OF MINORITY GROUPS IN LEGAL EDUCATION. We do not yet have accurate data on the number of American Indian attorneys, much less those from less visible minority groups such as Eskimos.

82. U.S. DEPT OF COMMERCE, BUREAU OF CENSUS, CHARACTERISTICS OF THE POPULATION pt. 49, at 41, 489 (1973).

rently in practice.⁸³ Arguably, therefore, a state interest that may once have been "compelling" has now lost its force. This claim has some superficial appeal, but should not go unchallenged. Even if all the black students now in law school graduated and became practitioners — an uncertain prospect in view of recent bar examination studies⁸⁴ — the net effect would be to increase black representation from one to two per cent and not to achieve anything like national proportionality. Moreover, these dramatic increases in minority enrollments have come as a direct result of the very preferential policies that are under review; to use evidence of improvement as a basis for removing the catalyst would be a perverse form of logic. Meanwhile, there is some evidence that minority enrollments at the undergraduate levels — the sources of graduate and professional students — have reached at least a temporary plateau and may actually be declining.⁸⁵ If such a reversal is indeed under way or in prospect, it becomes even clearer that continued expansion of minority graduate enrollments will require preference in graduate admissions. In any case, it is certainly too early to pronounce an end to the problem of underrepresentation simply because the numbers of minority students and lawyers are steadily increasing. The latest data reflect a promising beginning, but only that.

A "compelling" state interest, as has been suggested, should be not only substantial but demonstrable. There should be a little difficulty in showing the effects in a particular state or region of the minority underrepresentation in the legal profession. Courts should be willing to take judicial notice of such facts as the importance to society of the legal profession and statistics on minority representation. Evidence might be offered on such issues as the minority citizen's perception of the legal profession and how that perception is altered by dealing with a minority attorney; the expectations and aspirations of minority youths and how expanded access to the legal profession might affect those aspirations; and perhaps on the particular role of minority attorneys in cases where language or cultural barriers would reduce the effectiveness of an "outsider." Such evidence should serve to establish the substantiality of the governmental interest covered by this first heading, and should go far to validate a program reasonably designed to remedy the current condition.

83. Since there are estimated to be about 3,000 black attorneys currently admitted to practice, the number of black law students has exceeded that number since the academic year 1971-1972. The black enrollment for 1973 was 4,817 — a figure considerably larger than the black membership in the bar, even taking recent increases in bar admissions into account. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1973 SURVEY OF MINORITY GROUPS IN LEGAL EDUCATION.

84. See, e.g., *The Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures, — Racial Discrimination in Administration of the Pennsylvania Bar Examination*, 44 TEMP. L.Q. 141 (1971) [hereinafter cited as *Pennsylvania Bar Examination Report*]. For more recent and more alarming data, see ASSOCIATION OF AMERICAN LAW SCHOOLS, BAR EXAMINATION STUDY PROJECT, Memorandum No. 12, pts. 2-4, which reports on experience of minority students and graduates on the summer 1973 bar examinations.

85. See N.Y. Times, Feb. 3, 1974, §1, at 43, col. 1.

Preference To Vary and "Humanize" Admission Criteria

It would be quite naive to think that students are admitted to law school (or to any other highly selective program) solely in rank order on the basis of test scores and grade point averages. Where the demand for admission is as intense as it has become in American law and medical schools, strictly numerical selection is impossible; below the top the curve quickly widens to a point where final choice must be made on the basis of nonquantitative factors.⁸⁶ Nor is departure from strict rank ordering of applicants a novel technique. Seasoned admissions officers have always made choices partly on statistical grounds and partly on the basis of myriad other factors that could not be quantified.⁸⁷ "Preferential admissions" began decades before the current concern about minority students. Conscious preference has long been given to children of alumni, legislators, and friends of the institution; students with unusual forensic or leadership talents; physically handicapped applicants; and persons from exotic places who could enrich the lives of their fellow students.⁸⁸ The University of Washington Law School gave preference not only to minority group members, but also to returning veterans who had earlier been admitted at a time of less intense competition and now wanted to matriculate. Ironically, Marco DeFunis himself initially sought one such preference; his contention (rejected by both state courts) was that as a Washington state resident and taxpayer he should be admitted ahead of applicants from other states with better records.⁸⁹ Thus, there is nothing either racial or novel about departures from numerical ranking in the admissions process. The only question is the propriety of considering race or ethnic status as a variable factor.

