



2-1-1975

Constitutional Law—Equal Protection—Benign Discrimination—Minority Admissions Programs—Supreme Court's Response to Preferential Treatment—*DeFunis v. Odegaard*

Judith Ilene Bloom

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Recommended Citation

Judith I. Bloom, *Constitutional Law—Equal Protection—Benign Discrimination—Minority Admissions Programs—Supreme Court's Response to Preferential Treatment—DeFunis v. Odegaard*, 8 Loy. L.A. L. Rev. 191 (1975).

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CONSTITUTIONAL LAW—EQUAL PROTECTION—“BENIGN” DISCRIMINATION—MINORITY ADMISSIONS PROGRAMS—SUPREME COURT’S RESPONSE TO PREFERENTIAL TREATMENT—*DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Morton v. Mancari*, 417 U.S. 535 (1974).

And now let's go hand in hand, not one before the other
—Shakespeare, *The Comedy of Errors* act V, scene I

The equal protection clause of the fourteenth amendment¹— the most explicit constitutional recognition that all persons be considered equal before the law²—has been the major vehicle for removing the economic and political barriers that once blocked minority entrance into the mainstream of American life.³ While many of the legal barriers have disappeared, one must face the stark reality that judicial rhetoric cannot rectify the effects of generations of discrimination. The under-representation of minorities among high school graduates,⁴ college graduates,⁵ and professionals⁶ is clearly related to the economic

1. 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.

U.S. CONST. amend. XIV, § 1 (emphasis added).

2. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

3. *Id.*

4. In 1968 only fifty-eight percent of the black young adults had a high school diploma, Kendrick, *Extending Educational Opportunity—Problems of Recruitment, Admissions, High Risk Students*, 55 LIB. ED. 12, 13 (1969) [hereinafter cited as *Recruitment*], and that fifty-eight percent formed only eight percent of all high school graduates in the United States. *Id.* at 14. In the Los Angeles central city there are 14,000 Black and 17,000 Spanish-surnamed Americans receiving high school diplomas annually. *Hearings Before Equal Employment Opportunity Commission on Utilization of Minorities and Women Workers in Certain Major Industries* 99 (Los Angeles, Cal. 1969) [hereinafter cited as EEOC].

5. Figures for the academic year 1970-71 showed “substantial increases” in minority college enrollment over the 1967-68 figures. O’Neil, *Perferential [sic] Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 719 (1971) [hereinafter cited as O’Neil]. Since 1967-68, five to seven percent of all college and university students have been black, although the figures are somewhat higher for freshmen. *Id.* at 721.

If you are between the ages of 18 and 24 . . . your chances of being in college or a professional school are twice as great if you are a white than if you are a Negro.

deprivation that necessarily followed decades of legally created and maintained discrimination.

Advocates of government action to remove the "badges" of discrim-

Dyer, *Toward More Effective Recruitment and Selection of Negroes for College*, 36 J. NEGRO ED. 216, 221 (1967). While blacks form twelve percent of the population and twelve percent of the college age group, they comprise only six to seven percent of the college students. Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1069, 1073 [hereinafter cited as Gellhorn]. In California there are 30,000 Blacks and 38,000 Spanish-surnamed Americans enrolled in college. EEOC, *supra* note 4, at 99.

6. In 1969 2.75% of the medical students were black, and if predominantly black schools are excluded, only .9% of the students were black. N. GUMEO & A. HENDERSON, *ADMITTING BLACK STUDENTS TO MEDICAL AND DENTAL SCHOOLS* 7 (1971).

Less than one percent of the nation's lawyers are black. Gellhorn, *supra* note 5, at 1073. One white American in 625 becomes a lawyer, but only one in 7,100 blacks chooses the legal profession. *Id.* In the 1964-65 academic year, of the 701 black law students in ABA approved schools, 434 were in the 120 predominantly white schools, or an average of 3.06 blacks per white school. That left 267 in the six predominantly black law schools, or an average of 44.5 per black school. Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. LEGAL ED. 21, 23 (1967) [hereinafter cited as Carl]. Today the enrollment of minority students is higher, e.g., University of California, Boalt Hall, twenty-one percent; University of California at Los Angeles, twenty percent; University of California at Davis, eighteen percent. Hager, *Reverse Racism: Does it Exist?*, L.A. Times, Feb. 5, 1973, § 1, at 3, col. 5-8. Overall, however, only about seven percent of these students enrolled in full-time accredited law schools are Black, Spanish-surnamed, American Indian or Asian. *Id.* at 18, col. 1. Some of that seven percent may be in law school only because of preferential admissions. O'Neil, *supra* note 5, at 723. *But see* Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 383 [hereinafter cited as Summers]. Of those black students who are in law schools, almost half are in the predominantly black schools in the South. Comment, *Current Legal Education of Minorities: A Survey*, 19 BUFF. L. REV. 639, 642 (1970).

