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fauver Act, and as evidenced by the instant case, it is not the mere understanding of this approach, but rather its application which will best resolve such questions in the future.

> *As always,* resolution of a question of antitrust illegality *requires us* to describe the companies involved, *analyze the product and geographic market in which they compete,* and *explore the structure of the industry affected* by the merger, *to the end that we may properly assess the probable effects of the merger on competition.*[82]

Gregory A. Mazza

CONSTITUTIONAL LAW—Equal Protection—A State-Operated Law School May Grant Special Consideration To Minority Applicants In Selection Of Students

De Funis v. Odegaard, 507 P.2d 1169 (Wash. 1973).

Marco DeFunis applied for admission to the University of Washington School of Law class commencing in September, 1971. The school's general evaluation procedure for ranking applicants was an index called the Predicted First Year Average (PFYA). The PFYA was computed on the basis of a formula which included the applicants' grade point averages for their junior and senior years of undergraduate study, together with their scores on the Law School Admission Test. In addition, and as an exception to the PFYA standard, the school had a policy of preferential admissions for certain racial and ethnic minority groups. Such applicants were considered as a separate category, without correlation of their PFYA's to those of other applicants. In accordance with this policy, many minority applicants were accepted even though their PFYA's were lower than some white applicants who were rejected. Significantly, there were 44 minority students accepted, 38 of whom had lower objective qualifications than DeFunis. Some of these had college grades and LSAT scores so deficient that, had they not been members of a minority group, their applications would have been summarily denied. DeFunis brought suit against the University and certain of its officers, and the trial court ordered his admission, ruling that he had been discriminated against in violation of the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Defendants brought this appeal, contending that their preferential admissions policy was a necessary step in elevating minorities to a position of meaningful representation in

82. Stanley Works v. FTC, 469 F.2d 498, 499 (2d Cir. 1972), *cert. denied,* 41 U.S.L.W. 3634 (U.S. June 5, 1973) (emphasis added).

law schools and in the legal profession. Held—*Reversed.* A state-operated law school may, in consonance with the equal protection provisions of the United States Constitution, consider the racial or ethnic background of applicants as one factor in the selection of students.[1]

The issue confronted in *DeFunis* was one of first impression for the Washington Supreme Court. Inasmuch as the decision involved an interpretation of the bounds of the equal protection provision of the fourteenth amendment,[2] the court sought to base its decision upon an analysis of prior federal court decisions pertinent to the problem.[3]

The history of racial discrimination in modern education is rooted in a case which actually involved discrimination in the field of common carriers. In *Plessy v. Ferguson,*[4] the constitutionality of a statute calling for separate but equal facilities for blacks and whites to be provided by common carriers was upheld by the United States Supreme Court. This result was achieved despite the vigorous dissent of Justice Harlan, who contended that the laws must be, in effect, color blind.[5] This "separate but equal" doctrine was widely applied in the field of public education.[6] But 50 years experience with its inequities culminated in *Brown v. Board of Education,*[7] which specifically overruled the concept as it applied to public education,[8] and observed that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[9]

The interpretation and application of *Brown* resulted in a plethora of litigation, much of it relating to the methodology of integration. In *Green v. County School Board,*[10] the Court held that there existed an affirmative duty on the part of school boards to create integrated high schools, and that a mere relaxation of policies enforcing segregation was insufficient. Subsequent cases further considered the necessity for expediting integration,[11]

1. De Funis v. Odegaard, 507 P.2d 1169, 1184 (Wash. 1973).
2. U.S. CONST. amend. XIV, § 1 states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
3. De Funis v. Odegaard, 507 P.2d 1169, 1178-84 (Wash. 1973).
4. 163 U.S. 537 (1896).
5. *Id.* at 554. Harlan argued:
In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.
6. *E.g.,* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927).
7. 347 U.S. 483 (1954).
8. *Id.* at 495.
9. *Id.* at 493.
10. 391 U.S. 430 (1968).
11. *E.g.,* Alexander v. Board of Educ., 396 U.S. 19 (1969).

