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DeFunis Is Moot - The Issue Is Not

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The Supreme Court by 5/4 vote on April 23, 1974 held DeFunis moot. Since, Marco DeFunis would graduate from the University of Washington School of Law. And it remains unclear whether law school admissions must be racially neutral or whether for certain objectives, e.g., to bring about greater diversity in classes and in the profession, they may be racially conscious.

Only Mr. Justice Douglas, dissenting, spoke to the merits in DeFunis. He found that racial neutrality in admissions is required by the Equal Protection Clause. It was not clear to Mr. Justice Douglas, from the record, whether DeFunis was discriminated against because of his race. Thus, said Douglas, the case should be remanded for a new trial to determine whether the law school’s selection was racially neutral.

Among the new trial issues, he said, should be the question whether the LSAT can appropriately be used for minorities. As possible alternatives, he suggested a substitute test (which would probe openly into an applicant’s cultural background and relation to groups). He recommended the use of interviews, summer programs, consideration of prior achievements in light of racial discriminations that may have barred the way, and the likelihood that a particular candidate will employ his or her legal skills to service communities now inadequately represented. “Conceivably,” he said, “an admissions committee might conclude that a selection by lot of say the last 20 seats is the only fair solution.”

Since only one member of the Court has spoken to the merits, positions taken in the briefs retain vitality as sources for deliberation. The Editor.

When the applicants for admission to an entering class greatly outnumber the available places, the admissions officers must ask not only (1) does the applicant have the qualifications necessary for admission if space is available, but also (2) if qualified, should he or she be selected in preference to the other qualified candidates who must be rejected. The first question can usually be answered by reference to more-or-less objective measures of scholastic promise and accomplishment. The same or different or partially-overlapping criteria may be set up for the process of selection.

The choice of criteria for selection depends upon educational judgments concerning the quality of education the institution wishes to offer. A given

Please turn to page 18)

BY ARCHIBALD COX
Amicus Curiae, for Harvard University Law School
THE ISSUE IS NOT

THE CRITICAL QUESTION: WAYS BE COLOR BLIND?

SUMMARY OF ARGUMENT
Marco DeFunis was not permitted to compete for all of the places in the entering class of the University of Washington Law School. He was excluded solely because of his race from a significant number of places which were set aside and reserved for other races. Had DeFunis been black, Indian, Chicano or Philippine, such exclusion would have been unconstitutional. (Indeed if DeFunis were any of these, most of those appearing against him here would be his champions instead of his adversaries.) If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on racial grounds. For it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.

For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. This is the classic hard case making very bad law.

A state-imposed racial quota is a per se violation of the Equal Protection Clause because it utilizes a factor for measurement that is necessarily irrelevant to any constitutionally acceptable legislative purpose. A racial quota is a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit.

There was a finding by both courts below that the State of Washington used racial criteria to exclude DeFunis from admission to the State's law school. Exclusion from a state law school on the basis of race has long since been declared by this Court to be unconstitutional.

The only justification for use by a state of a racial classification is its use to cure or alleviate specific, (Please turn to page 19)

BY ALEXANDER M. BICKEL & PHILIP B. KURLAND
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institution might wish simply to select students at the highest intellectual capacity, measured by scholastic records and potential. Another institution might wish to give substantial weight to superior intellectual qualifications in filling all the places in the class—say 40 percent weight—but conclude that an equally marked superiority in other important qualities should be enough to offset them. At Harvard College experience has convinced admission authorities that if promise of high scholarship were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and the quality of the educational experience offered to all students would suffer.

The Equal Protection Clause does not impose an iron rule of "color-blindness." Prior opinions of this Court recognize that assigning minority students to a particular school in the same proportion to its student body as the minority bears to the whole population "as an educational policy" is "within the broad discretionary powers of school authorities" (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)). The Equal Protection Clause looks to equal treatment of the members of the identifiable groups composing society, not to disregard of the special characteristics of their members. An admissions policy that purposefully excludes members of a disadvantaged minority, segregates them or limits their number, asserts their inferiority to the predominant groups and therefore constitutes "hostile" or "invidious," and unconstitutional discrimination. An admissions policy that includes members of disadvantaged minorities in order to improve the education offered all students, carries no "hostile" or "invidious" implication. When an inclusive policy is conscientiously followed, race or color is a helpful but not invariably reliable indicator of special social, economic or cultural background and experience likely to carry their own varieties of talent, outlook and interests. The fact that race or color is only one of many highly personal characteristics used as a basis for judgment in preferring some qualified applicants over others in the inescapable process of selection helps to minimize any danger that such attention will be or be seen as "invidious."