A Pennsylvania survey found that, while ninety-eight percent of all students eventually pass the bar examination, only seventy percent of the black law students who take the exam eventually pass. *The Report of the Philadelphia Bar Ass'n Special Comm. on Penn. Bar Admission Procedures—Racial Discrimination in the Administration of the Penn. Bar Examination*, 44 TEMP. L.Q. 141, 150 (1971). Obtaining a proper college education is often financially burdensome, Summers, *supra* at 387, a problem exacerbated by the lack of available financial aid, O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. TOL. L. REV. 281, 283. There is also a problem of a lack of motivation. *See* McGee, *Minority Students in Law School: Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 BUFF. L. REV. 423, 428-30 (1971). "Certainly, motivation is very important; and, without it, qualification and opportunity are of little or no avail." Carl & Callahan, *Negroes and the Law*, 17 J. LEGAL ED. 250, 252 (1965). "Negro youth in the North, as well as the South, have been denied an inspiring image of the Negro lawyer, at least until recent years." *Id.* at 254. *But see* Cosby, *Black-White Differences in Aspirations Among Deep South High School Students*, 40 J. NEGRO ED. 17, 19-21 (1971). In many ghetto schools, students are often discouraged from working toward higher educational goals. MALCOLM X, *AUTOBIOGRAPHY OF MALCOLM X* 36-37 (1966); Carl, *supra* at 25; Smith & Hughes, *'Spillover' Effect of the Black Educated*, 4 J. BLACK STUDIES 52, 64 (1973). Often these

ination are faced with the dilemma that the concept of equality prevents preferential treatment for minorities in the same manner that it prevents discriminatory treatment.⁷ Specifically challenged is the academic community's response to discrimination in American society—minority admissions programs.⁸ These programs, which vary from merely “tipping the scales in favor of one student rather than another when all other factors are roughly equal”⁹ to others that establish minority quotas which unconditionally admit students with “qualifica-

schools provide inadequate educations as well, with the result that minority students often do not have the proper tools to successfully compete at a university or graduate school with high academic standards. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Consalus, *The Law School Admission Test and the Minority Student*, 1970 U. Tol. L. Rev. 501, 509 [hereinafter cited as *Admission Test*]. For a discussion of how ghetto schools do not psychologically prepare students for college as well as suburban schools do, see Elkind, *From Ghetto School to College Campus: Some Discontinuities and Continuities*, 1970 U. Tol. L. Rev. 607.

In addition to financial barriers, lack of motivation, and inadequate education, the minority student seeking admission faces the common university and graduate school practice of relying on the results of standardized tests. Many claim that such tests cannot measure all relevant variables (see Carl, *supra* at 25; Williams, *On Black Intelligence*, 4 J. BLACK STUDIES 29, 36 (1973) [hereinafter cited as Williams]) and that they are “culture-bound” because they measure the applicant's knowledge of the white middle class experience. “A test is a cultural artifact.” Adler, *Intelligence Testing of the Culturally Disadvantaged: Some Pitfalls*, 37 J. NEGRO ED. 364, 365 (1968). See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); Williams, *supra* at 31; Note, *The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children*, 61 GEO. L.J. 1027, 1031 (1973).

Proponents of the standardized examinations explain that if the exam is a cultural artifact then so are the colleges and graduate schools themselves. The proponents argue that if one is to work within the Anglo-American legal system, he or she must be able to work with the peculiarly Anglo-American concepts. Summers, *supra* at 391. The Law School Admission Test [hereinafter cited as LSAT] is primarily a predictor of success in the first year of law school. *Id.* at 390. As a predictor it is quite effective. *Admission Test, supra* at 509. If the test is invalid, then perhaps this is true of the entire grading system. Ramsey, *Law School Admissions: Science, Art, or Hunch?*, 12 J. LEGAL ED. 503, 506 (1960). This is a proposition that Ramsey ultimately rejects. A valid LSAT should meet the following four criteria: (1) It must be relevant to the ultimate goal; (2) It must be reliable and able to discriminate between individuals; (3) It must be objective; (4) It must be practical. *Id.* at 505.

7. See Comment, *But Some Animals Are More Equal Than Others: A Look at the Equal Protection Argument Against Minority Preferences*, 12 DUQUESNE L. REV. 580 (1974).

8. Brooke, *Introduction to the Symposium: Disadvantaged Students and Legal Education—Program for Affirmative Action*, 1970 U. Tol. L. Rev. 277; O'Neil, *supra* note 5, at 700.

9. O'Neil, *supra* note 5, at 700 n.3.

tions" significantly below the normal standard,¹⁰ have dramatically increased minority enrollments.¹¹ While some argue that the very nature of minority admissions contravenes the command of strict equality,¹² absolutes have seldom characterized the process of constitutional adjudication.¹³ The validity of minority admissions can only be ascertained by a careful weighing of competing values, examining "the character of the classification in question, the individual interests affected by the classification, and the governmental interests asserted in support of the classification."¹⁴

I. A CASE IN POINT—*DeFunis v. Odegaard*

In *DeFunis v. Odegaard*,¹⁵ Marco DeFunis, after having been denied admission to the University of Washington Law School,¹⁶ commenced legal proceedings alleging that he "had been wrongfully denied admission in that . . . persons were admitted to the law school with lesser qualifications than those of plaintiff."¹⁷ The trial court, although dismissing his prayer for damages,¹⁸ ordered DeFunis admitted, stating that the University's admissions policy which gave certain preferences to Blacks, Chicanos, Indians, and Filipinos¹⁹ had deprived him

10. *Id.*

11. *Id.* at 700.

12. See *DeFunis v. Odegaard*, 507 P.2d 1169 (Wash. 1973) (Hale, C.J., dissenting), vacated and remanded as moot, 416 U.S. 312 (1974).

13. See Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29 (1973); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Speech and Press?*, 17 U.C.L.A.L. REV. 1180 (1970); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

14. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) (Marshall, J.). See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

15. 507 P.2d 1169 (Wash. 1973), vacated and remanded as moot, 416 U.S. 312 (1974).

16. 507 P.2d at 1171-72.

17. *Id.* at 1172.

18. *Id.* Plaintiffs asked for injunctive relief in the form of an order to the University to admit DeFunis or, in the alternative, damages in the amount of \$50,000.