There has been much debate about the accuracy, or possible bias, of the Law School Admission Test (LSAT) and other standardized examinations.⁹⁰ It would not be profitable to reargue here the "fairness" of the LSAT, nor is it necessary to resolve that issue in deciding the constitutional issue. The question is not whether law schools may continue to use undergraduate grades and test scores in the admissions process, but only whether they may vary the role of these criteria in cases where they feel numerical indicia may not fully measure human potential. That is a much narrower and easier question than

86. See Brief Law School Admission Council as Amicus Curiae at 18-19, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

87. See, e.g., Holland, *What Every College President Should Know About Admissions Practices*, in *SELECTED ISSUES IN COLLEGE ADMINISTRATION* 17-23 (E. McGrath ed. 1967); Moffit, *The Admissions Process*, in *PHILOSOPHY AND PROBLEMS OF COLLEGE ADMISSIONS* 18-19 (Rich & Garrett eds. 1963).

88. See B. THRESHER, *supra* note 32, at 56, 57, 59-61.

89. See ¶15 of Complaint for Mandamus, Injunction and Damages, Single Appendix in the Supreme Court of the United States at 17, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). This issue was briefly disposed of by the Washington supreme court, and did not reappear. 82 Wash. 2d at 43, 507 P.2d at 1188.

90. E.g., Consalus, *The Law School Admission Test and the Minority Student*, 1970 U. Tol. L. Rev. 501; Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar*, 20 J. Legal Ed. 175 (1967); Raushenbush, *Broadening the Base of Persons Entering the Legal Profession: Recruitment and Admission to Law Schools*, AALS Section on Minority Groups, Newsletter, May 1974, at 1-3.

the one that requires detailed validation and content analysis of the tests themselves.⁹¹

Several factors may establish the compelling character of this second state interest. There seems no question that the use of standardized tests as performance predictors has brought about the exclusion of disproportionately large numbers of minority students.⁹² Many of those who have been excluded would probably have done adequate work, and some might have achieved distinction. The use of tests undoubtedly also excluded many nonminority applicants — especially those who have been economically or educationally disadvantaged — but not in comparable proportions. Yet such an effect does not mean, ipso facto, that such tests are biased or discriminatory; there is no evidence that such instruments have been designed or used with any conscious racial or ethnic animus. Given the close correlation between the tests and the curriculum in which performance is being predicted, it would be surprising if the correlation were not quite high. Professor Ernest Gellhorn has observed that the LSAT “is a mirror image of the law schools. Thus, the cultural bias, if any, is not inherent in the test, but rather is in the law schools and in their teaching and testing methods.”⁹³ Indeed, one might go on to say that the cultural bias reaches all the way back into the elementary and secondary schools of which minority students are the products. If the standardized tests accurately predict law school performance, this does not mean either that they do not exclude substantial numbers of qualified minority applicants, or that their use in judging minority applications should not be tempered by other considerations.

The Law School Admission Council has, in fact, consistently warned against a rigid, inflexible reliance on test scores. Where opponents of preferential admissions seem to argue that numerical ranking should be strictly observed — at least where race might enter the picture — the sponsors of the tests disclaim any such infallibility. In its brief *amicus curiae* in the *DeFunis* case, the Law School Admission Council stated publicly its position on this sensitive question:

[I]t would be unreasonable, arbitrary, and perhaps unlawful for a law school to look only to the Law School Admission Test in the selection process, and to refuse to consider other factors which bear upon an applicant's potential for academic performance in law study, for enriching the education of his classmates, or for useful service as a lawyer.⁹⁴

Such an authoritative statement from the organization responsible for the tests should leave little doubt about flexible weighing of test scores in the

91. In many recent employment discrimination cases, the fairness or possible bias of standardized tests and other measures has been analyzed in content terms. *See, e.g., Vulcan Soc'y of New York Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265 (S.D.N.Y. 1973).

92. Dyer, *Toward More Effective Recruitment and Selection of Negroes for Colleges*, 36 J. NEGRO ED. 216, 227 (1967) (comments of the Vice President of the Educational Testing Service).

