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Preferential Admissions to Professional Schools: The Equal Protection Challenge

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PROJECT

PREFERENTIAL ADMISSIONS TO PROFESSIONAL SCHOOLS:
THE EQUAL PROTECTION CHALLENGE.

I. INTRODUCTION

In order to overcome past discrimination, to provide minority representation both in the schools and the professions, and possibly, to overcome minority dissatisfaction, a professional school may institute a preferential admissions program (PAP) based upon race. The minority applicant who, because of a low grade point average (GPA) and low test scores, cannot be admitted through the regular admissions process, may be admitted through the PAP. The majority applicant who fails to be admitted through the regular process is not eligible, because of his race, to take advantage of this program and is therefore denied admission to the school. This process has resulted in a wide disparity not only between the quantifiable aptitude indicators — GPA and test scores — of those who are admitted through the PAP and those admitted through the regular process, but also between those admitted through the PAP and those denied admission, for excluded majority applicants often have higher GPA's and test scores than PAP-admitted minority applicants. Race is thus used not

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2. See Ely, supra note 1, at 725; O'Neil, supra note 1, at 700; see also Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. CHI. L. REV. 653, 654-58 (1975).

3. See Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 SUP. CT. REV. 1. The author suggests:

The Realpolitik argument against DeFunis is that preferential treatment of blacks and other militant minorities is the price the white majority must pay for avoiding the sort of unrest and violence of which the race riots of the 1960's were arguably but the portents. More narrowly, preferential treatment in university admissions may be the price of avoiding racial, and perhaps other types of student, unrest such as was experienced by many universities and colleges in that period. Although university administrators publicly justify their preferential admissions policies in terms of increasing diversity, rectifying historical injustices, and the like, in private they often will admit that appeasing student militancy was the dominant factor in the adoption of the policies.

Id. at 26.


5. See note 4 supra.

6. For instance, under the PAP utilized by the University of California Davis Medical School, which was scrutinized in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 880 (1976), cert. granted, 97 S. Ct. 1098 (1977), the applicant, Alexander Bakke, was denied admission although he had a rating which was 20 to 30 points above some of the students admitted through the PAP. 18 Cal. 3d at 43-44, 553 P.2d at 1161, 132 Cal. Rptr. at 687.

(983)
only as a factor to decide between quantifiable equals in the regular admissions process, but also as a consideration which can outweigh past academic performance. Moreover, a certain number of positions may be set aside specifically for PAP applicants, thereby limiting the admissions opportunities of majority applicants.

The excluded majority applicant will maintain that the implementation of the PAP denied him equal protection since he was denied admission because of race. A claimant could initially argue that since any determination based upon race is invalid, race can never be considered even in a decision between quantifiable equals; and alternatively that even if racial considerations are legitimate, race alone cannot be afforded such significance in a professional school admission decision.


8. In the PAP under consideration in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 97 S. Ct. 1098 (1977), the University of California at Davis Medical School set aside 16 places for minority applicants. Id. at 43, 553 P.2d at 1158, 132 Cal. Rptr. at 686.


There may also be affirmative action programs in employment. For a recent commentary on affirmative action in employment in higher education, see Solomon & Heeter, Affirmative Action in Higher Education: Towards a Rationale for Preference, 52 NOTRE DAME L. REV. 41 (1976).

10. This type of argument seems to be based upon a rationale that all racial discrimination is unconstitutional per se and thus that race is never a legitimate consideration. See DeFunis v. Odegaard, 82 Wash. 2d at 45, 61-67 (1973) (Hale, C.J., dissenting), 507 P.2d at 1189, 1197-1200; see notes 71-73 & 126-39 and accompanying text infra.

11. This type of argument springs from two different rationales. The first is the "best qualified through merit criteria" approach to professional education. See notes
A court reviewing this equal protection challenge will be faced with questions of significant difficulty and import involving appropriate means, legitimate ends, and the correct constitutional standard of review to be applied. The purpose of this article is to focus upon and analyze the major questions and problems presented by a PAP equal protection challenge. This project will first review past cases involving equal protection and the constitutional tests developed therein; second, discuss recent cases involving equal protection challenges to PAP's; third, set forth the possible standards for reviewing a PAP; and conclude with an analysis of the ends and means problems involved in a constitutional decision on a PAP.

II. EQUAL PROTECTION STANDARDS

A. General

The United States Supreme Court has long recognized that a state must classify in order to achieve its legislative objectives. The hundreds of classifications made by states result, necessarily, in different classes of people being treated differently. The issue for the courts to decide is the scope of this power to classify when a particular classification is challenged as being unconstitutional.

Attacks on classifications are usually advanced on the grounds that such classifications deny the complaining party the equal protection of the laws as guaranteed by the fourteenth amendment. When a court evaluates a particular classification, equal protection ordinarily demands that there be some minimum connection between the challenged classification and its objectives. The traditional terminology of this examination is that the classifying means of the particular state action must in some way be related to legitimate legislative ends. The extent of this scrutiny varies, however, depending upon the type of classification involved.

176-191 and accompanying text infra. The second is the “slow integration by nonsuspect means” approach apparently adopted by the California Supreme Court in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, (1976), cert. granted, 97 S. Ct. 1098 (1977). For a discussion of Bakke, see notes 69-96 and accompanying text infra.


13. State action is required and must be alleged in order for the constitutional guarantees of the fourteenth amendment to be invocable. See Civil Rights Cases, 109 U.S. 3 (1883). For the text of the fourteenth amendment, see note 15 infra. For purposes of this project, state action will be assumed.

14. For an in-depth analysis of the types of classifications made by legislators and the relation of those classifications to the equal protection clause, see Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949).

15. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961). The fourteenth amendment to the United States Constitution states in pertinent part: “No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. For an analysis of the history surrounding the enactment of the fourteenth amendment, see note 26 infra.


18. Although this section of the project will examine the traditional two-tiered approach to reviewing a challenged classification, i.e., employment of either a
Classifications are valid as a rule "if any state of facts reasonably may be conceived to justify [them]"\(^{19}\) and if "all persons similarly circumstanced [are] treated alike."\(^{20}\) There must be a reasonable relationship between the means (the classification) and the ends (the legislative objective).\(^{21}\) In applying this standard, courts have deferred to the legislative determination of objectives\(^{22}\) and, where the means used are merely rationally related to

"rational relationship" or a "strict scrutiny" standard \(see\) text accompanying notes 19–33, \(infra\) it should be noted that attempts to place all equal protection cases into two neat categories is often a difficult task. As Justice Marshall, dissenting in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), explained:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

\(Id.\) at 98–99. Commentators have suggested that the Burger Court is heading toward the utilization of a third standard of review in equal protection decisions. \(See\) Gunther, The Supreme Court 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HAV. L. REV. 1 (1972). Gunther has labeled this standard of review "minimum scrutiny with a bite," emphasizing that, although purporting to use a rationality standard, the Court seems to be scrutinizing classifications with greater care. \(Id.\) \(See, e.g.,\) Reed v. Reed, 404 U.S. 71 (1971). For a discussion of a middle level of review in a PAP context, \(see\) notes 97–108 and accompanying text \(infra.\)

In two recent decisions, a plurality of the Supreme Court has apparently applied a middle level of scrutiny, in determining the validity of gender based classifications. \(See\) Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Craig v. Boren, 429 U.S. 190 (1976).

In \(Craig,\) the Court struck down an Oklahoma statutory scheme prohibiting the sale of "nonintoxicating 3.2\% beer" to males under the age of 21 and to females under the age of 18. 429 U.S. 190. In holding the statute invalid, Justice Brennan, writing for the Court, stated that "to withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." \(Id.\) at 197–98. The Court held that the differential in ages drawn by the statute with respect to the purchase of beer by males and females, was not substantially related to the achievement of regulating drinking and driving — the State's purported objective. \(Id.\) at 204. In \(Califano,\) the Court invalidated a provision of the Social Security Act, 42 U.S.C. \$ 402(f)(1)(D) (1970 & Supp. 1975), that required widowers, but not widows, to prove that they were receiving at least one-half of their support from their deceased spouse in order to qualify for survivor's benefits. 97 S. Ct. 1021 (1977). Justice Brennan again wrote the opinion for the Court, and in holding that the gender based distinction violated the equal protection guarantees of the fifth amendment's due process clause, adopted the standard of scrutiny articulated in \(Craig.\) \(Id.\) at 4240.

20. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). According to Royster, states have the power to classify, "[b]ut the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." \(Id.\) at 415.
22. The consideration given to the legislative judgment is typified in the leading case of Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). In that case, a
those legitimate ends, the typical state classification will be upheld.\(^{23}\) However, when suspect classifications or fundamental interests are involved, courts have reviewed more intensely the legislative objectives and their relationship with the means selected to accomplish them.\(^{24}\)

In keeping with the original aim of the fourteenth amendment — the elimination of racial discrimination\(^{25}\) — classifications based upon race

New York City ordinance prohibiting the operation of vehicles bearing advertisements on the streets was challenged as a denial of equal protection. \textit{Id.} at 107–08. The regulation excepted vehicles which advertised the business of the vehicle's owner and which were used primarily for other business purposes. \textit{Id.} In holding that the contested regulation was valid, the Court refused to consider the evidence itself to determine if the purpose of the classification was sound, but instead accepted as permissible the purpose determined by the municipality — traffic control — and concluded that there was no evidence that the regulation was without relation to this objective. \textit{Id.} at 109. \textit{See also} Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); \textit{Gamble v. Cleary}, 335 U.S. 646 (1948). For an examination of the extent of inquiry into the purpose of a particular classification, see \textit{Developments in the Law — Equal Protection}, 82 \textit{Harv. L. Rev.} 1065 (1969) [hereinafter cited as \textit{Developments}].

\(^{23}\) \textit{See, e.g.,} \textit{McGowan v. Maryland}, 366 U.S. 420 (1961). In \textit{McGowan}, the Supreme Court explained that the fourteenth amendment gives the states discretion in enacting laws which touch citizens differently. \textit{Id.} at 425. In upholding a Maryland statute which prohibited the sale of certain merchandise on Sunday, the Court reasoned that the equal protection clause is not violated unless "the classification rests on grounds wholly irrelevant to the achievement of the State's objective." \textit{Id.} at 425. A classification, the Court held, "will not be set aside if any state of facts reasonably may be conceived to justify it." \textit{Id.} at 426. The Court reasoned that the legislature's exemption of certain items could reasonably be "necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day." \textit{Id.} The Court, accepted this as a permissible, noninvidious purpose and concluded that the classifications were rationally related to the legislative purpose. \textit{Id.} at 427–28.

\(^{24}\) Cases decided during the Warren Court years identified two areas where a challenged classification would be subject to a vigorous evaluation: where a statute employed a suspect classification or where the classification had an impact on a fundamental interest. For a discussion of suspect classifications, see notes 25–33 and accompanying text \textit{infra}.

The fundamental interest strand of "strict scrutiny" involves an initial finding by the Court that a particular activity is fundamental and thus deserving of special protection. The Court then imposes a heavy burden of justification on any classification which affects the activity. The primary examples of interests which the Warren Court identified as fundamental are the right to vote, the right to a criminal appeal, and the right to travel interstate. \textit{See, e.g., Shapiro v. Thompson}, 394 U.S. 618 (1969); \textit{Harper v. Virginia Bd. of Elections}, 383 U.S. 663 (1966); \textit{Douglas v. California}, 372 U.S. 353 (1963). It should be noted, however, that the Supreme Court has rejected a claim that education was a fundamental interest requiring strict scrutiny of any classification affecting it. \textit{San Antonio Ind. School Dist. v. Rodriguez}, 411 U.S. 1 (1973).

\(^{25}\) The fourteenth amendment was originally understood to have as its primary purpose the protection of the civil rights of the recently emancipated blacks. The Supreme Court has concluded that the principal purpose of the post-Civil War amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." \textit{Slaughterhouse Cases}, 83 U.S. (16 Wall.) 36, 71 (1873). \textit{See also} \textit{Developments supra} note 22, which states: "Historical analyses indicate that the immediate catalyst for passage of the fourteenth amendment was the fear that significant Reconstruction measures enacted by Congress would be held beyond the scope of congressional power." \textit{Id.} at 1068 (citation omitted). Because of the amendment's broad language, the equal protection clause has been interpreted to protect the rights of all racial
have been viewed with suspicion. If a suspect classification is challenged, the scope of a state's power to classify is thoroughly scrutinized; to be valid the classification must survive a "strict scrutiny" test. The classification must have more than a rational connection to a legitimate state purpose and a heavy burden is placed upon the states to justify the use of such a classification. In most instances, in order for an alleged improper

groups and has long been considered as imposing restraints on the utilization of classifications generally. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (guarantees of protection of the fourteenth amendment extend to all persons within the territorial jurisdiction of the United States). For an explanation of the history surrounding the enactment of the fourteenth amendment, see Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). See also G. Gunther, Constitutional Law 664-65 (9th ed. 1975).