Because giving attention to disadvantaged minority status in including minorities as a means of obtaining the diversity which raises the quality of education is not "hostile" or "invidious," it can be justified without "compelling purposes." Obviously, the distinctions thus drawn are not arbitrary or capricious. The objective of improving education for all students is permissible and non-discriminatory. The means is reasonably adapted to the objective. Should it be held that any notice of race requires a "compelling" justification, then we submit that seriously seeking to improve the non-discriminatory educational opportunities afforded all students is such a purpose.

II.

Definition of community needs and choice of emphasis in filling them is a central aspect of educational policy-making at any institution of higher learning. An institution's choice of the criteria to use in the selection of an entering class from a larger number of qualified applicants will be deeply influenced by its choice of ultimate objectives. In recent years many institutions of higher education have determined that their objectives should include removing the special obstacles facing disadvantaged minority groups in access to higher education, business and professional opportunities, and professional services—obstacles which are deeply ingrained consequences of the hostile public and private discrimination pervading the social structure. Giving favorable weight to minority status in selecting qualified students for admission is an important method of reducing these disadvantages.

Neither the pursuit of this objective nor the means adopted is beyond the scope of educational policy-making discretion under the Equal Protection Clause. The Equal Protection Clause does not prohibit all racially-conscious government activity, but only that which is "hostile" or "invidious" towards minorities without compelling justification; or which occurs in relation to a "fundamental right" without compelling justification; or which falls under the general constitutional ban against arbitrary or capricious classification. Giving an advantage in law school admissions in order to reduce the disadvantages suffered by members of minority groups long subject to pervasive discrimination, is neither "hostile" nor "invidious." Legal education is not a "fundamental right." Nor is counting membership in a disadvantaged minority arbitrary or capricious. Offsetting the disadvantages is a permissible object of state policy. Giving favorable weight to membership in a disadvantaged minority in the process of admissions is so plainly related to reducing the disadvantages which blacks, chicanos, American Indians and other minorities suffer in access to higher education and career opportunities and in securing legal services as

(Please turn to page 20)
illegal racial discrimination. There is no basis in this record even to suggest earlier illegal racial discrimination to be remedied by the racial quota adopted by the law school here.

Even if a racial quota were not, *per se*, a violation of the Equal Protection Clause, like any racial classification it was not available for use by a state in the absence of a "compelling state interest." There is no "compelling state interest" shown on this record.

ARGUMENT

The Racial Quota Utilized by the Law School of the University of the State of Washington Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The facts have been set out in detail in the above Statement in order to reveal the true nature of the racial quota system for admissions adopted by the University of Washington Law School. The size of the class was fixed within approximately five places. There was no suggestion that class size was expandable. (St. 115; 333-34.) Minority and majority applicants, as those terms were defined by the law school, went through separate, segregated admission procedures. (St. 351; 359; 399; 402.) As the chairman of the admissions committee stated: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate consideration." (St. 344.) The most desirable students were chosen within each of the two groups. (St. 353; 420.) But the candidates in one group were never considered in competition for the places allotted to the other group. (St. 353; 399.) The number of places allotted to minority applicants was changed from year to year by as inconspicuous a decision as possible. But a quota is no less a quota because it is not labelled as such or because it is subject to annual adjustment. (St. 416; 420.)

The use of the quota system—the segregation of two groups of applicants by race with admission for each group limited to its assigned numbers—makes it clear that this is not simply a case where race was used as one among many factors to determine admission. Instead, the law school used race as the criterion for imposing entirely separate admissions procedures. The class that entered the University of Washington Law School in 1971 was in fact two classes, distinguished in terms of racial attributes, one of "minority" students and the other of "majority" students, recognized and chosen as such by the University. To the extent that a place was assigned to one group, it was inaccessible to a student from the other group. What was demonstrated by the law school here was not a form of integration of races but rather a form of segregation of the races.