and the steps available for implementation.[12] Two cases involving racial discrimination in a state law school, one decided prior to *Brown* and one subsequently, reveal the changing posture of the Court. *Sweatt v. Painter*[13] concerned a plaintiff who had been denied admission to the University of Texas School of Law because he was black. The Court, following *Plessy*, ordered him admitted, not because unconstitutional discrimination was found, but because the defendant failed to prove that there were separate but equal facilities available for the plaintiff to attend.[14] The later case of *Florida ex rel. Hawkins v. Board of Control*,[15] drawing its support from *Brown*, held that a similarly situated black plaintiff was entitled to prompt admission to the University of Florida School of Law, under the same rules and regulations applicable to other qualified candidates, nothwithstanding the all-black facility at Florida A & M University.[16]

State enforced discrimination will not be considered unconstitutional in most cases if it has a rational basis.[17] When the discrimination or classification is made on a racial basis, however, it is constitutionally suspect, and subject to the closest scrutiny by the courts.[18] Several attempts at racial classification have been set aside as a result of this careful examination.[19] For a racial classification to be permitted, it must be shown to be necessary in order to carry out a compelling state interest.[20]

The court in *DeFunis* found a compelling state interest in the University of Washington's preferential admissions policy aimed at eliminating the underrepresentation of minorities in public law schools and in the legal profession.[21] The court's selection of cases to support the "compelling state interest" thesis, however, was inappropriate. Each of the three cases relied upon did in fact state that a compelling state objective could justify the imposition of

12. *E.g.*, Swann v. Board of Educ., 402 U.S. 1 (1971); Board of Educ. v. Swann, 402 U.S. 43 (1971) (an anti-busing statute was found unconstitutional); Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967).

13. 339 U.S. 629 (1950).

14. *Id.* at 636.

15. 350 U.S. 413 (1956).

16. *Id.* at 414.

17. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (statute involving a ban on Sunday retailing upheld). The court here stated that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426.

18. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (involving a ban on interracial cohabitation).

19. *E.g.*, Anderson v. Martin, 375 U.S. 399 (1964) found a law requiring designation of race on nomination papers and ballots unconstitutional, and unnecessary to a compelling state interest of informing the electorate as to candidates. Other contexts included Watson v. City of Memphis, 373 U.S. 526 (1963) (segregation in public parks and playgrounds); Virginia Bd. of Elections v. Hamm, 230 F. Supp. 156 (E.D. Va.), *aff'd*, 379 U.S. 19 (1964).

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

21. De Funis v. Odegaard, 507 P.2d 1169, 1182 (Wash. 1973).

a racial or ethnic classification.[22] In none of these decisions, however, was a compelling state interest found to exist,[23] thus leaving open the question of what constitutes such an interest. Furthermore, this line of authority comprises a "round robin" of mutual citation[24] with a common ground in *Korematsu v. United States*[25] and *Hirabayashi v. United States*.[26] The Supreme Court in both of these decisions permitted an ethnically discriminatory statute to stand, finding a compelling state interest at stake, but only because the nation was at war and the national security was threatened.[27] Such was the emergency required to render an interest vital enough to allow the deprivation of an individual's constitutional rights. For the court in *DeFunis* to rely on this line of decisions as justification for the racially preferential practice at issue, is to place increased minority participation in the legal profession on the same plane with safeguarding the national security.

Ample authority is available in federal court decisions for the theory that the consideration of race in school admissions may be justified in the interest of implementing an overriding state objective,[28] but there is a uniformly distingushing aspect in the cases announcing such a policy. In no instance is an identifiable individual or group deprived, by virtue of the racial classification, of any benefit or privilege to which another group is entitled. *Swann v. Board of Education*[29] and *Green v. County School Board*[30] are

22. Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

23. In *Loving*, a ban on interracial marriage was found not to be a compelling state interest; in *McLaughlin*, the prohibition of miscegenation was held not to be a compelling state interest; in *Hunter*, there was the same finding concerning a city charter amendment, regarding housing, which resulted in discrimination.