19. *Id.* at 1172-75. The University of Washington admissions procedures consisted of evaluation by a Committee on Admissions and Readmissions which was composed of six faculty members and three student members. Student applicants had to take the LSAT and submit a copy of their transcripts along with letters of recommendation. The application form gave the prospective student the option of noting his or her "dominant" ethnic origin. At that point the admissions procedures bifurcated, with one procedure for minority applicants and another for other students. Applicants with a Projected First Year Average (PFYA) below 74.5 were reviewed by the chairperson of the Com-

of the equal protection of the laws guaranteed by the fourteenth amendment.²⁰

The Washington Supreme Court reversed, finding no constitutional violation. Initially, the court addressed itself to the threshold issue of "whether race can ever be considered as one factor" in law school admissions, "or whether racial classifications are *per se* unconstitutional" ²¹ The trial court, relying solely on *Brown v. Board of Education*,²² held that, since racial classifications are *per se* unconstitutional, "a state law school can never consider race as one criterion in its selection of first-year students."²³ A majority of the court, interpreting the mandate of *Brown* as prohibiting only invidious racial classifications, concluded that there was surely a distinction between classifications which divide the races and classifications which bring together the races.²⁴

mittee while those above 77 were considered by the full committee. All files of minority applicants, though, were considered by the full committee regardless of PFYA. Plaintiff's application was held with all the others between 74.5 and 76.99. The Committee utilized such factors as PFYA, extra-curricular and community activities, employment, and racial and ethnic background. Each committee member received a set of files to review closely. The policy of the University as applied by the Committee was that:

More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges in the University and the University of Washington in particular, given the racial distribution of this state. . . .

So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.

Id. at 1175.

20. *Id.* at 1172.

21. *Id.* at 1178.

22. 347 U.S. 483 (1954).

23. 507 P.2d at 1178. The trial court stated:

In 1954 the United States Supreme Court decided that public education must be equally available to all regardless of race.

After that decision the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all races alike, and I feel that is what is required under the equal protection clause.

Id.

24. *Id.* at 1179. Citing *Green v. County School Bd.*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the court noted that "the Constitution is color conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation." 507 P.2d at 1180. The reliance on *Green* and *Swann* would seem to be misplaced because race was considered only in fashioning

The court next faced the potentially difficult question of which equal protection standard to apply.²⁵ In rejecting the rational basis test, the court noted that since *Loving v. Virginia*,²⁶ which overturned Virginia's anti-miscegenation statute,²⁷ the strict standard has always been applied to racial classifications.²⁸ Despite the fact that the classifications in this instance had a different, and indeed a laudable, goal from those which had previously been set aside, the court concluded that the effects were not benign with respect to those students denied admission to the law school.²⁹

a remedy to dismantle legally created and maintained dual systems of education.

25. When a statutory classification is challenged as being violative of equal protection, courts have generally utilized one of two accepted standards of review. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 18-44 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Bullock v. Carter*, 405 U.S. 134, 142 (1972); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 806-07 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting). Under the traditional test, great latitude is given to the state, and legislative schemes are seldom overturned if "rationally" related to a legitimate state purpose. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911). The strict standard of review will be employed if the classification is found to infringe upon a "fundamental" interest (the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to move from state to state, *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the right to vote, *Carrington v. Rash*, 380 U.S. 89 (1965)) or is identified as "suspect" (those based on race, color, religion, or alienage, see, e.g., *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Oyama v. California*, 332 U.S. 633, 644-46 (1948)).

26. 388 U.S. 1 (1967).

27. *Id.* at 10-11.

28. 507 P.2d at 1181-82. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court, in explaining why the class in *Rodriguez* was not suspect, articulated the "traditional indicia" of a suspect class:

[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28. One could plausibly assert that members of the white race are not "discreet and insular" minorities deserving of special constitutional protection. *But see Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

29. 507 P.2d at 1182. The Court stated:

It has been suggested that the less strict "rational basis" test should be applied to the consideration of race here, since the racial distinction is being used to redress the effects of past discrimination; thus, because the persons normally stigmatized by racial classifications are being benefited, the action complained of should be considered "benign" and reviewed under the more permissive standard. However, the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it,

Id.

Applying the strict test to the University's admissions procedure, the court concluded that the state's interest "in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation"³⁰ was sufficiently compelling to justify the racial preference. Noting the critical role that the legal profession plays in policy-making and the need for all segments of society to be represented,³¹ the court deemed the shortage of minority lawyers a compelling problem requiring racial preferences in the law school's admissions policy.³²

Chief Justice Hale, applying his conceptions of equal protection, stated that "constitutions are, and ever ought to be, color blind."³³ Citing previous holdings declaring racial classifications invalid, Chief Justice Hale concluded:

If the Fourteenth Amendment stands for anything at all, . . . it stands for the principle that all discrimination based on race, religion, creed, color or ethnic background . . . is prohibited.³⁴

Any analogy to the desegregation cases was rejected by the Chief Justice because the primary goal in school desegregation cases was to enhance the educational process for all children by invalidating actual discriminatory practices, while the goal in *DeFunis* was to increase minority lawyers.³⁵ No argument was ever posited that the education

30. *Id.* at 1183.

31. *Id.* at 1183-84.