26. As early as 1880, the Supreme Court indicated that it intended to implement the underlying purposes of the fourteenth amendment by prohibiting discrimination on the basis of race. Strauder v. West Virginia, 100 U.S. 303 (1880). In Strauder, the Court reversed a murder conviction by an all white jury, of a black man, on the grounds that a state statute which denied blacks the rights to become jurors violated the fourteenth amendment. Id. See note 29 infra.

The first explicit reference to race as a suspect classification warranting exacting judicial scrutiny, however, was in Korematsu v. United States, 323 U.S. 214 (1944). In sustaining a military exclusion order which applied to Americans of Japanese descent, the Supreme Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are subject to the strictest scrutiny. Id. at 216. The particular exclusion order in that case, however, survived a strict scrutiny examination. The Court held that the executive order was constitutional because the exclusion of certain citizens was justified in view of the dire and extreme circumstances of the war. Id. at 219. For recent decisions holding racial classifications suspect, see Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

The primary classification subjected to a strict scrutiny evaluation has been race; however, the Court has applied a "suspect" label to certain other classifications. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (state classifications based on alienage are suspect). In other cases, the Court has hinted that more than mere rationality is needed to justify certain classifications. See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968) (classifications based on illegitimacy held invalid); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality) (gender based classification found invalid with the plurality declaring sex to be a suspect class).


28. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967), McLaughlin v. Florida, 379 U.S. 184 (1964). In McLaughlin, the Supreme Court invalidated as a denial of equal protection a Florida statute which provided for the punishment of any black man and white woman or any white man and black woman who, though not married to each other, habitually lived in and occupied the same room during the night. Id. at 196. The Court pointed out that the policy of the fourteenth amendment, rendered racial classifications "constitutionally suspect." Subjecting the statute to "strict scrutiny," the Court could find no compelling state interest for the racial classification. Id. at 193-94.

In Loving, the Court was faced with determining the validity of Virginia's antimiscegenation statute which drew distinctions on the basis of race. 388 U.S. at 2. The Court distinguished the analysis of equal protection applied to the Virginia statute from cases involving no racial classifications and subjected the statute to the "most rigid scrutiny" because a "suspect" classification was involved. The Court thus concluded that there was no "overriding state purpose" for restricting one's freedom to marry solely on the basis of race. Id. at 11.

For examples of racial classifications which have been held invalid under a "strict scrutiny" analysis by lower courts and affirmed per curiam by the Supreme Court, see Hunter v. Erickson, 393 U.S. 385 (1969) (racial classification in referendum
classification based upon race to survive "strict scrutiny" the court must first find a compelling state interest; this search involves an exacting examination of the legislative purpose, with little deference given to legislative judgment. The court must also find a high degree of relevance between the classification and the established compelling interest. This latter aspect of the review — a strict scrutiny of the means — is often expounded as a balancing test. The burden is placed upon the state to show both, that its objectives cannot be achieved by measures which do not draw racial distinctions, and that the public interest in the classification outweighs any injury suffered by private parties.

B. Permissible Use of Racial Criteria

After the Supreme Court's decision in Brown v. Board of Education (Brown I), which rejected the "separate but equal" doctrine and held that


29. In determining whether there is a compelling state interest or purpose, it is clear that a challenged classification will not survive any scrutiny if there is a discriminatory purpose behind the particular classification. A classification, the purpose of which is to discriminate on the basis of race, has been deemed invidious and held invalid as violative of the fourteenth amendment. Strauder v. West Virginia, 100 U.S. 303 (1880). In Strauder, the Supreme Court held invalid a state statute which denied blacks the right to become jurors because the statute perpetrated discrimination against the black solely on the basis of race. Id. Strauder established the principle that if a classification relates rationally to a discriminatory purpose, it denies equal protection because the purpose of the classification is impermissible and not merely because the classification is based on race. Id. This rationale has been applied in decisions striking down classifications, where the discriminatory purpose of Educ., 347 U.S. 483 (1954) or becomes apparent as the law is administered (see, e.g., Griffin v. New Kent County School, 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886)). For an analysis of impermissible purposes in equal protection decisions, see Developments, supra note 22 at 1081, 1091-1100. But see Palmer v. Thompson, 403 U.S. 217 (1971) (closing of city public swimming pools for economic reasons, after desegregation order, held valid, despite some evidence of discriminatory motivation).


32. See generally Developments, supra note 22, at 1103.

33. See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964). The McLaughlin Court stated that even where there is a compelling state interest, a classification which seems to discriminate on the basis of race will "be upheld only if it is necessary and not merely rationally related, to the accomplishment of a permissible state policy." Id. at 196 (emphasis added).

34. 347 U.S. 483 (1954).

35. The separate but equal doctrine originated in Plessy v. Ferguson, 163 U.S. 537 (1896). In that case the Court sustained a Louisiana law which required railway
de jure segregation in the public schools was invalid,36 various types of state-maintained segregation were held unconstitutional in a number of per curiam decisions which merely cited Brown I as authority.37 This reliance on Brown I led many commentators to believe that the use of racial classifications was unconstitutional per se.38 In subsequent racial classification cases, however, the Court did not apply a per se rule but instead emphasized that the state laws involved were unconstitutional because of the absence of an “overriding statutory purpose” necessary to satisfy strict judicial scrutiny.39 That the utilization of racial criteria may be justified in certain circumstances was first recognized in the school desegregation cases decided in the aftermath of Brown I; these cases indicate that racial criteria may be a valid factor in implementing court-imposed integration procedures.

companies to provide “equal but separate accommodations” for whites and blacks. Id. at 540. The Court concluded that

[The object of the [14th] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Id. at 544.

In overruling Plessy, the Brown Court seemed to be adopting the position of the first Justice Harlan's dissenting opinion in Plessy. Justice Harlan, in discussing the separate but equal concept had argued that:

[O]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

163 U.S. at 559 (Harlan, J., dissenting).

36. The Brown Court invalidated a state law permitting segregation of white and black children in public schools solely on the basis of race. Id. at 494–95. In evaluating the equality of the segregated school systems, the Court refused to look only at tangible factors, such as the number and qualifications of teachers. Finding that segregation generated a feeling of inferiority, the Court concluded that minority children were deprived of equal educational opportunities because separate educational facilities in the field of public education were inherently unequal. Id.

Prior to Brown I, the Supreme Court had found the use of racial classifications in segregated graduate schools invalid because of the inequalities of intangible benefits inherent in the separate facilities. See, e.g. Sweatt v. Painter, 339 U.S. 629 (1950).


38. See Kaplan, Segregation Litigation and the Schools — Part I: The New Rochelle Experience, 58 Nw. U. L. Rev. 1, 22 (1963); Developments, supra note 22 at 1089.

39. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). In McLaughlin, for example, the Court concluded that “[w]ithout such justification the racial classification . . . is reduced to an invidious discrimination.” Id. at 192–93. For an explanation of these cases, see note 28 supra.
The Supreme Court first dealt with the issue of the remedies available to counter the effect of state-maintained segregation in *Brown II*.\(^{40}\) That case emphasized that a transition to nondiscriminatory school admissions policies was necessary to overcome past discrimination.\(^{41}\) Implementation of desegregation procedures was nevertheless essentially left to the discretion of local school boards and it was not until *Green v. New Kent County School Board*,\(^{42}\) thirteen years later, that the Court imposed a duty to integrate upon officially segregated public schools. In holding that a “freedom of choice” plan of integration was inadequate, the Court stated that “[s]chool boards [are] charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated.”\(^{43}\)

The issue of the validity of utilizing racial criteria as a permissible step in desegregating the schools was finally resolved in *Swann v. Charlotte-Mecklenberg Board of Education*.\(^{44}\) Rejecting a challenge to the use of racial quotas in student assignments, the *Swann* Court upheld a district court plan of integration.\(^{45}\) Although emphasizing that a certain proportionate representation of races was not required by the fourteenth amendment, the Court nevertheless affirmed the use of mathematical racial ratios as “a starting point in the process of shaping a remedy, rather than an inflexible requirement” and concluded that “the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.”\(^{46}\)

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\(^{41}\) Id. In *Brown II*, the Court initially reiterated the principle that racial discrimination was unconstitutional in public education and then turned to the scope of relief available in jurisdictions where such discrimination had been practiced. *Id.* at 298. Emphasizing that flexible remedies were available in equity, the Court stated that “[w]hile giving weight to . . . public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance” with the desegregation orders. *Id.* at 300.

\(^{42}\) 391 U.S. 430 (1968).

\(^{43}\) *Id.* at 437–38 (emphasis added). In *Green*, the Court was faced with determining the constitutionality of a Virginia school board’s “freedom of choice” plan for desegregating the schools, which allowed students to attend schools of their own choice without encountering racial barriers. *Id.* at 432–33. The Court held that the plan was unacceptable since it did little realistically to dismantle the dual school system. The Court, therefore, charged the district courts in the jurisdiction with the responsibility to evaluate the effectiveness of the desegregation plan and to search for available alternatives. *Id.* at 439–42.

It should be noted, that a distinction between de facto and de jure segregation has been maintained by the Supreme Court. *See, e.g.*, Keyes *v.* School District No. 1, 413 U.S. 189 (1973). Where there is a finding of a purpose or intent to segregate, reflected in a state’s laws or policies, de jure segregation exists and the Court will require local school boards and the district court in the jurisdiction to implement a plan of integration. *Id.* at 200. Where the segregation, however, is de facto — resulting merely, from a concentration of racial or ethnic groups in particular neighborhoods — courts have not compelled integration. *See, e.g.*, Deal *v.* Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Bell *v.* School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

\(^{44}\) 402 U.S. 1 (1971).

\(^{45}\) *Id.* at 25.

\(^{46}\) *Id.*
In *Swann*, therefore, the Supreme Court determined that some consideration of race by school authorities, where the purpose of the racial classification is to bring together rather than to separate the races, does not violate the fourteenth amendment.\(^{47}\) The *Swann* Court did not, however, discuss whether the use of racial criteria had to meet the exacting standard of a “strict scrutiny” test or the less stringent “mere rationality” standard. The Court seemed to assume arguendo that the steps taken by the district court were necessary and justifiable, given the exigent need to integrate the public schools.\(^{48}\)

Attempts to redress past discrimination by giving special treatment to particular racial groups have been labeled benign racial classifications.\(^{49}\) In addition to the desegregation cases, the use of benign racial classifications has emerged in areas such as public housing,\(^{50}\) employment,\(^{51}\) and graduate and

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\(^{47}\) For a recent interpretation of the legitimacy of the use of racial classifications in certain contexts, as mandated by *Swann*, see *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 70, 553 P.2d 1152, 1176-77, 132 Cal. Rptr. 680, 704-05 (1976) (Tobriner, J., dissenting) \(^{48}\) \(^{49}\) \(^{50}\) \(^{51}\)
professional education. In light of the Supreme Court’s affirmance of a limited use of racial criteria, racial classifications are apparently not invalid per se. The question remains, however, as to the standard of review a court must use in testing the constitutionality of state remedial programs which subject individuals to different treatment on the basis of race.

52. For recent decisions concerning the validity of utilizing racial classifications in admission programs, see notes 55–110, and accompanying text infra.

53. See notes 34–48 and accompanying text supra.

54. A recent Supreme Court decision, upholding the validity of a state legislature’s utilization of racial considerations in drawing legislative districts, provides a useful comparison. In United Jewish Organizations of Williamsburgh, Inc. v. Carey, 97 S. Ct. 996 (1977) the Court rejected an attack on the use of racial criteria by a state legislature in an attempt to comply with section five of the Voting Rights Act (Act), 42 U.S.C. § 1973c (1971). 97 S. Ct. at 999–1011. Attempting to fulfill the requirements of the Act in order to increase the representation of non-whites, New York State submitted a plan of reapportionment to the Attorney General for a determination that the plan did not have a racially discriminatory purpose. Id. at 1001–03. The plan, as approved, consisted of the redrawing of district lines to increase nonwhite majorities in a few specified districts by reassigning and splitting the petitioners’ Hasidic Jewish community into different districts. Id. at 1003. The petitioners alleged that this plan “would dilute the value of [their] franchise by halving its effectiveness” for the purpose of achieving racial quotas, and that they were assigned to districts solely on the basis of race. Id.

