DeFUNIS v. ODEGAARD
82 Wash. 2d 11, 507 P.2d 1169 (1973)
SUPREME COURT OF WASHINGTON

Defendants, who include the members of the Board of Regents of the University of Washington, the President of the University, and the Dean and certain members of the Admissions Committee of the University of Washington School of Law, appeal from a judgment ordering them to admit plaintiff Marco DeFunis, Jr., as a first-year student to the University of Washington School of Law, as of September 22, 1971.

Broadly phrased, the major question presented herein is whether the law school may, in consonance with the equal protection provisions of the state and federal constitutions, consider the racial or ethnic background of applicants as one factor in the selection of students.

Marco DeFunis, Jr. (hereinafter plaintiff), his wife, and his parents commenced an action in the superior court, alleging that plaintiff, an applicant for admission to the University of Washington School of Law (hereinafter law school) for the class commencing September 1971, had been wrongfully denied admission in that no preference was given to residents of the state of Washington in the admissions process and that persons were admitted to the law school with lesser qualifications than those of plaintiff. The complaint asked that the court order the defendants to admit and enroll plaintiff in the law school in the fall of 1971 and, upon the failure of defendants to do so, that plaintiffs recover damages in the sum of not less than $50,000.

The superior court granted a temporary restraining order and order to show cause, restraining defendants from selecting students for admission to the law school during the pendency of the action. Defendants, in turn, moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the cause and that the complaint failed to state a claim upon which relief could be granted.

The superior court dismissed that portion of the plaintiff's complaint seeking monetary damages. The balance of defendants' motion to dismiss was denied, and a temporary injunction was entered enjoining the defendants from admitting students to the law school "in a number which would preclude the admission of plaintiff, Marco DeFunis, Jr., to the 1971-72 first year class, should his admission eventually be ordered by the court." After a nonjury trial, the court ruled that in denying plaintiff admission to the law school, the University of Washington had discriminated against him in violation of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution. . . .

[DeFunis' application to the law school was considered by a committee of six faculty members and three law students. The law school received 1601 applications for admission in the fall of 1971, and planned to accept some 200 applications in order to arrive at a first-year class that would number 145 to 150. Most of the applicants were considered by the committee to be qualified for law study.

[Each applicant was assigned a "Predicted First-Year Average" (PFYA), based on undergraduate grades and test scores. The files of applicants with PFYAs of over 77 were reviewed by the full committee and acted upon (mostly favorably) as they came in. The files of applicants with PFYAs under 74.5 were reviewed by the committee chairman, and many were rejected. Some, however, were placed in a group for later review by the committee. The files of applicants with PFYAs between 74.5 and 77 were held until the pass-

ing of the application deadline, so that the full pool of applicants could be considered for the remaining positions in the entering class. Applicants who had previously been admitted to the law school, but who had been unable to enroll because of military service, were placed in this pool even though their PFYAs were below 74.5. Similarly, all files of "minority" applicants — defined by the committee as "Black Americans, Chicano Americans, American Indians and Philippine Americans" — were placed in this pool, regardless of PFYA.

[DeFunis had junior-senior grades averaging 3.71. He took the LSAT three times, and his scores (512, 566, 688) average 582; his writing test scores averaged 61. Under the U.W. system, his PFYA was 76.23. His file was placed in the pool.

[DeFunis was placed on a waiting list, and ultimately not admitted. Of those applicants admitted, 74 had lower PFYAs than did DeFunis. Of the 74, 36 were minority students, 22 were returning veterans, and 16 were thought by the committee to deserve admission "on the basis of other information contained in their files." Of the 36 minority students admitted, 18 actually enrolled. The trial court found that some of the minority admittees had undergraduate grades and LSAT scores that would have placed them in the group rejected by the committee chairman, but for their racial or ethnic characteristics.]

The trial court concluded . . . that, in denying plaintiff admission to the law school, the University of Washington discriminated against him and did not accord to him equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution; and therefore, that plaintiff should be admitted to the law school for the class of 1974, beginning September 22, 1971.

I.

[The Washington Supreme Court concluded that DeFunis had standing to challenge the law school's minority-admissions policy.]

II.

The essence of plaintiff's Fourteenth Amendment argument is that the law school violated his right to equal protection of the laws by denying him admission, yet accepting certain minority applicants with lower PFYAs than plaintiff who, but for their minority status, would not have been admitted.