32. *Id.* The court also rejected the plaintiff's contention that the admissions procedure violated due process because it was arbitrary and capricious. The appropriate test, according to the *DeFunis* majority, was stated as follows:

Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Id. at 1185, quoting *DuPont-Fort Lewis School Dist. No. 7 v. Bruno*, 489 P.2d 171, 174 (Wash. 1971). Accordingly, it was concluded that the plaintiff had "failed to show that the policy and procedures of the law school in denying him admission were so unreasoned and in disregard of the facts and circumstances as to constitute arbitrary and capricious action." 507 P.2d at 1187. Justice Hale, dissenting, disagreed. He specifically noted that many students were rejected for no discernible reason or were accepted on the basis of personality or political activism. *Id.* at 1194.

33. 507 P.2d at 1189.

34. *Id.* at 1198.

35. In *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 492 P.2d 536 (1972), the Washington Supreme Court sustained the action of the Seattle school district ordering compulsory bussing to curtail *de facto* segregation. Chief Justice Hale rejected the argument that *Brooks* was a potential barrier to the plaintiff's success:

There is no genuine parallel between Mr. DeFunis's case and the case of the

provided to white students was enhanced by increasing minority enrollment at the graduate school level. Further, he argued, even when school boundaries were changed and bussing ordered, no child was deprived of an education as must be the case in a program of special minority admissions.³⁶

When the United States Supreme Court granted certiorari in *DeFunis v. Odegaard*,³⁷ many commentators thought that the case would be the most significant discrimination decision since *Brown*.³⁸ However, since DeFunis would complete his third year of law school and receive his diploma regardless of any judicial resolution, the Court concluded that the principle of mootness demanded that it refrain from deciding a case that lacked the sufficient concreteness to warrant the finding of an actual controversy.³⁹

II. "BENIGN" DISCRIMINATION AND THE SUPREME COURT

The development of the "affirmative action" concept in the school desegregation cases⁴⁰ requires that dual systems of education be dismantled. Clearly, "affirmative action" in the context of eliminating

children required to ride the busses. There, we were dealing with a procedurally sound administrative determination that every child, under the plan and the constitution, would gain an integrated and thereby superior education at the expense of no other child. . . . [T]he Seattle school board was attempting to discharge its constitutional duty of providing equality of educational opportunity for all children within the district at the expense of no child or children.

Here we have precisely the opposite. Putting some applicants into the classroom deprived a qualified applicant of his seat there. It operated to deprive him thereby of the equal protection of the laws and at the same time granted to others privileges and immunities not available to him on equal terms.

507 P.2d at 1199.

36. 507 P.2d at 1198-99.

37. 414 U.S. 1038 (1973).

38. *E.g.*, *May a State Law School Use Race as One Criterion for Admission?*, 60 A.B.A.J. 429 (1974).

39. In reaching this conclusion, the Court disposed of two arguments. First, past decisions had held that "the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" 416 U.S. at 318, *quoting* *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Here, that did not depend "at all upon a 'voluntary cessation' of the admissions practices," but "upon the simple fact that DeFunis [was] in the final quarter of the final year of his course of study . . ." 416 U.S. at 318. Secondly, the Court determined that the issue presented was not "'capable of repetition, yet evading review'. . ." *Id.* at 318-19, *quoting* *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

40. *Keyes v. Denver School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

"state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils"⁴¹ has not raised serious constitutional questions. When the segregation, however, is *de facto* rather than *de jure*, it appears that there is no *duty* to desegregate since "[a] federal remedial power may be exercised 'only on the basis of a constitutional violation' . . ."⁴² Whether or not the school system itself may remedy *de facto* segregation has not been resolved.⁴³

41. *Milliken v. Bradley*, 94 S. Ct. 3112 (1974).

42. *Id.* at 3124. See *Keyes v. Denver School Dist. No. 1*, 413 U.S. 189 (1973); *Bradley v. School Bd. (Richmond)*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 59 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Downs v. Board of Educ.*, 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Bell v. School City of Gary*, 324 F.2d 209, 213 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

43. See *Offerman v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967) ("[t]hat there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional"); *Tometz v. Board of Educ.*, 237 N.E.2d 498, 503 (Ill. 1968) (the constitution permits voluntary state action aimed toward reducing and eliminating *de facto* school segregation); *School Comm. v. Board of Educ.*, 227 N.E.2d 729, 733 (Mass. 1967), *appeal dismissed*, 389 U.S. 572 (1968) (court would not question legislative determination of remedy to balance racial percentages in school); *Balaban v. Rubin*, 199 N.E.2d 375, 250 N.Y.S.2d 281, 377 (1964), *cert. denied*, 379 U.S. 881 (1965) (board of education acted reasonably in re-zoning for racial balance); *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 492 P.2d 536, 540 n.2 (Wash. 1972) ("*de jure*" segregation "is not limited by geography or by the concept of an express provision of law"). See also O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281, 282 n.1; O'Neil, *supra* note 5, at 714-15; 48 Tul. L. Rev. 403, 406 (1974).

The field of labor law has been suggested by some as a potentially useful source. See Comment, *But Some Animals Are More Equal Than Others: A Look at the Equal Protection Argument Against Minority Preferences*, 12 DUQUESNE L. REV. 580, 582 (1974). Specifically, judicial resolution of the discrimination aspects of seniority systems (see *Local 189 Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969) *cert. denied*, 397 U.S. 919 (1970) (continued use of seniority system, neutral on its face, which had its origins in discriminatory system violates Title VII of Civil Rights Act of 1964); *Quarles v. Philip Morris*, 279 F. Supp. 505, 515 (E.D. Va. 1968) ("plain language of the [Civil Rights] [A]ct condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the . . . act")), recruitment policies (*Carter v. Gallagher*, 452 F.2d 315, 330-31 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (minorities ordered hired on a ratio of one to two until 20 minorities hired); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (executive order ("Philadelphia Plan") requiring affirmative action as a condition precedent to award of contracts for federally financed projects upheld)), and standardized tests (*Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (employment tests must "bear a demonstrable relationship to successful performance of the jobs for which [they are] used")) deal tangentially with the issue.