93. Gellhorn, *supra* note 70, at 1069, 1089.

94. Brief for Law School Admission Council as *Amicus Curiae* at 12, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

admissions process. It would be anomalous if a court were to tell a law school it must give more literal adherence to LSAT results than the Council itself believes justified. Nor does the preferential admission process involve any abandonment of test scores and undergraduate grades, even for minority students. Most of the students admitted will continue to be white Anglos and, as in the past, they will undoubtedly be evaluated heavily on the basis of predicted first-year averages. As the number of *minority* applicants increases, more difficult choices must be made within the preferred group, and these decisions too will be guided by quantitative indicia. But against the background of exclusion, and the current position of the Testing Council, a dispensation for minority applicants as against the majority group seems at least permissible.⁹⁵

It is arguable that such an approach to numerical predictors is not only allowable but in fact required. With increasing frequency courts have struck down public employment testing and screening devices that excluded disproportionate numbers of minority applicants.⁹⁶ The formula governing such cases derives from the Supreme Court's decision in *Griggs v. Duke Power Co.*,⁹⁷ although *Griggs* dealt strictly with private employment under title VII of the 1964 Civil Rights Act it established a precedent of far broader scope. The essence of the *Griggs* decision emerged with stark simplicity: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."⁹⁸ In later employment cases this formula has been used as a basis for the quota hiring orders briefly discussed above.⁹⁹ More precisely, when an employment test or criterion is shown to be racially exclusionary, the employer must then clearly demonstrate its job relatedness in order to justify its continued use. In few of the cases decided in recent months has the employing agency been able to surmount this rather substantial hurdle.¹⁰⁰

The analogy of public employment cases to preferential admissions is not a perfect one. The *Griggs* formula has, however, been applied a bit closer to the admissions process. In one recent case challenging the procedures for classification of public school students as "educationally mentally retarded," (EMR) the crucial intelligence tests were ruled invalid on *Griggs* grounds.¹⁰¹ Following a finding that the use of such tests assigned disproportionate numbers of minority children to the opprobrious EMR track, the court required

95. It was this conclusion that apparently persuaded Mr. Justice Douglas that some departure from strict numerical ranking of applicants was permissible: "Insofar as LSAT tests reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. . . . My reaction is that the presence of an LSAT test is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials." *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting).

96. *E.g.*, *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973).

97. 401 U.S. 424 (1971).

98. *Id.* at 431.

99. *See, e.g.*, *Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973), and cases cited note 22 *supra*.

100. *See, e.g.*, *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

101. *See Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972).

school authorities to demonstrate the educational relevance of the tests, which they were unable to do. The inability to meet that burden resulted in the invalidation of standard intelligence measures.¹⁰²

While exclusion from law school is not equivalent to placement in a remedial class, the partial analogy between the two situations does underscore the possible relevance of *Griggs* to the problem of preferential admissions. Because no law school appears to rely exclusively on test scores or grades, the case is not likely ever to arise in precisely this form. But when the issue comes up another way, as it did in *DeFunis*, a concern for what the law might *require* should establish some latitude for *voluntary* efforts to reduce the barriers and expand access.

A brief summary will suggest whether the interest in question is compelling. If quantitative admission criteria were shown to be culturally biased or discriminatory in content, no one would challenge their suspension in minority admissions. In all likelihood, following the *Griggs* precedent — and assuming that access to higher education is no less important than access to public employment — such tests would be enjoined on constitutional grounds. There is no such proof, however, with respect to the LSAT or the predictive use of undergraduate grades. What has been shown of these criteria is that they tend to exclude disproportionate numbers of minority applicants — especially as admission levels continue to rise. Should the issue be pressed, embarrassing questions might be raised about their “education-relatedness,” even without a finding of cultural bias. Thus, there seems a persuasive case to permit, though not to require, that a law school consider other factors and weigh the numerical predictors differently in appraising minority applications. A single standard of review for majority and minority would simply continue the exclusionary pattern of the past.

Preference To Compensate for Past Discrimination and Denial of Opportunity

Quite apart from underrepresentation and exclusion, a third state interest may independently support preferential admission policies. Though not ordered to do so, a law school might well assume a responsibility to remedy past wrongs by recruiting and admitting more minority students than would enter through the normal processes. The current underrepresentation of minority groups in the legal profession did not result solely from lack of interest on the part of minority students, from a too rigid use of standard admissions criteria, or even from insufficiency of financial aid. It was only within the last quarter century that the Supreme Court struck down racial segregation in state-supported law schools,¹⁰³ and black applicants were excluded from some private university law schools in the South into the 1960's.¹⁰⁴ Segregated bar associations persisted until remarkably recent times. Even in Northern and Western states, vestiges of discrimination were evident in bar examinations until very

102. See generally Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 96-100 (1974).

103. *Sweatt v. Painter*, 339 U.S. 629 (1950).

