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ARTICLES

EQUAL PROTECTION, AFFIRMATIVE ACTION AND RACIAL PREFERENCES IN LAW ADMISSIONS
DE FUNIS v. ODEGAARD

Arval A. Morris*

In race relations, affirmative action programs\(^1\) are used to give preferential treatment to certain minority group members in an attempt to redress some of the deleterious effects of past racial or ethnic discrimination and to correct current racial imbalances.\(^2\) Underlying affirmative action programs are two of the most cherished ideals of American society: (1) that self-fulfillment, and the fulfillment of

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1. The term comes from labor relations; see, e.g., Labor Management Relations Act, § 10(c), 29 U.S.C. § 141 et seq. (1971). In education, courts have authorized and/or ordered school administrators to use numerical quotas in order to increase minority group representation at white schools; see Bell, School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools, 1970 Wisc. L. Rev. 257 (1970).

human potentialities can best be achieved by one's own efforts and (2) that the good society is one that, as much as possible, provides to each person the opportunities, the materials and the mind, character and spirit essential for self-development so that each person can achieve his self-fulfillment by engaging in a life and career that conform to his reasoned and mature choice. DeFunis v. Odegaard, in which the Washington Supreme Court upheld the constitutionality of a racially conditioned affirmative action program, represents the first appellate test of a program in higher education designed to aid minorities in achieving these ideals.

The term "affirmative action" is neither self-defining nor descriptive of any one, specific program. It is a generic term vaguely describing a range of possible programs which are characterized by an institution's taking some kind of initiative, either voluntarily or under compulsion of law, to increase the number or the status of certain minority group members within a larger group. Frequently, but not always, a racial classification is used, and the character of the initiative taken can vary widely. Thus, a governmental affirmative action program could be designed to redress racial imbalances in employment. It could seek to achieve this goal either by generally requiring that all federally assisted construction contractors and subcontractors afford equal employment opportunities or by specifically requiring that all federally assisted contractors and subcontractors make use of a racial criterion—perhaps by adopting racial quotas—and engage in bona fide efforts to achieve certain goals of minority group employment.


from the school-desegregation cases and recognizing the magnitude of the deleterious consequences of racial discrimination, Professor Bittker writes that this latter type of program implies "that we can have a color-blind society in the long run only if we refuse to be color-blind in the short run" and "the remedy, in short, is some hair of the dog that bit us."6

Recently, colleges, universities and law schools voluntarily have adopted analogous affirmative action programs of varying kinds, usually involving racial admission preferences. Generally, preferential law admissions policies classify all qualified applicants on the basis of their race or ethnic background and then apply one set of admission standards to white students and a different, less stringent set of academic standards to certain minority group members, thereby giving them a preference on racial grounds and denying admission to that number of academically better qualified white students who are displaced by operation of the program.7 The exit standards remain unchanged.

The case for an affirmative action program is especially compelling in the case of law schools. There is no reason to believe that the native ability needed to complete law school successfully and to enter the practicing bar is solely restricted to any one or few favored racial groups in American society. To the contrary, there is reason to believe that measurable intelligence traits associated with legal skills are spread across the spectrum of America's racial groups8 and that un-

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7. The displaced persons need not be denied a legal education. For example, DeFunis, the displaced plaintiff, had been accepted by four other law schools. 82 Wn. 2d at 30, 507 P.2d at 1181 n.11.
even occupational statistics are primarily a reflection of differences in social and family environment. The national statistics show that lawyers who are also minority group members do not populate the practicing bar in proportions roughly equal to their numbers in the underlying population as a whole. On the other hand, if there were truly equal access to legal education one would expect to find roughly the same proportion of lawyers who are minority group members as there are minorities in the population as a whole. To illustrate the present disparity, it is estimated that there are 324,818 lawyers in the United States, but of that number only 3,845 are black lawyers and 214 are black judges. Blacks make up about twelve percent of the American population, but only about one percent of the American bar. Roughly the result is that only one Black lawyer is available for 5,735 Blacks, as compared with one non-black lawyer for every 631 non-blacks. Since many Black lawyers work in state or federal employment, the actual number available for private practice is even smaller than these statistics reveal. Professor Ernest Gellhorn has estimated that even if the aggregate size of the legal profession remained unchanged "an additional 30,000 Negro attorneys would need to be trained before the Negro would achieve parity in the legal profession." The situation is certainly no better, and probably worse, for Spanish surnamed persons and American Indians.

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9. See note 166 infra.
11. The 1960-70 statistics were obtained by a questionnaire survey from the Governors of the 50 states and from individual inquiries made of National Bar Association members at the 45th Annual Meeting of the Association in New York City, July 21-25 (1970); they are printed as the REPORT OF BLACK LAWYERS AND JUDGES IN THE UNITED STATES, 1960-70, 91st Cong., 2d Sess., 116 CONG. REC. 30,786 (1970). In some states the underrepresentation was gross: Georgia had a black population of 1,122,596 and 4,824 total lawyers, but only 30 black lawyers and three black judges; Illinois had a black population of 1,037,470 and a total of 19,045 lawyers but only 667 black lawyers and 26 black judges, and 17 states had five or less black lawyers and black judges! See also U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, GENERAL POPULATION CHARACTERISTICS OF THE STATE OF WASHINGTON Tables, 17 & 18 (1970); OFFICE OF PROGRAM PLANNING AND FISCAL MANAGEMENT OF THE STATE OF WASHINGTON, POCKET DATA BOOK (1971); Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. TOl. L. REV. 321; Edwards, A New Role for the Black Law Graduates—A Reality or an Illusion?, 69 MICH. L. REV. 1407 (1971); Gellhorn, The Law Schools and the Negro, 1968 DUKE L.J. 1069 [hereinafter cited as Gellhorn].
12. 1970 U.S. CENSUS POPULATION, ADVANCE REPORT. See also Gellhorn, supra note 11, at 1073.
13. Gellhorn, supra note 11, at 1073.
14. Figures on Mexican Americans who are lawyers are extremely difficult to obtain. These groups tend to be the new invisible Americans and are unaccounted for. But
DeFunis v. Odegaard

It seems that only one of two possible explanations might account for the vast underrepresentation of certain minority groups in the practicing bar. Either American society affords them a fully equal opportunity to become lawyers, but they do not choose careers in law; or they would like to become lawyers, but equal opportunity does not exist for them in society as currently structured. This lack of opportunity might be caused by overt racial prejudice or by social institutions which function detrimentally to certain racial groups despite an absence of overt racial discrimination. That both overt racial prejudice and institutional malfunction currently exist at all levels of American society is undeniable. We sense it, we feel it and we know it. The

Denver, Colorado, provides an example. There, about nine percent of the population is Mexican American, and the city has 2,000 lawyers. However, only 10 of the 2,000 lawyers have Spanish surnames! This is only about one-half of one percent. (U. of Denver College of Law, Progress Report to the Ford Foundation: Law School Preparatory Program for College Graduates of Spanish Speaking Descent 3 (cited in O'Neill, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 727 n.104 (1971)). The data for California is consistent with that from Denver. See Reynoso, La Raza, The Law, and the Law Schools, 1970 U. Tol. L. Rev. 809, 814-16. Mexican Americans make up about twelve percent of California's population but less than one percent of the bar has Spanish surnames, and while the ratio of Anglo attorneys to Anglo clients is one lawyer for every 530, the comparable ratio for Mexican Americans is one lawyer for every 9,482. Like American Indians and Blacks, Mexican Americans have unique social and psychological problems that stem in great degree from their past treatment by American society. See, e.g., N. Wagner & M. Haug, Chicanos: Social and Psychological Perspectives (1971); C. Heller, Mexican American Youth: Forgotten Youth at the Crossroads (1966). 15. The situation of American Indians is even worse. There are well over half a million Indians in the United States, located primarily in the Southwest and Northwest. As of 1968, no American Indian had ever obtained a law degree from the Universities of Arizona, New Mexico or Utah, and as of 1968, not one American Indian was practicing law in either New Mexico or Arizona; however, the latter two states have over 135,000 Indians! Special Scholarship Program in Law for American Indians 4, 1968 brochure, reported in O'Neill at 727 n.106, note 14 supra. During school year 1969-70, after the creation of special affirmative action programs, there were only 71 American Indian students enrolled in all law schools in the United States. This meager number is considered to be a great stride forward. Association of American Law Schools Newsletter, No. 70-2, May 4, 1970, at 3. The truth is that in this country today there are only a handful of American Indians who are lawyers. (Actually about 35 are full-blooded Indian.). 16. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false . . . [W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversion of a willful scheme. Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967). The Supreme Court has frequently found that a state's policy, racially neutral on its face, actually denied equal protection of the laws because it had the "effect of denying the right . . . on account of race or color." Gaston County v. United States, 395 U.S. 285, 287 (1966) (the right to vote). Under Gaston, there need not be evidence of conscious discrimination if the effect is racial exclusion. See also Griggs v. Duke Power Co., 401 U.S. 424 (1971).
response by minority groups to the various affirmative action programs that voluntarily have been adopted and are currently in use by law schools indicates that institutional malfunction accounts for vastly more of the underrepresentation of certain minority group members in the practicing bar than voluntary choices not to become lawyers. 17

The use of a preferential admissions policy by a state law school obviously raises a serious question of equal protection which differs greatly from the type of equal protection problem raised by a local school board when it voluntarily adopts a desegregation plan for the common schools, even though it too uses a racial classification or racial quota. These differing types of constitutional problems are illustrated by considering a hypothetical and simplified school desegregation plan and comparing it with a law school preferential admissions policy where the law school has an enrollment limitation. Imagine two district schools of grades one through six that are located within two blocks of each other, one attended solely by white and the other solely by non-white children. The local school board voluntarily adopts an affirmative action program using a racial classification requiring that the schools—students, faculty and administration—be fully integrated in proportions roughly equal to the racial group representation in the surrounding society. 18 Assuming that after the integration occurs both schools afford the constitutionally required equal educational opportunity, 19 it can be seen that the use of the racial classification has resulted in a net gain, and that it has imposed no constitu-

17. As a result of special admissions policies, minority enrollment has risen, and in 1971, 5,568 minority students were attending law schools, comprising three percent of total enrollment. 1971 Survey of Minority Group Students in Legal Ed., Table 1. No one knows how many law schools use a preferential admissions system, but in 1969-70, 90 law schools accepted CLEO graduates. Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. Tol. L. Rev. 321, 326 n. 11.


tionally cognizable detriment upon any person because of his or another's race. All the children are going to school, and they are enjoying equal educational opportunity. Therefore, the use of the racial classification is benign. But in the preferential law admissions situation where applications are greater than the enrollment limitation, a new element is present: a detriment—the denial of admission to law school—is imposed upon an academically better qualified white applicant either because of his, or another person's, race or because of both. The purpose of this article is to explore the constitutional dimensions of the equal protection problem presented by a law school's voluntary adoption of racial classifications in a preferential admissions policy, and to do so, in part, by focusing on the recent case of DeFunis v. Odegaard.