To answer this contention we consider three implicit, subordinate questions: (A) whether race can ever be considered as one factor in the admissions policy of a state law school or whether racial classifications are *per se* unconstitutional because the equal protection of the laws requires that law school admissions be "colorblind"; (B) if consideration of race is not *per se* unconstitutional, what is the appropriate standard of review to be applied in determining the constitutionality of such a classification; and (C) when the appropriate standard is applied does the specific minority admissions policy employed by the law school pass constitutional muster?

A.

Relying solely on Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the trial court held that a state law school can never consider race as one criterion in its selection of first-year students. In holding that all such racial classifications are *per se* unconstitutional, the trial court stated in its oral opinion:

> Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group have not, in my opinion, been accorded equal protection of the laws guaranteed by the Fourteenth Amendment.
>
> In 1954 the United States Supreme Court decided that public education must be equally available to all regardless of race.
>
> After that decision the Fourteenth Amendment could not longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all

> races alike, and I feel that is what is required under the equal protection clause.

In *Brown v. Board of Education, supra,* the Supreme Court addressed a question of primary importance at page 493, 74 S.Ct. at page 691:

> 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? We believe that it does.

The Court in *Brown* held the equal protection clause of the Fourteenth Amendment prohibits state law from requiring the operation of racially segregated, dual school systems of public education and requires that the system be converted into a unitary, nonracially segregated system. In so holding, the Court noted that segregation inevitably stigmatizes Black children:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Board of Education, supra, at page 494, 74 S.Ct. at page 691. Moreover, "The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." *Id.* at page 494, 74 S.Ct. at page 691.

[4, 5] *Brown* did not hold that all racial classifications are *per se* unconstitutional; rather, it held that invidious racial classifications — *i. e.,* those that stigmatize a racial group with the stamp of inferiority — are unconstitutional. Even viewed in a light most favorable to plaintiff, the "preferential" minority admissions policy administered by the law school is clearly not a form of invidious discrimination. The goal of this policy is not to separate the races, but to bring them together. And, as has been observed,

> Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites.

O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 713 (1971).

[6] While *Brown v. Board of Education, supra,* certainly provides a starting point for our analysis of the instant case, we do not agree with the trial court that *Brown* is dispositive here. Subsequent decisions of the United States Supreme Court have made it clear that in some circumstances a racial criterion *may* be used — and indeed in some circumstances *must* be used — by public educational institutions in bringing about racial balance. School systems which were formerly segregated de jure now have an affirmative duty to remedy racial imbalance . . . .

[7] Thus, the Constitution is color conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation. In holding invalid North Carolina's anti-bussing law, which flatly forbade assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibited bussing for such purposes, the Court stated:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.

North Carolina State Board of Education v. Swann, 402 U.S. 43, 45, 91, S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). *Accord,* United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (1967), *cert. denied sub nom.* Board of Education of Bessemer v. United States, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed. 2d 104 (1967).

[8] Clearly, consideration of race by school authorities does not violate the Fourteenth Amendment where the purpose is to bring

together, rather than separate, the races. The "minority" admissions policy of the law school, aimed at insuring a reasonable representation of minority persons in the student body, is not invidious. Consideration of race is permissible to carry out the mandate of *Brown,* and, as noted, has been required in some circumstances.

[9] However, plaintiff contends that cases such as Green v. County School Board, *supra,* and *Swann v. Charlotte*/Meckenburg Board of Education, *supra,* are inapposite here since none of the students there involved were deprived of an education by the plan to achieve a unitary school system. It is questionable whether defendants deprived plaintiff of a legal education by denying him admission. But even accepting this contention, arguendo, the denial of a "benefit" on the basis of race is not necessarily a *per se* violation of the Fourteenth Amendment, if the racial classification is used in a compensatory way to promote integration.

For example, in Porcelli v. Titus, 431 F. 2d 1254 (3d Cir. 1970), *cert. denied,* 402 U.S. 944, 91 S.Ct. 1612, 29 L.Ed.2d 112 (1971), a group of white teachers alleged that the school board had bypassed them in abolishing the regular promotion schedule and procedure for selecting principals and vice-principals, and had given priority to Black candidates in order to increase the integration of the system's faculty. In upholding the board's judgment to suspend the ordinary promotion system upon racial considerations, the court stated:

> State action based partly 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.

Porcelli v. Titus, supra, at page 1257.

Similarly, the Eighth Circuit concluded that in order to eradicate the effects of past discrimination,

> [I]t 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 been so hired.

Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971); *cert. denied* 406 U.S. 950, 92 S.Ct 2045, 32 L.Ed.2d 338 (1972). Thus, the court ordered the department to hire minority applicants, although in doing so a more qualified nonminority applicant might be bypassed. *Cf.* Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 3d Cir. 1971), *cert. denied,* 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971).