104. Gellhorn, *supra* note 70, at 1070.

recently.¹⁰⁵ In short, the legal profession, and the law schools as a major element of the profession, have contributed to causing the problem they now seek to alleviate. The brief *amicus curiae* for some sixty law school deans argued this point candidly to the Supreme Court:

While not the universal pattern, until recently many law schools refused to admit blacks, and many blacks who were able to attend law schools could do so only at all-Negro institution. . . . If a Black did manage to graduate from law school he faced discrimination from bar associations, law firms and government agencies. . . . Thus blacks were discouraged from going to law school by their prospects after graduation, were denied admission to law school if they nevertheless applied, and were less likely to be able to practice law after they graduated.¹⁰⁶

The law schools, to be sure, were not the only culprits. Inequality of educational opportunity at all levels has denied professional opportunities to minority groups. As late as 1970, while 16.6 per cent of all whites had graduated from college, only 6.1 per cent of blacks, 5.3 per cent of persons of Spanish heritage, and 1.1 per cent of American Indians held baccalaureate degrees.¹⁰⁷ Thus, even *equal* access to law school would mean far less than proportional opportunity for these groups to enter the profession. Moreover, the problem does not stop at the college level. While the attendance and graduation rates are far higher in the elementary and secondary schools, *qualitative* differences become vitally important. Much has been written about the effects on higher education and career opportunities of overcrowded, undersupported ghetto and *barrio* schools.¹⁰⁸ Here it should suffice simply to note that all levels of the educational system share some responsibility for the constriction of minority access to schools.

Although the blame does not rest solely or even primarily with the law schools, and law schools cannot right all the ills of the educational system, it is equally clear that there will not be more minority lawyers unless the law schools assume a leading role in recruitment, admissions, and retention. Undergraduate minority student programs depend for their effectiveness upon enhancement of opportunity for their graduates, which the graduate and professional schools can provide.¹⁰⁹ Thus, a state (or its law school) might well assume a major responsibility in this area, even if it had never actually denied access to minority applicants in the past.

Regardless of past wrongs, a law school might also see a minority recruitment program as a key ingredient of its affirmative action program. Because such a program — legally required of all institutions of higher learning re-

105. See *Pennsylvania Bar Examination Report*, *supra* note 84.

106. Brief for a Group of Law School Deans as *Amici Curiae* at 17, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

107. *Id.* at 17 n.15.

108. See, e.g., Cohen, *Policy for the Public Schools: Compensation and Integration*, 38 HARV. ED. REV. 114 (1968). See also T. CARTER, *MEXICAN-AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT* (1970).

109. See *SCHOLARSHIP FOR SOCIETY: A REPORT ON THE EMERGING ROLES AND RESPONSIBILITIES OF GRADUATE EDUCATION IN AMERICA* 35-37 (1973).

ceiving federal funds — seeks to overcome past denial of opportunity to minority groups through higher education, many of the same considerations are pertinent. Although no institution has yet been required to recruit preferentially as part of its affirmative action obligation, federal officials do view with suspicion low minority admission and retention rates.¹¹⁰ Allocation of financial aid to minority students is also a recurrent concern of HEW visiting teams. Perhaps most relevant as a component of affirmative action is the recruitment of minority faculty members. Now that every law school must adopt goals and timetables for the utilization of women and minorities in professional roles, and must then take positive steps to meet those goals, the legal education community has a vital stake in the availability of prospective minority law teachers. Because the employer of faculty talent is also the producer of that talent, the major law schools cannot avoid faculty recruitment obligations by pleading unavailability of enough qualified minority law graduates. The legal education system as a whole, now has a nondelegable responsibility to increase the pool of minority law graduates from which future law teachers — always a small and carefully selected fraction of the profession — will be chosen.

Again, it is important to recall the precise question before us. The issue is not whether a law school *must* preferentially admit minority applicants, but only whether it *may* do so as part of its general admissions program. The interest of the legal education community in overcoming the effects of past discrimination seems a substantial one, especially because the law schools are not blameless for the current plight of the minority bar. With the added impetus of the new governmental affirmative action programs, the substantiality of this interest seems beyond question.