Because of the unique position occupied by institutions of higher education,

[w]ell established principles of public school desegregation have not been applied generally to institutions of higher learning in the same manner in which they have been applied to public schools below the college level.⁴⁴

Higher education is not compulsory; the decisions to study and where to study after high school are based upon many subjective factors affecting both the applicant and the school.⁴⁵ Thus far, the only judicial interference with the admissions practices of institutions of higher education has been to invalidate overtly discriminatory practices. Recognition has been extended to the subjective considerations that generally characterize the selection process, and absent a finding of arbitrariness or capriciousness, the decision of the school is seldom overturned.⁴⁶

Given the factual context in which the desegregation cases have arisen, one must look elsewhere to resolve the constitutional validity of minority admissions. During the 1973 term of the Court, three cases presented the vehicle for discussion, or resolution, of various minority preference schemes. Justice Douglas, in his *DeFunis v. Odegaard*⁴⁷ dissent, discussed the constitutionality of law school minority admissions programs; *Kahn v. Shevin*⁴⁸ involved a Florida statute which gave certain tax benefits to widows but not to widowers; and *Morton v. Mancari*⁴⁹ unanimously upheld legislation which gave Indians employment and promotion preferences by the Bureau of Indian Affairs. The varying approaches taken by the Justices reflect the difficulty in reconciling minority preferences with principles of equal protection.

A. *DeFunis v. Odegaard*

Justice Douglas, in his *DeFunis* dissent, condemned, as invidious discrimination, any state sponsored preferences in the selection process.⁵⁰ Although stating that the United States Constitution neither required law schools to evaluate only test scores and grades nor prevented law

44. *Lee v. Macon County Bd. of Educ.*, 453 F.2d 524, 527 (5th Cir. 1971).

45. O'Neil, *supra* note 5, at 702.

46. *See* note 32 *supra*.

47. 416 U.S. 312 (1974).

48. 416 U.S. 351 (1974).

49. 417 U.S. 535 (1974).

50. 416 U.S. at 320.

schools "from evaluating an applicant's prior achievements in light of the barriers that he had to overcome,"⁵¹ each application had to be considered in a "racially neutral way".⁵²

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.⁵³

Continuing, Justice Douglas expressly rejected the argument that a "compelling" state interest could supply sufficient justification for racial discrimination:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans That is the point at the heart of all our school desegregation cases A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.⁵⁴

51. *Id.* at 331.

52. *Id.* at 334. Justice Douglas viewed the LSAT as an evil which was necessary for nonminority applicants, but which discriminated against minorities. His primary objection was to the cultural values which were examined by the tests:

Since LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.

Id. The solution he proposed was to remand the case for a trial to determine the validity of the LSAT. If the LSAT were found to discriminate against minorities, Douglas advocated eliminating the test for minority applicants. *Id.* at 336.

53. *Id.* at 336-37.

54. *Id.* at 342-43. Since the University only included Blacks, Chicanos, Indians, and Filipinos within the class extended preference, an irrebuttable presumption has been cre-

Justice Douglas, although condemning racial preferences, would accord great latitude to schools in the admissions process.⁵⁵ Decisions should be made on the basis of individual attributes, rather than on the basis of race.⁵⁶ While such a requirement would seem to impose greater administrative burdens on the university,⁵⁷ the end result would be an admissions process which lacks the stigma of any system based on racial preferences.

B. *Kahn v. Shevin*

In *Kahn v. Shevin*,⁵⁸ a widower sought to contest Florida's long-standing provision which granted property tax relief exclusively to widows.⁵⁹ Kahn, a widower living in Florida, applied for and was denied similar tax relief.⁶⁰ The Circuit Court of Dade County granted Kahn's request for declaratory relief, holding that the Florida statute unfairly discriminated on the basis of sex.⁶¹ The Florida Supreme Court, finding the necessary fair and substantial relation to the object of the legislation⁶²—reduction of the economic disparity between men and women—reversed the lower court opinion.⁶³

ated that only that class is imbued with the trait that the program is designed to take into consideration. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (pregnant teacher unable to continue teaching duties); *Vlandis v. Kline*, 412 U.S. 441, 453 (1973) ("students who applied from out of state [were given no opportunity] to demonstrate that they [had] become bona fide . . . residents"); *Stanley v. Illinois*, 405 U.S. 645 (1972) (unmarried fathers unqualified by statute to raise children); *Bell v. Burson*, 402 U.S. 535 (1971) (uninsured motorist involved in accident presumed at fault for the purpose of license revocation); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

55. 416 U.S. at 331-32.

56. *But see Hughes, Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063, 1073 (1968) ("the mere fact of a person's being black in the United States is a sufficient reason for providing compensatory techniques even though that person may in some ways appear fortunate in his personal background").

57. See note 80 *infra*.

58. 416 U.S. 351 (1974).

59. Florida law provides:

Property to the value of five hundred dollars (\$500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

FLA. STAT. ANN. § 196.202 (Supp. 1974).

60. 416 U.S. at 352.

61. *Id.*

62. *Shevin v. Kahn*, 273 So. 2d 72, 73 (Fla. 1973), quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971). The court stated:

[U]ntil the steps taken toward legal equality result in equality in fact, a finding of identity between the sexes at this time would rest on fiction and not fact.

273 So. 2d at 74.

63. 273 So. 2d at 74.