Never, since this Court struck down what Mr. Roy Wilkins has called a "zero quota" (N. Y. Post, 3 March 1973) in *Brown v. Board of Education*, 347 U.S. 483 (1954), has a racial quota been approved by this Court. Both proponents and opponents of integration have recognized such quotas as *per se* violations of the Equal Protection Clause that cannot be justified. That is why respondents try to assert that what is involved here is not a "quota." For a quota is not merely a racial classification. It is an attribution of status—of caste—fixed by race. A quota necessarily legislates not equality, but a governmental rule of racial differences without regard to an individual's attributes or merits.

This is made clear by the fact that the "minority" applicants were not judged by different criteria for admission than were applied to the "majority" candidates. The predictive factors for measuring potential success in law school were the same for both groups. What was different was the law school's ruling that "minority" candidates, because of their race, could not be expected to meet the higher standards established for "majority" students, without any regard to be given to individual capacities. Here lies the inherent evil of quotas that reverse the objective of Anglo-American democracies to move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society.

I. Any Racial Classification by a State is Presumptively Invalid Under the Equal Protection Clause of the Fourteenth Amendment.

A generation ago, this Court held that the exclusion of a black applicant from a state university law school solely because of his race was a violation of the Equal Protection Clause. *Sweatt v. Painter*, 339 U.S. 629 (1950). The Court is, nevertheless, asked here to hold that the exclusion of a non-black applicant from the law school of the State of Washington, solely because of his race, is a valid racial classification. We respectfully submit that the rule of equality mandated by this Court in *Sweatt v. Painter* compels the reversal of the judgment of the Supreme Court of Washington in this case.

It has long been established that a racial classification imposed by "official state sources," *Loving v. Virginia*, 388 U.S. 1, 10 (1967), is presumed to be invalid under the Equal Protection Clause.

(Please turn to page 21)
to be not only reasonable but to satisfy the "compelling interest" test.

Affirmance would establish the rule only where the inequalities of opportunity are plain beyond dispute and only in situations in which giving weight to minority status does not increase the ratio of minority students to all students significantly beyond the ratio of minority groups to the whole population from which the entering class is drawn. Nor does the case require decision upon the constitutionality of fixing specific racial, ethnic, linguistic or national quotas.

ARGUMENT

I.

THE ADMISSIONS OFFICERS OF A STATE UNIVERSITY MAY GIVE FAVORABLE WEIGHT TO MEMBERSHIP IN A DISADVANTAGED MINORITY GROUP AS A MEANS OF IMPROVING THE EDUCATION OF ALL STUDENTS.

A. THE CONSCIOUS SELECTION OF SOME QUALIFIED MEMBERS OF MINORITY GROUPS FOR INCLUSION IN A STUDENT BODY OF LIMITED SIZE IMPROVES THE EDUCATIONAL OPPORTUNITIES OF ALL THE STUDENTS.

At an institution with many more applicants than available places the admissions officers must be prepared to answer two questions:

1. How shall they determine which applicants are "qualified" in the sense that they have sufficient ability to benefit substantially from the proposed course of study at the institution and to bring a level of intellectual capacity to the classes which does not impede other students? The question in any given instance is, "will we accept this applicant if there is room?"

2. By what criteria shall they select from among a large number of fully-qualified applicants the much smaller number whom the institution can accommodate?

We do not imply that in practice all applicants are first put through the step of winnowing out the unqualified, and that the qualified are thereafter subjected to the step of selection. In practice, some applicants will immediately appear to be qualified in the first sense and to present an outstanding case for selection in the second sense. In other instances, especially where scholarly attainment is one of the major criteria for selection, it may quickly appear that although an applicant is "qualified" in the first sense, his case for actual admission, in terms of the criteria established for selection, is far too weak to merit further consideration.

The distinction is important nonetheless, because the criteria used for determining whether an applicant is qualified must not be confused with the criteria for actual selection. At the first stage the criteria are chiefly intellectual: intelligence and aptitude tests, past academic record and previous education. Health and motivation may be minor elements. Membership in a racial or disadvantaged minority group is relevant, if at all, only in adjusting test scores and other predictors of academic success in order to compensate for correctable deficiencies in the previous experience or education of particular students. A priori the qualities which admissions officers at a particular institution value in making actual selections may be the same as those to which they look in determining admissibility, but they may be different or they may be overlapping. The various predictors of academic success measured by grades on examinations and assigned papers may be the best measure in judging whether an applicant possesses the school's minimum qualifications, but neither logic nor law nor sound educational policy commands exclusive use of, or even any reliance upon, the predictors in making selections from among the qualified applicants at the second stage of admissions. Most institutions treat sufficiently great promise of academic success as ground for actual admission, using virtually the same predictors as are used in determining minimum qualification, but below that level such predictions may be treated as irrelevant, or the greater academic promise of one applicant may be judged less important than some quite different asset of another. The proportion of students selected because of academic promise alone differs from institution to institution. Harvard College selects about 150 students on the basis of extraordinary intellectual potential for an entering class of 1,100.