Preference and Education: The Law School as Microcosm

Suppose the law school simply decides that an almost totally White-Anglo student body is educationally unsound and launches a preferential program for that reason alone. Can this consideration by itself constitute a “compelling state interest”? It is well to recall at this point precisely what the Supreme Court said in *Sweatt v. Painter*,¹¹¹ which held that Texas could not constitutionally exclude black applicants from law school:

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of

110. There is a particular irony that the first major court challenge to preferential admissions involved the University of Washington. That institution has been a major target of federal affirmative action and there has been a serious threat of termination of federal funds because of allegedly inadequate efforts in this area. See CHRONICLE OF HIGHER EDUCATION, July 8, 1974, at 3.

111. 339 U.S. 629 (1950).

views with which the law is concerned. . . . with such a substantial and significant segment of society excluded. . . . we cannot conclude that the education offered . . . is substantially equal¹¹²

The Court's immediate concern was with the black student relegated to a small and obviously inferior black law school. Precisely analogous reasoning could be applied to the white student for whom a completely white environment would be equally unrepresentative of life beyond the ivy walls. Throughout the Supreme Court's desegregation decisions runs a concern for both black and white children, and for the values of assimilation and contact through the school setting. In the Charlotte desegregation case, for example, the Court recognized that as a matter of "educational policy" a school board "might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."¹¹³ Thus, there does appear to be legal support for a preferential admission decision based principally upon the educational interests of the *majority*, rather than the *minority*. If one accepts as an educational premise that a graduate or professional school should mirror the society of which it is a part, then the use of preferential admissions to achieve the requisite mix acquires an additional base of support.

The "microcosm" theory also helps to dispel the argument advanced in *DeFunis* that the University of Washington could not justify a preferential program because under the regular admissions policy the black enrollment in its law school matched that of the two per cent state population ratio.¹¹⁴ Despite its superficial appeal, this argument has several flaws. For one thing, as noted earlier, blacks were not represented in the Washington bar at anything like two per cent, but at something like one-third of one per cent.¹¹⁵ The two per cent representation that existed several years ago was apparently something of a fluke, for, without some preferential consideration the class entering in the fall of 1971 would have contained no black students at all. But these two points really miss the major issue: The University of Washington and its law school are at least regional and possibly national institutions, serving a constituency far larger than that of the state. Since the University is now the second largest recipient of federal funds among all colleges and universities in the country — ranking close behind MIT¹¹⁶ — it would be supreme irony to confine its admissions focus to the Pacific Northwest. Moreover, if universities and law schools could recruit only to the level of local proportionality, national redress for what is clearly a national problem would be virtually foreclosed. Ironically, those law schools like the University of Washington, located in areas of relatively low minority population, would not be able to preferentially increase their minority enrollments, despite the commitment and the resources to do so; meanwhile, schools in areas of high minority concentration

112. *Id.* at 634.

113. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

114. Brief for Anti-Defamation League of B'nai B'rith as Amicus Curiae in Support of Jurisdictional Statement at 14, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

115. See text following note 82 *supra*.

116. *CHRONICLE OF HIGHER EDUCATION*, July 8, 1974, at 3.

would be left to bear an even larger share of the already heavy burden of urban higher education. To hold that local population marks the limits of a preferential admission policy would, in effect, legitimize the very ethnic quotas that responsible academic institutions have tried to avoid by eschewing strict proportionality.

Preferential admission policies might, then, rest at least in part on sound educational considerations. A college or university — particularly one remote from urban areas — might well decide that its white students could get a meaningful total education only if they had among their classmates more than a token number of minority students. Such an educational commitment might well lead to a minority recruitment and admission program that would only incidentally benefit the minority students who participated. The primary beneficiaries would be the institution and its dominant culture. To make such a choice on educational grounds does seem to reflect a compelling state interest.

The Absence of Alternatives

Earlier we left open the possibility that some or all of the allegedly compelling state interests could be achieved by nonracial means and would thus fail the final constitutional test. The time has now come to consider several alternatives — first, to see whether they would serve the same interest; and second, to see if they are truly nonracial. For the state's interest in educational diversity, nonracial alternatives would not work. If the goal is to create on campus a microcosm of society, including substantial minority participation, only explicit recruitment of minority students will be effective. If the institution is highly selective, as are almost all law schools, and private liberal arts colleges like Antioch, Oberlin, and Connecticut Wesleyan that have shown special concern for minority students, then the preferential consideration of race seems essential.