Justice White, announcing the judgment of the Court in a plurality opinion, examined the legislative history and case law interpreting the Act and concluded that its purpose was remedial and would often necessitate racial considerations in drawing district lines to reflect and protect the voting strength of the minority community. Id. at 1005–11. Holding that the states’ use of racial criteria was permissible, Justice White emphasized that neither the fourteenth or fifteenth amendments prevented a state subject to the Act from “deliberately creating or preserving black majorities in particular districts” in order to assure compliance with the Act. Id. at 1007.

In a separate section of the opinion, joined by two other justices, Justice White stated that “[w]hether or not the plan was authorized by or was in compliance with the Act,” the action of the New York legislature did not violate the fourteenth or fifteenth amendments, even assuming that the state had used race in a purposeful manner. Id. at 1009. In support of this conclusion, Justice White maintained that the “[reapportionment] plan represented no racial slur or stigma with respect to white or any other race;” did not fence out the white population from participation in the political process, and “did not minimize or unfairly cancel out white voting strength.” Id. Stating that no discriminating purpose or effect was found in the New York plan, the Court concluded that

[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State. Id. at 1011 (citation omitted).

It is interesting to note that, in a concurring opinion, Justice Brennan emphasized that the use of racial criteria in this case was validated simply by the existence of the Voting Rights Act. Id. at 1011–16. However, Justice Brennan disagreed with Justice White’s conclusion that there would be no Constitutional violation even in the absence of the Act. Id. Justice Brennan suggested that the propriety of using racial criteria in a so-called benign manner presented “sensitive issues of doctrine and policy” which he was content to leave unanswered until another day. Id. at 1012–13. Although recognizing that “not every remedial use of race is forbidden” and “that circumstances exist where race may be taken into account,” Justice Brennan focused on issues that would have to be considered in determining these “circumstances and ... how substantial a reliance may be placed upon race.” According to Justice Brennan, a court must consider 1) whether a purported preference may in reality be a disguised disadvantageous treatment of
III. TESTING PREFERENTIAL ADMISSIONS PROGRAMS

A. The Case Law

In the absence of Supreme Court authority on the constitutionality of utilizing racial classifications in the context of a PAP, the few lower court decisions which have dealt with the issue have searched for an appropriate standard of review to determine whether a particular PAP denies an individual equal protection. It is obvious that, because courts differ in their interpretations of prior case law, and their attitudes towards the scope of permissible or compelling state interests and the means by which to accomplish those interests, no uniform standard for reviewing PAP's has emerged.

In DeFunis v. Odegaard, a white applicant who was denied admission to the University of Washington Law School brought an action in state court alleging, inter alia, that his admission was denied because of the law school's PAP and that the use of the PAP denied him equal protection of the laws as guaranteed by the fourteenth amendment. The lower court found

minorities; 2) whether classifications based upon race would tend to increase "society's latent race consciousness" and 3) that benign classifications are "viewed as unjust by many . . . especially by those individuals who are adversely affected by a given classification." Id. at 1013-15. In conclusion, Justice Brennan stated

In my view, if and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act. However the Court ultimately decides the constitutional legitimacy of "reverse discrimination" pure and simple; I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.

Id. at 1014-15.

Chief Justice Burger dissented and in discussing the use of racial classifications emphasized that

although reference to racial composition of a political unit may, under certain circumstances, serve as a starting point in the process of shaping a remedy, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25 (1971), rigid adherence to quotas, especially in a case like this, deprives citizens such as petitioners of the opportunity to have the legislature make a determination free from unnecessary bias for or against any racial, ethnic or religious group. Manipulating the racial composition of electoral districts to assure one minority or another its 'deserved' representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process.

Id. at 1020 (Burger, C.J., dissenting).

55. 82 Wash. 2d 11, 507 P.2d 1169 (1973), vacated as moot, per curiam, 416 U.S. 320 (1974).

56. 82 Wash. 2d at 13, 507 P.2d at 1171-72. In order to determine which applicants to admit to its first year class, the university's admissions committee followed certain procedures which gave preference to minority groups such as Blacks, Chicanos and American Indians which the committee determined had been discriminated against in the past. Id. at 17-20, 507 P.2d at 1174-75.
that the PAP violated equal protection and ordered DeFunis admitted, but the Washington Supreme Court disagreed and reversed. Although the controversy was later declared to be moot by the United States Supreme Court, the state court's decision is important as an example of a method of applying an equal protection analysis to a PAP.

In upholding the PAP, the Washington Supreme Court first concluded that racial classifications in PAP's were not unconstitutional per se under Brown I which the court read as prohibiting only those classifications which “stigmatize a racial group with the stamp of inferiority.” Both Green and

57. Reviewing the applications of minorities, the committee placed less weight on the predicted first-year average in evaluating the ability of the particular applicant to succeed than it did for majority applicants, and, in determining this probability of success, the minority applicants were compared with one another and not with majority applicants. Id. at 21, 507 P.2d at 1175–76.

58. Id. at 13-14, 507 P.2d at 1171–72. At the Washington Superior Court's trial, the law school's admissions procedure was found to be unconstitutional per se under Brown v. Board of Education, 347 U.S. 483 (1954). The trial court, in oral opinion, articulated the reasoning behind its holding:

Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group have not, in my opinion, been accorded equal protection of the laws guaranteed by the Fourteenth Amendment.

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

59. 416 U.S. 312 (1974). The majority of the Court found the case moot, on the ground that DeFunis had been admitted to the law school, had attended classes while the case was in the courts, and was about to graduate. 416 U.S. at 316–17. Only Justice Douglas wrote an opinion on the merits. He suggested that there were possible cultural biases in the ordinary admissions criteria and would have remanded the case for a new trial to consider this factor. Id. at 335–36. Strongly condemning the use of racial factors in admissions criteria, he emphasized that although minority applicants might be handled differently on the basis of a finding that Law School Admission Test scores were culturally biased, decisions must be made on “the basis of individual attributes, rather than according a preference solely on the basis of race.” Id. at 332. Justice Douglas commented:

There is no constitutional right for any race to be preferred. . . . 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.

Id. at 336–37.

On remand, three justices of the Washington Supreme Court decided that dismissal of the action was mandated by the United States Supreme Court's decision to vacate the judgment. The six remaining justices addressed the merits, four arguing that the prior decision should be reaffirmed and two dissenting. DeFunis v. Odegaard, 84 Wash. 2d 617, 529 P.2d 438 (1974).

60. 82 Wash. 2d at 27, 507 P. 2d at 1179. In reaching this conclusion, the court observed that “[p]referential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of education preferences to certain disadvantaged racial
Swann, the court reasoned, have upheld racial classifications when as here, the purpose "is not to separate the races, but to bring them together."61

The court then addressed the question of the appropriate standard of review to be applied. Concerning the law school's contention that benign racial classifications should be subject to minimum scrutiny, the court found that the racial classification was not benign in its effect on the excluded applicants and refused to apply the rational relation test.62 The classification, according to the court, was inherently suspect and would have to pass strict scrutiny.63 The DeFunis court discerned three reasons why there may be a compelling State interest in an increase of minority representation: 1) the need to eradicate the continuing effects of past racial discrimination; 2) the fact that increasing minority representation would be advantageous to all law students because they would benefit from the classroom discussions of other races; and 3) the need to rectify minority underrepresentation in the legal profession.64 Moreover, since the PAP at issue in DeFunis gave special minorities will be to stigmatize whites." Id. at 27, 507 P.2d at 1179, quoting O'Neil, supra note 1, at 713.

Similarly, Professor Ely criticizes the type of analysis which concentrates on invidiousness because such an analysis seems to focus only on those discriminations which are defined as harmful. Ely, supra note 1, at 730 n. 36.

61. 82 Wash. at 27, 507 P.2d at 1179.
62. Id. at 32, 507 P.2d at 1182. According to the court:
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., citing O'Neil, supra note 5, at 710. For a discussion of the rational relation test, see notes 17-24 and accompanying text supra.

63. 82 Wash. 2d at 32, 507 P.2d at 1182. For a discussion of the strict scrutiny test see notes 25-33 and accompanying text supra.
64. 82 Wash. 2d at 32-35, 507 P.2d at 1182-84. But see Graglia, Special Admission of the Culturally Deprived to Law School, 3 BLACK L.J. 232 (1974). (achieving a racial mix is not a proper end of higher education). One commentator suggests that a fundamental purpose of PAP's is to prevent the minority's dissatisfaction with the system from erupting into violent conflict. See Posner, supra note 3, at 26.

In deciding that the school had a compelling state interest in implementing the PAP, the DeFunis court rejected the plaintiff's contention that "since the law school itself has not actively discriminated against minority applicants, it may not attempt to remedy racial imbalance in the law school student body, and, consequently, throughout the legal profession." 82 Wash. 2d at 33, 507 P.2d at 1182-83. The court reasoned:

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

Id. at 34-35, 507 P.2d at 1183. (footnote omitted). In dismissing this contention the court raised and avoided answering the question whether de jure discrimination exists in the standardized admission test or the law school's teaching methods. According to the court: "We do not, therefore, reach the question of whether there is an inherent cultural bias in the Law School Admission Test, or in the methods of teaching and testing employed by the law school, which perpetuates racial imbalance to such an extent as to constitute de jure segregation." Id. at 34 n.13, 507 P.2d at 1183 n.13. For a
consideration only to those minorities who were underrepresented in the school and who could not "secure proportionate representation if strictly subjected to the standardized mathematical criteria for admission," the program was upheld.

In contrast to the DeFunis majority, the dissent felt that giving any preferences to minority racial groups was per se unconstitutional. The Constitution, the dissent stated, must be color blind. The dissent reasoned that the kind of rationale used in busing cases such as Green and Swann was inapplicable to the case at bar since a PAP not only consciously aids minorities, but also results in harm to nonminority students. Thus, while the DeFunis majority viewed the discrimination against majority applicants as giving rise to the necessity for strict scrutiny, the dissent, because of this discrimination against the majority applicant, would have held that the PAP could never pass constitutional muster.


65. 82 Wash. 2d at 37, 507 P.2d at 1184. Concerning the possibility that the compelling state interest could be achieved through a less restrictive means the court concluded:

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

Id. at 36, 507 P.2d at 1184, quoting Green v. New Kent County School Bd., 391 U.S. 430, 439 (1968) (emphasis supplied by the Court).

66. 82 Wash. 2d at 45, 507 P.2d at 1189.

67. Id. at 64-66, 507 P.2d at 1199-1200. For a discussion of the Green and Swann rationales, see notes 42-48 and accompanying text supra.

68. 82 Wash. 2d at 66-67, 507 P.2d at 1200. The dissenters disagreed with the majority's conclusion that a PAP was the only possible means by which to achieve increased minority representation, and maintained that any other means would be more appropriate. Several alternative methods were articulated as follows:

Although the courts have neither the power nor the aptitude to operate a university and should be without the inclination to do so, several possible methods come to mind which prima facie, at least, meet the fairness and equal protection standards of the constitutions. One would be a system of comprehensive competitive examinations in predesignated courses such as English, history, basic science, mathematics, economics and sociology, and with optional courses in other fields selected by the student.

Another method would be to work out a reasonably accurate mathematical correlation between grade values from different colleges or universities in preannounced prelaw courses and to compute those equivalent grades with admission granted the 150 students with the highest grades. This gives every student a fair chance to achieve his ambition.

Another possible solution — in case the faculty believes that high prelaw grades should not be in the main criterion — prescribe a sound but not
The route taken by the DeFunis dissent has not been the only method of declaring PAP's invalid. In Bakke v. Regents of the University of California, the California Supreme Court struck down a PAP, holding extraordinarily high prelaw grade standard and make a random selection by lot and chance of the 275 applicants to be admitted from among those qualifying. And the fairest way of all — but I doubt its efficacy — admit all applicants possessing a minimum prerequisite grade point in prescribed courses, conduct the law classes in the field house or stadium, if necessary, give frequent examinations, and let the better qualified few survive on the basis of their grades in law school. There are, of course, other methods equally fair and impartial which may be readily developed, all of which will meet the constitutional tests of fair and impartial application. But whatever scheme is developed, one thing is certain: Keep it within the principles of the constitutions, no one can be preferred and no one can be disparaged because of race, color, creed, ethnic origin or domestic environment.