I. THE LAW SCHOOL'S ADMISSION POLICIES AND PROCEDURES

Marco DeFunis, Jr., applied for admission to the law school for the class entering in 1970 but was refused admission; he applied again in 1971, and once more was refused admission. Notwithstanding the fact that he had "worked part-time 20 to 40 hours per week during the school year," DeFunis had "graduated from the University of Washington in June, 1970, Phi Beta Kappa and magna cum laude" and "with an overall grade point average of 3.62 out of a possible 4.00; a junior-senior grade point average of 3.71, as calculated by the law school, or 3.8 when you include 9 hours of straight 'A' he received in Latin during the first quarter of his junior year in the summer of

20. I use the term "benign" to refer to a situation where the consequence of using a racial classification imposes no detriment on anyone. There is a dispute on the proper use of the term "benign." One author holds that a racial quota or race classification is benign when it is part of "a system under which a fixed ratio is established . . . for the purpose of achieving and maintaining integration." Marcuse, Benign Quotas Re-examined, 3 J. OF INTERGROUP REL. 102 (1962). See also Navasky, The Benevolent Housing Quota, 6 How. L.J. 30 (1960); Hellerstein, The Benign Quota, Equal Protection and the "Rule in Shelley's Case," 17 RUTGERS L. REV. 531 (1963). Nevertheless, a court has defined a "benign" quota in housing by referring only to the proportion of Blacks in the surrounding community and not to the "tipping point." Lakewood Homes v. Bd. of Adjustment, 258 N.E.2d 470 (Ohio C.P. 1970), modified, 267 N.E.2d 595 (1971).
22. Id. at 13, 507 P.2d at 1172. He spent school year 1970-71 in graduate school.
1968.\textsuperscript{23} In 1971, he also presented "24 hours of graduate school courses, in which, at the time of his application, he had received 21 hours of 'A' and three hours of incomplete, while working 36 or more hours per week for the Seattle Park Department."\textsuperscript{24} He had taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, New Jersey, three times, receiving scores of 512, 566 and 668 which the law school averaged out to 582, and he received average writing test component scores of 62, 58 and 64, which the law school averaged to 61.\textsuperscript{25} For DeFunis, as for all other applicants, the "junior-senior undergraduate grade point average" and the LSAT scores "were combined through a formula to yield a predicted first-year of [sic] law school grade average for the applicant."\textsuperscript{26} DeFunis' predicted first-year average (PFYA) was 76.23.\textsuperscript{27}

The law school had established a committee on admissions and readmissions to determine who shall be admitted,\textsuperscript{28} and for purposes of selecting the entering class of 1971 the faculty of the law school expanded the membership of the committee to five faculty members and two student members\textsuperscript{29} each member having an equal vote. To the dissenters in DeFunis, this faculty action raised a substantial question of whether it is wise or legally proper to place "a controlling power over the careers and even the lives of many potential students in the hands of their fellow students."\textsuperscript{30}

In 1971, the law school received 1,601 applications for admission to the first-year class\textsuperscript{31} and almost all of the 1,601 applicants were fully qualified for the study of law. However, Washington's Legislature had previously imposed an overall maximum limitation of student enrollment on the University of Washington, and under "the un-
versity's enrollment limitation there were only 445 positions allotted to the law school, and of these the number available for the first-year class was between 145 and 150. 32 Thus, under these conditions the law school was forced to use some kind of preferential admission policy, there being no possible way to admit all the qualified applicants. The response of the law school's Committee on Admission and Readmission was to apply not one or two admission preferences, but at least four.

The first preference was based almost exclusively on the PFYAs. The "committee decided that most promising applicants . . . would be defined as applicants with predicted first-year law school averages over 77." 33 Therefore, all "applicants with PFYAs above 77 were reviewed and decided on by the full committee as soon as they came in, in order to reach an early decision as to the acceptance of such students." 34 Next, a set of negative "preferences" was administered. With two automatic exceptions—certain minority groups and returning servicemen applicants—all "applicants with PFYAs below 74.5 were reviewed by the chairman of the committee and were either rejected by him or placed in a group for later review by the full committee." 35 A third set of preferences was automatically given to all "persons who [applied immediately after discharge and who] had been previously admitted but who were unable to enter or forced to withdraw from the law school because of inductions into the military service . . . ." 36 Further consideration of all remaining applicants including those with PFYAs between 74.5 and 76.99, including DeFunis, was delayed until after the passage of the date on which applications would no longer be received for the class entering in 1971. This group constitutes the group of "delayed" applicants.

When considering the applications upon which action had been delayed, 37 the committee gave a fourth set of admission preferences to some but not all applicants who were "Black Americans, Chicano Americans, American Indians, and Philippine Americans," but not to

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31. Id. at 15, 507 P.2d at 1172.
32. Id.
33. Id. at 17, 507 P.2d at 1173.
34. Id.
35. Id.
36. Id. The serviceman preference has been dropped.
37. I.e., those over 77 or under 74.5 who for some reason had been neither accepted nor rejected and all those between 74.5 and 76.99.
"Oriental Americans." All of the minority group applicants with PFYAs below 77 were considered on an individual basis by the committee along with all the remaining applicants, most of whom had PFYAs ranging from 74.5 to 76.99. "In selecting the applicants from this narrow range, the committee used the process described in its Guide for Applicants, a copy of which was sent to all applicants:"38

We below describe the process we applied to determine the class that entered the University of Washington School of Law in September 1970. We anticipate that the same process will be applied in determining membership in the class of 1971.

We received about 1025 applications for the approximately 160 seats available for the 1970 class. Because of the uncertainties of the draft and because many students apply to several schools, we accepted 288 applicants to fill the 160 seats.

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

We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

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

We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.39

38. 82 Wn. 2d at 18, 507 P.2d at 1174.
39. Admissions Council, Guide for Applicants, University of Washington School of Law (1971). The first, third, fourth, fifth and sixth paragraphs of the quoted material appear in DeFunis, 82 Wn. 2d at 16, 18-19, 507 P.2d at 1173-74. "The class [entering in 1970] had the following make-up: Total size 163; Number of women 20; Number of minority students 19; Age—Range 20 to 48, Median 24; Jr.-Sr. Grade Point Average
This attempt at definition by the committee is laudable, but a failure. The Guide is clearly incomplete and inaccurate. It implies that it applies to all applicants equally, but it mentions nothing about two of at least four of the admission preferences—those preferences applying to applicants with PFYAs over 77 and those applying to returning servicemen who promptly reapply for admission. More importantly, one can see that any attempt to apply the "rules" that are stated in the Guide necessarily leads to purely subjective and even intuitive considerations being decisive in admissions. For example, when gauging "the potential for outstanding performance," the committee considered "the quality of [an applicant's] work in difficult analytical seminars, courses and writing programs, the academic standards of the school attended by the applicant . . . and the nature of the applicant's employment (emphasis added) . . . ." It is a mystery how an admissions committee can have a sufficiently precise knowledge to judge and to rank objectively all of the jobs existing in the country and then to determine which among them gives an applicant "the potential for outstanding performance in law school," especially without any indication whether the applicant did his job well or poorly. Likewise, one is skeptical in the extreme that the law school's Admission Committee can have current and objective knowledge of all the "seminars, courses and writing programs" that are offered by all of the nation's colleges and universities, let alone be in a position to judge and rank their "difficulty" or their "analytical" qualities and then to decide upon their contributions to the 1,601 law applicants' "potential for outstanding performance in law school." These same considerations apply to judgments made about the "academic standards of the school attended by the applicant." Moreover, one wonders whether any admissions committee can have the competence necessary to weigh, objectively and comprehensively, a law applicant's "extracurricular and community activities, employment and general background, and then assess their contribution to the "applicant's ability to make significant contributions to law school classes and the community at large (emphasis added) . . . ." These are sonorous
words that appear in the Guide for Applicants, but they merely masquerade as rules. They are not rules at all. They simply cannot be followed, and they do not guide. They invite and demand subjective judgments, probably based on intuition, rumor, hearsay or prejudice, which are not saved from errant subjectivity when the decisions are made by a majority vote in a committee composed of five faculty members and two students. Moreover, these "rules" provide no guidance on the composite way in which each of the factors should be weighed and combined in relation to all others when making the overall and final judgment on a candidate. In this situation, subjective and intuitive factors necessarily must enter, perhaps decisively, into law admissions decisions.

These subjective considerations clearly played a significant role in some law admissions and denials of admission, and the use of such subjective considerations raises a serious question of fairness under the fourteenth amendment's due process clause. Another consideration makes it more serious. The burdens of the law school's preferential admissions policies were not borne equally by each of the 1,601 applicants, but almost solely by applicants having PFYAs in that narrow range between 76.99 and 74.5. Prima facie, this allocation of the burden of a preferential admissions policy appears arbitrary and unfair, and no explanation is given for it. Applying the administrative law standard of review Washington's Supreme Court upheld the law

41. Dissenting judges complained about the subjectivity and the lack of clear standards stating that:

Of the approximately 150 students actually enrolled in the class for which petitioner DeFunis made his application, only some 42 admission files were placed in evidence. But an inspection of these files, in my judgment, fails to show any consistent policy on admissions at which a prelaw student could aim his career. If he is intelligent, works hard, and achieves high grades, his place in the law school class may be preempted by someone with lesser grades but who is engaged in what is described as 'community activities', or is otherwise described as a student activist. Or, if he is engaged in community activities and still attains high grades through diligence and intelligence and long hours at the books, his position may be taken in the entering class by one who has neither engaged in 'community activity' nor achieved high grades but, nevertheless, has made a high LSAT score. Or, even if he studied hard, is intelligent, and placed high in grades, LSAT and PFYA, and engaged in what are called community activities, his place might still be awarded to a minority student who has done none of these. All of these inequities are, I fear, bound to foster a spirit of anti-intellectualism in the heart of what should be an intellectual center.

82 Wn. 2d at 59-60, 507 P.2d at 1196 (Hale & Hunter, JJ., dissenting).

42. The evolving doctrine is that administrative agencies making discretionary judgments that allocate rights, duties, offices or social and economic benefits must make
school's practice, holding that it did "not agree that the exercise of judgment in evaluating an applicant's file constitutes arbitrary and capricious action. Nor do we find an abuse of that judgment here."43

My concern in this article is not to explore the ramifications of the due

those discretionary judgments in accordance with "ascertainable standards." See, e.g., Holmes v. Housing Authority, 398 F.2d 262 (2d Cir. 1968); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293 (1972). In DeFunis, a majority of the court expressed concern about the lack of standards. Three justices concurred specifically "to point out the desirability of more complete published standards for admission." 82 Wn. 2d at 45, 507 P.2d at 1189. Two dissenting justices held that there was a fatal lack of standards and no "consistent policy on admissions at which a prelaw student could aim his career." Id. at 59, 507 P.2d at 1196. Thus five judges, a majority of the court, expressed serious concern about the adequacy of the Law School's standards.

43. 82 Wn. 2d at 40, 507 P.2d at 1186,. The majority opinion upholds the Law School's action, but the dissent states:

In general, it is a fair summary of the record, I think, that of the approximately 70 files distributed to each committee member, an applicant neither included in the 10 recommended nor in some 20 more carried as secondary possibilities had little or no chance for admission. Id. at 54, 507 P.2d at 1194.

There is also a curious aura of civil, political or community 'activism,' as it is sometimes called, surrounding the recommendations for admission or rejection. One student applicant recommended by [a student committee member] had an LSAT of 562, substantially lower than the average of Mr. DeFunis, but was recommended for the waiting list because of being very active on campus and in his community. The activity which impressed her the most was that he was a founding member of Isla Vista Branch of the American Civil Liberties Union and president of its student chapter at the University of California, Santa Barbara. He had participated in the John Tunney for Senate campaign in California and in the operation of a student owned and operated radio station in Santa Barbara. Also, the applicant had been a campus news reporter and a member of several other campus organizations. . . . She recommended, however, against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant [sic]. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington.

Id. at 55-56, 507 P.2d at 1194.

A random examination of the records of various students accepted by the law school in the entering classes for which Mr. DeFunis had applied shows extraordinary and inexplicable variations in their qualifications. One admitted applicant showed an almost vertical academic climb. He had a junior-senior grade point average of 3.64, but an overall grade point average of 2.85. The admission committee notes in his file read as follows: 'Overall GPA 2.85. strange recommend. "arrogant, conceited" but apparently bright . . . [not readable] Take a chance on his screwy personality & admit.' His PFLA was 78.35 with a writing score of 71. One cannot discern from the files whether a heightened community or campus activity, or whatever, constituted the determining factor for admission. One young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council.

An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the
process problem, nor to assess whether the Washington Supreme Court's application of its administrative law rule was proper. Nevertheless, I respectfully dissent from the court's due process holding because, as I have pointed out above, there were probably neither accurate, clear nor followable "rules" or "guides" for judgment by the committee. Even if there were, it is doubtful whether they actually prevailed in all cases, as revealed by the cavalier actions of the deans and the results obtained by the committee. It should be clear that except for the way in which the burden is distributed, none of these due process considerations is relevant to the constitutional validity of a carefully constructed and executed affirmative action program favoring minority group admissions.

