A Moment of Truth on Racially Based Admissions

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Introduction

Three years after the nondecision in *DeFunis v. Odegaard*,[1] *Bakke v. Regents of the University of California*[2] presents the United States Supreme Court with another opportunity to pass upon the constitutionality of special admissions programs in which racial quotas are used as a means of increasing the representation of certain racial and ethnic minorities in professional schools. In neither case was the school shown to have previously discriminated against nonwhites, nor were those preferentially admitted shown to have suffered any specific wrong entitling them to special treatment. Rather, such minority group members were the beneficiaries of a program aimed at achieving commendable social objectives that, due to the limited number of places, had to be achieved at the expense of better qualified white applicants.

In his dissenting opinion in *DeFunis*, Mr. Justice Douglas coupled a rejection of racial preference programs with an eloquent plea for an admissions scheme utilizing flexible criteria through which the ability and potential of applicants could be determined "on an individual basis, rather than according to racial classifications."[3] It was the earnest hope of those civil rights organizations that supported DeFunis that the academic community would heed Justice Douglas's plea. This has not occurred.

Indeed, a leading law school whose special admissions program is based on race candidly admitted in a recent report on special admissions

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1. 416 U.S. 312 (1974). *See* Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" With a Message*, 75 COLUM. L. REV. 520 (1975).

2. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977).

3. 416 U.S. at 341 (Douglas, J., dissenting).

that only when *Bakke* was before the California Supreme Court did it seem "important . . . to begin to discover the state of the art on constitutionally safe approaches to special admission programs."[4] According to this report, contacts with forty other law schools to learn whether they "had produced information and ideas for systems of admissions that eschewed racial criteria in favor of criteria of disadvantage [revealed that] there is no real body of experience in dealing with a disadvantagement approach to special admissions in law school."[5] The report concluded that, "to the extent that law schools have special admissions programs of any substance, they operate along racial rather than economic or other lines, although some schools prefer not to advertise that fact."[6]

The grace period provided by the nondecision in *DeFunis* could and should have been used to develop a "body of experience" in dealing with nondiscriminatory admissions criteria. The failure of the academic community to formulate such criteria made it inevitable that a new test case would come before the Court.[7] That failure has also hardened opposing positions due to the economic recession, the dearth of federal funds for higher education, the questionable results of special admissions programs utilizing preferential racial criteria, and the increasing realization among white applicants that they too have a right not to be discriminated against.

DeFunis and Bakke Compared

While the basic issue raised by *DeFunis* is also presented in *Bakke*, the context in which the latter reaches the Supreme Court differs significantly. In *DeFunis*, the highest court of the State of Washington, with only a single dissent, upheld the minority admissions program of the University of Washington Law School. In *Bakke*, the Supreme Court of the State of California, likewise with only a single dissent, declared unconstitutional the special admissions program of the University of California at Davis Medical School. In *DeFunis*, the evidence did not establish the existence of a fixed quota, and the law school was able to argue that there was no quota at all. In *Bakke*, however, there was an express finding of a fixed quota under which sixteen of one

4. REPORT ON SPECIAL ADMISSIONS AT BOALT HALL AFTER BAKKE 1 (1976) [hereinafter cited as SPECIAL ADMISSIONS].

5. *Id.* at 8.

6. *Id.*

7. The United States Supreme Court recently granted certiorari in *Bakke*. Regents of Univ. of Cal. v. Bakke, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977).

hundred places in each entering class were reserved for special admission applicants, and a further finding, not challenged on appeal, that "applicants who are not members of a minority are barred from participation in the special admission program."[8] Furthermore, in *DeFunis* there was some question as to whether the plaintiff would have been admitted even if there had been no minority admissions program. In *Bakke*, by virtue of a counterclaim for declaratory judgment interposed by the medical school, the constitutionality of the school's program became an issue separate from the plaintiff's right to admission.