Id. at 65–66, 507 P.2d at 1199–1200 (Hale, C. J., dissenting). The means suggested by the dissent indicate a preference for concentrating on merit criteria for admission. These merit criteria have been criticized. See Bell, supra note 9 at 241–43; Baeza, supra note 64, at 138–40.

There are alternative means which can be suggested which are not based purely upon merit considerations: one alternative focuses primarily on removing the suspect classification and involves redefining the group along socially deprived or underprivileged lines. See Posner, supra note 3 at 21–26. However, it seems that the dissent would not even allow these means. Rather, it asserts:

If it is the state policy — and I think it should be — to afford special training, guidance and coaching to those students whose domestic environment has deprived them of a fair chance to compete, or to provide financial assistance to students in economic straits, it is within the state's constitutional powers to do so, but once these students have reached the point of seeking admission to a professional or graduate school, no preference or partiality can or should, under the constitutions be shown them.

82 Wash. 2d at 66, 507 P.2d at 1200 (Hale, C. J., dissenting). This broad dismissal by the dissent of economic and social deprivation factors might be read as indicating a correlation between race and social deprivation. The dissent might have been addressing the majority's conclusion concerning the rationale for preferential treatment along racial lines. In this context the language could be construed to mean that social deprivation is an insufficient reason for using a suspect classification — race. On the other hand, it appears that the dissent's adherence to merit criteria could be indicative of a view that social deprivation should never be a consideration in professional school admission, even when the preference is not based on a suspect classification. This latter argument would disallow any nonmerit preference such as a preference based upon resident or veteran status.

69. 18 Cal. 3d 34, cert. 553 P.2d at 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 97 S. Ct. 1098 (1977). In 1973 and 1974, Allan Bakke, a caucasian, was denied admission to the medical school of the University of California at Davis (University). Id. at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. Bakke filed a complaint against the University alleging that he was the victim of invidious discrimination — that because of the use of preferential standards, minority applicants less qualified than he were accepted — and that his application was rejected solely on the basis of his race. Id. Seeking mandatory, injunctive and declaratory relief, Bakke alleged that the PAP denied him the equal protection of the laws. Id.

70. One hundred places were available for the first year class at the University. Id. at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. Eighty-four places were selected according to the regular admissions program which based its assessment upon a combination of factors such as application information, test scores on the Medical College Admission Test [hereinafter referred to as MCAT], recommendations, interviews, grade point averages, motivation and character. Id. at 38–44, 553 P.2d at 1155–59, 132 Cal. Rptr. at 683–87. Sixteen places were reserved for applicants who qualified under a PAP which provided for a special admissions committee to screen applicants for the purpose of integrating “the student body and the medical
that, while a state may develop programs designed to increase minority representation in medical schools, race, in and of itself, may not be the determinative factor for admission. In so holding, the court approached the problem in a manner similar to the DeFunis majority. The court reasoned that while cases such as Swann made it clear that not all classifications based upon race are unconstitutional per se, a strict scrutiny of the classification was necessary.

Different objective standards were used as criteria for selection under the two admission plans. In determining which applicants would be offered admission, the regular committee automatically disqualified applicants with a grade point average below 2.5, while the PAP—restricted to reviewing minority applications—did not have this cutoff and "some minority students who were admitted under the special program . . . had grade point averages below 2.5" Id. at 43-44, 553 P.2d at 1158, 132 Cal. Rptr. at 686. In addition, most of the minority students admitted under the program had lower MCAT test scores and benchmark ratings—a combined numerical rating which reflected such factors as, for example, scores, grades, and interviews—than nonminority applicants who were denied admission. Id. at 42-45, 553 P.2d at 1157-59, 132 Cal. Rptr. at 685-87. Bakke had a grade point average of 3.51 and scored in the 90th percentile in three of the four categories on the MCAT. Id. at 43, 553 P.2d at 1158, 132 Cal. Rptr. at 686.

71. 18 Cal. 3d at 38, 54-55, 553 P.2d at 1155, 1166, 32 Cal. Rptr. at 683, 694. The trial court found that Bakke was entitled to be evaluated without consideration of his race and concluded that the PAP was discriminatory and unconstitutional; however, because Bakke could not show that he would be admitted even if there had been no PAP, injunctive relief ordering admission was denied. Id. at 39, 553 P.2d at 1156, 132 Cal. Rptr. at 684. The California Supreme Court held that the PAP, as administered by the university, violated the constitutional rights of nonminority applicants because it gave preference according to race to those less qualified than the majority applicants who were denied admission. They also viewed minority status, in itself, as not a substantive qualification and concluded that because of the lower ratings, the PAP admitted minority applicants were less qualified than some nonminority applicants denied admission "because they were not members of a minority race." Id. at 38, 47-48, 553 P.2d at 1156, 1161-62, 132 Cal. Rptr. at 684, 687-89. The court also reversed the lower court's denial of an injunction, concluding that, since Bakke had established that he had been discriminated against, the burden fell on the university to demonstrate that he would not have been admitted if the university had not had the PAP. Id. at 63-64, 555 P.2d at 1172, 132 Cal. Rptr. at 700.

72. Id. at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688. The Bakke court, distinguishing Swann and other cases which allowed racial classifications which benefited minorities, stated that

[i]n none of them did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed.

. . . The disadvantages suffered by a child who must attend school some distance from his home or is transferred to a school not of his qualitative choice cannot be equated with the absolute denial of a professional education, as occurred in the present case.

Id. at 46-47, 553 P.2d at 1160-61, 132 Cal. Rptr. at 688-89. For a discussion of Swann, see notes 44-48 and accompanying text supra.

The university had argued that

[a] "compelling interest" measure is applicable only to a classification which discriminates against a minority, reasoning that racial classifications are suspect only if they result in invidious discrimination . . . and that invidious discrimination occurs only if the classification excludes, disadvantages, isolates, or
The university had asserted that there were three principal objectives justifying the PAP. Preferential treatment to minorities, the school claimed, was necessary first, "to integrate the medical school and the profession," second, to "increase the number of doctors willing to serve the minority community" and third, to provide black doctors for black patients because "black physicians would have a greater rapport with patients of their own race" and would be more interested in treating diseases common to blacks. 73 The court rejected the university's last assertion on the grounds that there was no evidence justifying this implicit parochialism and that the sanctioning of such an objective would be directly contrary to the constitutional goal of the "'elimination of all racial barriers.'" 74 Assuming arguendo that the other justifications were compelling, the court still found the PAP in question invalid on the ground that the university did not meet its burden of establishing that its objectives could not be "achieved by means less detrimental to the rights of the majority." 75 Concerning the university's objective of integrating the student body, the court rejected the
notion that without a PAP minorities would not gain admission. Stating that there was no "rule of law" that a university must use only objective criteria in admission decisions, the court pointed out that the university could adopt flexible admission standards. Consideration of such factors as the degree to which low GPA's and test scores actually reflected the ability of the minority applicant, personal interviews, recommendations, potential for success, and matters relating to the needs of the profession, among other things, were held to be viable alternatives to traditional admissions criteria, as long as they were not "utilized in a racially discriminatory manner." If these elements were not "related to race, . . . they [would] provide for consideration and assistance to individual applicants who have suffered previous disabilities, regardless of their surname or color."

With respect to the university's second major objective — the recruitment of more doctors for the minority community — the court conceded that this was an urgent and legitimate interest, but, similar to its analysis of the school's objective of integrating the student body, the court found no evidence demonstrating that the PAP was the "least intrusive or even the most effective means" of achieving that goal. The university could not show that the minority students admitted would actually practice in a minority community. On the contrary, the court reasoned that "[a]n applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage." In other words, the majority reasoned that the means used were not necessary to bring about the desired ends and emphasized that the university had not even "considered the adoption of . . . non-racial alternatives to the special admission program."

Deciding that the university's PAP did not meet the requirements of a "strict scrutiny" test, the Bakke majority proceeded to refute the contention that cases upholding preferential employment of minorities supported the
university’s position in the case at bar. The majority explained that those cases involved a finding that the particular employer involved had discriminated in the past and that, absent such a finding, federal courts have invalidated such preferential treatment on the ground that it deprived members of the majority of benefits solely on the basis of race. Since there was no evidence in the record showing that the university had discriminated against minorities in the past, the court concluded that the cases cited by the university did not control the instant case.

The Bakke majority would thus subject a challenged PAP to strict scrutiny, which would, unlike the DeFunis majority’s strict scrutiny test, involve a strenuous search for less intrusive alternatives to accomplish the goals of the PAP in question. Unlike the DeFunis dissent, however, which held preferential treatment on the basis of race unconstitutional per se, the Bakke majority emphasized that increasing minority representation was a compelling state interest and that a PAP might possibly be constitutional so long as the admissions criteria were not “utilized in a racially discriminatory manner.”

The fundamental disagreement between the majority and dissent in Bakke centered around the standard of review employed in determining whether the PAP satisfied constitutional guarantees. Agreeing with the Bakke majority and both DeFunis opinions, the Bakke dissent felt that PAP’s should be carefully scrutinized; but in adopting a relatively liberal standard of review, it would have upheld the PAP under consideration. Although acknowledging that there was a well-established policy of strictly reviewing classifications based upon race, the dissent noted that racial classifications have been held to be constitutionally suspect or presumptively unconstitutional only when they are deemed “invidious,” that is, where they exclude a particular racial group with the result that the racial group is stigmatized as inferior. The dissent, insisting that the majority had misinterpreted prior case law, further observed that where a racial classification is used to remedy the effects of past discrimination, numerous

85. 18 Cal. 3d at 57–58, 553 P.2d at 1168–69, 132 Cal. Rptr. at 696–97. The majority reasoned that if there were a finding of past discrimination, a “need for remedial measures to compensate minorities” arose, but if there were no showing of discrimination, it would be unconstitutional to utilize racial classifications to grant a benefit to the minority race at the expense of the majority. Id.
86. Id. at 59–60, 553 P.2d at 1169, 132 Cal. Rptr. at 697. The majority rejected the argument that reliance upon grades and MCAT scores “amounted to discrimination in fact against minorities.” Id.
87. Id. at 64–66, 553 P.2d at 1172–74, 132 Cal. Rptr. at 700–02 (Tobriner, J., dissenting).
89. 18 Cal. 3d at 67–68, 553 P.2d at 1175, 132 Cal. Rptr. at 703.
decisions have upheld their validity in such areas as the desegregation of public schools, public housing, and employment. The dissent concluded that the PAP in the case at bar was not invidious since it did not intend to


The Bakke dissent stated that numerous decisions recognize that as a practical matter racial classifications frequently must be employed if the effects of past discrimination and exclusion are to be overcome and if integration of currently segregated institutions is to be achieved; these cases establish that the Constitution does not forbid such use of remedial racial classifications.

18 Cal. 3d at 65, 553 P.2d at 1173, 132 Cal. Rptr. at 701. The dissent relied especially on the Swann rationale concerning the validity of racial classifications and concluded that it was directly applicable, stating that here, the educational authorities have concluded that in order to prepare medical students to live and practice in a pluralistic society, the medical school should have an integrated student body, and they have utilized racial classifications to achieve such integration. Swann teaches that such a noninvidious use of racial classifications “is within the broad discretionary powers of school authorities ”

Id. at 70, 553 P.2d at 1177, 132 Cal. Rptr. at 705 (emphasis supplied by the court), quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

The majority had claimed that benign racial classifications were upheld in the past only where they did not involve any detriment to minorities or were utilized to remedy past discrimination by a particular defendant. 18 Cal. 3d at 57–59, 553 P.2d at 1169–96, 132 Cal. Rptr. at 696–97. The dissent attempted to rebut these generalizations by emphasizing that in many of the employment cases, the hiring of minorities certainly deprived some nonminority applicants of a benefit they would have enjoyed but for their race. Id. at 73–75, 553 P.2d at 1179–80, 132 Cal. Rptr. at 707–09. The dissent also maintained that the university’s PAP was intended “to overcome the continuing effect of past discrimination in this country,” thus negating a requirement that the university itself must be found to have engaged in past racial discrimination. Id. at 75–76, 553 P.2d at 1180, 132 Cal. Rptr. at 708.