The failure to grasp this essential distinction is the source of petitioners' repeated but misleading
We deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499; and subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. *Hirabayashi v. United States*, 320 U.S. 81, 100. *McLaughlin v. Florida*, 379 U.S. 184, 191, 192 (1964).

Racial discrimination is not justified because the burden of the state action falls on both races or all races so classified. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). There is no question here but that DeFunis's exclusion from the state law school was a result of a racial classification. The trial court ordered DeFunis's admission for that reason. Nor did the Supreme Court of Washington disagree with the lower court that the law school had used a racial classification to exclude DeFunis. Rather, it announced that, in ostensible conformity with the commands of this Court, "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." (507 P. 2d at 1182.)

In short, the controversy in this Court is not over the question whether a racial classification was used as the basis for the exclusion of DeFunis, but whether that otherwise unconstitutional racial classification was validated by "a compelling state interest."

It is our position that a racial classification that takes the form of a racial quota, as in this case, is unconstitutional *vel non*, because racial quotas are anathema to the concept of individual freedom. But we submit that even if a racial quota does not fall into a special invalid category of its own giving rise to an irrebuttable presumption of violation of the Fourteenth Amendment, the racial classification here cannot be validly imposed within the limits of the Equal Protection Clause.

**II. A Racial Classification by a State Is Invalid Under the Equal Protection Clause Except as a Specific Remedy for Specific Unconstitutional or Illegal Racial Discrimination.**

Not since *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), has this Court permitted the use of race as a factor for classification, except to cure an earlier illegally imposed racial discrimination. And even in those cases in which this Court has sanctioned such limited cognizance of a racial factor, the use of the racial factor has been condoned only to assure the elimination of the illegal discrimination and never as a tool for "reverse discrimination" of the kind sought to be justified by the Washington Supreme Court here. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

The Washington Supreme Court rested heavily on a dictum of this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), which affords no support for the conclusion reached by the state court. At most, *Swann*, in its context of remedial litigation, suggested that a school system might provide for the distribution of students already in the system in the relative proportions of the races in the school system as a whole.

Indeed, the Washington Supreme Court recognized that the use of "race" in *Swann* was justified only "to prevent the perpetuation of discrimination and to undo the effects of past segregation." (507 P. 2d at 1180.) But it failed to recognize that there was no showing on the record in this case of any past discrimination by respondents that purported to be remedied by the law school's use of a racial quota. Nor did it seem to understand that *Swann* did not endorse a "fixed racial balance or quota" even in the presence of a clear demonstration of prior discrimination. *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 1227 (1971).

It is equally important to see that in *Swann*, and other cases dealing with segregation in public schools, the contemplated remedy—a remedy for specific racial discrimination—is a reallocation of students within the system. The "racial balances" involved in those cases denied no white or black, Indian or Asiatic, education at a state school. Here, however, the law school's admission process flatly denied access of white students, including DeFunis, to state education facilities in order to make them available to others of different race, because of their race.

*(Please turn to page 60)*
As we confront the new demands on government and its administrative apparatus that the energy crisis, the environmental crisis, and the population crisis pose and reflect on the ethical product of our existing institutions of governance, Dean Manning's questions take on a sharper pertinence. However, it is not enough to compare the utility of his two competing targets for social investment. One must also ask how effectively legal education is now structured to contribute to the improved functioning of government, its greater efficiency, and a higher ethical product. As we now stand, an appeal for funds based on such a representation would, I suggest, invite skepticism. However, the prospect of satisfying the skeptical legislator or donor would, I believe, rise dramatically if the funding's proposed objective were not simply a better-financed law school but a fully-developed law center.

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(Continued from page 20) assertion that minority applicants were preferred despite DeFunis, Jr.'s superior qualifications. Petitioners' Opening Brief, pp. 2,7. The assertion assumes that the predictors used in measuring admissibility are the only proper criteria in the process of selection. The assumption is contrary to policy and practice both at the University of Washington Law School and elsewhere.