[10] We conclude that the consideration of race as a factor in the admissions policy of a state law school is not a *per se* violation of the equal protection clause of the Fourteenth Amendment. We proceed, therefore, to the question of what standard of review is appropriate to determine the constitutionality of such a classification.

B.

[11] Generally, when reviewing a state-created classification alleged to be in violation of the equal protection clause of the Fourteenth Amendment, the question is whether the classification is reasonably related to a legitimate public purpose. And, in applying this "rational basis" test "[A] discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

[12] However, where the classification is based upon race, a heavier burden of justification is imposed upon the state. In overturning Virginia's antimiscegenation law, the Supreme Court explained this stricter standard of review:

> 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 . . .
>
> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.

Loving v. Virginia, 388 U.S. 1, 10-11, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010 (1967). *Accord,* McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969).

It has been suggested that the less strict "rational basis" test should be applied to the consideration of race here, since the racial distinction is being used to redress the effects of past discrimination; thus, because the persons normally stigmatized by racial classifications are being benefited, the action complained of should be considered "benign" and reviewed under the more permissive standard. However, the minority admissions policy is certainly not benign with respect to non-minority students who are displaced by it. *See* O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 710 (1971).

[13] The burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest.

C.

It can hardly be gainsaid that the minorities have been, and are, grossly underrepresented in the law schools — and consequently in the legal profession — of this state and this nation. We believe the state has an overriding interest in promoting integration in public education. In light of the serious underrepresentation 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.

Plaintiff contends, however, that any discrimination in this case has been de facto, rather than de jure. Thus, reasons plaintiff, since the law school itself has not actively discriminated against minority applicants, it may not attempt to remedy racial imbalance in the law school student body, and, consequently, throughout the legal profession. We disagree.

[14] In State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121, 128, 492 P.2d 536, 541 (1972), we held that whether the nature of segregation is de jure or de facto is of no consequence where a voluntary plan of eliminating racial imbalance is adopted by school officials:

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

This conclusion is supported by the reasoning of the district court in Barksdale v. Springfield School Committee, 237 F. Supp. 543, 546 (D. Mass. 1965), vacated on other grounds, 348 F.2d 261 (1st Cir. 1965):

> It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.

Significantly, this case does not present for review a court order imposing a program of desegregation. Rather, the minority admissions policy is a voluntary plan initiated by school authorities. Therefore, the question before us is not whether the Fourteenth Amendment *requires* the law school to take affirmative action to eliminate the continuing effects of de facto segregation; the question is whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy. In refusing to enjoin school officials from implementing a plan to eradicate de facto school segregation by the use of explicit racial classifications, the Second Circuit observed: "That there may be no constitutional duty to act to undo de facto segregation, however, does not mean that

such action is unconstitutional." Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967).

The de jure-de facto distinction is not controlling in determining the constitutionality of the minority admissions policy voluntarily adopted by the law school. Further, we see no reason why the state interest in eradicating the continuing effects of past racial discrimination is less merely because the law school itself may have previously been neutral in the matter.

The state also has an overriding interest in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation. As the Supreme Court has observed, this cannot be done through books alone:

> [A]lthough 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 practied 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.

Sweatt v. Painter, 339 U.S. 629, 634, 70 S. Ct. 848, 850, 94 L.Ed. 1114 (1950).

[15] The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the state in producing a racially balanced student body at the law school is compelling.

Finally, the shortage of minority attorneys — and, consequently, minority prosecutors, judges and public officials — constitutes an undeniably compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within our legal system.

Once a constitutionally valid state interest has been established, it remains for the state to show the requisite connection between the racial classification employed and that interest. The consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived.

It has been suggested that the minority admissions policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law schools through direct competition with non-minority applicants on the basis of the same academic criteria. This would be highly desirable, but 18 years have passed since the decision in Brown v. Board of Education, *supra,* and minority groups are still grossly underrepresented in law schools. If the law school is forbidden from taking affirmative action, this under-representation may be perpetuated indefinitely. No less restrictive means would serve the governmental interest here; we believe the minority admissions policy of the law school to be the only feasible "plan that promises realistically to work, and promises realistically to work *now.*" Green v. County School Board, *supra,* 391 U.S. at page 439, 88 S.Ct. at page 1694.

We conclude that defendants have shown the necessity of the racial classification herein to the accomplishment of an overriding state interest, and have thus sustained the heavy burden imposed upon them under the equal protection provision of the Fourteenth Amendment.