24. *McLaughlin* cites *Hirabayashi* and *Korematsu* as setting the norm for acceptable racial classifications (compelling state interest); *Loving* cites *Hirabayashi, Korematsu* and *McLaughlin* for the same purpose; and *Hunter* cites *Loving, McLaughlin, Korematsu* and Bolling v. Sharpe, 347 U.S. 497, 499 (1954), which, in turn, cites *Hirabayashi* and *Korematsu*. So all are based on the two World War II cases which established the compelling state interest doctrine in a time of national emergency.

25. 323 U.S. 214 (1944).

26. 320 U.S. 81 (1943).

27. *Id.* at 100.

> Distinctions between citizens solely because of their ancestry are . . . odious to a free people whose institutions are founded upon the doctrine of equality. . . . [C]lassification or discrimination based on race alone has often been held to be a denial of equal protection. We may assume that these considerations would be controlling here were it not for . . . [a] time of war and . . . threatened invasion.

In Korematsu v. United States, 323 U.S. 214, 218 (1944), the Court, speaking of laws ordering curfews against Japanese and ordering their exclusion from the vicinity of defense installations, said: "Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."

28. Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

29. 402 U.S. 1 (1971).

30. 391 U.S. 430 (1968).

relied on by *DeFunis* for the proposition that race may be a determining factor in the composition of a school's student body.[31] Such decisions, pertaining as they do to public high schools, are not in point. *DeFunis* recognized this, conceding that "none of the students there involved were deprived of an education by the plan to achieve a unitary school system."[32] Acknowledging this distinction, the court looked to an other field, that of discrimination in employment, to find cases in support of a policy of racial preference.[33] In *Porcelli v. Titus*,[34] a school board's decision to suspend the regular promotion list upon racial considerations was upheld, over the objections of white teachers who complained that priority in promotions had been given to blacks, in violation of equal protection. The Court of Appeals for the Eighth Circuit, in *Carter v. Gallagher*,[35] ordered the Minneapolis Fire Department to hire one qualified minority individual for every two whites hired, until such time as there were 20 minority persons employed. Upon a close analysis, however, these cases fail to give a judicial stamp of approval to preferential employment, as *DeFunis* implies.[36]

In *Porcelli*, though the promotion list in effect at the time was suspended on racial grounds, this action was taken because the list was formulated under a policy which was discriminatory against blacks. Subsequent to the suspension of the list, teachers were promoted on an objective basis, with no preference on account of race. The district court, in an opinion adopted by the court of appeals, specifically stated that it was satisfied that no discrimination against whites or preference for minorities existed, or it would not have upheld the school board's action.[37] *Porcelli*, then, is contrary in principle to the policy endorsed by *DeFunis*, rather than in accord with it.

Although *Carter*, in prescribing a one-to-two ratio in hiring for minority to nonminority applicants, appears to lend precedence to the preferential treatment approved by *DeFunis*, it is clearly distinguishable on at least two grounds. First, the preference in *Carter* was of brief duration, limited to the hiring of 20 minority persons.[38] To the degree the preference was permitted, its distinct purpose was to overcome the reluctance of minority individuals to apply for employment, and to give them confidence that they would be hired on more than a token basis,[39] since not one of their number had ever

31. De Funis v. Odegaard, 507 P.2d 1169, 1179-80 (Wash. 1973).
32. *Id.* at 1181.
33. *Id.* at 1181.
34. 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).
35. 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).
36. De Funis v. Odegaard, 507 P.2d 1169, 1181 (Wash. 1973).
37. Porcelli v. Titus, 302 F. Supp. 726, 733 (D.N.J. 1969).
38. Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).
39. *Id.* at 331; *i.e.*, the hiring of such a large number of blacks would instill in the black community the conviction that a true policy change had taken place, thus encouraging blacks to seek employment,

been hired by the Minneapolis Fire Department. Once this distrust was overcome by the hiring of the requisite number of minority persons, however, there was to be a return to a normal selection procedure for employment.[40] On the other hand, in *DeFunis*, where defendant university was already integrated, such a rationale did not exist; nor did the school place any limitations upon the advantageous position in which the minorities were placed, as did *Carter*. Secondly, *Carter* further justified its action by stating that the qualification examination for the fire department had not been shown to be an accurate gauge of the examinees' qualifications to be firemen.[41] Absent any validating evidence concerning the test, the court felt that there was no proof that "better qualified" whites would be bypassed in favor of less qualified minority applicants. *DeFunis* conceded that better qualified white applicants were bypassed, and only addressed itself to the question of constitutionality.[42] Again, *DeFunis* has relied heavily upon a case whose holding is inapposite to its own.