The actual admissions decisions on all the delayed applications were made by the Admissions Committee by first giving "[e]ach member of the committee, including student members, . . . approx-

Remarks of the admissions committee that he be rejected. An applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his recommendations are equivocal and his academic career unimpressive. The admissions council deemed unimpressive a 3.32 junior-senior average earned in chemistry, physics, analytical geometry, calculus and general physics laboratory. This particular applicant with the so-called unimpressive academic record had also earned 6 hours of A in advanced calculus, 6 hours of A in mechanics and an A in introduction to digital computers.

Another applicant had a junior-senior grade point average of 2.63, an LSAT of 481, and a writing score of 55. The file shows that she was 35 years of age at the time of admission and would thus be 38 upon graduation, if indeed able to complete the program on schedule. The remarks entered by the admissions council in her file note that she was 'Divorced with five kids. Could make it if her personal situation could be worked out.' It added, 'Excellent recommendations; sound record.' and upon these conclusions recommended admission to the law school.

Nor the question whether a preference must be given to Washington residents.

A substantial question of "due process" fairness arises from various actions taken by the Deans; for example, according to the dissent, 33 days after DeFunis had received the letter denying him admission on August 2, 1973, "one young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council." 82 Wn. 2d at 58, 507 P.2d at 1195. "An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475 was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected." Id. "Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his acceptance by letter September 14, 1971, by the dean of the law school" 33 days after DeFunis received his rejection letter. Id. at 59. 507 P.2d at 1196.

See discussion in notes 41 and 43 supra.
DeFunis v. Odegaard

approximately 70 [randomly selected] files upon which to make recommendation for admission or rejection, with instructions that only about 10 were to be approved for admission [and] . . . 20 more carried as secondary possibilities."47 The law school's committee added an additional number of applicants and ranked Marco DeFunis, Jr. in such a position that he and 152 other applicants were notified that they had not been rejected outright, but that they had been placed on a waiting list. This list was divided into quartiles with DeFunis located in the lowest quartile. On August 2, 1971, DeFunis was notified "that he was neither admitted nor any longer on the waiting list."48 "Of those invited [to attend law school], 74 had lower PFYAs than [did DeFunis]; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files."49 After he received notification that he would not be admitted, DeFunis brought suit. The trial court held in his favor, reading Brown v. Board of Education50 as holding that the Constitution's equal protection clause is color-blind, that all racial classifications are per se unconstitutional, and that the law school's use of a racial criterion when giving admissions preferences "discriminated against [DeFunis] and did not accord to him equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution . . . ."51 Washington's Supreme Court reversed the trial court on the equal protection issue.52

The exact use which the law school made of its racial classification should be noted. Under the law school's policy, although "race was a

47. 82 Wn. 2d at 54, 507 P.2d at 1193. (The committee reviewed each file.).
48. Id. at 22, 507 P.2d at 1176.
49. Id.
51. 82 Wn. 2d at 23, 507 P.2d at 1177. The court also noted:
   The trial court found that some minority applicants with college grades and LSAT scores so low that had they been of the white race their applications would have been summarily denied, were given invitations for admission; that some such students were admitted instead of plaintiff; that since no more than 150 applicants were to be admitted to the law school, the admission of less qualified students resulted in a denial of places to those better qualified; and that plaintiff had better "qualifications" than many of the students admitted by the committee. The trial court also found that plaintiff was and is fully qualified and capable of satisfactorily attending the law school.
   Id. at 22-23, 507 P.2d at 1176-77.
52. The state supreme court let stand the trial court's further rulings that DeFunis had standing to sue, and that no preference must be given to residential over non-residential applicants. Id. at 23-24, 507 P.2d at 1177.
major factor, it was not the only factor considered by the committee,” and “no minority quota was established; rather, a reasonable representation of such groups in the law school was sought.” On the other hand, “although the same standard was applied to all applicants (i.e., the relative probability of the individual’s succeeding in law school), minority applicants were directly compared to one another, but were not compared to applicants outside the minority group.” Moreover, Asian Americans “were not treated as ‘minority’ applicants for admissions purposes since a significant number could be admitted on the same basis as general applicants.” Although strict quotas were not used, I conclude that the law school’s policy gave a decisive or absolute preference on racial grounds to minority applicants believed by the admissions committee to present the requisite probability of success in law school. The question is whether such a decisive preference is constitutional under the equal protection clause.

II. STANDING

On appeal, Washington’s Supreme Court was confronted with the threshold argument that DeFunis failed to present the necessary standing to sue. The law school argued that its Admission Committee's evaluation of DeFunis had placed him on its waiting list in the last quartile with at least 120 applicants ahead of him; that only 36 minority applicants had been admitted; that therefore DeFunis would not have been admitted even if the law school had no preferential admissions policy; and that therefore DeFunis had no standing to sue.

The court correctly rejected the law school’s argument. If the law school’s argument had prevailed, a wrongfully denied applicant would have no standing to sue unless he could overcome the impossible burden of showing that he, of all those denied admission, would have been admitted but for the admission of a certain number of minority group members. Because of this burden, the law school could easily place itself beyond the reach of judicial review and the Constitution by the simple expedients of not using a waiting list and by denying admission outright to all persons except those accepted. There is another
vital flaw in the law school's position. The argument surely has no proper application to applicants who were placed by the law school on its waiting list. By placing DeFunis on its admissions waiting list, rather than rejecting him outright, the law school gave him a contingent interest. It had fully approved all substantive aspects of his admission; admission was to be contingent solely on the decisions of those applicants whom the law school itself had placed ahead of him on the waiting list. There was no way for the law school or DeFunis to know how many of the applicants posted ahead of DeFunis would decline invitations to attend. It was possible that all applicants ahead of DeFunis would decline, and that he would be the first waiting list applicant admitted. This contingent interest alone should have given him standing. Moreover, the law school itself placed DeFunis in the last quartile. It would be anomalous indeed to accept the law school's argument and to allow the school's placing of DeFunis in a particular position on its waiting list to deny him standing to litigate the very question of whether the law school had properly placed him. Furthermore, there can be no doubt of the actual adverseness of the parties in this case. Washington's Supreme Court correctly ruled that DeFunis' "interest in this litigation clearly constitutes the requisite 'personal stake in the outcome of the controversy' necessary to request an adjudication of the merits of this case." \(^{57}\)

III. THE RELEVANCE OF THE SCHOOL DESEGREGATION CASES

The school desegregation decisions of the Supreme Court of the United States are relevant to some aspects of DeFunis and irrelevant to others. Because they adjudicate a different kind of equal protection question, the school desegregation decisions are not dispositive of the equal protection issue presented by DeFunis. The desegregation decisions are most immediately relevant to the holding of the trial court which relied exclusively on Brown v. Board of Education,\(^{58}\) reading that case to hold that the equal protection clause required the states to


\(^{58}\) 347 U.S. 483 (1954) (Brown I).
be color-blind, that any racial classification used by the law school was per se unconstitutional, and that therefore, "a state law school can never consider race as one criterion in its selection of first year students." This reading of Brown is incorrect. An incomplete but correct statement of the holding of Brown I and Brown II which accounts for what was said and done in those cases and squares with subsequent holdings by the United States Supreme Court would read: A state has no constitutional power to operate a dual school system for whites and non-whites by assigning students to schools on the basis of their race, thereby imposing a detriment on the minority group students by segregating and stigmatizing them, and where an attempt has been made by a state to operate such a dual system, it must convert that system into a unitary, non-racially segregated system of public education.

The question put to the Court in Brown was: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" The Supreme Court answered this question by stating that "[s]eparate education facilities are inherently unequal," and "we conclude that in the field of public education the doctrine of 'separate but equal' has no place." From these two quotations alone one might conclude that Brown's holding was that the equal protection clause required that a state be color blind "in the field of education." Brown's holding, however, cannot be distilled from these two quotations alone. In the paragraph immediately preceding the quotations, the Supreme Court commented on the deleterious effects of segregation. It rejected the state's argument that the "separate but equal" doctrine of Plessy should be extended to the field of education be-

59. 82 Wn. 2d at 25-26, 507 P.2d at 1178. See also Bittker, The Case of the Checker-Board Ordinance: An Experiment in Race Relations, 71 YALE L.J. 1387, 1392 (1962). The notion that the constitution is color-blind derives from the First Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896); cf. Cummings v. Bd. of Educ., 175 U.S. 528 (1899). If strictly applied the color-blind theory would disallow racial distinctions in the census. See Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564, 575 (1965). It might be noted that the term "race" appears but once in the Constitution; in the fifteenth and not the fourteenth amendment.

61. 347 U.S. at 493.
62. Id. at 495.
63. In Sweatt v. Painter [339 U.S. 629 (1950)] supra, in finding that a segregated law school for Negroes could not provide them equal educational opportu-
cause the effects of the doctrine were believed to be inherently stigmatizing, stamping minority children with a badge of inferiority. Therefore, the doctrine was detrimental to the education and welfare of minority group children and resulted in invidious discrimination.

Washington's Supreme Court correctly observed that Brown does not hold that the equal protection clause requires that a state law school be color-blind in its admissions policy, nor does it hold that all racial classifications in the field of education are per se unconstitutional. Brown's holding in this regard is that only those racial classifications used by a state that have the effect of stigmatizing and imposing detriments on a racial group in the field of education are invidious and thus violate the equal protection clause. On this analysis, Brown leaves open the question presented by DeFunis: Whether race can be a constitutionally valid criterion for admission to a state law school if the law school's purpose and the effect of its policy is not to stigmatize or segregate but partially to rectify and ameliorate the consequences of racial segregation by effectively affording equal educational opportunity to certain minority group members where previously it did not exist, notwithstanding the admitted detriment imposed on certain displaced non-minority group applicants.
In summary, the school desegregation cases are relevant to the equal protection question presented by *DeFunis* only because they do not preclude the law school from using a racial criterion in its admission policy nor do they hold that the constitution is color-blind in every educational situation. The school desegregation cases are irrelevant in the sense that they do not expressly authorize the law school's admission policy. Constitutional criteria additional to those found in the school desegregation cases are needed to resolve the equal protection question presented by *DeFunis*.

IV. CURRENT USES OF RACIAL CLASSIFICATIONS

Before directly discussing the equal protection question in *DeFunis*, it will prove illuminating first to consider authorities other than school desegregation cases that have upheld uses of a racial classification. Racial classifications currently are used by the federal government. The President by executive order and the Congress by legislation have used racial classifications in various affirmative action programs. For example, Congress has enacted a measure requiring that hiring preferences be given to American Indians by the Bureau of Indian Affairs. Indeed, Congressional classification by race is most clearly evident in regard to American Indians. Congress has enacted comprehensive legislation governing almost all aspects of a reservation Indian's life including matters of education, health, civil liberties, welfare, transfer of land, validity of contracts, testamentary


66. See notes 4 and 5 and accompanying text supra.


73. See, e.g., 25 U.S.C. §§ 81, 82, 82a, 84 (1970) (limiting power to contract without prior approval of the Secretary of the Interior).
dispositions\footnote{74}{See, e.g., 25 U.S.C. §§ 371-80 (1970) (requiring approval of Secretary of Interior for certain kinds of testamentary dispositions).} and expenditures of tribal funds.\footnote{75}{See, e.g., 25 U.S.C. § 122 (1970).} The category “American Indian” has been held to be a racial classification; indeed, “Indians can only be defined by their race.”\footnote{76}{"If legislation is to deal with Indians at all, the very reference to them implies the use of a ‘criterion of race.’ Indians can only be defined by their race." Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge court), aff'd per curiam, 384 U.S. 209 (1966); see also Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971) (upholding classification of Indians by race).}

It is unlikely in the extreme that any court would hold that Congress failed to present a compelling and overriding interest justifying its use of the racial classification in these statutes. A three-judge federal court has upheld Congress’ use of this racial classification, and its decision was affirmed, per curiam, by the Supreme Court in \textit{Simmons v. Eagle Seelatsee}.