It should be noted that the dissent also disagreed heatedly with the majority’s finding that less qualified applicants had been admitted under the PAP. Id. at 65–66, 553 P.2d at 1173–74, 132 Cal. Rptr. at 701–02. The dissent reasoned that by adopting the special admission program, the medical school has indicated that in its judgment differences in academic credentials among qualified applicants are not the sole nor best criterion for judging how qualified an applicant is in terms of his potential to make a contribution to the medical profession or to satisfy needs of both the medical school and the medical profession that are not being met by other students.

Id. at 66, 553 P.2d at 1173–74, 132 Cal. Rptr. at 701–02. In contrast is the majority’s statement that

[the fact that all the minority students admitted under the special program may have been qualified to study medicine does not significantly affect our analysis of the issues. . . . Bakke was also qualified for admission, as were hundreds, if not thousands of others who were also rejected. In this context the only relevant inquiry is whether one applicant was more qualified than another. . . . Bakke alleged that he and other non-minority applicants were better qualified for admission than the minority students accepted . . . and the question we must decide is whether the rejection of better qualified applicants on racial grounds is constitutional.

Id. at 48, 553 P.2d at 1162, 132 Cal. Rptr. at 690 (emphasis supplied by the court).
exclude any racial group but rather attempted to ensure that all racial
groups would have some representation in the institution.91

Although it found the classification to be benign, the dissent rejected the
use of the rational relation standard which some courts had used in the past
to test such classifications.92 They formulated a different standard,
reasoning that a court should take a cautious approach in evaluating benign
racial classifications "[i]n light of the historical misuse of racial classifica-
tions in this country."93 Finding that a remedy aimed at overcoming the
effects of past discrimination by promoting integration was compelling, the
dissent would require first that there be a finding by the court that the PAP
under review was employed as a "good faith attempt to promote integration"
and second, that the racial classification embodied in the PAP be related
directly and reasonably to that interest.94 Since the dissent had already
determined that benign racial classifications were not constitutionally
suspect and, therefore, not subject to strict scrutiny, the existence of
alternative remedial measures was not relevant in testing the validity of the
PAP.95 Finding that, in the case at bar, the "racial classifications were

91. Id. at 68, 553 P.2d at 1175, 132 Cal. Rptr. at 703. The dissent also pointed out
that "the racial classifications [in Bakke] do not stigmatize any racial group as an
'inferior' race, but instead give realistic recognition to the continuing effects resulting
from several centuries of discriminatory treatment." Id. (footnote omitted).

In addition to reliance upon prior case law, the dissent reasoned that a
distinction between invidious and benign racial classifications was warranted by the
history of the fourteenth amendment and by the philosophy behind the utilization of a
strict standard of review. Id. at 78–79, 553 P.2d at 1182–83, 132 Cal. Rptr. at 710–11.
Initially, the dissent emphasized that the purpose of the fourteenth amendment was
to protect the civil rights of the blacks and they could find nothing in its history
suggesting that it precludes a state from affording preferential treatment to
minorities. Id. The dissent also explained that

[heightened judicial scrutiny is accordingly appropriate when reviewing laws
embracing invidious racial classifications, because the political process affords
an inadequate check on discrimination against "discrete and insular minorities"
...]. By the same token, however, such stringent judicial review is not
appropriate when, as here, racial classifications are utilized remedially to benefit
such minorities, for under such circumstances the normal political process can be
relied on to protect the majority who may be incidentally injured by the
classification scheme.

Id. at 79–80, 553 P.2d at 1183, 132 Cal. Rptr. at 711 (emphasis supplied by the court)
citations and footnotes omitted). For criticism of this theory, see Posner, supra note 3
at 12–32.

92. For cases utilizing a rational relation standard in upholding racial
classifications, see note 51 supra.

93. 18 Cal. 3d at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

94. Id. at 80–81, 553 P.2d at 1184, 132 Cal. Rptr. at 712. Although recognizing that
a court should take a "cautious approach" in evaluating benign racial classifications,
the dissent emphasized that "a court must also be mindful that remedies for the
continuing effects of past discrimination have proven distressingly elusive, and that
it is therefore important that entities attempting in good faith to promote integration
be given reasonable leeway in experimenting with various methods to achieve this
compelling societal objective." Id. at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

Id. at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

95. Id. at 89, 553 P.2d at 1189–90, 132 Cal. Rptr. at 717–18. Applying a different
standard of review than the majority, the dissent maintained that under their test
"[i]f alternative remedies are relevant to the constitutionality of the program at all,
clearly devised as a realistic attempt to promote integration," the dissent concluded that the PAP should be upheld.96

The Bakke dissent is not the only opinion to depart from the traditional two-tiered equal protection analysis.97 Faced with deciding the validity of a PAP98 in a publicly-funded medical school, the New York Court of Appeals in Alevy v. Downstate Medical Center99 utilized the sliding scale approach to equal protection expounded by Justice Marshall in his dissent in San Antonio Independent School District v. Rodriguez.100 Such an approach recognizes the rational basis and strict scrutiny tests but, additionally, proposes a middle level of scrutiny,101 with the degree of care which a court will examine a particular classification depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."102 Accordingly, the Alevy court rejected a strict scrutiny approach to PAP's, emphasized that the purpose of the fourteenth amendment was to achieve equality for blacks, and observed that the amendment had been interpreted to permit remedial measures to redress past discrimination.103 Reasoning that any preference on the basis of race presented such "untoward consequences" as "polarization of the races," diminution of incentive in the discriminated group, labeling the advantaged group as being less qualified, and "perpetuating undesirable perceptions of race as criteria affecting state action," the Alevy court concluded that PAP's "should be subject to more careful scrutiny than traditional standards of

the party attacking the validity of the program should bear the burden of demonstrating the realistic availability of alternative methods of achieving the medical school's numerous objectives." Id. at 89, 535 P.2d at 1190, 132 Cal. Rptr. at 718.

96. Id. at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712. The dissent stated that any one of the enumerated purposes of the PAP would serve to justify it. Id. at 80–86, 553 P.2d at 1184–88, 132 Cal. Rptr. at 716–17.

97. For a discussion of the two-tiered approach to analyzing equal protection problems, see note 18 and accompanying text supra.

98. The PAP in Alevy v. Downstate Medical Center consisted of a special system of marking and considering minority applicants; applications of blacks, Puerto Ricans, Mexican Americans and American Indians were separated and scrutinized more thoroughly to determine whether they were "culturally deprived." 39 N.Y.2d 326, 329–30, 348 N.E.2d 537, 540–41, 384 N.Y.S.2d 82, 85–86 (1976). Petitioner, a magna cum laude graduate of Brooklyn College, was placed on a waiting list and "commenced this proceeding alleging that his qualifications for admission were superior to those of other applicants to whom respondent had arbitrarily granted preferential treatment in violation of the law." Id. at 328, 348 N.E.2d at 540, 384 N.Y.S.2d 84–85.


102. 411 U.S. at 98 (Marshall, J., dissenting). For recent decisions applying a middle level standard see note 18 supra.

103. 39 N.Y.2d at 335, 348 N.E.2d at 545, 384 N.Y.S.2d at 87–90.

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rationality." In order for a PAP to be valid, the court decided that racial preferential treatment must satisfy a "substantial state interest" which "need not be urgent, paramount or compelling;" however, on balance, any possible detriment to the rights of nonminorities must be outweighed by "the gain to be derived from the preferential policy." If such a substantial state interest were found, a court reviewing a PAP would then inquire as to whether nonracial or less objectionable racial alternatives exist and, if such alternatives were absent, the PAP would be valid. The court in Alevy, however, never decided if the PAP at issue was justified by a substantial state interest or whether alternative measures less intrusive on nonminority rights existed, since it was held that the petitioner failed to show that he would have been admitted even if the PAP were eliminated.

It is apparent, as the disagreement in the cases examined illustrates, that the constitutionality of using racial classifications in the context of a PAP is uncertain. At the present time, it would seem that the validity of

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104. Id. at 335–36, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.
105. Id.
106. Id.
107. Id. at 336–37, 348 N.E.2d at 545–46, 384 N.Y.S.2d at 90.
108. Id. at 338, 348 N.E.2d at 546, 384 N.Y.S.2d at 91–92. The Alevy court had stated the issues in terms of whether "reverse discrimination" was constitutional, defining reverse discrimination as "benign" discrimination, that is, where classifications are utilized to assist certain "groups of persons presumed or shown to be disadvantaged." Id. at 328 n.2, 348 N.E.2d at 540 n.2, 384 N.Y.S.2d at 84 n.2. The Alevy court concluded from the record that the defendant had practiced "reverse discrimination" but never decided whether that discrimination was constitutional. Id. at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91–92. The Alevy court dismissed the petition because it found that the "petitioner failed to show his own right to relief, even if the entire minority program were eliminated." Id. at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91. The court emphasized that it was not saying that the petitioner lacked standing but merely that he did not demonstrate his "ultimate right to obtain relief" and "[s]tanding... does not depend on a threshold demonstration of the narrower, final right, to an individual remedy." Id. at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91–92, citing inter alia, Burke v. Sugarman, 35 N.Y.2d 39, 44, 315 N.E.2d 772, 774, 358 N.Y.S.2d 715, 718 (1974).

109. The matter is made more complicated by the fact that one court has held that the use of racial criteria in admissions procedures must be intended from the outset and the state must set forth some basis for justifying the discrimination from the start. Hupart v. Board of Higher Educ., 420 F. Supp. 1087 (S.D.N.Y. 1976). In Hupart, white and Asian applicants to a biomedical program brought suit in federal district court seeking admission to the program and/or monetary damages for the unlawful denial of admission. The applicants alleged, inter alia, that discrimination on racial grounds had been practiced against them. Id. at 1090. In an attempt to select candidates for admission, a subcommittee of the program had intentionally eliminated nonminorities because of their race from an original list of qualified applicants thereby giving a racial preference to minorities. Id. at 1096, 1103. The district court held that the discrimination in the case violated the equal protection and due process clauses because the subcommittee had "deviated from University policy, as enforced by state law." Id. at 1106–07. The defendants — the school board and the city college of the city university — had maintained that they did not practice any discrimination on the basis of race and that if, in fact, the subcommittee did discriminate, it was in violation of the policy of the admissions committee, the university and the school board. Id. at 1105. The Hupart court reasoned, therefore, that the utilization of racial criteria in the admissions procedures was not the issue to be decided, since "it is clear that the state cannot justify making distinctions on the
any PAP would depend on the particular jurisdiction in which it is challenged. There is no absolute answer to the question of what justifications a court would require to validate racial classifications. Whether the state interest proffered must be compelling, substantial, or merely reasonable, and whether merely reasonable or the least objectionable means could be used to further that interest is abstruse. An examination of precedent and present case law evidences only a state of confusion.\footnote{10}

B. The Standard of Review

Applying equal protection in the PAP context raises several problems. Even if it is established that there is state action,\footnote{11} and that the specific claim is justiciable,\footnote{12} there remains the troublesome issue of the appropriate basis of race without having first made a deliberate choice to do so." Concluding that the subcommittee's intentional elimination of only nonminority candidates was an infringement of equal protection rights, the \textit{Hupart} court emphasized that distinctions based upon race must be justified before their implementation. \textit{Id.} at 1106. The court declined to decide whether such a justification had to be rational, compelling or "something in between," but held that the justifying basis must be supplied by "appropriate state officials before they take any action" and stated that "[t]he defendants cannot sustain their burden of justification by coming to court with an array of hypothetical and \textit{post-facto} justifications for discrimination that has occurred either without their approval or without their conscious and formal choice to discriminate as a matter of official policy." \textit{Id.} at 1106 (emphasis supplied by the court).

\footnote{10} It is interesting to note that a federal district court recently held that a law school's financial policy which allocated a grossly disproportionate amount of its scholarship funds to minority students violated the antidiscrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970 & Supp. V 1975). \textit{Flanagan v. President and Directors of Georgetown College}, 417 F. Supp. 377 (D.D.C. 1976). In that case, the court concluded:

While an affirmative action program may be appropriate to ensure that all persons are afforded the same opportunities or are considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing, or financial aid) in favor of one race to the detriment of others. \textit{Id.} at 384.