At the stage of selection, the educational and admissions policies of any institution of higher learning should be interrelated. The criteria of selection determine the composition of the student body, which in turn seriously affects the kind and quality of educational opportunities offered to all students. Policies fixing the criteria should therefore be based upon academic decisions concerning the kinds and quality of educational opportunities the institution wishes to offer.

A given institution might wish simply to select students of the highest intellectual capacity, measured by scholastic records and potential, in the belief that it should be exclusively concerned with challenging the intellect and increasing the formal learning of the student body, and with encouraging the students thus to challenge each other in these areas. Exclusive reliance on measured achievement might also be thought to introduce the highest form of equality and productive stimulus.

Another institution might conclude that education should be conceived more broadly and that, given minimum assurance of scholastic competence, all students are best served by selecting from the qualified applicants the entering class whose members have the most diverse social, economic and cultural backgrounds and the widest variety of talents and interests. In this view, diversity is a stimulus to the development of every student's personality and understanding as well as a preparation for the society in which he will live. Securing these non-discriminatory, educational objectives for the whole student body dictates evaluating a wide variety of personal characteristics, many of them utterly irrelevant in measuring ability to meet academic standards.

Still a third institution might wish to give substantial weight—say 40 percent—to superior intellectual qualifications in filling all the places in a class, but conclude that an equally marked superiority in other qualities judged to be important should be enough to offset them.

In the first case, neither race nor minority status would be relevant. In the second and third cases, membership in a minority race or other special ethnic group would be a relevant and often highly material consideration because of its significance in forming an entering class whose members will have the diverse characteristics, attachments and experience making them markedly stimulating to each other. Race, color or ethnic origin, like economic or cultural background, is one of the many characteristics that a student presents to his classmates as an individual does to the world—a characteristic which should carry neither invidious distinction nor arbitrary preference, which some treat as always and utterly irrelevant but which others may perceive as encouraging pride and a sense of identification in cultural origins and diversity without hostile connotation. Race, color and ethnic origin also tend to identify forms of special experience, social and cultural background, outlook, interests and attachments which make important contributions to a student body. This is especially true at any institution which has been predominantly white for a long period.

The foregoing general observations concerning the relationship between educational and admissions policy are drawn largely from experience at a number of Harvard schools, especially the undergraduate college. For the past 25 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 25 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of
Aid, quality of the educational experience offered to all its vitality and intellectual excellence and that the chicanos and other minority students. Contemporary only Californians or Louisianans but also blacks and potential stockbrokers, academics and politicians. football players; biologists, historians and classicists; dwellers and farm boys; violinists, painters and California, New York and Massachusetts; city Harvard College admissions. Ten or fifteen or twenty to the educational process has long been a tenet of the Committee and Dean of Admissions and Financial Chairman of the Admission and Scholarship Committee seeks: 
variety in making its choices. This has seemed important ... in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] ... The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements. (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968), (emphasis supplied)

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Ten or fifteen or twenty years ago, however, diversity meant students from California, New York and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students/could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small number might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

The explicit emphasis put on diversity at Harvard College is greater than in other parts of Harvard University. The range of relevant diversity is probably greater in undergraduate than graduate education; musical talent, for example, would surely be given greater weight by the Admissions Committee of Harvard College than by the committees at the Medical School or Law School. The level of intellectual promise, coupled with academic preparation, is so uniformly superior among a large number of applicants and refined differences have such relatively small importance for undergraduate education as to furnish scant basis for selection.
Emphasizing a wide range of diversity, moreover, almost automatically ensures that Harvard College will help to open educational and career opportunities to young men—and through Radcliffe College, young women—from all parts of society and sections of the country.

Though the range of significant diversities may be less at some graduate or professional schools and relatively less weight may be placed upon them, all Harvard faculties recognize the educational importance of diversity of social and economic background, experience and resulting outlook in the class and seminar rooms, and in less formal discussions in the dormitories and commons. The point was well stated in the brief filed by The Committee of Law Teachers Against Segregation in Legal Education in *Sweatt v. Painter*, 339 U.S. 629 (1950), as printed at 34 MINN. L. REV. 289, 325 (1950):

The lawyer, to meet the responsibilities of his profession, must have a vital sense of the culture of the community in which he lives and works. “Lawyers are perpetually engaged in trying to anticipate, prevent, mediate, settle or win human disagreements involving alleged rights recognized at law. Their thinking, planning and action are permits only the elimination of specific prior racial discrimination and not a substitution of racial discrimination against others.

