DeFUNIS v. ODEGAARD: PREFERENTIAL LAW SCHOOL ADMISSIONS FOR RACIAL MINORITIES

> A[n] . . . objection that has been made to preferential admission standards is that the use of race or ethnicity as a factor in admissions decisions violates the Constitution. The courts have not yet been squarely faced with this claim, and in dealing with it we are therefore forced to proceed by analogy, piecing together decisions which have skirted the periphery of this sensitive and complex issue.[1]

In *DeFunis v. Odegaard*[2] the Supreme Court of Washington has provided American jurisprudence with its first excursion into the difficult constitutional area of preferential admission standards. Plaintiff, an unsuccessful applicant to the University of Washington School of Law, challenged the constitutionality of the policy and procedure that resulted in his being denied admission.

The University's express policy was to increase representation of disadvantaged racial minorities in the law school and the legal profession. To further this policy, the admissions committee adopted a "preferential" program for minorities that considered an applicant's racial background as one factor in the selection of students.[3] A "predicted first-year average" was computed for all applicants on the basis of college grades and Law School Admissions Test scores. The averages of minority applicants, however, were not directly compared with those of non-minority applicants. In a separate evaluation the admissions committee undertook to identify the minority applicants most likely to succeed in law school. As a result of this process, a

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1. O'Neil, *Perferential* [sic] *Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 705-06 (1971).

2. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated per curiam as moot*, 94 S. Ct. 1704 (1974). The United States Supreme Court's treatment of the case on certiorari is discussed in the Epilogue *infra*.

3. Policies granting preferential treatment to minority groups are commonly called "affirmative action" programs. The origins and nature of these programs have been discussed in Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*—DeFunis v. Odegaard, 49 WASH. L. REV. 1-7 (1973) [hereinafter cited as Morris].

number of minority applicants were admitted with predicted first-year averages lower than plaintiff's.[4] Based upon these facts, plaintiff maintained, *inter alia*,[5] that his denial of admission violated the equal protection clause of the fourteenth amendment. The Supreme Court of Washington held that the University's consideration of race as a factor in its admissions policy was not unconstitutional.[6]

The threshold issue raised in *DeFunis* is whether racial classifications are per se unconstitutional; that is, whether the equal protection clause mandates "color-blindness." Although the per se rule has been advocated by individual members of the United States Supreme Court in various contexts, it has never been expressly adopted by a majority.[7] Limited support for this position may be found in *Brown v. Board of Education*[8] and in subsequent per curiam decisions invalidating racial classifications.[9] While the *Brown* opinion focused heavily on the "inherent inequality" of segregated school systems, per curiam decisions of the Court have relied on *Brown* to invalidate

4. The predicted first-year average was not the sole criterion employed by the admissions committee. Nonetheless, the trial court found that plaintiff was "better qualified" than many of the minority applicants admitted, and this finding does not appear to have been challenged by the University on appeal. 82 Wash. 2d at ....., 507 P.2d at 1176-77.

5. Plaintiff also raised two secondary arguments. First, he maintained that the law school's consideration of race and deviation from the numerical ranking of applicants constituted arbitrary and capricious administrative action. The court ruled that plaintiff had failed to carry his burden of proof on this issue. *Id.* at ....., 507 P.2d at 1185-87. Secondly, plaintiff argued that the University was required to give preference to Washington residents over non-residents. This argument was based on article 9, section 1 of the state constitution, regarding the duty of the state to provide education for resident children, and on certain statutory provisions that differentiated between residents and non-residents for various purposes including the receipt of state aid. The court held that article 9 did not apply to the University of Washington and that the statutes did not require that preference be given to state residents with regard to admission. *Id.* at ....., 507 P.2d at 1187-88.

6. *Id.* at ....., 507 P.2d at 1184-85.

7. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring) (state anti-miscegenation statute); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart & Douglas, JJ., concurring) (state anti-interracial cohabitation statute); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting) (alleged discriminatory administration of state pilotage laws); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (state statute requiring "equal but separate accommodations" for white and black railway passengers).

8. 347 U.S. 483 (1954), *order entered*, 349 U.S. 294 (1955).

9. *See* cases cited notes 10-14 and accompanying text *infra*.

segregated public parks,[10] golf courses,[11] courtrooms,[12] buses,[13] and beaches[14] in cases containing little evidence of inherent inequality.