77 The case involved the rights of inheritance of the children and grandchildren of an enrolled member of the Yakima tribe who had died. Under the law of the State of Washington the children and grandchildren qualified to inherit certain interests of the deceased in Yakima Indian allotments on the Yakima Indian reservation. But the Secretary of the Interior, pursuant to Congressional statute,\footnote{78}{Act of August 9, 1946, ch. 933, § 7.60 Stat. 969, as amended 25 U.S.C. § 607 (1970), provides: Hereafter [after August 9, 1946] only enrolled members of the Yakima Tribes of one-fourth or more blood of such tribes shall take by inheritance or by will any interest in that part of the restricted or trust estate of a deceased member of such tribes which came to the decedent through his membership in such tribes or which consists of any interest in or the rents, issues, or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951).} ruled that the deceased’s children and grandchildren failed to qualify for inheritance because of their inability to meet the federal statutory requirement of “one-fourth or more blood” of the Yakima tribe. The purpose of Congress’ statute was analogous to that of the law school’s policy in \textit{DeFunis}. Congress used a racial classification in order to confer the benefit of inheritance only upon those natural heirs who were “of one-fourth or more [Indian] blood” while denying that benefit and imposing the detriment of inability to inherit on all other natural heirs of an enrolled Indian. By this statute, Congress grants a
preference to a racially defined minority group at the expense of non-minority group members. The statute was attacked in part on the ground that it "is unconstitutional because it is based on a criterion of race contrary to the [due process provision] of the Fifth Amendment . . . ." The Simmons court upheld its constitutional validity, appearing to have distinguished the beneficial effects of the racial classification for the preferred Indian minority group from the deleterious effects caused by use of the racial classification in the school segregation situation. The court held that Congress' use of the racial classification in this "case has no resemblance to Bolling v. Sharpe80 . . . where the segregation of pupils, by race, in public schools was held a violation of the Fifth Amendment."81

Porcelli v. Titus,82 like Eagle Seelatsee, is directly analogous to DeFunis. In Porcelli a state rule was involved. A group of white persons challenged a local school board's abolition of its regular procedures and promotion schedules for principals and vice-principals and the substitution of a racially conditioned policy giving priority to certain Black candidates in order to increase their number and status in the school system. The United States Court of Appeals upheld the action of the local board, stating that "[s]tate action based on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the fourteenth amendment,"83 notwithstanding the fact that a clear detriment was imposed on the white candidates on racial grounds. Similarly, in the context of general employment, another United States Court of Appeals held in Carter v. Gallagher84 that "it would be in order for the district court to mandate that one out of every three persons hired by the [Minneapolis] Fire Department would be a minority individual who qualifies until at least 20 minority persons have

79. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 810-11 (E.D. Wash. 1966). aff'd per curiam, 384 U.S. 209 (1966). The argument against use of the racial classification was based on the federal school desegregation case, Bolling v. Sharpe. 347 U.S. 497 (1954), where the Court held that with respect to the federal government "Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." Id. at 499.
81. Simmons, 244 F. Supp. at 815.
82. 431 F.2d 1254 (3d Cir. 1970) (per curiam); cert. denied, 402 U.S. 944 (1971).
83. Id. at 1257.
84. 452 F.2d 315, 331 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); accord, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).
been so hired,” notwithstanding the fact that in doing so a more qualified but non-minority candidate might have the detriment of being bypassed imposed upon him.

A state’s use of a racial classification for record-keeping purposes was upheld in *Hamm v. Virginia Board of Elections*85 which was affirmed per curiam by the Supreme Court. Virginia’s statute required that racial designations appear on its voting, property tax assessment and divorce records. The court held that “the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement of such information by state authorities cannot be outlawed per se.”86 The court then upheld Virginia’s statute requiring racial record keeping relating to divorce because “the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege.”87 However, it struck down Virginia’s statutes relating to voting and property taxes because they required segregation of the records according to race and served “no other purpose than to classify and distinguish official records on the basis of race or color.”88

In *Anderson v. Martin*,89 the Supreme Court disallowed an identifying racial classification in a voting context and “concluded that the compulsory designation by Louisiana of the race of the candidate on the ballot operates as a discrimination against appellants [minority group members] and is therefore violative of the Fourteenth Amendment’s Equal Protection Clause.”90 “The vice,” the Court said, “lies not in the resulting injury [to minority group members] but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.”91

All the school desegregation cases, and the authorities discussed above, shed light on the constitutional requirements a state must meet when using a racial classification. These authorities consistently hold the following: (1) that a link exists between the use of a racial classifi-
cation and its effect; (2) that constitutionally the equal protection clause’s usual prohibition of racial classifications must be understood in terms of the effects achieved by that classification; (3) that it is the effect of the classification (desegregation, production of equal educational opportunity, production of racial prejudice, etc.) that governs a court’s decision on the validity of a state’s racial classification; (4) that a court must judge whether the effects of a classification are invidious; (5) that the effects of a racial classification are invidious and the classification unconstitutional if a racial group is stigmatized thereby or if it has a detriment imposed upon it; and (6) that a racial classification is not unconstitutional nor are its effects invidious if its use is in furtherance of a proper governmental objective—e.g., extending equal educational opportunity without denying it to anyone—and its effect is to ameliorate and correct the effects of past racial discrimination; (7) that a racial classification need not be authorized by the prior decision of a court: “That there may be no constitutional duty to act to undo de facto segregation, however, does not mean that such action is unconstitutional,” even if it is achieved by a state’s voluntary use of an explicit racial classification. Three of the cases—Eagle Seelatsee, Porcelli and Carter—are directly relevant to DeFunis in that they uphold the use of a racial classification for the purpose of granting a preference to a minority group member, even where its effect is to impose a clear detriment on a non-minority group member.

V. THE FRAMEWORK FOR DECISION

Brown and the above cases illuminate and identify the framework for decision in DeFunis. This framework can be best understood as an expression of the theories of justice richly described by Aristotle. Brown I and its progeny go to the general notion of distributive justice and Brown II and its progeny to the notion of compensatory justice; both concepts of justice, like the equal protection clause itself, are closely connected to the problem of equality in human life. Distributive justice consists of the type of justice usually meted out by a legislature when it distributes rights, duties, offices, honors or goods in the

first instance to members of the community. The legislature must accomplish this distribution in accordance with the principle of proportionate equality. The legislature may thus take account of reasonable or natural differences in humans, where it can be shown that they exist naturally, but if they cannot be shown clearly to exist naturally, then the legislature must treat natural equals equally. In effect, the Court has interpreted the concept of legal equality expressed in the fourteenth amendment's equal protection clause to correspond to Aristotelian notions of distributive justice. In particular, equal protection is construed to incorporate the requirement of proportionality, which guarantees that all naturally equal persons must be afforded equal access to state awarded benefits and opportunities, such as the opportunity to receive a legal education at a state law school.

Distributive justice was not afforded by Southern legislatures during slavery, nor later under the separate but equal doctrine. These legislatures were engaged in distributing rights, duties, offices and goods on the basis of "race," which is a classification of "convenience" and not a distinction existing in nature among human beings. It is an unnatural or unreasonable classification. Recognizing this, the Supreme Court held, in effect, in *Brown I* that the "separate but equal" doctrine of *Plessy* constituted a violation of the basic principle of distributive justice under the equal protection clause because, since "separate educational facilities are inherently unequal," it improperly allowed legislatures to award educational rights, duties, goods and

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94. Aristotle differentiated distributive from corrective justice, distributive justice having as its goal the attainment of geometrical rather than arithmetic equality. He described geometrical (or proportionate) equality in terms of a mathematical construct. Four terms, he noted, are required for the equation. If "A" and "B" represent the respective merits of two persons and "a" and "b" their respective shares of the goods to be distributed, then the goods will be distributed justly if the distribution satisfies the equation A:B = a:b. The ratio between shares is equal to the ratio between merits. (By illustration, if one flute player is twice as proficient as another, the principles of distributive justice would allow him to receive the flute which is of twice the quality as the other. *Politics, supra* note 93, Book III, ch. 12.)

By analogy with a geometrical series (e.g., 1, 3, 9, 27, ...), in which each term bears an identical ratio to the term preceding it, the Greeks called this proportionate equality a "geometrical equality." *Aristotle, Nichomachean Ethics, Book V, ch. 3* (Loeb ed. 1934). On the other hand, Aristotle observed, corrective justice requires an equation using only two terms: retaining the same symbols, a = b. This simple equation is an "arithmetic equality." *Id.,* Book V, ch. 4.

95. *Politics, supra* note 93, Book III, ch. 9, § 15.

honors unequally to children who are by and large equal in educational ability. Stated another way the Court held, *inter alia*, that legislatures cannot distribute opportunities for education unequally on the basis of an immutable but unscientific characteristic—"race"—which is determined by the accident of birth and which in no way has been shown to be an accurate indicator of a natural difference of educational ability.\(^\text{97}\)

However, one might too quickly conclude, as did the trial court in *DeFunis*, that after *Brown* the equal protection clause requires the state to be neutral and color-blind in the field of education. The state is dealing with persons of all "races" who are not significantly unequal in educational ability, and thus race is an irrelevant characteristic. No distribution based on race shall be authorized by state law—that is the principle. This conclusion, as appropriate and desirable as it is in the long run, would be premature. To embrace this principle now as constitutional law simply would be unjust. It would ignore the entire history of race relations in America, which cannot be ignored, and the continuing deleterious consequences of this history which must be corrected, and it would also ignore the important corrective role yet to be played by distributive and corrective justice at the social level. The ultimate goal is a society where the color of a person's skin is as irrelevant as his eye color when the law distributes rights, offices, duties and other benefits. To achieve this society we may have to have "some of the hair of the dog that bit us."

The usual exercise of corrective justice assumes that the legislature traditionally has followed the principles of distributive justice and that it has properly allocated rights, duties, offices and goods in the first instance. The job of corrective justice is to protect and maintain the distributive equilibrium against illegal invasions. Corrective justice usually, but not always, is administered by courts. Thus, if one member of the community encroaches upon another's rights, privileges or property, disturbing the proper distributive equilibrium and unjustifiably enriching himself, it is the function of a court to re-establish the distributive equilibrium by returning the items to the

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victim, thereby "making him whole," or by requiring the malefactor to compensate the victim for his losses.98

The principles of distributive and corrective justice are obviously relevant to the decisions and remedies fashioned in Brown and other school desegregation cases. The use of Plessy's doctrine by a state was held in Brown I to violate the principle of distributive justice. Since the state, in effect, improperly invaded the interests of some of its citizens on behalf of others,99 a court can make the injured parties whole through the use of corrective justice at the distributive level. By using corrective justice in this way, a racial classification could appropriately be required to identify the injured minority groups when administering the court's remedy. The Supreme Court has expressly held that where a state has previously segregated its school children, thereby breaching the principle of distributive justice that should have prevailed, a court's remedial decree can correct this improper invasion by establishing that balance of distributive justice which originally should have been the distributive equilibrium.100 The odd consequence is that a court's remedial decree applying corrective justice can properly require that school authorities use a racial classification when assigning students to various schools as a means to insure that the color-blind principle of distributive justice prevails and that a unitary school system is realized.101 Thus, the Constitution is "color con-

98. See ARISTOTLE, NICOMACHEAN ETHICS, Book V, ch. 4 (Loeb ed. 1934).
99. See text accompanying notes 102-03 infra.
100. See authorities cited in notes 101-02 infra.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. The fact that no such objective was actually achieved and would appear to be impossible tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing 'that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , [t]hat no school [should] be operated with an all-black or predominantly black student body, [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.'

Id. at 23.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular cir-
scious” when attempts are made to eliminate racial discrimination. The teaching of distributive and corrective justice and of the desegregation cases is that a racial classification can and perhaps must be used to correct past violations of the principle of distributive justice. The racial classification is corrective. In the usual school desegregation context it has no detrimental effect on any person because of race, and it results in affording educational opportunity equally to all equals. In so doing, the proper distributive equilibrium is established, and in many school situations it is established for the first time in this nation’s history.

As indicated above, the usual application of corrective justice principles presupposes that the principles of distributive justice were applied initially by legislatures, and therefore that a just social and legal structure exists in accordance with the principles of distributive justice and that invasions of the distributive equilibrium will be sporadic—to be corrected by courts. That is why courts must first find a violation of law before they can fashion a “correcting” remedy. The assumption is not that the social order itself is malstructured and that wholesale violations of distributive principles have occurred at the hands of the legislatures. But slavery, Plessy, “separate but equal,” “Jim Crowism,” Brown v. Board of Education and the entire history of race relations

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cumstances. As we said in Green, a school authority’s remedial plan or a district court’s remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

Id. at 25 (emphasis added).