III. The Benign Intent of the Framers of the Racial Quota Here Cannot Save It. The Validity of State Racial Discrimination Is Measured by Effect Not Motive.

It is argued that the racial quotas adopted by the law school here are not “invidious” because their purpose was “benign.” But respondents’ purpose in effecting its racial quota system is irrelevant. It is not the purpose but the effect of a racial classification that commands its invalidation. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). This is a lesson that this Court has continuously declared. For example, in *Wright v. Council of City of Emporia*, 407 U.S. 543, 547 (1972), the Court answered, “Thus, we have focused upon the effect—not the purpose or motivation—of a school board’s action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.” And in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the Court said: “[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.”

The Supreme Court of Washington conceded that “the minority admissions policy is certainly not...
benign with respect to nonminority students who are displaced by it." (507 P. 2d at 1182.) Since it is the "nonminority student" who is the victim of this invalid racial classification, that should suffice to dispose of the argument of the benign nature of the racial classification. But there is even reason to doubt the State court's notion that the evil of a racial quota does not stigmatize the "minority student" who gains admissions under such circumstances. For there is certainly the great possibility of that consequence, especially where, as under the law school's admissions program, the lower admission standards for "minority students" were such a well-publicized element. (St. 418, Exh. 45.) A recent black graduate of a law school put the problem cogently:

Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and like certain members of the faculty, had developed paternalistic attitudes toward us. (McPherson, The Black Law Student: A Problem of Fidelities, ATLANTIC 88 (April 1970).)

The quota system is admittedly not "benign" so far as the excluded majority applicants are concerned. There is little or no basis for suggesting that it is not "invidious" and "stigmatizing" for the category of applicant labeled by race as incapable of meeting the standards applied to others. See Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. PA. L. Rev. 351, 353-59 (1970).

Indeed, a racial quota is always stigmatizing and invidious, particularly when it is applied to areas concerned with intellectual competency and capacity. It is suggested that such a statement lacks sincerity if made by a non-black. And so we have attached as an Appendix to this brief a copy of a nationally made by a non-black. And so we have attached as an

The actual harm done by quotas is far greater than having a few incompetent people here and there—and the harm that will actually be done will be harm primarily to the black population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among this rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.

A racial quota is derogatory to those it is intended to benefit and depriving of those from whom is taken what is "given" to the minority. A beneficent quota is invidious as it is patronizing.

IV. There Are No "Compelling State Interests" to Justify the Racial Quotas Used by the Respondents to Determine Admission to the State's Law School.

The Washington Supreme Court announced that the law school's racial policies were on their face presumptively invalid but might be justified on a showing of a "compelling state interest." It then examined the evidence and proceeded to validate the racial quotas on what, at most, could be called a "rational means" test.

As we have already argued, there can be no "compelling state interest" for racial classification by the state except for its use to eliminate adverse racial classification theretofore imposed, or perhaps where the nation's security in time of war may be thought to justify such classification. See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Assuming, however, that racial quotas can be justified by some other "compelling state interest," there is no such interest justified in this record.

The record in this case is devoid of support for the conclusion of "compelling state interest." Indeed, there was no conscious effort by respondents at trial to demonstrate any compelling state interest. Respondents' case rested primarily on "the cultural disadvantage" which the admissions committee wished to take into account in awarding places in the class. It was assumed, but not shown, that cultural disadvantage could be correlated with the four minority groups whose members were to be given preferential treatment. (St. 416; 73-74; 90; 108; 353; 400-01; 418-19; 424-25.) As one witness on compensatory pre-law training put it: "In formal terms, we articulate our concern for the economically and culturally disadvantaged. I suppose in practical terms our efforts have been largely with the minority group student . . ." (St. 125.) The equation between the "minority group students" and the culturally deprived can no more be made to justify racial classification than can the equation between minority groups and the economically deprived in the political sphere. Compare Reitman v. Mulkey, 387 U.S. 369 (1967), with James v. Valtierra, 402 U.S. 137 (1971).