In addition, a recent United States Supreme Court decision has stated that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970 & Supp. V 1975) and 42 U.S.C. § 1981 (1970) prohibit racial discrimination against white persons under the standards applicable when a nonwhite alleges discrimination. \textit{McDonald v. Santa Fe Trail Transp. Co.} 427 U.S. 273 (1976). The \textit{Bakke} majority, rejecting the university's contention that the court should apply a rational basis test in determining the validity of the PAP, had concluded that deprivation based upon race was not subject to a "less demanding standard of review" simply because it was the majority rather than the minority who suffered discrimination. 18 Cal. 3d at 51, 533 P.2d at 1164, 132 Cal. Rptr. at 692. While the \textit{Bakke} court recognized that there were no Supreme Court decisions directly on this point, \textit{McDonald} was cited in support of their conclusion as a manifestation of "the high court[s]' . . . marked reluctance to apply different standards to determine the rights of minorities and members of the majority." \textit{Id.} The \textit{Bakke} dissent, however, distinguished \textit{McDonald}, stating that the "racial discrimination at issue in that case was unrelated to any affirmative action program." \textit{Id.} at 69 n.3, 533 P.2d at 1176 n.3, 132 Cal. Rptr. at 704 n.3.

\footnote{11} See note 13 \textit{supra}.

\footnote{12} In \textit{DeFunis v. Odegaard}, 416 U.S. 312 (1974), the claim was dismissed as moot because the claimant had been admitted to law school during the litigation and was about to graduate. \textit{Id.} at 319–20. See note 55 and accompanying text \textit{supra}. There may also be a problem with standing, especially where it is clear that the applicant would
standard of review. Recently the United States Supreme Court granted certiorari to hear Bakke; however, until the Court decides that case, the standard of review applicable to PAP’s remains an open question. It is suggested that the determination of the propriety of any standard must be derived from a focus upon the nature, purpose, and effect of the classification in question, analyzed in the light of general constitutional principles.

In Brown I, racial classifications which marked the excluded race with a stamp of inferiority were held unconstitutional per se. Mere exclusion, however, is not tantamount to being branded as inferior. In Brown I, not have been admitted even if there were no PAP. The claim in Alevy was dismissed for just this reason. 39 N.Y.2d at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91; see note 108 supra.

114. 347 U.S. at 494; see notes 34–37 and accompanying text supra.
115. It has been argued that racial classifications detrimental to minorities are suspect because they “will usually be perceived as a stigma of inferiority and a badge of opprobrium.” Developments, supra note 22, at 1127. The mere exclusion of a majority applicant does not seem detrimental in this sense, because it is doubtful that the entire majority race has been stigmatized because of the exclusion of a few members.

However, the focus upon the group nature of the detriment raises the question of the individual/group nature of the equal protection challenge. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court emphasized:

The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Id. at 22 (footnote omitted). The individual challenging the PAP seems to be asserting an individual, not a group right to equal protection because in the professional school context, members of the majority race constitute the bulk of students admitted. This position has been questioned because basic to equal protection is classification, a group conceptualization. See Alexander, The High Court and the Bakke Decision: Is Affirmative Action Reverse Discrimination? STUDENT LAWYER, January, 1977, 16, 17–18. It seems that a court, by focusing on the equal protection challenge to a PAP as an individual right not only misconstrues the nature of the action generally but also specifically since an individual’s claim to fair treatment may be more attractive and seem more compelling than the majority-minority conflict inherent in the claim.

The challenge to the PAP seems to be both an individual and a group claim. At the same time that the individual is attacking a PAP and the group preference it entails, he is also seeking relief upon group terms by asserting his group’s right to defeat a preference afforded to another group, a preference which is detrimental to the excluded group. It is clear that a ruling on a PAP will have a group effect. The individual nature of the action must nevertheless be recognized also. Any decision should consider the possibility that the majority group is not so homotypical that the gains of those admitted satisfactorily absorb the losses of those rejected. Professor Ely seems to view the majority group as homogeneous. He states:

A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that extend to certain Whites and the advantages generally extended to Blacks.

Ely, supra note 1, at 735 (footnote omitted). This argument has been criticized for its view of the majority group and of the political process in general. See Posner, supra note 3, at 20–21. The California Supreme Court in Bakke also criticized Ely’s view,
only were blacks excluded from white schools, but, conversely, whites were excluded from black schools. The fact that white students may have been denied an opportunity to attend black schools did not result in a finding that white students were branded as inferior.\textsuperscript{116} It is submitted, therefore, that branding by exclusion has been recognized as affecting minorities only.\textsuperscript{117}

It could be argued that a PAP has such a branding effect on minority professional school students. For example, in \textit{Sweatt v. Painter},\textsuperscript{118} the United States Supreme Court invalidated racial discrimination in a law school admission, finding that the separate but superficially equal facilities were separate and intangibly unequal.\textsuperscript{119} It has been suggested that validating a PAP's separate and unequal admissions procedures might tend to create within the professional school the situation found offensive in \textit{Sweatt} — that minority students admitted preferentially will feel inferior.\textsuperscript{120} This argument, while plausible, is at once too hypothetical and too remote; it is unclear whether minority students admitted through a PAP do feel inferior, and it is generally the majority, not the minority, students who challenge the PAP.\textsuperscript{121} It is doubtful that PAP's could be ruled unconstitutional per se on the ground of any branding effect on minorities.

The dissent in the state court decision in \textit{DeFunis} apparently found that the PAP was so detrimental to the majority that it should be ruled unconstitutional per se.\textsuperscript{122} According to this view, exclusion based solely upon race would have been invalid per se under \textit{Brown I}.\textsuperscript{123} It is submitted and asserted that "the complexion of the person who discriminates cannot be a significant factor in deciding whether an individual has been deprived of his right to equal protection." 18 Cal. 3d at 52 n.18, 553 P.2d at 1164 n.18, 132 Cal. Rptr. at 692 n.18.

To tell the excluded applicant that his race is sufficiently represented and that members of another race, persons who may be less qualified than he, must be accepted in his place for the greater good seems to address insufficiently the needs and desires of that applicant. Thus, it is suggested that it is better to recognize that the claim encompasses both individual and group aspects.

\textsuperscript{116} 347 U.S. at 494. The Court in \textit{Brown I} focused only on the exclusion of blacks and it seems clear that the purpose underlying the discrimination was to keep blacks out, not to harm whites. \textit{Id.} at 493.

\textsuperscript{117} See Ely, supra note 1, at 728–33; \textit{Developments}, supra note 22 at 1127.

\textsuperscript{118} 339 U.S. 629 (1950).

\textsuperscript{119} \textit{Id.} at 633–36. Petitioner, a law school applicant denied admission to the University of Texas Law School because of his race, claimed that he was denied equal protection. \textit{Id.} at 631. The state argued that the existence of a newly founded law school for Negros to which the petitioner could apply and be admitted rendered his equal protection challenge untenable. \textit{Id.} at 632. The Supreme Court found that the alternative offered to the respondent was insufficient because the Negro law school did not approximate the University of Texas Law School in facilities or faculty and, therefore, the schools, while separate, were not equal. \textit{Id.} at 632–35.

\textsuperscript{120} See United Jewish Organizations of Williamsburgh, Inc. v. Carey, 97 S. Ct. 996, 1011–16 (1977). (Brennan, J., concurring). In \textit{Carey}, Justice Brennan suggested that benign classifications be closely scrutinized because the purported preference might "disguise a policy of discrimination" which "disadvantages minorities." \textit{Id.} at 4229.

\textsuperscript{121} Posner labels unclear the "familiar argument" that one singled out for a preference is humiliated. Posner, supra note 3, at 12.

\textsuperscript{122} 82 Wash. 2d at 60–65, 507 P.2d at 1199. (Hale, C. J., dissenting); see notes 66–68 and accompanying text supra.

\textsuperscript{123} See notes 66–68 and accompanying text supra.
that such a reading of Brown I is too broad because, absent a discriminatory purpose and a branding effect, the classification will not be held unconstitutional per se. The reliance on the per se approach also may be of doubtful validity in the PAP context because the per se ruling has not been reaffirmed outside of the Brown I school desegregation situation. Indeed, in several cases where minorities have been harmed, the Supreme Court has applied a strict scrutiny test rather than adopting a per se approach.

Assuming the per se approach is dismissed, perhaps the rational relation test should be considered. The Supreme Court in Swann held that school officials seeking to achieve integration could use racial criteria in their decision. Some commentators suggest that a proper interpretation of Swann mandates that voluntary, like court imposed benign or remedial racial classifications are proper and should be subject only to a rational relation test. Proponents of PAP's contend that the racial classification used in those programs are benign and hence subject only to the more permissive standard of review. It is submitted, however, that while the purpose of a PAP may be benign, it is not benign in its effect upon the excluded majority applicant. Of course, the adverse effects of a remedial classification could be dismissed as a necessary hardship, for in Swann, the integration plan imposed upon the students the hardship of being bused

124. Brown I's per se holding may be interpreted as based upon a finding of "invidious discrimination." See DeFunis v. Odegaard, 82 Wash. 2d 11, 27, 507 P.2d 1169, 1179 (1973), vacated as moot, 416 U.S. 312 (1974); O'Neil, supra note 1, at 712-18. The proper meaning of the term "invidious" as used in Brown I is subject to some dispute. Invidious may be defined as describing a "purposeful" discrimination, or it may denote a classification which has an adverse or branding effect upon an entire race. See Development, supra note 22, at 1127. Whatever the proper meaning of "invidious", it seems clear that PAP's are based neither upon a purely discriminatory purpose nor do they have a branding effect upon the excluded white applicant. See Wright, The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint? 54 CORNELL L. REV. 1 (1968).


126. 402 U.S. at 22-25. See notes 44-48 and accompanying text supra.


128. This argument was made by the law school in DeFunis (see notes 55-65 and accompanying text supra) and by the medical school in Bakke (see note 72 and accompanying text supra). See also Comment, supra note 127, at 480-81.

129. The dissent in Bakke dismissed the injury to nonminorities by arguing that any remedial program has some adverse effect. The dissenter asserted at one point: "The simple reality . . . is that in many circumstances any remedy for the inequalities flowing from past discrimination will inevitably result in some detriment to nonminorities. Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by a reallocation of such resources; those who have previously enjoyed a disproportionate advantage must give up some of that
long distances. However, the inconvenience of busing is shared by all races generally and should be recognized as less detrimental than the denial of an opportunity for professional education. Indeed, those courts which have reviewed the constitutionality of PAP's have noted the adverse effect and have refused to review the classification under a rational relation test. Thus, notwithstanding the benign purpose of a PAP, the nonbenign effect seems to make mere rationality standards inappropriate.

18 Cal. 3d at 75, 553 P.2d at 1180, 132 Cal. Rptr. at 708 (Tobriner, J., dissenting). See also Comment, supra note 127, at 479–80. 130. 402 U.S. at 29–31. For a discussion of Swann, see notes 44–48 and accompanying text supra. See also Ely, supra note 1, at 724.


The detriment to nonminorities caused by the PAP is a major obstacle to the argument for deferential review. In the oral argument of DeFunis before the United States Supreme Court, the following exchange took place between counsel for the University, Mr. Gorton, and the Court:

MR. GORTON: ... We have engaged in a voluntary program, very precise in its outlook. Racial discrimination was the problem, therefore race had to be the criterion for solving that problem. We are precisely within Mr. Justice Burger's holding for this entire Court in Swann v. Charlotte, remedial judicial authority does not put judges in the shoes of school authorities, whose powers are plenary. School authorities are traditionally charged with broad power to formulate and implement education policy, and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students, reflecting the proportion of the district as a whole.

To do this as an educational policy is within the broad discretionary powers of school authorities.

QUESTION: Is there anything in that context that would keep anyone out of any school, however,

MR. GORTON: — he [De Funis] was in exactly the same position as the school children in the Swann case.

MR. GORTON: ... We were doing, I submit, precisely what you said we had the discretion to do when you wrote the opinion for the entire Court in the Swann case.

QUESTION: But you haven't pointed out how that would exclude anyone, as Mr. DeFunis would have been excluded.


While an exchange in an oral argument has no weight, these passages certainly indicate the burden the PAP proponent will have to overcome. Justice Brennan's concurrence in United Jewish Organizations of Williamsburgh, Inc. v. Carey, 96 S. Ct. 996 (1977), suggests that remedial classifications must be scrutinized to determine their detrimental effects. Id. at 1013–15. Certainly the detriment to the individual majority applicant is a fundamental issue in determining the validity of a PAP.