This holding of the Charlotte-Mecklenburg case was anticipated in United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) in which the Supreme Court affirmed a desegregation order requiring that teachers be assigned so that the proportion of white and black teachers in the system as a whole would be fairly reflected in the proportion of white and black teachers in each school within that system. In order to achieve this goal, it became the duty and it was absolutely necessary for the state to take a teacher’s race into consideration when deciding upon the school to which he should be assigned. This duty of racial classification was explicitly approved by the Supreme Court of the United States. Green v. County School Bd., 391 U.S. 430 (1968), opened the door to the use of race as a criterion in student admissions and assignment when it held a freedom-of-choice plan to be an impermissible basis for admitting or assigning students where that plan failed to produce the constitutionally required result of a unitary system of public education. A freedom-of-choice plan is innocent on its face, not being conditioned by a racial classification. By rejecting it, the Supreme Court rejected the notion that only non-racial criteria may be used and opened the door for the use of a racial classification.

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in this country from its origins 102 painfully demonstrate that distributive justice has never been fully achieved in race relations. White society unjustly enriched itself and damaged Blacks and some American Indians first, by enslaving them, and later by exploiting their cheap labor. Persons who are equals in reason and nature have been treated unequally on a massive scale. The "racial" defects in American society have been implanted not only in the law, but also in our personal attitudes and in the socio-economic structure. These defects are one symptom of a social order that has failed to meet not only the justifiable needs of minority group members, but human needs generally. Thus, this type of social situation is radically different from the one usually assumed to exist when the principle of corrective justice is applied. What is demanded is not a "case-by-case" adjudication, but wholesale justice at the distributive level, establishing the principles of distributive justice as they should have been established in the first instance. It is this recognition that I believe led Professor Bittker to write "that we can have a color-blind society in the long run only if we refuse to be color-blind in the short run." 103

Given America's history of race relations, there need not first be a finding by a court that some aspect of race relations is contrary to the requirements of distributive justice before a legislative body constitutionally can use a racial classification in a remedial and corrective way. Moreover, Aristotle's theory of justice avoids the issue of precise correspondence between individual deprivation and need. One need not determine that any specific person has been subjected to racial or ethnic discrimination before the State can administer a corrective


103. See note 6 and accompanying text supra.

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevance of color to a legitimate governmental purpose. . . . Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities.

preference based on race or ethnicity; even those few minority group members who have "made it" in American society would probably be much further along the ladder of success if it were not for the racial practices of the dominant white society. Three hundred years of immorality has taken its toll of our social institutions. What needs to be corrected is the institutional structure of society itself; generally, that is a task for legislation, and a legislature need not await an authorizing declaration by a court in each instance. Under these circumstances it is constitutionally permissible for state officials voluntarily, without judicial coercion, to undertake to correct the imbalances and to afford effective equal educational opportunity by using a racial criterion: 104

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, 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. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

The above quotation states part of the rationale for the law school's policy, and with one modification it summarizes that policy. Having been limited by law to a first-year class of between 145 and 150 students and confronted with 1,601 applicants, there simply was no way

104. Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 16 (1971). That the fourteenth amendment itself does not preclude state officials from using racial classifications when making educational opportunities equally available is additionally demonstrated by those cases wherein a school board, which although under no duty to integrate, voluntarily seeks to eliminate the effects of de facto, residential segregation by assigning students to schools under a racial classification. These practices have been upheld. See, e.g., Addabbo v. Donovan, 16 N.Y. 2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68 (1965) cert. denied, 382 U.S. 905 (1965); Offerman v. Nitkowski, 248 F. Supp. 129 (W.D. N.Y. 1965), aff'd, 378 F.2d 22 (2d Cir. 1967) and 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).

This thrust of the decisions of the Supreme Court of the United States was summarized in 1968 in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920. 931-32 (2d Cir. 1968):

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.
for the law school to afford equal educational opportunity to all applicants qualified for law study. To ensure that minority group applicants would effectively enjoy equal educational opportunity the law school gave them a preference, but it gave that preference to "only 'qualified' minority applicants" and "many minority applicants were denied admission."\textsuperscript{105}

VI. THE EQUAL PROTECTION OF THE LAWS

A state cannot function without legislatively classifying persons within its jurisdiction for various purposes and treating some differently from others. Any state classification is subject to challenge as denying equal protection. The fundamental requirement for the validity of a classification is that it include "all [but no more than those] persons who are similarly situated with respect to the purpose of the law."\textsuperscript{106} This formulation can be difficult to apply because it requires a determination of the purpose of the law with respect to each legislative classification, as well as a determination of the specific meaning of "similarly situated" in varying contexts. Within this general framework the Supreme Court of the United States has evolved two basic approaches to judicial review under the equal protection clause.\textsuperscript{107}

One standard approach, involving a restrained judicial review, is the "rational basis" test which allows great deference to the judgment of state legislatures. Generally, the Supreme Court applies this test when reviewing a state's classifications in economic, fiscal or regulatory matters. This test affords the presumption of constitutionality to a state's classification, and it will be upheld if "any state of facts reasonably may be conceived to justify [the classification]."\textsuperscript{108}

A second approach involves a more active judicial review applying a stricter test that requires "the most rigid scrutiny" of state classifications that are based on race,\textsuperscript{109} alienage,\textsuperscript{110} national origin\textsuperscript{111} and

\textsuperscript{105} 82 Wn. 2d at 39, 507 P.2d at 1185-86.
\textsuperscript{107} For discussion, see Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969).
\textsuperscript{110} See Graham v. Richardson, 403 U.S. 365, 372 (1971).
soon, perhaps, on sex. These classifications appear to be inherently “suspect” because they are predicated on an immutable characteristic determined solely by the accident of birth. To impose legal disabilities on persons because they possess such characteristics would appear to violate “the basic concept of our system that legal burdens should bear some [reasonable] relationship to individual responsibility . . . .” The Court has stated the “most rigid scrutiny” test as follows:

The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. [Citations omitted.]

. . . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny,’ [citation omitted] and, if they are ever 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 . . . .

This test does not disallow a state’s use of a racial classification. In this sense, it does not go as far as the color-blind theory. Instead, it shifts the burden of persuasion to the state, eliminating the presumption of constitutionality, and requires the state to show a compelling and overriding interest justifying its use of the racial classification. This test also applies to certain rights or interests that have been ranked as “fundamental,” such as the right to vote, to criminal

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112. In Frontiero v. Richardson, 93 S. Ct. 1764 (1973), four justices (Brennan, Douglas, Marshall and White) voted that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and must therefore be subject to strict judicial scrutiny.” Id. at 1768. Three justices (Powell, Burger and Blackman) joined the above four justices on the disposition of the case on the ground of Reed v. Reed, 404 U.S. 71 (1971), but stated that they “cannot join the opinion . . . which would hold that all classifications based upon sex . . . are inherently suspect and must therefore be subject to judicial scrutiny.” Id. at 1773. They left open the possibility that they might later join the above-named four justices but wanted to await the fate of the Equal Rights Amendment. Justice Stewart separately joined in the disposition on the basis of Reed v. Reed, and Justice Rehnquist dissented.


DeFunis v. Odegaard

appeals and to interstate travel. Washington's Supreme Court held that the "most rigid scrutiny" test is properly applicable to the equal protection question presented by DeFunis.

The above formulation of the "most rigid scrutiny" test comes from Loving v. Virginia where Virginia's anti-miscegenation statute, like those of 16 other states, employed a racial classification solely for the purpose of prohibiting intermarriage between "any white person" and "any colored person." Besides classifying by race, the statute clearly impaired the freedoms of choice and association. It allowed intermarriage between "colored persons," however they may be defined, but, in effect, required that whites marry only whites, thereby demonstrating that the statute had been "designed to maintain White Supremacy." Given this analysis, "the racial classifications must stand on their own justification," because the state had failed to show any "legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." Presumably, if the state could have carried the burden and shown an overriding and compelling interest, its racial classification would have been upheld. But since Virginia did not carry its burden, a unanimous Supreme Court held the anti-miscegenation statute to be an unconstitutional deprivation of the equal protection of the laws. Mr. Justice Stewart concurred specially on the ground that it is not constitutionally permissible for a state to make "the criminality of an act depend upon the race of the actor."

Loving's test appears to be the proper one to be applied to DeFunis, but the decision in Loving does not dispose of DeFunis. Just as DeFunis is different from the school desegregation cases, so is it different from Loving and its line of cases. First, the law school was not imposing a criminal penalty on anyone by using a racial classification, as was Virginia in Loving when it prohibited intermarriage between

118. 82 Wn. 2d at 31-32, 507 P.2d at 1181-82.
120. Id. at 4.
121. Id. at 11.
122. Id.
123. Id.
124. Id. at 12. This was also the position of Mr. Justices Douglas and Stewart concurring in McLaughlin v. Florida, 379 U.S. 184, 198 (1964).
white and colored persons and thereby deprived them of freedom of choice and association in selecting marriage partners. Second, the law school was faced with 1,601 applicants and a student limitation imposed by law. Since it could not admit all the applicants, it was forced to pick and choose among them. There was no comparable necessity requiring segregation of the races in *Loving*. Third, the law school did not solely impose detriments, as Virginia did in *Loving*, but it also conferred the benefit of effective equal educational opportunity upon certain minority group applicants. Without the detriment imposed on DeFunis, the objective of making equal education opportunities effective clearly would be a legitimate state purpose, but maintaining White Supremacy by using a racial classification to abridge freedoms of choice and association would not be.

*DeFunis* is a case of first impression, and the “most rigid scrutiny” test seems to govern it. Under this test at least three immediate questions arise: (1) Is the use of the racial classification “necessary” to the accomplishment of the state’s objective, or is there a more reasonable alternative available for accomplishing the same purpose without using the racial classification; (2) if the racial classification is necessary, is the otherwise legitimate state purpose of affording equal educational opportunities compelling and overriding when it makes equal legal educational opportunity effective by awarding an admission preference to certain minority group members while also imposing the burden of racial discrimination on nonminority group persons such as DeFunis; and (3) if so, what is the class of “similarly situated” minority group persons with respect to the purpose of the law school’s racial classification?

VII. THE NECESSITY OF A RACIAL CLASSIFICATION

A racial classification must be “necessary” in order to achieve an otherwise legitimate state purpose. The burden is on the state to show such necessity. There can be no question that the general purpose of making available equal educational opportunity is a legitimate state purpose. The question is whether the state can achieve its purpose by using a racial classification. The requirement of “necessity” means that a court must identify whether any classification other than a racial classification will accomplish equally well the state’s purpose of making legal education equally available. If so, then the state cannot
use the constitutionally suspect racial classification. For example, in *McLaughlin v. Florida*\textsuperscript{125} the Supreme Court assumed *arguendo* that Florida's anti-miscegenation statute involving a racial classification was directed toward achievement of the legitimate state purpose of preventing interracial cohabitation. Nevertheless, the Court held the statute unconstitutional on the ground that the state's purpose of preventing interracial cohabitation could be achieved without the use of a racial classification simply by enforcing the "general, neutral, and existing ban on illicit behavior..."\textsuperscript{126}

The state's purpose in *DeFunis* was to make the opportunity for a legal education equally available to persons of all racial groups, including those that previously had been deprived. Can this purpose be accomplished without using a racial classification? I think the answer is NO because to accomplish its purpose the state must use a racial classification first to identify all the racial groups. If the state finds that any racial group lacks equal educational opportunity it then may move to correct this deficiency. I know of no reasonable alternative classification that could equally well accomplish the state's purpose. That which the state seeks to correct is a racial deprivation of equal opportunity for a legal education. There is no way to redress the evil of racial deprivation other than by using a racially conditioned admission preference and applying it to those groups which have been so deprived because of their race. It would appear that a racial classification is as much of a necessity in *DeFunis* as it was in the remedial and corrective decrees fashioned by courts under the authority of *Brown I* and *Brown II*.