When asked to explain the law school's race-based preferential treatment, respondents repeatedly claimed to be favoring applicants from deprived cultural and educational backgrounds. Those who offered this justification included the chairman of the school's admissions committee (St. 352; 402), the dean of the law school (St. 416-18; 424-25), the president of the university (St. 225; 243-44), and the former chairman of the board of trustees of the university (St.
The evidence is, however, clear that defendants did not give preferential treatment to "deprived students" who were not blacks, Chicanos, Indians, or Filipinos. (See, e.g., St. 344; 352; 399.)

There is nothing in this record that shows that membership in one of the four minority races correlates with such deprivation. Indeed, a member of one of the favored minorities was to be treated as "culturally deprived" so far as the law school was concerned, even if he came from a highly intellectual and cultured family. Moreover, if a correlation could be made that showed every member of the four racial minorities to fall into the category of culturally and educationally deprived, the classification would still be invalid for underinclusiveness because it would fail to include culturally and economically deprived persons who are not members of these four racial minorities.

What the Constitution prohibits is that admissions be determined by race. Equal protection might not be offended by consideration of cultural deprivation; it is offended by considerations of race. If elimination of cultural deprivation were the compelling principle, however, it was not the guide used for special treatment for admissions to the law school here. The rule established for the University of Washington School of Law was simply that it was easier for a black, a Chicano, an American Indian, or a Philippino to enter than for a white or an Asian, without regard to the cultural deprivation from which the applicant may or may not have suffered. (St. 108-09; 225; 243-44; 261; 418; 423-24; 431.)

To support the so-called state interest in discrimination on the basis of race the Supreme Court of Washington relied only on three bits of evidence: (1) a self-serving declaration by the dean of the law school (St. 416); (2) the text of an impromptu speech given by the president of the university to a group of striking black students in 1968 during the time of the "university troubles" (Exh. 13); and (3) a "Survey of Black Law Student Enrollment" giving statistics for 125 law schools including the University of Washington School of Law for the year 1970-71 (Exh. 7). These three items are patently inadequate to carry the "heavy burden" of showing a compelling state interest of the State of Washington in discriminating in favor of four racial groups in filling its law school classes.

In this case the State, thus, made only a token effort to shoulder the heavy burden of proving a compelling state interest in racial discrimination. Even if the minimal proof accepted by the Supreme Court of Washington could qualify under a rational means test, it cannot meet the compelling state interest test. The substitution of the lower quantum of proof is explicitly forbidden by a consistent line of cases in this Court dealing with racial classifications. Slaughterhouse Cases, 16 Wall. 36, 71 (1870); Strader v. West Virginia, 100 U.S. 303, 307-08 (1880); Ex parte Virginia, 100 U.S. 339, 344-45 (1880); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Korematsu v. United States, 323 U.S. 214, 216 (1944); Oyama v. California, 332 U.S. 633, 644-46 (1948); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Loving v. Virginia, 388 U.S. 1, 10-11 (1967); Hunter v. Erickson, 393 U.S. 385, 392 (1969); Graham v. Richardson, 403 U.S. 365, 372 (1971).

That the compelling state interest necessary to justify a racial quota has not been established here may be quickly seen from a glance at the decisions of this Court in recent years that have applied that standard. Although none of them involved so patent a violation of the Equal Protection Clause as a racial quota, in each case this Court has ruled that the interest of the state was not sufficient to override the prima facie violation of the Equal Protection Clause. McLaughlin v. Florida, 379 U.S. 184 (1964); Carrington v. Rash, 380 U.S. 89 (1965); Harper v. State Board of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968); Kraemer v. Union Free School District, 395 U.S. 621 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972). Indeed, as the Chief Justice pointed out in his dissent in Dunn v. Blumstein, "[N]o state law has ever satisfied this seemingly insurmountable standard." (405 U.S. 330, 363-64 (1972).)

The "compelling interest" standard has another attribute that was substantially ignored by the Washington Supreme Court and that dictates the reversal of that court's judgment. This Court stated in Dunn v. Blumstein, supra, 405 U.S. at 343: "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" There was in this case no substantial undertaking to discover the feasibility of means other than the utilization of a presumptively invalid racial quota for admission to the law school to accomplish the alleged state interests asserted here.