The opponents of PAP's have seized upon this issue. See Graglia, supra note 1, at 354–59. Even those who favor PAP's seem to recognize the importance of this detrimental effect. For example, Professor Ely acknowledges that the preferential "selection system in controversy quite tangibly disadvantages Whites." Ely, supra note 1, at 730 n. 36.
The dismissal of the rationality standard in the two-tiered approach to equal protection seems to confine review to strict scrutiny, the standard which has been applied in most cases where a race has been harmed.\textsuperscript{132} Perhaps, a different standard of review should apply because of the remedial purpose of the PAP.\textsuperscript{133} Although the applicability of a middle level of scrutiny has received only limited acceptance,\textsuperscript{134} an argument can be proffered that classifications with remedial purposes and detrimental effects, or "quasi-benign" classifications, should be reviewed outside the two-tiered approach.

Apparently the Bakke dissent, which focused on the benign pro-integration purpose of the PAP\textsuperscript{135} and recognized the detriment it necessarily entailed,\textsuperscript{136} tacitly determined that the PAP classification was "quasi-benign" and, therefore, better suited to analysis under a standard somewhere between rationality and strict scrutiny. The dissent suggested a standard where the ends had to be compelling but the means had only to be rationally related to the compelling end.\textsuperscript{137} This standard, however, appears to have no judicial support,\textsuperscript{138} and its acceptance, it is submitted, would result in the adoption of a new special standard of review applicable only in a narrow area. Moreover, the suggestion for this new standard seems to have been based upon a belief that a PAP would not be found constitutional under the strict scrutiny test.\textsuperscript{139}

\textsuperscript{132} See notes 24–33 and accompanying text supra.
\textsuperscript{133} The purpose of the PAP is to integrate not segregate. See Comment, supra note 127, at 479–82.
\textsuperscript{135} 18 Cal. 3d at 67–80, 553 P.2d at 1177, 132 Cal. Rptr. at 705. (Tobriner, J., dissenting). See notes 87–96 and accompanying text supra.
\textsuperscript{136} Id. at 73–75, 553 P.2d at 1179–80, 132 Cal. Rptr. at 707–09. (Tobriner, J., dissenting). See generally, Ely, supra note 1, at 730 n.36.
\textsuperscript{137} 18 Cal. 3d at 89, 553 P.2d at 1190, 132 Cal. Rptr. at 717–18. (Tobriner, J., dissenting). See notes 87–96 and accompanying text supra.
\textsuperscript{138} The standard does not seem to be a "sliding scale" as suggested by Justice Marshall in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting), nor does the proposed test employ the means-focused standard suggested by Gunther, supra note 18, at 20–24.
\textsuperscript{139} In suggesting a less strict means test, the dissent in Bakke could have found that the strict scrutiny "means" requirement could not be overcome. 18 Cal. 3d at 89, 553 P.2d at 1190, 132 Cal. Rptr. at 717–18. (Tobriner, J., dissenting). It is unclear why the dissent did not argue for upholding the PAP under strict scrutiny, since the possibility that a PAP could pass strict review is certainly not improbable given the holding by the Washington Supreme Court in DeFunis. See notes 55–65 and accompanying text supra.
Possibly the "sliding scale" standard\textsuperscript{140} for consideration of equal protection challenges should be established to review "quasi-benign" classifications such as PAP's. This approach, prompted by a dissatisfaction with the rigidity of the two-tiered method of review has at least some support,\textsuperscript{141} and it may provide a standard sufficiently flexible to enable a reconciliation between pro-integration programs and their detrimental effects. Certainly the \textit{Alevy} standard which requires very narrow means and substantial ends indicates such an approach.\textsuperscript{142} While the narrowness of the means which the \textit{Alevy} version of the "sliding scale" would require is unclear,\textsuperscript{143} it appears to consider more fully the "quasi-benign" nature of a PAP, than the new standard proposed by the \textit{Bakke} dissent does.

Although a middle level of scrutiny similar to that proposed by \textit{Alevy} may be desirable, such an analysis has not yet achieved general support from the bench.\textsuperscript{144} Because equal protection challenges have generally been reviewed under the two-tiered approach, the issue of the appropriate standard of review for PAP's comes down to a choice between the rational relation test and the strict scrutiny test.\textsuperscript{145} Because of the detrimental effects of PAP's\textsuperscript{146} and the established tradition of reviewing detrimental racial classifications under strict scrutiny,\textsuperscript{147} it is submitted that where the court is faced with a choice between rational and strict review, the latter standard should prevail. However, a decision to review under strict scrutiny does not answer the basic question of the constitutionality of a PAP, for the majorities in \textit{Bakke} and \textit{DeFunis} certainly indicate that conflicting results are possible under the same strict standard of review.\textsuperscript{148} It is submitted that strict scrutiny merely provides a focus for reviewing the classification and that the final resolution, with the possibility of conflicting decisions on a
PAP, must be traced to the ends and means of the classification as defined and limited under the standard of review.

C. The Ends and the Means

A court's view of what ends may be properly achieved by admissions committees and the means for accomplishing those ends may ultimately determine the validity of a PAP. Assuming that the two-tiered approach is employed and that strict scrutiny review is thus applicable, compelling ends and the least restrictive means for accomplishing those ends will be required for a PAP to be constitutional.149

The primary goal of a PAP is to increase minority representation in the school and the profession.150 The determination that this goal is or is not compelling may depend upon what is seen as the proper ends of professional education. While there is strong argument for increasing minority representation in the professions,151 there is also a recognizable counterargument that the integration of the professions is neither a proper nor a substantial purpose of higher education.152 A fundamental premise underlying the latter argument is that the overriding purpose of professional education is to prepare the best qualified professionals.153

149. See notes 34–38 and accompanying text supra. See generally G. Gunther, supra note 25, at 698–702.

150. One commentator has hypothesized a different constitutional focus, suggesting that a hidden purpose — the exclusion of certain ethnic groups by the acceptance of other ethnic minorities — may cause a significant constitutional problem. Henkin, DeFunis: An Introduction, 75 Colum. L. Rev. 483, 488–89 n.24 (1975). Professor Graglia attacks the validity of this integration end. Graglia, supra note 64, at 241–43.

151. In DeFunis, the Washington Supreme Court outlined three possible motivations for increasing minority representation in the professions. See Posner, supra note 3, at 26, identifying the fear of minority unrest as the motivation for integrating universities.

152. The dissent in the state court's holding in DeFunis apparently felt that integration was not a proper end of higher education, suggesting that, while integration was a proper and generally, its effectuation was not to be accomplished by professional school admissions committees. See notes 66–68 and accompanying text supra. Professor Graglia concurs in this approach. Graglia, supra note 64, at 234.

153. Justice Douglas, in his dissent in DeFunis suggested:

The State . . . may not proceed by racial classification to force strict population equivalencies for every group in every occupation. . . . 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.

DeFunis v. Odegaard, 416 U.S. 312, 342 (Douglas, J., dissenting). This passage points out the conflict between the integration end and the training the best qualified professionals end which complicates the argument over the constitutionality of PAP's. While it seems apparent that Justice Douglas would not go as far as saying that integration is not a proper end or a compelling interest, id. at 341–44, the dissent in the state court opinion in DeFunis arguably takes this approach. See notes 66–68 supra. Professor Graglia seems to feel that the concern for minority representation in the professions may not be the proper business of the admissions committees, suggesting instead that the business of professional education is to educate the best people:

The most specific and frequent argument for the new admissions policy is simply that there are too few Negro lawyers, that Negroes are "underrepresented"
Implicit in this ends conflict is a means conflict. Simply stated, those who consider integration to be compelling may allow, or even demand, efficient, race-conscious means for accomplishing this end,\textsuperscript{154} while those who see the "best qualified" end as compelling may dismiss race as an improper indicator of qualification, recommending that admissions decisions be based solely on quantifiable aptitude indicators or what can be termed "merit" considerations.\textsuperscript{155}

It is submitted that while both ends should be recognized as valid, this recognition does not answer the ends problem, because it does not indicate which end is more significant. A decision ascribing the relative importance of the ends appears inescapable because, unfortunately, these ends cannot

in the legal profession. As one proponent of the policy has stated, "All should recognize that the current shortage of Negro attorneys has reached crisis proportions." The exact nature of the "crisis" is not made clear. We would undoubtedly all be happier if all definable groups were proportionately represented in all social categories, employment and other — it would be consistent with democratic ideals. . . . It is, however, even more consistent with, indeed required by, the democratic ideal that people not be classified — and neither taught nor expected to classify others — on the grounds of race. I do not know that Negroes do or should prefer that their attorneys be Negroes, or that Negro attorneys can more effectively represent their interests. To assume, accept, and even urge, otherwise seems to me to verge upon racism, to use that most common and forceful of epithets. Achievement of proportional representation of different groups is not a proper goal of higher education. . . . Society needs the best lawyers it can get, regardless of racial or ethnic derivation.

Graglia, \textit{supra} note 64, at 234 (footnote omitted). Professor Bell criticizes this view. Bell, \textit{supra} note 64, at 241–43.


The race-conscious means approach springs from the argument for color consciousness in the short run to achieve true color blindness in the long run. \textit{See} Comment, \textit{supra} note 127, at 485. The author offers the following analysis of the situation:

This argument has often been illustrated by analogy to a footrace. Let us suppose that there are two runners at the start of a footrace; one of them is shackled while the other is unencumbered. As the race progresses, the shackled runner drops far behind. If at this point the shackles were removed and the race permitted to continue, \textit{would the result be fair}? Does it make a difference who placed the shackles on the runner? If the race was a relay, does it make a difference that the subsequent runners are no longer shackled? The answers to these questions are an emphatic "no."

\textsuperscript{155} It is quite apparent that what fairness demands is that an adjustment be made so that the race can continue on a more nearly equal basis. Of course, the unshackled runner is relinquishing his advantage in the process, but he cannot be heard to complain as he was not entitled to it in the first place. \textit{Id.} at 485 n.60.

\textsuperscript{155} The dissent in the state court decision in \textit{DeFunis} seems to argue for a merit approach. \textit{See} notes 66–68 and accompanying text \textit{supra}. Professor Graglia also seems to prefer merit as the basis of decision. Graglia, \textit{supra} note 64 at 236–37. Professor Posner, on the other hand, approaches the question from a suspect versus nonsuspect means formulation which would not limit the decision makers to pure merit considerations. Posner, \textit{supra} note 3, at 21–26. Professor Bell criticizes the qualified/merit view. \textit{See} Bell, \textit{supra} note 64, at 241–43. Mr. Baeza attacks the merit approach for its lack of utility in addressing social needs. \textit{See} Baeza, \textit{supra} note 64, at 132–40.
be fully achieved simultaneously. Admission based solely upon merit criteria to achieve the best qualified end would not result in significant integration, and admission by efficient race-conscious means to achieve the integration end would result in some subordination of the best qualified end. In weighing these conflicting approaches, it is suggested that the best qualified end is a mere abstraction which should be subordinated to the integration end in a decision on a PAP because of the confusing nature of the term "qualification" and the reality of the admissions process.

Proponents of selection by merit criteria alone tend to describe those applicants who are not "best qualified" as "unqualified." The validity of the merit criteria as indicators of professional qualification is debatable, however, and even assuming that merit criteria are to some extent indicative of qualification, it is submitted that those admitted through a nonmerit preference are sufficiently qualified to perform the work demanded. Moreover, while the ideal may be that professional schools admit only those best qualified, the reality of the admissions process seems to undercut this ideal. For example, a commendable interest in aiding veterans and state residents by affording them educational and occupational preferences has prompted professional school admission committees to consider these

156. There might be no problem if the merit indicia, that is, the scores and marks of minority students, approximated those of non-minorities. Unfortunately, this is not often the case. For instance, there was a significant difference in merit indicia of the minority students admitted in *Bakke* and the majority students excluded. See note 70 supra.

157. Graglia, *supra* note 64, at 233–34. Professor Graglia seems to be concerned that the desire to have minorities admitted could result in unqualified professionals. He says:

My basic objection to the new admissions policy is that, insofar as it results in the admission of unqualified or unprepared students to law schools, it is likely to benefit no one and harm many. Whatever the validity, in general, of the principle that racial discrimination may be used as a means of compensation for past injustices, it can have no application to the admission of unqualified students to institutions of higher education. Inadequate grade school, high school, and college educational opportunities cannot be redressed by offering quality law school education. In quality education it is not possible to begin at the top. Denying admission to qualified students because they were black was a very great wrong; granting admission to unqualified students because they are black is not the remedy.