There remains a further question as to the scope of the classification. A validly drawn classification is one "which includes all [and only those] persons who are similarly situated with respect to the purpose of the law." Tussman & ten-Broek, The Equal Protection of the Laws, 37 Calif.L. Rev. 341, 346 (1949). The classification used by defendants does not include all racial minorities, but only four (Blacks, Chicanos, Indians and Philippine

Americans). However, the purpose of the racial classification here is to give special consideration to those racial minority groups which are underrepresented in the law schools and legal profession, and which cannot secure proportionate representation if strictly subjected to the standardized mathematical criteria for admission to the law school.

In selecting minority groups for special consideration, the law school sought to identify those groups most in need of help. The chairman of the admissions committee testified that Asian-Americans, *e. g.*, were not treated as minority applicants for admissions purposes since a significant number could be admitted on the same basis as general applicants. In light of the purpose of the minority admissions policy, the racial classification need not include all racial minority groups. The state may identify and correct the most serious examples of racial imbalance, even though in so doing it does not provide an immediate solution to the entire problem of equal representation within the legal system.

We hold that the minority admissions policy of the law school, and the denial by the law school of admission to plaintiff, violate neither the equal protection clause of the fourteenth amendment to the United States Constitution nor Article 1 s. 12 of the Washington State Constitution. . . .

[The court also rejected various other arguments based on provisions of the Washington Constitution and on state statutes.]

The judgment of the trial court is reversed.

The foregoing opinion was prepared by Justice Marshall A. Neill while a member of this court. It is adopted by the undersigned as the opinion of the court.

FINLEY, HAMILTON, STAFFORD, WRIGHT and UTTER, JJ., and TUTTLE, J. pro tem., concur.

[Justice WRIGHT added a brief concurring opinion, in which Justices FINLEY and STAFFORD concurred, recommending that the law school make available "more complete published standards for admission."]

HALE, Chief Justice (dissenting).

Racial bigotry, prejudice and intolerance will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequities from one man to his neighbor. To aggrandize the first will, to the extent of the aggrandizement, diminish the latter. There is no remedy at law except to abolish all class distinctions heretofore existing in law. For that reason, the constitutions are, and ever ought to be, color blind. Now the court says it would hold the constitutions color conscious that they may stay color blind. I do not see how they can be both color blind and color conscious at the same time toward the same persons and on the same issues, so I dissent.

The court, as I see it, upholds palpably discriminatory law school admission practices of the state university mainly because they were initiated for the laudable purpose of enhancing the opportunities of members of what are described as "ethnic minorities." It thus suggests a new rule of constitutional interpretation to be applied here that, if the administrative intentions are adequately noble in purpose, Mr. DeFunis may be deprived of equal protection of the laws and certain special immunities and privileges may be granted to others which, on the same terms, are denied to him. One should keep in mind the wisdom of the old saying that the road to perdition is paved with good intentions.

The court holds that the university law school may give preferential treatment to persons who come from groups "which have been historically suppressed by encouraging their enrollment within the various programs offered at the University." But what seems to me to be a flagrant departure from the constitutions, ignored by the court, is epitomized in the statement that the admission policy was adopted by the law school "to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system." This

assertion confesses to prior racial discrimination which I doubt existed, and fails to recognize, in a case where the demand for seats in the law school is much greater than the school's capacity, that the increased minority participation assured by such admission procedures inevitably produces a correlative denial of access to nonminority applicants.

Thus, in keeping with what may be described as the expanding horizons of latter-day constitutional principles in perpetual processes of invention and assertion, the court discovers in an administrative agency of the state the power to determine, first, who, among the applicants, shall be classified as Black Americans, Chicano Americans, American Indians and Philippine Americans and, then, a concomitant power to exlude all other ethnic minorities, including Asian Americans, from the preferred classification. It lets the agency grant preferences — or as they more accurately should be described, indulgences — accordingly. For reasons not clear in the record, Asian Americans and all others of different ethnic derivation than those enumerated are not included among those to receive such preferences or indulgences. . . .

In deciding which particular groups should be classified as ethnic minorities, the committee on admissions first made an assumption supported by no evidence whatever, *i. e.*, that all of the accepted minority students except Asian Americans were of a lower economic status than Mr. DeFunis. No comparative investigation or study as to the financial condition or economic background was made to establish the relative economic and cultural condition of the students applying. It was thus categorically assumed that the ethnic minority applicants were, to use the descriptive term current in academic circles, culturally deprived — meaning, one must suppose, that the environmental factors surrounding a minority student and tending to affect his academic achievements were of a lower order than those surrounding white or majority students. This sweeping and unsupported assumption, derived from no real evidence whatever, that all of the admitted minority students were both poor and culturally deprived, supplied the modus vivendi for the scheme of preferences. It ignored the correlative assumption which inevitably had to be made that neither Mr. DeFunis nor any of the nonminority applicants had been equally culturally or economically deprived . . . .