Obviously, as the compelling state interest cases already cited reveal, this Court is not the place to examine the alternatives that might permit the State to bring more of the culturally deprived members of racial minorities into the law school on an equal footing with other students. Affirmative action programs, not quotas are the requirements of national policy. (See our brief in support of the petition for certiorari in this case at pp. 19 et seq.) An "open admission" policy without racial standards might afford the answer. It might also be possible to open more places in law schools at the University of Washington or in other State university facilities where admission would not depend on the racial characteristics of the applicants. Special schooling might be afforded for preparation for admission to law schools for those who cannot meet the existent standards without such additional training, but again only so long as that schooling is not afforded on a racial basis. This case, however, involves no legitimate affirmative action, but a racial quota. As our brief in support of the petition for certiorari pointed out, so-called affirmative action programs that are not circumscribed in terms consistent with the Equal Protection Clause collapse into the very evil they seek to cure.

The social problem that the Washington Supreme
Court purported to address cannot properly be considered one of quantity rather than quality. Even if it were legitimate to postulate, as that court did, that a lawyer or doctor should be trained to serve only persons of the same skin color or parental origins—a proposition that itself is inconsistent with the doctrine of equality underlying the Fourteenth Amendment—those doctors and lawyers should have the same appropriate skills and capacities as those practising their professions on behalf of others. The answer to the problem cannot be, as the Washington court would have it, a simple play on numbers. This we think should be evident from the fact that the alleged compelling state interest asserted by the Washington court here—providing training for black lawyers to serve black clients—would most easily and readily be met by creation of additional separate law schools for “minority” applicants who do not meet the standards for admission to existent law schools. No one doubts that the patent invalidity of such racial classification could not be overcome by the “compelling state interest” asserted here. Neither can the racial device actually used by the law school be justified by the “compelling state interest” found by the Washington Supreme Court.

The most charitable reading of the Washington Supreme Court’s decision is that it has said that the alternative means for reaching its goal are more difficult, more time-consuming, more expensive. So long as the alternatives have the virtue of constitutionality, however, the Equal Protection Clause commands their use rather than the unconstitutional means that may be quicker, or less difficult, or less expensive. If the goals attributed to the state here are constitutionally valid, they cannot be accomplished by the unconstitutional means of that most invidious of discriminatory devices, the racial quota.

**CONCLUSION**

The judgment below should be reversed because it condones the use of a patently unconstitutional means to an invalid end. A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. Though it may be thought here to help “minority” students, it can as easily be turned against those same or other minorities. The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

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**CLASS ACTION**

(Continued from page 27)

prejudicial to my case than any reasoning I might do with geometry to show that Raines had time to slow down or that Milford speeded up. I think it would have been damaging.

HELMQUIST: Sir, I think I would have to agree with Mr. Schweitzer. I think he had a lot more to gain than to lose if he could establish that the defendant was travelling at an excessive rate of speed, based on the conditions of the road. Even if the defense counsel established that the witness was also travelling at an excessive rate of speed, this does not negate the fact that defendant was also travelling at an excessive rate of speed. I think the passing testimony would raise a presumption in the jury’s mind of negligence. We don’t know when Milford left Green River because he never said what time he left Green River. Therefore, this idea of it only taking an hour is strictly theoretical because it is based on Raines’s estimate that it only took an hour. Also, we don’t know exactly when the accident occurred as to the time Milford arrived on the scene. He said it could have just happened or it might have just happened. If any impeachment were done on this point, I think I could have rehabilitated Mr. Milford.

WALKER: There is nothing theoretical at all about the time that it took him to travel this 27 miles because he stated he was going approximately 25 miles per hour. Even though he didn’t say what time he left Green River, the fact is that if you travel at 25 miles per hour it would take you approximately one hour.

KEETON: Mr. Walker, I think, if I may interrupt, that it might help us if you asked a few questions of the witness as you would have undertaken to do if this matter of speed had come in, that is, if you had not objected when you did, and successfully, to this testimony about speed. You have indicated that you would have wanted to make something of this on your cross examination. Mr. Evans, in his role as Mr. Milford, is sitting right beside you now. I would like you to go ahead and ask the questions you would put on cross examination.

WALKER: Yes, sir. Now, Mr. Milford, you have already testified that the defendant’s car passed you for the second time three miles outside of Green River.

MILFORD: Yes, sir, it was three miles west of Green River.

WALKER: And I believe you also indicated that it was about 27 miles from this point to the point where the accident took place?

MILFORD: Yes, sir, I did.