VIII. THE OVERRIDING AND COMPPELLING STATE INTEREST

Once it is determined that a racial classification is necessary, a court then must balance the underlying interest of society in not permitting a state to use racial classifications against the interest a state sets forth for using them in order to determine whether the state's interest is compelling and overriding. However, two preliminary observations are required. First, there is a deep and bitter irony that today a

\textsuperscript{125} 379 U.S. 184 (1964).
\textsuperscript{126} Id. at 196.
state constitutionally is required to show an overriding and compelling state interest before it can step in and help minority groups who are struggling to free themselves from the deleterious consequences of racial discrimination, while previously states directly imposed those burdens or racial discrimination upon minority groups and were required only to meet the permissive "reasonable basis" test. This type of constitutional interpretation ironically imposes the worst of both worlds upon minority group members with their bread buttered on neither side.\textsuperscript{127} Second, the law school's preferential admission policy obviously is not a covert attempt to stigmatize the majority white race as inferior and thereby to subject its members to invidious racial discrimination. Nor is it reasonable to believe that extending a few admissions preferences to minority group members will have that effect. Since the object is to correct the previously unbalanced scales with respect to the opportunity for a legal education, allowing for distributive justice, the preferential admissions policy administered by the law school can not be classified as "invidious" in the constitutional sense as that word has previously been understood. "The goal of this policy is not to separate the races [and to stigmatize one of them], but to bring them together."\textsuperscript{128}

Washington's Supreme Court held that:\textsuperscript{129}

\begin{quote}
[T]he state has an overriding interest in promoting integration of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling.
\end{quote}

There can be no quarrel with this holding. Equality of access lies at the core meaning of the equal protection clause. But minority groups have not enjoyed equal access to legal education. The national data showing the gross disparities in minority representation have been pre-

\textsuperscript{127} For exploration of the possibility of a permissive standard of review where the racial classification is "benign," see Note, \textit{Developments in the Law—Equal Protection} 82 \textit{Harv. L. Rev.} 1065, 1104-17 (1969).

\textsuperscript{128} \textit{DeFunis}, 82 Wn.2d at 27, 507 P.2d at 1179. If the sole purpose of a racial classification is to discriminate against persons on account of race, the classification will be held unconstitutional because of the impermissible, discriminatory purpose. Loving \textit{v. Virginia}, 388 U.S. 1 (1967). See also Note, \textit{Developments in the Law—Equal Protection}, 82 \textit{Harv. L. Rev.} 1065, 1103-04 (1969).

\textsuperscript{129} \textit{DeFunis}, 82 Wn. 2d at 33, 507 P.2d at 1182.
sented,¹³⁰ and the law school considers itself a national law school.¹³¹ While relevant, these national data are not conclusive. The overriding and compelling interest required by the equal protection clause is bounded by the scope of application of that clause. The equal protection clause applies only within the borders of a state; it does not apply across state borders. Thus, in DeFunis the overriding and compelling state interest required by the equal protection clause is one that must be located within the boundaries of the State of Washington. Under this analysis whether a state has a compelling state interest and the duration of such an interest will vary from state to state, depending upon the conditions existing within that state. A state law school in Mississippi, Alabama, Louisiana or Georgia, for example, may present a much stronger compelling state interest, and it may be of longer duration, than the compelling interest presented by the state school of law in Washington.

The status of minority groups in the State of Washington is not any better than that generally existing in the nation; in some ways it is worse. In 1970, the State of Washington had a total population of 3,409,169 of whom 3,251,055 or 95.4 percent were classed as white (since 1940, this category also has included Mexican Americans); 71,308 or 2.1 percent were Negro, and 33,386 or 1 percent were American Indian.¹³² Because the U.S. Bureau of Census places all Mexican Americans in the white category, no direct figures are available from that source. However, in a letter to the author, an official of the U.S. Department of Housing and Urban Development indicated that in 1970 there were 70,734 Spanish-speaking people in the State of Washington or 2.1 percent of the population. It was estimated that by April, 1972, the state's Spanish-speaking population had outstripped the Black population, having grown to more than 72,000 while the Black population was approximately 71,000.¹³³ Thus, the total number of persons in the State of Washington in 1970 who were

¹³⁰ See discussion in notes 10-15 and accompanying text supra.
¹³¹ The University of Washington School of Law attracts students from throughout the nation and seeks to graduate lawyers who "are prepared to practice anywhere in the United States." U. OF WASHINGTON BULL. 11 (Dec. 1970).
¹³³ On file University of Washington Law School Library. The Appendix infra sets forth the racial composition of the four northwest states as of 1970.
Black, American Indian or Mexican American was about 175,428 or about 5.2 percent of the total population.

In 1970, there were approximately 5,250 (4,550 active and 700 inactive) members of the Washington State Bar Association. Of the 4,550 active lawyers in the State of Washington, only twenty were Blacks, three of whom were judges, and there were only five who were part or full-blooded American Indian.134 According to the Washington State Bar Association, there was not one member of the Washington bar known to be Spanish surnamed or Mexican American!135

These Washington figures indicate that in 1970 there was one active Anglo lawyer for approximately every 720 Whites in the state. But there was only one black lawyer for approximately every 4,195 Blacks in the state, and there was only one American Indian lawyer for approximately every 6,677 American Indians in the State. There was not one Mexican American lawyer for 70,734 Mexican Americans in the State!136 Clearly, this is shocking; Washington's Supreme Court recognized as much when it observed that "minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—of this state and this nation."137

134. The number of practicing Indian lawyers in the U.S. is statistically appalling:
Although no segment of our society more needs representation within the legal profession than does the American Indian, no group has fewer lawyers. There are well over a half-million Indians. To achieve proportionate representation at the bar, five hundred to a thousand Indians would have to be lawyers; yet there are perhaps not more than two dozen practicing lawyers who identify as Indian in the entire United States. The number who are actively engaged in work affecting Indians is even less.

Christopher & Hart, Indian Law Scholarship Program at the University of New Mexico, 1970 U. Tol. L. Rev. 691, 692-93. On the other hand, "[n]o American comes within the sweep of as many laws as the Indian living on a reservation." Id. at 691.

Because the very existence of Indian organizations is now dependent on the pleasure of Congress, law has taken on a role in the life of Indians that it has thankfully not assumed over the life of almost any other group except for those involved in subversive activities. The government's power is of life and death dimensions.


135. Telephone interview with unidentified party, Washington State Bar Association. Confirmation in writing did not follow as requested. The author believes there are two lawyers who are Mexican American who work for the government but does not know whether they are members of the Washington State Bar Association.

136. Mexican Americans suffer other severe disadvantages. One economist has stated "that Mexican-Americans have a more severe employment handicap than Negroes." He cited language difficulties and occupations that are seasonal or short-term as major factors. Kaplan, Equality in an Unequal World, 61 Nw. U.L. Rev. 363, 375 n.25 (1966).

137. DeFunis, 82 Wn. 2d at 32-33, 507 P.2d at 1182.
DeFunis v. Odegaard

The State of Washington has a deep and abiding interest in correcting these disparities and in making sure that legal education is in fact made equally available. While the state voluntarily undertook to provide a corrective program of law school admission it may actually have been under a constitutional duty to have done so.138

That access to legal education has effectively been denied to minority group members in the State of Washington is only too painfully evident from these statistics. Yet, minority group members pay state taxes, a part of which go to support the University of Washington and its law school. In fact, since minority groups in the state are found disproportionately in the lowest income classes, and since Washington's tax structure is highly regressive, minority groups tend to incur a disproportionately heavy state tax burden.139

138. Supreme Court cases establish that absent overriding considerations all persons within a state are entitled to equal access to benefits and opportunities distributed by the state. Statistics can play the vital role of showing that all persons have not enjoyed equal access. The use of statistical information to establish a prima facie case of racial discrimination has long been recognized as constitutionally valid. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). The validity of this approach was recently reaffirmed by the Supreme Court. See United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of City of Emporia, 407 U.S. 541 (1972). For discussion and application of this approach to race relations, see Nisenbaum, Race Quotas, 8 Harv. Civ. Rights—Civ. Lib. L. Rev. 128, 131-41 (1973). The gross statistical disparities described in the text show a massive differential distribution of a societal benefit—access to public, legal education—according to race and a breach of the principle of distributive justice. Courts have held in such circumstances that the denial of equal access warrants the inference of discrimination and that "when a prima facie case of discrimination is presented, the burden falls, forthwith, upon the State to overcome it." Avery v. Georgia, 345 U.S. 559, 563 (1953) (emphasis added). If the state fails to produce positive evidence directly contradicting the prima facie case, a court will hold that no such evidence exists because "if [the theory of the State] can possibly be conceived . . . we do not doubt that the State could have proved it." Patton v. Mississippi, 332 U.S. 463, 468 (1947); accord, Hill v. Texas, 316 U.S. 400, 404-05 (1942). See also Keyes v. School Dist. No. 1, 93 S.Ct. 2686, 2698 (1973). Thus, unless the state produces the necessary evidence, the gross statistical disparity of access to legal education would be seen by a court as a mandatory presumption requiring a holding of a violation of equal protection of the laws and a court could prescribe a racial quota-like remedy. Thus, the law school could be under a constitutional duty to use a racially conditioned preferential admission policy. See also Note, The Affirmative Duty to Integrate in Higher Education, 79 Yale L.J. 666 (1970).


Furthermore, while the majority of America's and Washington's poor are not minority group members the great majority of America's and Washington's minority groups are poor. For example, on a percentage basis four times as many Blacks are
Given that Washington's minority groups have not enjoyed an equal share of public legal education and that they pay state taxes, part of which support the law school, it is obvious that the state has a compelling and overriding interest in effectively making public legal education equally available to minority groups for the simple reason that under the equal protection clause a state is obligated to provide equal opportunity to all its citizens. The state's law school may fulfill that obligation voluntarily by using a racially conditioned preferential admissions policy.

Washington's Supreme Court held that a second overriding and compelling state interest is that the law school provide "all law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation," and that to do this adequately one cannot rely on books alone; thus, "[t]he educational interest of the state in producing a racially

The frequency of limited educational attainment markedly distinguishes America's poor from its non-poor. Two-thirds of the heads of poor families have no more than an eighth-grade education, but in the general population only one-third have such limited education. Moreover, state supported higher education, although legally available to all, is in fact available only to the more affluent. Two University of Wisconsin economists, W. Lee Hansen and Burton Weisbrod, have studied California's system of colleges and universities, supposedly the most egalitarian in our country. They found that students from poor families were the least likely to be eligible to attend, and even if eligible, the least likely to attend the colleges or university of the State of California. Proportionately six times as many high school graduates whose families earned over $25,000 planned to attend California's system of higher education as did those whose parents earned less than $4,000. Given the paucity of Washington lawyers who are minority group members, there is reason to believe that their findings regarding California are generally applicable also to Washington. See Hansen & Weisbrod, The Distribution of Costs and Direct Benefits of Public Higher Education—The Case of California, 4 J. of Human Resources, 176 (1969).

The children of the poor—they numbered 12.5 million in 1966 and made up one sixth of the Nation's children—must have a higher educational attainment if they are to be productive members of our society, but over half the poor children are in families having four or more children, many of them Black, Mexican American or Indian. J. Gwartney has shown that changes in relative education have actually worked against non-whites since World War II. The jobs requiring the most education show the greatest racial disparities in income; thus, as all races become better educated, the comparative situation of non-whites tends to deteriorate. J. Gwartney, Changes in the Non-White/White Income Ratio, 1939-67, 60 Am. Econ. Rev. 872 (1970). The truth is that the bulk of our racial minority groups are poor and greatly in need of effective equal educational opportunity. See Orshansky, Counting the Poor: Another Look at the Poverty Profile, Poverty in America 42-82 (L. Ferran ed. 1965); S. Miller & P. Roby, The Future of Inequality (1970); N. Yetman & C. Steele, Majority and Minority: The Dynamics of Racial and Ethnic Relations (1971).
balanced student body at the law school is compelling." There can be no quarrel with this holding.

Legal education is a unique and practical education. It prepares men and women to play special roles in our society: we are "a nation that professes deep regard for the dignity of man and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy." Mr. Chief Justice Stone put it succinctly:

Law performs its function adequately only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in a modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and future . . . . We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law. . . .