Justice Douglas, writing for the majority, recognized that the financial problems which face a woman living alone were far more debilitating than those facing a man alone.⁶⁴

There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. . . . While the widow can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.⁶⁵

According to the statutory scheme minimal scrutiny,⁶⁶ Justice Douglas concluded that "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" ⁶⁷

While minimally scrutinizing classifications based upon sex is clearly consistent with previous holdings, Justice Douglas had joined the plurality in *Frontiero v. Richardson*⁶⁸ in urging that "classifications based

64. 416 U.S. at 353. See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971); Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 NOTRE DAME LAW. 514 (1972); Read & Petersen, *Sex Discrimination in Law School Placement*, 18 WAYNE L. REV. 639 (1972); Note, *Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. 133 (1973); Comment, *Sex Discrimination in Hiring Practices of Private Employers: Recent Legal Developments*, 48 TUL. L. REV. 125 (1973).

65. 416 U.S. at 353-54 (footnotes omitted).

66. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

67. 416 U.S. at 355, quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971).

68. 411 U.S. 677 (1973). In *Frontiero*, the Court invalidated federal statutes which required a servicewoman to prove that her husband was in fact dependent upon her for support for the purpose of obtaining increased housing allowances and medical and dental benefits. 10 U.S.C. § 1072(2)(c) (1970); Act of Sept. 7, 1962, Pub. L. 87-649, 76 Stat. 469, as amended, 37 U.S.C.A. § 401 (West Supp. 1974). A serviceman could claim his wife as a dependent without regard to whether or not she was in fact dependent upon him for support. 10 U.S.C. § 1072(2)(a) (1970); Act of Sept. 7, 1962, Pub. L. 87-649, 76 Stat. 469, as amended, 37 U.S.C.A. § 401 (West Supp. 1974). Justice Brennan's plurality opinion, joined in by Justices Douglas, White and Marshall, categorized sex as a suspect classification and invalidated the statutory scheme because of the absence of a compelling state interest. 411 U.S. at 688-91. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, expressly declined to reach the question of whether or not sex is a suspect classification on the ground that the result was supported by *Reed v. Reed*, 404 U.S. 71 (1971). 411 U.S. at 691-92.

upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to close judicial scrutiny."⁶⁹

Justice Douglas' position can be reconciled with *Frontiero* on the basis that *Kahn*, unlike *Frontiero*, did not involve a statutory scheme which saddled any disabilities upon women. Language from *Kahn* supports this analysis:

This is not a case like *Frontiero v. Richardson* where the Government denied its female employees both substantive and procedural benefits granted males "solely . . . for administrative convenience." We deal here with a state law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden.⁷⁰

Justice Douglas also noted that the statutes invalidated by the *Frontiero* plurality were

"not in any sense designed to rectify the effects of past discrimination against women. On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages."⁷¹

Given Justice Douglas' statements in *DeFunis* that racial preferences are constitutionally defective,⁷² together with his *Frontiero* concurrence, it is difficult to conclude that sex-based preferences are constitutionally sound. Perhaps, Justice Douglas' analysis can best be explained by the fact that *Kahn* involved tax classifications, an area traditionally accorded minimal scrutiny by the Court.⁷³

Justices Brennan and Marshall, adhering to their position in *Frontiero*,⁷⁴ concluded that a gender-based classification "must be subjected to close judicial scrutiny, because it focuses upon generally immutable

69. 411 U.S. at 682 (footnotes omitted).

70. 416 U.S. at 355 (footnotes omitted).

71. *Id.* at 355 n.8, quoting *Frontiero v. Richardson*, 411 U.S. 677, 689 n.22 (1973).

72. See notes 50-57 *supra* and accompanying text.

73. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 355 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959); *Magnano Co. v. Hamilton*, 292 U.S. 40, 44-47 (1934); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 283 (1932); T. Moon & W. Moon, *The Property Tax, Governmental Services, and Equal Protection: A Rational Analysis*, 18 VILL. L. REV. 527 (1973); Sturve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

74. See note 68 *supra*,

characteristics over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."⁷⁵ Although stating that the provision of "special benefits for a needy segment of society long the victim of purposeful discrimination and neglect . . . serves the compelling state interest of achieving equality for such groups,"⁷⁶ they nevertheless concluded that the statute was unconstitutional because

the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means.⁷⁷

The statute was plainly overinclusive since widows with adequate financial means were extended the tax benefits.⁷⁸ Since Florida had "offered nothing to explain why inclusion of widows of substantial economic means was necessary to advance the State's interest in ameliorating the effects of past economic discrimination against women"⁷⁹ and since an alternative means of tailoring the tax exemption to exclude persons with ample financial resources was readily available,⁸⁰ the strict standard had not been met.⁸¹

75. 416 U.S. at 357.

76. *Id.* at 358-59.

77. *Id.* at 360.

78. *Id.*

79. *Id.*

80. *Id.* The Court noted that only those widows who filed a form establishing themselves as widows qualified for the exemption. *Id.* See FLA. STAT. ANN. § 196.011 (Supp 1974). Justice Brennan concluded that "[b]y merely redrafting that form to exclude widows who earn annual incomes, or possess assets, in excess of specified amounts, the State could readily narrow the class of beneficiaries to those widows for whom the effects of past economic discrimination against women have been a practical reality." 416 U.S. at 360. Although such a requirement would impose an additional administrative burden on the state, administrative convenience has never been a sufficient justification where precious human values are at stake. See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634-38 (1969).