Taking another approach, *DeFunis* recognized the *Brown v. Board of Education*[43] decision as an obstacle, and rendered its own interpretation as to the true meaning of that opinion:

> *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.[44]

The implications of this line of reasoning are disturbing. Under the logic of *DeFunis*, virtually any type of racial discrimination against the majority race of the nation could be justified, on the ground that it is permissible as long as the majority is not marked with a badge of inferiority. By limiting the application of equal protection of the law to this "stigma" theory, *DeFunis* would effectively remove all but minority groups from the protection guaranteed to "all persons" in the Constitution.[45] The Supreme Court did state in *Brown* that a segregated school system constitutes invidious discrimination, and that it fixes the black minority with a mark of inferiority.[46] But the Supreme Court has not limited its findings of "invidious discrimination" to cases pertaining to racial "stigmatization". The two are not coextensive, as suggested by *DeFunis*. There is a long line of decisions finding invidious

40. *Id.* at 331.
41. *Id.* at 331.
42. De Funis v. Odegaard, 507 P.2d 1169, 1178 (Wash. 1973).
43. 347 U.S. 483, 493 (1954); *i.e.*, that public education must be made available equally to all regardless of race.
44. De Funis v. Odegaard, 507 P.2d 1169, 1179 (Wash. 1973).
45. U.S. CONST. amend. XIV, § 1.
46. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

discrimination in areas unrelated to race.[47] In the incipient steps of civil rights litigation, it was felt that the fourteenth amendment afforded protection only to blacks;[48] but that misconception has long since been overruled, and that protection is considered to be personal to each citizen, without regard to race or ethnic group.[49]

DeFunis purported to follow prior authority, and to apply it analagously to its own unique circumstances. In actuality, the court departed radically from the existing body of law. The court drew from decisions whose goal was to end unequal treatment of one group, and manipulated them to justify discriminatory behavior against others. *DeFunis* cited cases supposedly permitting preferential hiring, while ignoring the Civil Rights Act of 1964, which refused to require preferential treatment because of race.[50] The Supreme Court, interpreting the Act in *Griggs v. Duke Power Co.*,[51] said:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[52]

In addition to the constitutional obstacle presented by awarding preferential treatment to some at the expense of others, there is some doubt as to its validity as good public policy.[53] Although the adequate representation of minorities in the legal profession is a worthwhile goal, the means used may result in a tarnishing of the accomplishment once achieved. Lowering academic standards for minority persons in law or other professional schools would call into question the legitimacy and credentials of every minority graduate.[54]

In retrospect, the Supreme Court did face the situation which confronted the court in *DeFunis*, and has provided pertinent precedent. In *Florida ex rel. Hawkins v. Board of Control*,[55] a plaintiff stood before the Court as a United States citizen deprived of a benefit for which he was qualified equally with

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47. *E.g.*, Harper v. Board of Educ., 383 U.S. 663 (1966), which held that a poll tax created an invidious discrimination on the basis of wealth; Carrington v. Rash, 380 U.S. 89 (1965), which held that denying a soldier the right to vote because of a residence requirement imposed an invidious discrimination.

48. Strauder v. West Virginia, 100 U.S. 303, 306 (1879); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

49. Adickes v. S.H. Kress & Co., 398 U.S. 144, 169 (1970); Shelley v. Kraemer, 334 U.S. 1, 22 (1948); United States v. Texas Educ. Agency, 467 F.2d 848, 852 (5th Cir. 1972).

50. 42 U.S.C. § 2000e-2(j) (1970).

51. 401 U.S. 424 (1971).

52. *Id.* at 430-31.

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

54. *Id.* at 356.

55. 350 U.S. 413 (1956).