Many commentators, however, suggest that these cases merely prohibit de jure segregation of the races with regard to public facilities and are not dispositive of cases involving purposeful integration by racial classification.[15] Lower court decisions, moreover, have consistently rejected the notion that racial classifications are per se impermissible. Racially-conscious programs have been permitted when there is a constitutional obligation to eliminate de jure segregation.[16] In *North Carolina State Board of Education v. Swann*[17] the Supreme Court invalidated a state statute proscribing school bussing assignments made on the basis of race. The Court stated: "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."[18]

The question remains whether racial classifications are permissible as part of a *voluntary* program to eliminate racial imbalance. Although the Supreme Court has not ruled on the issue,[19] lower courts have allowed school boards considerable discretion in establishing voluntary programs employing racial classifications to eliminate de

10. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, *aff'g per curiam* 252 F.2d 122 (5th Cir. 1958).

11. Holmes v. City of Atlanta, 350 U.S. 879, *vacating per curiam* 223 F.2d 93 (5th Cir. 1955).

12. Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam).

13. Gayle v. Browder, 352 U.S. 903, *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956).

14. Mayor & City Council v. Dawson, 350 U.S. 877, *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955).

15. *See* L. HAND, THE BILL OF RIGHTS 54-55 (1958); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969); *cf.* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959).

16. *See, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

17. 402 U.S. 43 (1971).

18. *Id.* at 46.

19. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23 (1971).

facto school segregation.[20] No federal court of appeals or highest state court has applied the per se rule to invalidate governmental efforts to reduce racial imbalance in the schools.[21]

A significant distinction between school desegregation cases and the problem of preferential admissions must not be overlooked. The object of school integration is simply to provide *all* individuals with an equal educational opportunity, and thus "the use of the racial classification . . . impose[s] no constitutionally cognizable detriment upon any person because of his or another's race."[22] Preferential admissions, however, given the inability of institutions of higher education to enroll all applicants, clearly impose a detriment—the denial of admission.[23]

Yet, recent cases indicate that the imposition of a detriment is not determinative. Policies that favor minorities have been upheld even when they have deprived non-minorities of benefits. In *Porcelli v. Titus*,[24] for example, a school board suspended the ordinary teacher promotion schedule in order to give priority to black candidates. Sustaining this action, the Third Circuit concluded: "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."[25] Similarly, in *Simmons v. Eagle Seelatsee*[26] the Supreme Court upheld Congress' use of a racial classification to establish preferential inheritance rights for certain American Indians, notwithstanding the obvious imposition

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20. *E.g.*, Offermann v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378 F.2d 22 (2d Cir. 1967); Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), *vacated on other grounds*, 351 F.2d 323 (3d Cir. 1965), *adhered to on the merits*, 250 F. Supp. 81 (D.N.J. 1966); Guida v. Board of Educ., 26 Conn. Supp. 121, 213 A.2d 843 (Super. Ct. 1965); Strippoli v. Bickal, 16 N.Y.2d 652, 209 N.E.2d 123, 261 N.Y.S.2d 84 (1965); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied*, 382 U.S. 905 (1965); Van Blerkom v. Donovan, 15 N.Y.2d 399, 207 N.E.2d 503, 259 N.Y.S.2d 825 (1965); 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).

21. P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS 1140 (3d ed. 1967).

22. Morris 6-7.

23. *Id.* at 7.

24. 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

25. 431 F.2d at 1257.

26. 384 U.S. 209 (1966), *aff'g per curiam* 244 F. Supp. 808 (E.D. Wash. 1965) (three-judge court).

of a detriment upon other individuals.[27] Given these and other cases acknowledging the use of racial classifications,[28] the *DeFunis* court's rejection of the per se rule would appear to be well supported by the judicial decisions most directly in point.