The record in *Bakke* is thus an unappealing vehicle for proponents of special admissions programs. Moreover, that record will be reviewed in a legal climate that, in the years since the decision in *DeFunis*, has become less hospitable to the indiscriminate use of racial quotas to cure society's ills.[9] For example, at the time of *DeFunis*, it was still undecided whether and to what extent whites were protected by antidiscrimination laws such as Title VII of the Civil Rights Act of 1964[10] or section 1981 of the Civil Rights Act of 1866.[11] In *McDonald v. Sante Fe Trail Transportation Co.*,[12] the United States Supreme Court held that *all* victims of racial discrimination have the same rights under these statutes. The discrimination in *McDonald* did not arise in the context of an affirmative action program, and the Court in a footnote expressly declined to consider the permissibility of such a program,[13] but it is not likely that this disclaimer was intended to sanction the kind of blatant racial discrimination involved in *Bakke*.

Furthermore, the Court's ruling concerning the universal applicability of section 1981 vitiated by analogy an argument made in *DeFunis*, that because the primary purpose of the equal protection clause of the Fourteenth Amendment was designed to prevent discrimination against blacks, a lower standard of justification should be employed when whites are the subjects of discrimination. This argument, based on

8. 18 Cal. 3d at 44, 553 P.2d at 1159, 132 Cal. Rptr. at 687.

9. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976); EEOC v. Sheet Metal Workers Local 28, 532 F.2d 821 (2d Cir. 1976); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975); Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976); Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). *But see* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221 (U.S. Mar. 1, 1977).

10. 42 U.S.C. § 2000e (1970).

11. Act of April 9, 1866, 14 Stat. 27 (current version at 42 U.S.C. § 1981 (1970)).

12. 96 S. Ct. 2574 (1976).

13. *Id.* at 2578 n.8.

early decisions under the Fourteenth Amendment,[14] was advanced despite the many cases in which the Supreme Court has declared the provisions of the amendment to be "universal in their application, to all persons . . . without regard to any differences of race."[15] However, none of those cases had involved racial discrimination against whites. Although rejected both by Justice Douglas in *DeFunis*[16] and by the California Supreme Court in *Bakke*,[17] this argument had sufficient plausibility to persuade the New York Court of Appeals in *Alevy v. Downstate Medical Center*[18] to abandon, at least in dictum, the "compelling state interest" standard normally applied to individious racial classifications in favor of a lesser "substantial state interest" standard when the victim is white and the discrimination in question is "benign."[19]

In *McDonald*, decided several months after *Alevy*, Mr. Justice Marshall noted that although the "immediate impetus" for the Civil Rights Act of 1866 "was the necessity for further relief of the constitutionally emancipated former Negro slaves,"[20] section one of that act[21] was meant to proscribe discrimination against or in favor of any race. He added:

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14. Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

15. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See* United States v. Wong Kim Ark, 169 U.S. 649, 695 (1898); Gibson v. Mississippi, 162 U.S. 565, 591 (1896).

16. 416 U.S. at 333, 342-44 (Douglas, J., dissenting).

17. 18 Cal. 3d at 50-51 n.18, 553 P.2d at 1163-64 n.18, 132 Cal. Rptr. at 691-92 n.18.

18. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

19. *Id.* at 334-36, 348 N.E.2d at 544-46, 384 N.Y.S.2d at 89-90. The dissent in *Bakke* likewise sought to distinguish between "benign" and "invidious" racial classifications, arguing that the "compelling state interest standard" applies only to the latter. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d at 65, 80, 553 P.2d at 1173, 1184, 132 Cal. Rptr. at 701, 712 (Tobriner, J., dissenting). Justice Brennan, in his concurring opinion in *Carey*, likewise spoke of "benign discrimination"; but he expressly viewed as being open the constitutional propriety of "benign racial sorting" in a non-voting-rights context. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221, 4229 (U.S. Mar. 1, 1977) (Brennan, J., concurring). But constitutional rights would be ephemeral indeed if the applicable constitutional standard turned upon subjective evaluations as to whether a particular discriminatory act merits one or the other of these adjectives. Furthermore, as the Washington Supreme Court recognized in *DeFunis*, "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." DeFunis v. Odegaard, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973), *vacated as moot*, 416 U.S. 312 (1974).

20. 96 S. Ct. at 2582.