81. 416 U.S. at 360. Justice White, dissenting, stated:

It may be suggested that the State is entitled to prefer widows over widowers because their assumed need is rooted in past and present economic discrimination against women. But this is *not a credible explanation* of Florida's tax exemption; for if the State's purpose was to compensate for *past discrimination* against females, surely it would *not have limited the exemption to women who are widows*. Moreover, even if past discrimination is considered to be the criterion for current tax exemption, the State nevertheless ignores all those widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the cycle of poverty. It seems to me that the State in this case is merely conferring an economic benefit in the form of a tax exemption and has not adequately explained why women should be treated differently than men.

Id. at 361-62 (emphasis added).

C. *Morton v. Mancari*

In *Morton v. Mancari*,⁸² the Court also had occasion to examine the equal protection challenge of a nonminority. Non-Indian employees of the Bureau of Indian Affairs (BIA) brought a class action claiming that provisions of the Indian Reorganization Act of 1934⁸³ granting employment preferences to qualified Indians in the BIA⁸⁴ violated the Equal Employment Opportunities Act of 1972⁸⁵ and the fifth amend-

82. 417 U.S. 535 (1974).

83. Act of June 18, 1934, ch. 383, 48 Stat. 984-88. The main purpose of this Act was to conserve and develop Indian lands and resources. The Act imposed restrictions on sales of land to, and inheritance by, non-Indians. The Secretary of Interior was enabled to acquire land for incorporation into tribal estates, and expenditures of up to two million dollars per year were authorized for this purpose. 25 U.S.C. §§ 464-65 (1970). Expenditures were authorized to defray the expense of organizing Indian chartered corporations "for the purpose of promoting the economic development of the tribes." *Id.* § 470. Tuition loans were made available to assist Indian attendance at "recognized vocational and trade schools." *Id.* § 471. Finally, Indians were exempted from civil service rules to promote and increase Indian employment in the Bureau of Indian Affairs. *Id.* § 472. See Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 THE ANNALS 12, 19-22 (1957).

At the same time, legislation was enacted to develop Indian self-government through federal-state cooperation. Act of Apr. 16, 1934, ch. 147, § 1, 48 Stat. 596 (codified at 25 U.S.C. § 452 *et seq.* (1970)). The Act authorized the Secretary of Interior to enter into contracts with the states, territories, and private institutions to provide education, medical assistance, agricultural assistance, and social welfare assistance to Indians through established agencies. Haas, *The Legal Aspects of Indian Affairs From 1887 to 1957*, 311 THE ANNALS 12, 19 (1957).

84. 25 U.S.C. § 472 (1970), which provides:

The Secretary of the Interior is directed to establish *standards of health, age, character, experience, knowledge, and ability* for Indians who may be appointed, *without regard to civil-service laws*, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the *preference to appointment to vacancies* in any such positions.

(Emphasis added).

In 1972, the Commissioner of Indian Affairs, with the approval of the Secretary of Labor, issued the following directive:

The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. . . . The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy.

Quoted at 417 U.S. at 538 n.3.

85. 42 U.S.C. § 2000e *et seq.* (Supp. II 1972). The Equal Opportunities Act of 1972 extended Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.* (1970)) to employment practices of the United States government. 42 U.S.C. § 2000e-16(a) (Supp. II 1972) provides:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than

ment.⁸⁶ A three-judge court was convened and held that the 1972 Act implicitly repealed the employment preference provision of the 1934 Act.⁸⁷

The preference granted by the Wheeler-Howard Act extended to initial hiring and promotion, but not to reductions in the work force.⁸⁸ The policy behind the hiring preferences clearly emerged from a reading of the legislative history. The need to promote self-reliance and self-government among the Indian tribes was of primary importance to the 1934 Congress.⁸⁹ Senator Wheeler, co-sponsor of the Act, explained:

We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned⁹⁰

Congress, not unmindful of the potential disadvantages to non-Indians within the BIA, nevertheless concluded that the advantages to the Indian community outweighed the disadvantages to the other BIA employees.⁹¹ The goals of the legislation were three-fold: first, it

the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

86. While the fifth amendment does not contain an equal protection clause, the Supreme Court, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), stated that "discrimination may be so unjustifiable as to be violative of due process." *Id.* at 499. Since *Bolling* the due process clause has been applied as though it contained an equal protection clause. See *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 680 (1973).

87. 417 U.S. at 537.

88. 25 U.S.C. § 472 (1970). See note 84 *supra*.

89. 417 U.S. at 541-45.

90. *Hearings on S. 2755 and S. 3645 Before the Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, at 256 (1934), quoted at 417 U.S. at 541. Congressman Hastings stated:

It is urged that the employees of an Indian community should be largely Indian. I am in sympathy with that suggestion. This could be done by amending the civil-service laws.

78 CONG. REC. 9269 (1934).

91. 78 CONG. REC. 11737 (1934) (remarks of Congressman Carter).

was designed to give Indians greater participation in their own self-government; second, it fulfilled the government's trust obligation toward the Indian tribes; and third, it decreased the detrimental effect of having non-Indians administer Indian tribal life.⁹² In the congressional judgment, this preference was necessary to promote Indian competition on an equal basis with the rest of American society.⁹³

After concluding that the Indian preference had not been implicitly repealed by the Equal Opportunities Act of 1972,⁹⁴ the unanimous Court addressed itself to the question of whether or not the preference constituted invidious racial discrimination.⁹⁵ Noting that article one, section eight, clause three⁹⁶ of the United States Constitution gives Congress plenary power to deal with Indian problems,⁹⁷ the Court stated that "[l]iterally every piece of legislation dealing with Indian tribes . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations."⁹⁸ Were such legislation to constitute invidious racial discrimination, "an entire Title of the United States Code . . . would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."⁹⁹ It was against this background that the Court examined the constitutional validity of the preference system.