Once a court finds that a racial classification is not per se unconstitutional, as did the *DeFunis* court, the question still remains by what equal protection standard the constitutionality of the racial classification should be measured. The preponderance of case law indicates that racial classifications are "suspect" and must withstand a "very heavy burden of justification."[29] This strict standard of review imposes upon the state the burden of demonstrating two elements. First, the state must show that a legitimate and important state interest is served by the classification.[30] This requisite state interest is often described as "overriding" or "compelling," particularly when racial classifications are involved.[31] Secondly, the state must show a high degree of relevance between the suspect classification and the state interest. When racial and other suspect classifications are involved, a mere rational relationship between the classification and the state interest is deemed insufficient to satisfy the strict standard of review.[32] Rather, the state must demonstrate that the racial classification is a "necessary" means of implementing the governmental purpose, *i.e.*, that feasible non-racial alternatives are not available.[33]

Several commentators have questioned the application of the strict standard of review to racial classifications designed to redress the

27. 244 F. Supp. at 815. The federal statute provides that "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 . . . [the] estate of a deceased member of such tribes . . ." and thus works to the detriment of all other natural heirs. Act of August 9, 1946, ch. 933, § 7, 60 Stat. 969, *as amended*, 25 U.S.C. § 607 (1970) (emphasis added).

28. Korematsu v. United States, 323 U.S. 214 (1944); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); Hamm v. Virginia Bd. of Elections, 230 F. Supp. 156 (E.D. Va.) (three-judge court), *aff'd sub nom.* Tancil v. Woolls, 379 U.S. 19 (1964).

29. Loving v. Virginia, 388 U.S. 1, 9-11 (1967); *see* McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

30. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1104 (1969) [hereinafter cited as *Developments in the Law*].

31. *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

32. *E.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967).

33. *Developments in the Law* 1101-02.

effects of past discrimination.[34] One alternative is to subject "benign" racial classifications to a less rigid standard of review, perhaps even the more permissive "rational relationship" test normally applied to economic regulations.[35] Convincing arguments have been made on both sides of this issue. It has been noted that the less stringent rational relationship test would permit greater governmental flexibility in formulating remedial programs for minorities.[36] Moreover, the traditional rationales for applying the strict standard arguably do not apply when racial classifications are designed to benefit disadvantaged minorities.[37] Those opposed to a permissive standard of review maintain that racial classifications call for strict judicial scrutiny because they offend traditional notions of individualism, weaken the government as an educative force, and are inherently divisive.[38] The stricter standard would also require the courts to determine whether a particular use of a racial classification was truly benign[39]—an inquiry that becomes especially problematic when the classification works to the detriment of certain persons, as do preferential admissions.[40]

An examination of pertinent case law does not reveal by what standard ostensibly benign racial classifications should be measured. Courts that have dealt with voluntary programs to end de facto school segregation have not clearly articulated an applicable standard of review.[41] Even when the language of their opinions indicates application of the strict standard of review, courts have not required the state to demonstrate the absence of non-racial alternatives.[42] Instead,

34. *See* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1965); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U.L. REV. 363 (1966); Navasky, *The Benevolent Housing Quota,* 6 How. L.J. 30 (1960); O'Neil, *supra* note 1.

35. *See Developments in the Law* 1108.

36. *Id.*

37. *Id.* at 1107-08.

38. Kaplan, *supra* note 34, at 375-79.

39. *Developments in the Law* 1114.

40. *See* notes 22-23 and accompanying text *supra.*

41. *Developments in the Law* 1108; *see, e.g.,* Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed,* 389 U.S. 572 (1968); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); 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).

42. *See, e.g.,* Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); 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).

benign racial classifications have been readily accepted as necessary to the governmental objective of eliminating racial imbalance.[43]

Thus, the remedial purpose of state action may affect the degree of judicial scrutiny,[44] and past decisions do not foreclose the possibility of applying the more permissive rational relationship test to benign racial classifications. For this reason, one writer concluded that "the choice between the different standards of review may well be the critical factor in the decision of the constitutionality of some measures involving benign racial classifications."[45]

In *DeFunis,* however, the court's application of the strict standard of review did not prove fatal to the University's admissions policy. The court found that the policy of considering race as a factor in a preferential admissions program for minority students met both elements of the strict standard—the compelling state interest and the requisite high degree of relevance. The University's objective was to remedy underrepresentation of racial minorities in the law school and the legal profession. The court found that this objective met the state interest requirement of the strict scrutiny test.[46] In de facto school segregation cases, courts have consistently upheld voluntary policies designed to ameliorate racial inequality.[47] A few months before *DeFunis,* the Supreme Court of Washington acknowledged the state interest in voluntary programs of bussing school children in order to eliminate racial imbalance in public schools.[48] Courts have also recognized, at least implicitly, the important state interest served by racially-conscious corrective programs in other contexts—most notably grand jury selection,[49] urban renewal relocation,[50] and governmental hiring of minorities.[51] Furthermore, numerous reports and individual commentators have testified to the severe underrepre-

43. Offermann v. Nitkowski, 378 F.2d 22, 23 (2d Cir. 1967).

44. *See generally* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Katzenbach v. Morgan, 384 U.S. 641 (1966).