The possibility of nonracial responses to the other three interests remains for consideration. The quest for such alternatives may be enhanced somewhat by Mr. Justice Douglas' emphasis in *DeFunis* on "consideration of [law school] applications in a racially neutral way."¹¹⁷ This opinion goes on to suggest that an admissions committee might in fact increase its share of minority students by taking into account nonethnic factors that would tend to benefit minority applicants — interviews, performance in special summer pre-law programs, prior achievement in light of racial discrimination, commitment to community service, and perhaps other "racially neutral" criteria.¹¹⁸ While such a program might be administratively less convenient than the racial preference, it would, in Justice Douglas' view, "substantially fulfill the law school's interest in giving a more diverse group access to the legal profession."¹¹⁹ Several of the amicus curiae briefs supporting *DeFunis* in the Supreme Court similarly

117. 416 U.S. at 340 (Douglas, J., dissenting).

118. *Id.* at 341.

119. *Id.*

argued that however commendable the University's goals might be, they could and should be achieved through means that took no account of race.¹²⁰

The central premise of these alternatives is that programs open generally to "disadvantaged" persons will incidentally include more minority students than would formerly have been admitted. Undoubtedly some increase in racial and ethnic minority involvement would result, but uncertainly, imprecisely, and haphazardly. The total number of "disadvantaged" students required to boost the minority share might well tax the institution's resources beyond capacity, thus necessitating a substantial cutback in minority enrollment. A college or university cannot — and constitutionally, need not — tackle all social problems at once, but may decide to begin with those that are most pressing. The particular choice would be constitutionally vulnerable only if a compelling state interest were lacking or nonracial means would equally well serve that end.

There is another reason why nonracial alternatives may not work particularly well. The level of minority interest in higher education, and the number of individual applications, have risen sharply in the last few years. A major catalyst has undoubtedly been the widespread publicity given to programs of admissions and financial aid expressly geared to minority students or, even more specifically, to members of particular ethnic groups. If such programs were suddenly superseded by more vague appeals, much of the momentum that has been finally achieved would be lost. Hence the number of minority students actually recruited through "racially neutral" programs might well be even fewer than present projections would suggest.

To the extent that such alternatives might function effectively, they would probably succeed by changing only the form and retaining the substance of minority programs. For example, a pre-law institute at a black law school, publicized at black colleges and among black undergraduate groups, would probably turn out to have a highly homogeneous student body even if the language of "disadvantage" were scrupulously employed. A similar program, announced on Spanish language posters throughout East Los Angeles, would probably also be quite selective even if not a word were said about the ethnic background of the applicants. But such avoidance of a "minority" focus would be disingenuous. In substance such programs would be as clearly and as sharply aimed at racial and ethnic groups as are the present pre-professional and other educational efforts. It would be far better to avoid the euphemisms and state candidly what is being sought — not only to avoid the charge of hypocrisy from persons for whom the program is clearly not intended, but also to make the most efficient use of limited resources.

A dilemma thus emerges: alternatives that are truly nonracial are likely to be far less effective, those that really do offer viable and workable alternatives are not likely to be truly neutral. If, as Justice Douglas has suggested,¹²¹ a law

120. See Brief for Advocate Society, American Jewish Committee, Joint Civil Committee of Italian Americans & UNICO National as Amici Curiae at 25-30, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

121. The Washington supreme court dealt directly and forcefully with the "nonracial alternatives" argument: "If the law school is forbidden from taking affirmative action, this

school admissions committee should rely on nonracial criteria such as commitment to the community, ability to overcome effects of discrimination, or performance at special pre-law summer institutes, the end result in terms of the number of minority students might well approximate the effects of the present, more explicit, selection process. But one wonders whether anything would be gained by telling a rejected White-Anglo applicant that preference had been given to persons who looked better on various nonquantitative measures and just happened to be mostly black or Chicano. In short, the selection *process* might appear racially neutral, but if the institution were truly committed to the goals outlined here, the *results* would likely be rather race-selective.

This is not to say that "racially neutral" alternatives could not be designed in the future. For the present, such alternatives do not appear to exist. Perhaps the current critical need to expand minority enrollments simply requires a degree of directness — a focus upon race per se — that will not be necessary ten years hence. It is quite clear that preferential policies of any sort should not outlast the justification for them, but should be deemed essentially "emergency" measures. During this transitional period, the use of nonracial alternatives would only impede the already uncertain and difficult progress toward vital national goals.

underrepresentation may be perpetuated indefinitely. No less restrictive means would serve the governmental interest here; we believe the minority admissions policy of the law school to be the only feasible 'plan that promises realistically to work, and promises realistically to work now.'" *DeFunis v. Odegaard*, 82 Wash. 2d 11, 36, 507 P.2d 1169, 1184 (1973).