The main stream of current constitutional law runs forthrightly against the discriminatory practice of preferential treatment based on race, color, or ethnic origin. In McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct 283, 13 L.Ed.2d 222 (1964), an adultery statute imposing greater penalties when the participants were of different races was held unconstitutional under the Fourteenth Amendment. Despite the wide legislative judgment to be sustained in determining whether an act is reasonably designed to attack the evil aimed at, any classification based upon race must, it was held, be suspect at the outset on the general rule that the constitution and amendments were intended to eliminate all racial discrimination arising from official actions. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

As pointed out in McLaughlin v. Florida, *supra*, racial classification has been held invalid in many cases: race was required to be designated in voting and property records (Virginia State Board of Elections v. Hamm, 379 U.S. 19, 85 S.Ct. 157, 13 L.Ed.2d 91 (1964)); designation of race on nomination papers and ballots (Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964)); racial segregation in public parks and playgrounds (Watson v. Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963)); segregation in the public schools (Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 and 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (1954)); segregation of the races in public transportation (Gayle v. Browder, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956)); and as a social practice even without sanction of ordinance or statute in public restaurants (Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963)); and in public swimming

areas. Baltimore v. Dawson, 350 U.S. 877, 76 S. Ct. 133, 100 L.Ed. 774 (1955). All were held repugnant to the constitution. If the Fourteenth Amendment stands for anything at all, it should be clear from these decisions that it stands for the principle that all discrimination based on race, religion, creed, color or ethnic background by any state, its constitutions, its subdivisions, or its agencies, is prohibited.

The majority concedes and the record is indisputable that Petitioner DeFunis was ousted from the list of acceptable students solely because of preference accorded others, and that this preference was granted to many solely becuase of race and ethnic origin. Even though there are many areas of public endeavor where it would be deemed a valid and constitutional exercise of the police power to provide special assistance for those segments of our population described as disadvantaged or poor, or culturally deprived, such special assistance could not constitutionally deprive Mr. DeFunis of a seat in the law school and award it to a member of a group whose existence is defined or controlled by considerations of race or ethnic origin. When the seat in the law school is awarded on the basis of race or ethnic origin, the procedure necessarily falls within the constitutional principles prohibiting racial segregation or preference. . . .

The rationale of Anderson v. San Francisco Unified School Dist. (N.D. Cal. 1972), an opinion dated October 30, 1972, filed in the United States District Court, Northern District of California, I think, expresses the principles which should govern the *DeFunis* case. That court held unconstitutional a school district's plan to give preference in employment and promotions to members of ethnic minorities in administrative and supervisory positions, such as principals, assistant principals, deans and heads of departments — a plan designed to increase the numerical representation of ethnic minorities in the administration of the schools. That court, in holding the scheme unconstitutional, said that "The key issue in this case is whether or not a classification which is based on race is valid," and answered it with a statement of principles which ought to control here:

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?

Mr. DeFunis came before the bar of the Superior Court much as did petitioners, parents of school children, in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), asking that he not be denied admission to the university law school because of race or ethnic origin. The trial court properly ordered his admission. So, too, would I, and, therefore, I would affirm.

HUNTER, J., concurs.

HUNTER, Justice (dissenting).

The majority supports a laudable purpose — to enable students of certain minority races to enter the University of Washington School of Law in order that ultimately there will be a greater representation of practicing lawyers of those races in the legal profession — with which purpose I do not disagree. This must not be accomplished, however, by clear and willful discrimination against students of other races as the Admissions Committee of the University of Washington School of Law has done in this case by denying admission to the respondent, Marco DeFunis, Jr., to this school, as found by the trial court and amply supported by the record.

This action by the Admissions Committee of the School of Law constitutes arbitrary and capricious action, flaunting the guarantees of the equal protection provisions to all citizens as provided in our state and federal constitutions.

The line of federal cases cited by the majority are not in point. They stand for the proposition that full opportunity for education be afforded to students of all races;

whereas, the present case denies the opportunity of education to students of one race to make room for students of other races and with lesser qualifications.

I would affirm the trial court, directing the Admissions Committee to admit the respondent, Marco DeFunis, Jr., to the University of Washington School of Law.

HALE, J., concurs.