45. *Developments in the Law* 1107.

46. *See* text at note 30 *supra.*

47. *See* note 20 and accompanying text *supra.*

48. State *ex rel.* Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972).

49. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

50. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

51. Contractors' Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

sentation of minorities in law schools and the legal profession and to the urgent need for government to undertake remedial programs.[52] Finally, the *DeFunis* court noted that racial balance in law schools would facilitate the state's educational interest in ensuring that "lawyers . . . be cognizant of the views, needs and demands of all segments of society."[53]

The court's opinion seems least persuasive in its examination of the requisite high degree of relevance between the University's consideration of race and its objective.[54] Applying the strict standard of review, the court required that the use of race as a factor in admissions be "necessary" to the University's objective and inquired, albeit briefly, into possible non-racial alternatives.[55] In arguing that the minority admissions policy did meet the test of necessity, the court relied on *Brown v. Board of Education*[56] and on the statement in *Green v. County School Board*[57] calling for a remedial plan that "promises realistically to work *now*."[58] These cases established the affirmative constitutional duty to eradicate de jure segregation, and, therefore, their relevance to voluntary actions, such as preferential admissions for minorities, is limited.

The *DeFunis* court's conclusion that "[n]o less restrictive means would serve the governmental interest here"[59] does find some support in secondary material. After examining alternatives such as greater reliance on black colleges, expansion of junior colleges, use of "open" admissions, and preferential treatment based on general disadvantage, one commentator reached the conclusion that "there is no effective substitute for the explicit use of race as a preferential criterion for most colleges and universities."[60]

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52. REPORT OF BLACK LAWYERS AND JUDGES IN THE U.S., 1960-70, 116 CONG. REC. 30786 (1970); Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 MICH. L. REV. 1407 (1971); Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069; Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. TOL. L. REV. 321.

53. 82 Wash. 2d at ....., 507 P.2d at 1183.

For the suggestion that preservation of the public peace constitutes another compelling state interest in the *DeFunis* context see Morris 42-44.

54. *See* text following note 31 *supra*.

55. 82 Wash. 2d at ....., 507 P.2d at 1184.

56. 347 U.S. 483 (1954), *order entered*, 349 U.S. 249 (1955).

57. 391 U.S. 430 (1968).

58. *Id.* at 439.

59. 82 Wash. 2d at ....., 507 P.2d at 1184.

60. O'Neil, *supra* note 1, at 747.

Authority to the contrary, however, is equally abundant.[61] It is argued, for example, that remedial action based directly on prior disadvantage would effectively correct racial imbalance without the inherent divisiveness of racial classifications.[62] Greater effort in recruitment and financial aid is also proposed as an alternative to preferential minority admissions.[63] Because of this sharp disagreement among authorities and the lack of relevant judicial precedent, the issue of non-racial alternatives may have warranted greater attention and exposition by the *DeFunis* court.[64]

In summary, the Washington supreme court's resolution of *DeFunis* was complicated by three factors. First, *DeFunis* is the first judicial encounter with a state university's use of an admissions policy based in part on racial factors. Secondly, prior to *DeFunis*, courts had not clearly articulated the equal protection standard to be used in reviewing purportedly benign racial classifications. Thirdly, the court faced the difficult task of achieving a sensitive balance between the need for governmental flexibility in formulating racially remedial policies and the creation of a constitutional doctrine that is not susceptible to abuse.[65]

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61. For an extensive discussion and evaluation of various law school admissions policies see *Symposium*, 1970 U. TOL. L. REV. 277.

62. *See* Vieira, *supra* note 15, at 1617.

63. *Cf.* Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 353 (1970).

64. Consider, however, one writer's suggestion that the factual record before the *DeFunis* trial court was insufficient for a full evaluation of alternative measures. 52 B.U.L. REV. 304, 308 (1972).