The fourfold objectives of the law school at the University of Washington are like those of other law schools: (1) to prepare for public service; (2) to prepare for practice; (3) to prepare for law teaching; and (4) to prepare for legal research. It is the special duty of state supported legal education to supply the state and the nation with many of our social inventors, as well as our social mechanics. From the law student population comes Washington's main body of civic leaders, judges, legislators and other public servants. It is the law school which should train lawyers to be policy-makers for the even more complete achievement of the democratic values which are the professed ends of American policy. It is evident that if we are to preserve and extend our traditions of equality and freedom, and if we are to compete successfully at home and abroad with other ideologies and philosophies, then all of our people must be educated, and all our

140. DeFunis, 82 Wn. 2d at 35, 507 P.2d at 1184.
142. See Smith, Harlan Fiske Stone: Teacher, Scholar and Dean, 46 Colum. L. Rev. 700, 708 (1946).
lawyers must know the problems and ways of thought of the various racial groups within our society. In short, if they are to do their jobs, lawyers must be enlightened. Mr. Justice Holmes said that the aim of the law school is "not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the master."\(^{143}\)

If an enlightened group of lawyers is a necessary factor in the equation of democracy, then it follows that they must be exposed first-hand to America's most serious social problems. Since the problem of race relations is America's number one domestic problem,\(^{144}\) and since its real dimensions cannot be appreciated fully from books alone, it follows that to be properly educated in law, students should associate and be educated with students who come from all racial groups.\(^{145}\) In that way class discussion, out-of-class discussion and legal education generally are facilitated because diverse insights are brought to bear on a common subject matter. This is what legal education is all about. Thus, the state has a compelling educational interest in producing a racially mixed group of law students because, as tomorrow's leaders of our society, they will be required to know the problems well in order to create peaceful and lawful solutions if our society is to endure.

The state has a third compelling interest: that of preserving the public peace. Our nation recently has been besieged by breaches of public peace caused by racial violence and riots which periodically threaten to renew. America's racial wounds are still deep and festering. Only a strong commitment of state and national action on an unprecedented scale can shape a future that is compatible with the proclaimed ideals of American society. Change must come; hopefully, it will be peaceful and lawful change brought about by our courts and

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\(^{143}\) O. W. Holmes, The Use of Law Schools, Collected Legal Papers 39-40 (1920).

\(^{144}\) See generally Report of the National Advisory Commission on Civil Disorders (1968).

\(^{145}\) 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 the exchange of views with which the law is concerned.

by our legislatures, rather than forced upon us by bloody violence in
our streets.146

If we are to respond peacefully to the dimensions of this racial
problem, our institutions of legal education must produce lawyers,
legislators, judges and civil servants who are also minority group
members, because they are the persons most likely to be sensitive to
certain critical aspects of racial problems and to be the best represent-

146. This is our basic conclusion: Our nation is moving toward two societies, one
black, one white—separate and unequal.

Reaction to last summer's disorders has quickened the movement and deepened
the division. Discrimination and segregation have long permeated much of Amer-
ican life; they now threaten the future of every American.

This deepening racial division is not inevitable. The movement apart can be re-
versed. Choice is still possible. Our principal task is to define that choice and to
press for a national resolution.

To pursue our present course will involve the continuing polarization of the
American community and, ultimately, the destruction of basic democratic values.

The alternative is not blind repression or capitulation to lawlessness. It is the
realization of common opportunities for all within a single society.

This alternative will require a commitment to national action—compassionate,
massive, and sustained, backed by the resources of the most powerful and the
richest nation on this earth. From every American it will require new attitudes,
new understanding, and, above all, new will.

The vital needs of the nation must be met; hard choices must be made, and, if
necessary, new taxes enacted.

Violence cannot build a better society. Disruption and disorder nourish repres-
sion, not justice. They strike at the freedom of every citizen. The community
cannot—it will not—tolerate coercion and mob rule.

Violence and destruction must be ended—in the streets of the ghetto and in the
lives of people.

Segregation and poverty have created in the racial ghetto a destructive environ-
ment totally unknown to most white Americans.

What white Americans have never fully understood—but what the Negro can
never forget—is that white society is deeply implicated in the ghetto. White institu-
tions created it, white institutions maintain it, and white society condones it.

It is time now to turn with all the purpose at our command to the major unfin-
ished business of this nation. It is time to adopt strategies for action that will pro-
duce quick and visible progress. It is time to make good the promises of American
democracy to all citizens—urban and rural, white and black, Spanish-surname,
American Indian, and every minority group.

Our recommendations embrace three basic principles:

- To mount programs on a scale equal to the dimension of the problems;
- To aim these programs for high impact in the immediate future in order to close
  the gap between promise and performance;
- To undertake new initiatives and experiments that can change the system of
  failure and frustration that now dominates the ghetto and weakens our society.

These programs will require unprecedented levels of funding and performance,
but they neither probe deeper nor demand more than the problems which called
them forth. There can be no higher priority for national action and no higher claim
on the nation's conscience.

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1-2 (1968) (em-
phasis added).
atives of minority groups. Hopefully, if our nation has enough minority group members educated in the law, peaceful ways of change will be developed in our courts and legislatures, sparing us from a recurrence of the racial calamities of recent years. Increased minority representation at the Bar tends to develop articulate and responsible community leadership which opens the door of participation in the processes and institutions of democratic government to minority groups. The resolution of racial grievances can be accomplished through the peaceful processes of law. These considerations afford a state a third compelling interest recognized by Washington's Supreme Court: "If minorities are to live within the rule of law, they must enjoy equal representation within our legal system." 147

In addition, minority group members who become lawyers are symbols to minority youth that they too can "make it" within the system. Every minority group member who becomes a doctor or lawyer or other highly respected professional symbolizes the possibility of socio-economic achievement to minority youth, and his impact may well have a multiplier effect on the next generation. 148

Each of the three interests discussed individually above would supply the overriding and compelling state interest, 149 but surely, in the aggregate, they fully meet the constitutional requirement.

The requirement that a state show a compelling interest in order to justify its racial classification goes to its policy generally, and the state's compelling and overriding interest in DeFunis is clear. Yet, a related consideration must be explored even though it does not negate the state's compelling interest. Persons such as Marco DeFunis, Jr.,

147. DeFunis, 82 Wn. 2d at 35, 507 P.2d at 1184.
149. Another, less compelling state interest is the adequate representation of minority groups. Non-minority group lawyers do represent minority group members, but there is an intangible, but nonetheless real, difference when a lawyer is also a member of that minority group. For example:

Many Anglo and Spanish-speaking lawyers now attempt in good faith to represent American Indians in tribal and personal matters. The vast differences between cultures, however, make meaningful representation often difficult and in many cases impossible. It is hardly surprising, then, that there is a desperate need for Indian lawyers, for those individuals who have not only a critical skill but also have a special understanding needed to deal effectively with the affairs of the people who have too long been described as 'forgotten Americans.' J. Fleishman, School of Law, University of New Mexico, Special Program in Law for American Indians 2, 1969.
are completely innocent; they are not responsible for the vast amounts of racial discrimination that have occurred in America, and indeed, they may themselves have suffered from racial or religious prejudice. Yet, these innocent persons who are displaced by a racially conditioned preferential law admission policy are the ones who must bear the burden of correcting the evils of society's racial practices. These are the persons required to forego their opportunity to be judged strictly on their academic merit in order to afford an opportunity for legal education to an academically less well qualified minority group member solely on the basis of race. From the vantage point of persons like DeFunis, the law school's admission policy can be viewed as racial discrimination with a deleterious impact enforced by law. This consideration, as important as it is, does not eliminate the state's overriding and compelling interest. The interests presented by DeFunis and others similarly situated are overridden by the state when it shows a compelling interest justifying its use of a racial classification.

The interest exemplified by Marco DeFunis, Jr., impales the law school on the horns of an unpleasant dilemma "of the very first importance."¹⁵⁰ One horn of the dilemma is that if the law school does not use a preferential admissions policy to make legal education equally available for minority group members, it then might be in breach of its constitutional duty.¹⁵¹ To do nothing would be to ignore the unjustified present circumstances of minority groups—the consequences of the long history of racial discrimination, the effective denial of equal opportunity to study law and the glacial rate of social change in race relations in this country such that many minority members have cause to believe that America's institutions have consigned them to a fate of permanent inferiority on racial grounds. Certainly Blacks, and to a lesser extent Mexican Americans and American Indians, have made some real gains during the past few decades. There has been some progress. But a walk through the nearest ghetto with its rat-infested housing and unemployed people will demonstrate how far minority groups have to go. Thus, to do nothing means that the law school (and by example the law?) should do nothing to help solve America's most severe domestic problem; yet, helping to solve this problem is precisely

¹⁵¹. See discussion at note 138 supra.
what the law school ought to do and may well have a legal obligation
to do.\textsuperscript{152}

The other horn of the dilemma is that if the Law School uses a ra-
cially conditioned preferential admissions policy, it is then involved in
the dirty business of racial discrimination by not judging applicants
strictly on their academic merits as they have been traditionally but
imprecisely measured by undergraduate grade point and Law School
Admission Tests.\textsuperscript{153} Thus, the dilemma is clear: either the law school
fails to meet its obligation to make legal educational opportunity
equally available to members of all racial groups or the law school
engages in the nasty business of racial discrimination, and against
innocent parties.

This is a cruel dilemma, and it poses a hard choice. Without the
creation of new criteria that more accurately measure the "merit"\textsuperscript{154}
of all law applicants, I do not see how this dilemma can be avoided. I
think a choice can be made first by recognizing that one of this na-
tion's highest priorities is the elimination of the adverse effects of ra-
cial discrimination,\textsuperscript{155} and second by invoking the principle of the
lesser evil. Surely it is a lesser evil to deny law admission on racial
grounds to some whites for a few years\textsuperscript{156} than to continue the current
denial of opportunity for legal education and to continue the paucity

\textsuperscript{152} Id.

\textsuperscript{153} That these traditional measures are not always accurate should be obvious.
Consider the problems encountered by American Indians: "[F]ew persons have any
confidence in the validity of a culture-bound test for measuring innate intelligence and
most tests of mental ability are agreed to be culture-bound (especially those of the
group variety)." L. COOMBS, THE EDUCATIONAL DISADVANTAGE OF THE AMERICAN INDIAN
STUDENT 83 (1970). "[O]nly a test which has been validated for minorities can be
assumed to be free of inadvertent bias." EEOC Guidelines on Employment Testing
Procedures 5 (August 21, 1968). For the past 15 years, Yale's Law School has dis-
counted traditional academic measures when dealing with applicants whose histories
are culturally atypical but reflect a high probability of success. See Fleming & Pollak,
\textit{The Black Quota at Yale Law School—An Exchange of Letters}, 19 THE PUB. INTEREST
44 (1970). And Yale is not alone: "[S]ome schools reported minority students who
scored low on the LSAT performing in the upper 25% of their classes." 1970 AALS
REPORT 32. Because of cultural differences not being taken into account in test sit-
uations, these traditional measures of academic ability may not meet the requirement of
have the means of articulation to manifest itself fairly in a testing process."

\textsuperscript{154} See discussion at note 153 supra.

\textsuperscript{155} That the elimination of the adverse effects of racial discrimination is one of
our highest national priorities has been stated and restated by governmental agencies,
legislatures, courts and politicians. The statements are collected in \textit{Revolution in Civil
Rights}, CONG. Q. 21-31, 60-61, 100, 102 (June, 1968).

\textsuperscript{156} See discussion at note 20 supra.
of lawyers who are minority group members. Large-scale hire-the-handicapped programs exist without objection, and yet the loss of an arm is often less of a handicap in American society than being born with a dark skin. Moreover, physical handicaps have not been deliberately inflicted by society as have racial handicaps.