92. 417 U.S. at 541-43.

93. *Id.* at 543-44.

94. *Id.* at 545-51. The Court's conclusion that Congress had not intended to repeal the Indian preference was based on four factors. First, provisions of the 1964 Act excluded tribal employment and certain preferential treatment by business on or near a reservation. *Id.* at 547-48. See 42 U.S.C. §§ 2000e(b), 2000e-2(i) (1970). Second, after passage of the 1972 Act, Congress enacted new Indian preference laws in the area of education. 417 U.S. at 548-49. See 20 U.S.C. §§ 887c(a), (d), 1119a (Supp. II 1972). Third, since Indian preferences had previously been excepted from executive orders forbidding discrimination in employment by government agencies (*see, e.g.*, Exec. Order No. 10,577, 19 Fed. Reg. 7521 (1954); Exec. Order No. 7423, 1 Fed. Reg. 885 (1936)) and since the 1972 Act was essentially a codification of the anti-discrimination orders, it could not be presumed that Congress intended to "erase" the preferences. 417 U.S. at 549. Finally, the Court noted that "'repeals by implication are not favored.'" *Id.*, quoting *Posedas v. National City Bank*, 296 U.S. 497, 503 (1963).

95. 417 U.S. at 551.

96. The Congress shall have Power

. . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

97. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 536, 557-59 (1832). See U.S. SOLICITOR FOR THE DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958).

98. 417 U.S. at 552.

99. *Id.*

Initially, the Court made the curious assumption that the employment preference was "not even a 'racial' preference":¹⁰⁰

Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . . The preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.¹⁰¹

The test to be applied in such cases is whether or not "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians"¹⁰² Here, the employment preference was said to rationally further the congressional policy of Indian self-government.¹⁰³

Mancari, although arising against a background of two-hundred years of special congressional concern for Indians,¹⁰⁴ raises speculation as to the applicability of the Court's reasoning to minority admissions. Clearly, the Court's conclusion that the employment preference is not a "racial" preference is hardly satisfying. The non-Indian denied employment or promotion solely on the basis of the immutable characteristic of his or her birth as a non-Indian surely will not take comfort in such tenuous distinctions. A more correct analysis would seem to lie in the acknowledgement that there is in fact a racial preference; the question then becoming whether or not the preference is constitutionally sound. Language from *Mancari* suggests an approach.

Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.¹⁰⁵

100. *Id.* at 553.

101. *Id.* at 554. The Court stated:

The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 553 n.24. It is difficult to agree with the Court's conclusion that the preference is not "racial in nature." While only certain Indians are accorded the preference (*e.g.*, Cherokee, Apache, Arapaho, Chickasaw, etc.), all others are disadvantaged solely by virtue of their birth as non-Cherokee, non-Apache, non-Arapaho, non-Chickasaw, etc. Clearly, some racial groups are being preferred over others.

102. *Id.* at 555.

103. *Id.* at 554. See Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

104. See U.S. SOLICITOR FOR THE DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958).

105. 417 U.S. at 554.

Whether or not minority admissions is a "legitimate, nonracially based goal" is yet to be considered by the Court.

CONCLUSION

The underlying goal of any minority admissions program is to seek to redress imbalances created by political and economic deprivation.¹⁰⁶ Whether or not this goal can be squared with principles of equal protection is problematical given the recent pronouncements in *DeFunis*, *Kahn*, and *Mancari*. From a consideration of these cases, it is evident that the possible approaches are numerous and seemingly inconsistent. Thus, for example, one finds Justice Douglas supporting the widow and Indian preferences in *Kahn* and *Mancari*, while vigorously opposing the racial preference in *DeFunis*.

The unpredictability of any Supreme Court resolution of minority preferences clearly casts doubt on the validity of minority preferences throughout the country. Should the Court be inclined to resolve the controversy, it is suggested that the approach advocated by Justice Douglas presents the sensible and appropriate solution. As Justice Douglas correctly concludes, special consideration should be given in a "racially neutral manner."¹⁰⁷ To give preference to the child of a Boston lawyer solely because he or she is black and to deny preference to the child of an Appalachia coal miner solely because he or she is white does violence to the principle that the "Constitution is color-blind."¹⁰⁸ Such benign policies are fraught with danger and can conceivably inflame racial prejudice.

Such treatment, even though intended to neutralize discrimination and to achieve educational equality, may actually generate more private prejudice. Blacks as well as whites may instinctively attribute the preferential treatment of a minority race to a low assessment of its capabilities.¹⁰⁹

While there may have once been a time when colleges and universities only considered grades and test scores,¹¹⁰ many subjective considerations now permeate the admissions process.¹¹¹ Indicia such as

106. See O'Neil, *supra* note 5, at 699.

107. See text accompanying notes 50-57 *supra*.

108. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

109. Birnbaum, *Who Should Go?*, in OPEN ADMISSIONS AND EQUAL ACCESS 121 (P. Rever ed. 1970); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classifications by Race*, 67 MICH. L. REV. 1553, 1611 (1969). See Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063, 1072 (1968).

110. O'Neil, *supra* note 5, at 702.

111. *Id.*

recommendations, extra-curricular activities, leadership qualities, and community service are often considered.¹¹² Unless the Court is prepared to declare intelligence the sole criterion for college admissions,¹¹³ the consideration of one's economic or cultural background should not raise serious objections.

Judith Ilene Bloom

112. *Id.*

113. See generally Note, *Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647 (1974).