Another writer has asserted that the Washington supreme court's opinion was deficient with respect to a related issue—whether the law school's definition of the minority group members entitled to its admissions preference was constitutionally sufficient. Morris 47-51. A definition of a class that does not encompass those members who are "similarly situated," *i.e.*, that is under- or over-inclusive, ordinarily will not be permitted under the strict standard of review. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). The law school limited its admissions preference to certain designated minority groups. It provided no criteria for determining whether an individual qualified as a member of one of the groups, and applicants were simply allowed to categorize themselves. 82 Wash. 2d at ....., 507 P.2d at 1173-74. The *DeFunis* court specifically found: "In light of the purpose of the minority admissions policy, the racial classification need not include all racial minority groups." *Id.* at ....., 507 P.2d at 1184. Yet, the court did not address itself to the lack of criteria for ascertaining minority group membership.

65. Vieira, *supra* note 15, at 1617.

In light of these factors, the *DeFunis* court's clear articulation of an applicable standard is by itself of considerable value. Further, the court's decision produces a reasonable compromise between conflicting concerns: it allows the state a certain degree of freedom to initiate voluntary plans designed to remedy severe racial imbalance in state schools, and, at the same time, the court's application of the strict standard of review guards against governmental abuse of racial classifications in the effort to achieve racial balance.

In two respects, however, the *DeFunis* court's development of equal protection doctrine warrants cautious consideration. Courts have been imprecise in articulating and lax in applying the strict standard of review to purportedly benign racial classifications.[66] The danger therefore exists that the strict standard may become merely a nominal legal doctrine with its efficacy impaired when applied to the challenge of non-benign racial classifications. At the other extreme, vigorous application of the strict standard might seriously undermine governmental attempts to rectify past deprivation based on race. If either of these developments occurs, the options of applying the less stringent standard of review or of formulating a special intermediate standard for racially-conscious remedial programs should be seriously considered.*

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66. *See* notes 41-43 and accompanying text *supra.*

*EPILOGUE

In November 1973 the United States Supreme Court granted plaintiff's petition for a writ of certiorari. DeFunis v. Odegaard, 414 U.S. 1038 (1973). Five months later the Court rendered a per curiam opinion holding that the case was moot and vacating the judgment of the Supreme Court of Washington. DeFunis v. Odegaard, 94 S. Ct. 1704 (1974). Plaintiff had been admitted to the law school in accordance with the trial court's decree and had remained enrolled by virtue of a stay of the Washington supreme court's judgment. Thus, as the case came before the United States Supreme Court, plaintiff was enrolled for the final quarter of his law school career, and evidence in the record indicated that he would be permitted to graduate regardless of the outcome of the appeal. *Id.* at 1704-06. On these grounds, the Court concluded that it could not, "consistently with the limitations of Article III of the Constitution, consider the substantive constitutional issues tendered by the parties." *Id.* at 1707.

Four members of the Court dissented. In an opinion joined by Justices Douglas, White and Marshall, Justice Brennan considered applicable the principle that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case," *Id.* at 1721, *quoting* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968), and therefore objected to "the Court's straining to rid itself of this dispute." 94 S. Ct. at 1722.

Only Justice Douglas, in a separate dissenting opinion, discussed the merits of the case. He strongly emphasized the conclusion that state law school applications must be considered *"in a racially neutral way."* *Id.* at 1714, 1716. Thus, Justice Douglas would not permit admissions preference to be accorded solely on the basis of race. *Id.* at 1713. Yet he would condone an admissions policy that took into account disparate cultural backgrounds as well as possible biases in undergraduate records and the Law School Admission Test. *Id.*

The legal rationale by which Justice Douglas reached this conclusion is somewhat difficult to discern. As this Comment has indicated, racial classifications may be held unconstitutional on several grounds: that they are per se impermissible, that the state did not establish a compelling interest, or that non-racial alternatives were available. Apparently, Justice Douglas considers no state interest sufficiently important to justify differences in racial treatment when mental ability and professional competition are involved. He stated: "So far as race is concerned, any state sponsored preference to one race over another in that competition is in my view 'invidious' and violative of the Equal Protection Clause." *Id.* at 1719. This language may suggest that Justice Douglas embraces the theory that racial classifications are per se impermissible in most contexts. As examples of the few contexts in which racial discrimination might be justified, Justice Douglas noted "racial strains, racial susceptibility to certain diseases, [and] racial sensitiveness to environmental conditions that other races do not experience . . . ." *Id.*