IX. THE CLASS OF "SIMILARLY SITUATED" MINORITY GROUP PERSONS

To recapitulate, it is clear that "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . . ." To be constitutionally valid a classification that is suspect, such as race, must demonstrate a much greater degree of relevance in relation to the purpose of the classification than must non-suspect classifications used in economic, fiscal or regulatory matters. As indicated above, not all suspect classifications such as race are unconstitutional per se. The burden of justifying their use is on the state, and they come to a court without a presumption of constitutionality—indeed, with a presumption of unconstitutionality. Moreover, under the "most rigid scrutiny" test a suspect classification must be "necessary" in order to achieve a legitimate purpose of the state. This requirement of "necessity" implies two further considerations: (1) that a suspect classification will not be upheld if there is a reasonable alternative available (considered supra), and (2) that courts will be unlikely to tolerate, if at all, under- or over-

157. It is unlikely that a passive policy of nondiscrimination will achieve equality for minority groups, and, indeed, affirmative action programs may not fully do the job: The fact that alienation is such a circular process does not mean that nothing can be done to deal with the problems of segregation. It does mean that antidiscriminatory legislation alone cannot bring about instant integration. Instead, such legislation would be more effective if accompanied by other efforts to overcome the psychological barriers to integration. Balough, *Alienation in the Ghetto*, 72 AM. J. SOCIOLOGY 469, 477-78 (1967).


159. The ordinary presumption favoring a state's non-suspect classification, see, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961), is reversed in the case of suspect classifications and a showing by the state of the possibility of a rational basis for its classification is insufficient, see, e.g., *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967). Thus, a state must show a compelling and overriding interest in using a suspect classification.

inclusiveness of persons in the class of those who are "similarly situated." 161

The definition of the class of those persons who are similarly situated is equally subject to "the most rigid scrutiny" test. One consequence of such rigid scrutiny is that a court will not defer to legislative judgment to the extent it does in cases of non-suspect classifications, nor will a court assume that a set of facts exists which would uphold the reasonableness of a state's suspect classification and its definition of the class of similarly situated persons. 162 The definition of the class of persons similarly situated must be set forth clearly; the state must introduce evidence showing that its supporting facts exist; and a definition that is under- or over-inclusive will not readily be upheld. 163 This constitutional requirement is the Achilles heel of the specific preferential admissions program used by the law school, 164 although it would not invalidate a carefully constructed affirmative action program.

The law school failed to provide any definition whatsoever of the "minority group members" who qualified for its admissions preferences. Furthermore, "[t]he admissions process does not include personal interviews and does not reveal whether applicants are poor or affluent." 165 The law school allowed applicants to characterize themselves. No one knows what criteria the applicants actually used in making their self-characterizations or whether any consistent set of criteria was used. Without a definition first supplied by the law school, there can be no accurate judgment by any court on whether the class of persons granted the preference is coextensive with the class of persons who ought to receive it; nor can there be accurate judgments on whether the law school's classification is under- or over-inclusive, nor whether the criteria defining a minority group person were properly administered. Because of this lack of criteria it becomes impossible to determine whether the class of persons similarly situated is properly defined.

164. Although the question was passed on, Washington's Supreme Court failed to explore thoroughly whether the class was precisely defined or whether it was over- or under-inclusive. 82 Wn. 2d at 36-37, 507 P.2d at 1184-85.
165. 82 Wn. 2d at 16, 507 P.2d at 1173.
DeFunis v. Odegaard

One reason why it is so difficult to identify who is a bona fide member of a racial minority group is that the concept of "race" has no independent or scientific validity. Scientists such as geneticists, biologists or physical anthropologists generally agree that MAN, the genus Homo, constitutes a single species to which all living "races" belong. A species is a natural inbreeding population that is reproductively isolated from all other populations in the sense that its members are not capable of mating with members of other species and producing fertile offspring. Thus, a species is a genetically closed system and is the basic group for biological and anthropological classification. The basic unit of the species is the individual gene carrying organism which in the human species is the individual. Between the individual and the species is another layer of classification of human beings known as "race." A racial classification is a classification of a population group that exists within a species and which, historically, has tended to inbreed among itself for long periods of time due to the firmness of either its social or geographical boundaries. This endogamy results in certain similar physical characteristics which are sometimes classified as "racial." The number of "races" of mankind is infinite, and different classificatory systems have listed as few as two and as many as two hundred "races." It all depends on whether the classifier is a "lumper," who groups many varieties of characteristics into one "racial" group because he believes their differences are too unimportant to warrant separate classification, or a "splitter" who believes that any major distinction of characteristic merits a separate "racial" classification. The point is that there is no scientifically valid classification known as "race." It is merely a collection of a group of persons that is made as a matter of convenience. The classificatory criterion ultimately rests on a value judgment. Moreover, whenever an individual mates outside his "racial" group, the proper "racial" classification of the offspring is immediately put in question. This last consideration assumes great importance when miscegenation—which for the past five centuries has achieved unprecedented rates in human history—becomes widespread because "racial" classifications of convenience then become even more blurred.166 Accurately speaking, for MAN there is but one "race"—the human race.

166. For full discussion, see L. Morris, Human Populations, Genetic Variation and Evolution (1971); S. Garn, Human Races (3d ed. 1971); R. Goldsby, Race and Races (1971); J. Barzun, Race: A Study in Superstition (1963); A. Montagu, Man's
While accurate physiological criteria defining race are not available, the law school could have used certain social and racial classifications upheld by the Supreme Court in the past. For example, in the infamous case of *Plessy v. Ferguson*, the Supreme Court did not disallow Louisiana's definition of the "colored races" as applied to Plessy, who "averred that [he] was seven-eighths Caucasian and one-eighth African blood" and "that the mixture of colored blood was not discernible in him." Or the law school could have adopted Congress' classification of "quarter-bloods" that is applied to American Indians. Finally, to insure completeness of the class the law school should have considered whether Oriental Americans should have been afforded a preference for they, too, have suffered mightily from overt and institutional racial prejudices, especially on this nation's West Coast.

The law school relied upon self-characterizations made by applicants on their applications, but there is a fatal lack of identity or congruity in the racial categories. The law school allowed an applicant to circle one of the following on his application: "Afro-American, American Indian, Caucasian, Mexican American, Oriental, Other (specify)

But it awarded its law admission preferences to "Black Americans, Chicano Americans, American Indians and Philippine Americans." With the exception of "American Indian," the categories for self-characterization provided on the law school application form are not identical with the categories of persons qualifying for an admission preference. For example, a law school applicant cannot self-characterize himself as a "Philippine American," although Philippine Americans qualify for an admission preference, but an applicant can characterize himself as "Oriental." Unless a Philippine American applicant considered himself as "Other" and so specified on his application, he would never surface as a candidate for one of the law school’s admission preferences. Thus, there could be under-inclusion

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167. 163 U.S. 537 (1896).
168. *Id.* at 538.
172. 82 Wn. 2d at 18 n.3, 507 P.2d at 1174.
within the class. On the other hand, each applicant otherwise qualified for law study who characterized himself as "Afro-American," "Mexican American" or "American Indian" automatically would receive preferential treatment even though the applicant could have been "caucasian" and honestly, but erroneously circled the wrong category or the applicant intentionally circled the wrong category in order to receive a preference. Thus, the class would be over-inclusive.

Furthermore, the actions of the law deans, and perhaps the committee, raise a question of whether the racial preference and non-racial criteria were properly administered. Finally, the law school's use of its racial classifications is not strictly related to its purpose of effectively making legal education available to all members of various racial groups for the reason that some racial groups justifying a preference may not qualify for one. For example, there is no specific indication that Oriental Americans are effectively receiving equal opportunity for legal education. Thus, to the extent evidence exists on the question of the similarly situated class in relation to purpose it is against the law school. For these reasons, I conclude that the law school's affirmative action program of giving racial preferences in admissions is defective and unconstitutional. On the other hand, a carefully constructed and administered affirmative action program which properly defined the racially preferred groups could validly pass this test of constitutionality.

X. CONCLUSION

Under current equal protection precedents a state law school constitutionally can award a racially conditioned preference in law admissions so long as it does so within a carefully constructed and openly administered affirmative action program. The compelling and overriding justification for using a specific racial classification would exist as long as that state's institutions function to deny a racial group equal opportunity for a legal education. Hopefully, the use of a racial classification will be a short-term, temporary expedient:

The ideal to which we must work is of course the provision of a basic

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173. See notes 41, 42 and 45 and accompanying text supra.
primary educational system which will be of such uniformly good quality on a national level that, combined with the elimination of gross economic inequality, it will remove the necessity for compensatory expedients.

This goal will not be achieved in a day, but justice demands that we not ignore the hopelessly unfair and uncompetitive position into which minority groups have been thrust by the inequitable operation of America's social system. Affirmative action programs in law education are one salutary response to this situation.

However, the elements of the program must be set forth in writing in clear language that a person of ordinary intelligence can read and understand. Moreover, given the fact that a constitutionally suspect class—race—is used, the program and all its component parts should be published well in advance of its use so that a clear description of the program will be fully and equally available to all. The constitutional use of a constitutionally suspect classification demands that its administration be open and well above reproach, and that the details of its administration be honestly recorded and made publicly available to all. Nothing less than these requirements can be tolerated when a state is constitutionally permitted to use a racial classification in order to confer rights, duties, offices, benefits or detriments.
### APPENDIX

**REGION X—RACIAL COMPOSITION (1970)**

<table>
<thead>
<tr>
<th>STATE</th>
<th>TOTAL POPULATION</th>
<th>TOTAL MINORITY POPULATION</th>
<th>WHITE</th>
<th>SPANISH SPEAKING</th>
<th>NEGR0</th>
<th>INDIAN</th>
<th>JAPANESE</th>
<th>FILIPINO</th>
<th>CHINESE</th>
<th>ALL OTHERS</th>
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<tbody>
<tr>
<td>WASH.</td>
<td>3,409,169</td>
<td>228,848</td>
<td>3,180,321</td>
<td>70,734</td>
<td>71,308</td>
<td>33,386</td>
<td>20,335</td>
<td>11,462</td>
<td>9,201</td>
<td>12,422</td>
</tr>
<tr>
<td>ALASKA</td>
<td>300,382</td>
<td>69,894</td>
<td>230,488</td>
<td>6,279</td>
<td>8,911</td>
<td>16,276</td>
<td>916</td>
<td>1,498</td>
<td>228</td>
<td>35,786</td>
</tr>
<tr>
<td>IDAHO</td>
<td>712,567</td>
<td>32,241</td>
<td>680,326</td>
<td>18,476</td>
<td>2,130</td>
<td>6,689</td>
<td>2,255</td>
<td>206</td>
<td>498</td>
<td>1,987</td>
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<tr>
<td>OREGON</td>
<td>2,091,385</td>
<td>93,883</td>
<td>1,997,502</td>
<td>34,577</td>
<td>26,308</td>
<td>13,510</td>
<td>6,843</td>
<td>1,633</td>
<td>4,814</td>
<td>6,198</td>
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<tr>
<td>TOTAL</td>
<td>6,513,503</td>
<td>424,866</td>
<td>6,088,637</td>
<td>130,066</td>
<td>108,657</td>
<td>69,861</td>
<td>30,349</td>
<td>14,799</td>
<td>14,741</td>
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### PERCENTAGE

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<tbody>
<tr>
<td>WASH.</td>
<td>6.7</td>
<td>93.3</td>
<td>2.1</td>
<td>2.1</td>
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<td>.6</td>
<td>.3</td>
<td>.3</td>
<td>.3</td>
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<tr>
<td>ALASKA</td>
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<td>.3</td>
<td>.5</td>
<td>.1</td>
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<tr>
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<td>95.5</td>
<td>2.6</td>
<td>.3</td>
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<td>.3</td>
<td>.03</td>
<td>.07</td>
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</tr>
<tr>
<td>OREGON</td>
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<td>95.5</td>
<td>1.7</td>
<td>1.3</td>
<td>.6</td>
<td>.32</td>
<td>.08</td>
<td>.2</td>
<td>.3</td>
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<tr>
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<td>93.5%</td>
<td>2.0%</td>
<td>1.7%</td>
<td>1.0%</td>
<td>.5%</td>
<td>.2%</td>
<td>.2%</td>
<td>.9%</td>
<td></td>
</tr>
</tbody>
</table>

Note—Mexican-American persons are considered as "white" by the U.S. Bureau of Census. The above table tabulates non-Spanish-speaking and Spanish-speaking white populations separately.