*Id.* at 233. Admitting only the most meritorious applicants would be the best approach according to this view.


159. Justice Tobriner, dissenting in *Bakke*, asserted:

[The majority incorrectly assert] that the minority students accepted under the special admission program are "less qualified" — under the medical school's own standards — than nonminority applicants rejected by the medical school. . . . This is simply not the case. The record establishes that all the students accepted by the medical school are fully qualified for the study of medicine. 18 Cal. 3d at 66, 553 P.2d at 1173, 132 Cal. Rptr. at 701 (Tobriner, J., dissenting) (emphasis in original). See also Bell, *supra* note 64, at 241–43.
nonmerit qualifications as important factors.\textsuperscript{160} Similarly, it is submitted that in achieving the goal of integration, admissions committees should be allowed to look beyond pure merit indicators.

Assuming that the end of minority representation should be given greater weight than the “best qualified merit” approach, the decision whether a PAP will be found constitutional under strict scrutiny review may depend upon the definition given that end. This definitional problem can be described as one of degree, essentially involving the rate at which the goal of minority representation should be accomplished.\textsuperscript{161} The definition which a court gives to the minority representation end may also be determinative of the means which that court will allow. An even greater problem lies in the definition of the word compelling. Defining the minority representation end as compelling — meaning that there is a need for a fast rate of integration — might possibly necessitate efficient, albeit suspect, race-based means.\textsuperscript{162} On the other hand, defining the end as compelling — meaning that integration need only be achieved at a somewhat slower rate — might possibly limit effectuation to nonsuspect, racially neutral means.\textsuperscript{163}

Recognition of the fact that the validity of a PAP may depend on whether a court determines that the compelling interest to increase minority representation is to be accomplished at a relatively faster or slower rate may explain some of the differences between the \textit{Bakke} and \textit{DeFunis} opinions. The \textit{Bakke} court, using strict scrutiny, found the PAP under review to be unconstitutional,\textsuperscript{164} while the \textit{DeFunis} court found its PAP to be constitutional purportedly under that same standard of review.\textsuperscript{165} In formulating its decision, the \textit{Bakke} majority apparently reasoned that a suspect classification should never be allowed if viable nonsuspect alternative methods of achieving the goal existed.\textsuperscript{166} By contrast, the \textit{DeFunis} court dismissed the alternative means by suggesting that these means were insufficient to accomplish the compelling end.\textsuperscript{167} Simply stated, \textit{Bakke} preferred racially
neutral means\textsuperscript{168} while \textit{DeFunis} would allow race-conscious, efficient means.\textsuperscript{169}

Assuming that both courts correctly applied the least restrictive means element of strict scrutiny,\textsuperscript{170} and that the different results cannot be traced to factual distinctions,\textsuperscript{171} it is submitted that the \textit{DeFunis} court saw the meaning of a compelling end to be a faster rate of increase in integration than the \textit{Bakke} court did. Certainly the means allowed by \textit{DeFunis} would result in faster integration than those proposed by \textit{Bakke}.\textsuperscript{172} Moreover, it is doubtful that the nonsuspect reclassification pattern proposed by \textit{Bakke} would accomplish the goal of minority representation to a very significant extent because a social-deprivation preference seems directed to a different interest.\textsuperscript{173}

If the viability of the means proposed by \textit{Bakke} is dubious,\textsuperscript{174} a similar question arises about \textit{DeFunis} since it is questionable that the need for minority professionals is so urgent or compelling that programs employing race conscious means should pass strict scrutiny review.\textsuperscript{175} It is possible that the present lack of minority professionals could be described as an emergency situation similar to the wartime circumstances in \textit{Korematsu v. United States};\textsuperscript{176} it is submitted, however, that the fast rate of integration promoted by \textit{DeFunis} is not a sufficiently compelling interest to meet the test of strict scrutiny.

Perhaps the two-tiered approach should be abandoned in the case of "quasi-benign" classifications — since neither rational nor strict review seems aimed at the specific problem of benign race consciousness — and a

\begin{itemize}
  \item \textsuperscript{168} See notes 69–86 and accompanying text supra.
  \item \textsuperscript{169} The \textit{DeFunis} court seemed to consider the PAP the most efficient means of integrating the professions and therefore allowable. See notes 55–65 supra. See also Ely, supra note 1, at 720–33.
  \item \textsuperscript{170} It could be argued that the \textit{DeFunis} court, while allegedly reviewing the PAP under strict scrutiny, \textit{sub silentio}, employed a different standard of review. In determining the means to the compelling end, the court seemed to focus on the best, not the least restrictive means of achieving minority representation. 82 Wash. 2d at 36, 507 P.2d at 1184.
  \item \textsuperscript{171} Perhaps the \textit{Bakke} court, more than the majority in \textit{DeFunis}, focused on the quota aspects of the PAP.
  \item \textsuperscript{172} A program which focuses on the race of the applicant undoubtedly accomplishes the goal of a racial mix more efficiently.
  \item \textsuperscript{173} A reclassification approach, such as defining the preference to be one for "socially deprived" students will not result in quick achievement of minority representation because others will undoubtedly fit this description. Moreover, some minority applicants who do not fit within the classification may be excluded. See Sandalow, supra note 2, at 690–92.
  \item \textsuperscript{174} Professor Sandalow criticizes the reclassification procedure suggested by Professor Posner. Id. The \textit{Bakke} court's reclassification method is subject to similar criticism. See notes 69–86 supra.
  \item \textsuperscript{175} One case in which racial classification was upheld under strict scrutiny was \textit{Korematsu v. United States}, 323 U.S. 214 (1944). Most cases applying strict scrutiny, however, have invalidated racial classifications. See, e.g., \textit{Loving v. Virginia}, 388 U.S. 1 (1967); \textit{McLaughlin v. Florida}, 379 U.S. 184 (1964). See also notes 24–33 and accompanying text supra.
  \item \textsuperscript{176} \textit{Bakke} was decided on the merits by the U.S. Supreme Court in 1978. See note 25 supra. If the lack of minority representation in the professions constitutes an emergency of crisis proportions, then drastic, expedient, and suspect means may be necessary.
\end{itemize}
middle level, like that of Alevy, applied. The fact remains, however, that PAPs involve racial classifications which have always been deemed to be suspect and subject to strict review. The mere fact that a PAP purports to aid one race seems insufficient to remove its consideration from strict review, especially since the implementation of the PAP may have an adverse effect on another race and on racial relations in general.

Strict scrutiny demands least restrictive alternatives, and suspect means are not allowed if there are nonsuspect alternatives. It seems apparent therefore, that the existence of viable nonsuspect means should prevent the PAP from being upheld under strict scrutiny. Accordingly, it is doubtful that PAP's should be upheld unless an alternative approach, similar to that proposed by Bakke, is used. A PAP may be the easiest or most efficient means of accomplishing minority representation in the professions, but where there is a choice between efficiency and less restrictive alternatives, it seems the latter should prevail. Moreover, if a PAP is to be considered constitutional under strict scrutiny, it is suggested that factors, other than efficiency, must be present before the necessity of using

177. See note 18 and accompanying text supra.
178. For discussion of the standard proposed by Alevy, see notes 98-108 and accompanying text supra.
179. See notes 24-33 and accompanying text supra.
180. For discussion of the benign aspects of PAP's, see notes 126-131 and accompanying text supra.
181. The excluded applicant is harmed. For discussion of the detrimental effects of PAP's, see notes 131-135 and accompanying text supra.
182. Granting preferences to one race over another could lead to racial unrest. Race consciousness could breed race hatred. See United Jewish Organizations of Williamsburgh, Inc v. Carey, 97 S. Ct. at 1012-m-15 (Brennan, J., concurring). Justice Brennan would look closely at benign racial classifications to see whether they would tend to increase society's "latent race consciousness." Id. at 4229 (Brennan, J., concurring).
183. See notes 31-33 and accompanying text supra.
184. Several alternative means suggested include a reclassification procedure or some type of nondiscriminental affirmative action. For an examination of some reclassification methods, see Posner, supra note 3, at 32. The Bakke court also proposed some affirmative action measures. See notes 83-86 and accompanying text supra.
185. See notes 83-86 and accompanying text supra. Perhaps guidelines similar to those enacted by the Department of Health, Education, and Welfare (HEW) should be used by professional school admissions committees. According to these guidelines: "Affirmative action" requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. . . . [A]ffirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. 37 Fed. Reg. 24,687 (1972) (Guidelines established by HEW, at 2–3). The HEW made it clear that "affirmative action" should not constitute preferential treatment. According to the guidelines:

In the area of academic appointment, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferred treatment" which leads to the selection of unqualified persons over qualified ones. Indeed to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.

Id. HEW Guidelines at 8. See Solomon and Heeter, supra note 9, at 46–50.
186. See Sandalow, supra note 2, at 692.
race conscious means can be demonstrated. One such factor could be evidence of de jure discrimination against specific minorities either by the individual school, the schools in general, or the standardized tests. For instance, if it could be demonstrated that the standardized tests are de jure discriminatory toward a specific minority, then the means allowed to combat this discrimination arguably should be race conscious. It seems, however, that absent such evidence, alternative means such as nonracial criteria or nondetrimental affirmative action should be required, at least, until there is evidence that the alternatives do not accomplish the proposed goal.

IV. Conclusion

The purpose of this project has been to define and discuss the problems involved in deciding the constitutionality of PAP’s. Three different courts have wrestled with the problem, each court reaching different conclusions concerning both the appropriate standard of review and the ultimate result required upon the application of a particular test. Moreover, within the three decisions there are five different opinions about the various questions which arise concerning a PAP. In summary, there are different views concerning the standard of review, the ends of a PAP, the ends of professional education, the compelling nature of the ends, the speed at which the ends must be achieved, if at all, and the various means for accomplishing the end, however that end is defined. The commentators also seem to be at odds over these issues.

From this conflict of opinion, certain conclusions may perhaps be drawn. First, assuming that the two-tiered approach to equal protection challenges is not abandoned, and assuming further that rationality standards are inappropriate because of the suspect nature of racial

187. For a discussion of de jure discrimination, see note 43 supra.
188. Justice Douglas’ dissent in DeFunis criticized the use of the Law School Admission Test (LSAT) as a predictor of professional promise. 416 U.S. at 328-31 (Douglas, J., dissenting). He also noted that evidence that the LSAT was de jure discriminatory might have enabled the University to justify their PAP. Id. at 331-41. The Washington Supreme Court in DeFunis discussed and dismissed the question summarily because there seemed to be insufficient evidence to support a finding of de jure discrimination. See note 43 supra. Perhaps, if evidence of de jure discrimination could be adduced, then race conscious remedial measures would be more supportable. Certainly, the employment cases such as Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), would lend some support in such a case.
189. The use of reclassification methods can be criticized because they may be only indirectly related to the goal of integration and because minorities who do not meet the new classification criteria will not be admitted. See Sandalow, supra note 2, at 690-92. The reclassification approach may be more palatable because one of its major effects is to increase the number of deprived minority applicants who might otherwise be excluded from participating in a PAP. SeePosner, supra note 3, at 32. Of course, the reclassification procedure may not achieve integration as quickly as some might desire. See Sandalow, supra note 2, at 691.

The major argument against nondetrimental affirmative action, such as aggressive recruiting of minorities, may be its inefficiency and the increased burden such actions would place upon the resources of admissions committees. See Sandalow, supra note 2, at 691-92.
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classifications, then strict scrutiny should apply. If strict scrutiny is indeed applicable, then it is doubtful that PAP's will be upheld. This conclusion is, of course, based upon the assumption that the minority representation end will not be defined as requiring a fast rate of integration and that the lack of minority professionals will not be seen as an emergency situation requiring drastic measures. It is assumed also that there exists no de jure discrimination against specific minorities requiring race-conscious remedial measures. Absent a showing of one of these factors, it seems probable that PAP's cannot withstand strict scrutiny.

While there may be a compelling need for minority professionals, there is also a constitutional tradition against the use of suspect classifications. It may be said that the difficult case makes the law; surely, the consideration of PAP's will sorely test the two-tiered approach to equal protection. Perhaps the two-tiered approach will fall because of the "quasi-benign" nature of PAP's and a middle level of review will be adopted. However, as the law now exists, PAP's seem to deny equal protection.

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