21. Act of April 9, 1866, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1981 (1970)).

> Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuades us that the Thirty-ninth Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.[22]

Such a broader principle was likewise established by the subsequently ratified Fourteenth Amendment. Indeed, as the Supreme Court noted in *Tillman v. Wheaton Haven Recreation Association*,[23] the 1866 Act, although rooted in the Thirteenth Amendment, was re-enacted "pursuant to the Fourteenth and changes in wording may have reflected the language of the Fourteenth Amendment."[24]

Issues Presented in Bakke

The position that will be taken in the Supreme Court by those who support *Bakke* is predictable. The record clearly establishes that Davis Medical School's special admissions program was inherently discriminatory: white applicants were systematically excluded from sixteen percent of the places in each entering class solely because of their race, and some of those denied admission were, by the school's own criteria, better qualified than many of the minority students admitted under the auspices of the special admissions program.[25]

Furthermore, the supporters of *Bakke* will have the benefit of Justice Douglas's eloquent, if somewhat ambivalent, dissent in *DeFunis* and also the well reasoned decision of the California Supreme Court. Both opinions applied an exacting equal protection analysis, subjecting the racial classification at issue to rigid scrutiny and declining to adopt a less stringent standard of justification for discrimination merely because the victim of the discrimination was white.[26]

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22. 96 S. Ct. at 2585-86.

23. 410 U.S. 431 (1973).

24. *Id.* at 439-40 n.11.

25. As the California Supreme Court noted: "The rating of some students admitted under the special program in 1973 and 1974 was as much as 30 points below that assigned to Bakke and other nonminority applicants denied admission. Furthermore, white applicants in the general admission program with grade point averages below 2.5 were, for that reason alone, summarily denied admission, whereas some minority students in the special program were admitted with grade point averages considerably below 2.5." 18 Cal. 3d at 48, 553 P.2d at 1161, 132 Cal. Rptr. at 689.

26. DeFunis v. Odegaard, 416 U.S. 312, 333 (1974) (Douglas, J., dissenting); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 50, 553 P.2d 1152, 1163, 132 Cal. Rptr. 680, 691 (1976).

Likewise, both opinions declined to equate cases involving the exclusion from a professional school on the basis of race with cases such as *Swann v. Charlotte-Mecklenburg Board of Education*,[27] which involved the reassignment of students and teachers to remedy de jure segregation in the public schools, and *Katzenbach v. Morgan*,[28] which involved the constitutionality of a provision of the Voting Rights Act of 1965[29] protecting the right of certain non-English speaking persons to vote. As Justice Douglas and the California Supreme Court recognized, the holdings in these decisions deprived no one of a legally cognizable right or benefit.[30]

However, there are differences of approach between the two opinions. For example, Mr. Justice Douglas in *DeFunis* rejected the reasoning of the Washington Supreme Court that the objectives of the law school constituted a compelling state interest. Arguing that no theory of societal organization justifies the erection of racial barriers, Justice Douglas warned: "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality."[31] On the other hand, in *Bakke* the Supreme Court of California assumed, arguendo, that the objectives of the medical school to integrate the student body and to improve medical care for minorities established a compelling state interest. However, it ruled that the medical school had failed to meet "its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority."[32] Such differences are of little help to the medical school and its supporters, given the lack of any real effort by the academic community to develop a body of experience with racially neutral approaches to special admissions. Nor are the supporters of the medical school's admissions program helped by the fact that Justice Douglas, on the basis of the record

27. 402 U.S. 1 (1971).

28. 384 U.S. 641 (1966).

29. 42 U.S.C. §§ 1971-73 (1970).

30. 416 U.S. at 336 n.18 (Douglas, J., dissenting); 18 Cal. 3d at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 668. Much the same reasoning was employed by Justice White in United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221, 4227 (U.S. Mar. 1, 1977). *See also* Califano v. Webster, 45 U.S.L.W. 3630 (U.S. Mar. 21, 1977). By contrast, it is established that an applicant to a state university has a legally cognizable right under the equal protection clause not to be excluded on the basis of race. *See* Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

31. 416 U.S. at 343 (Douglas, J., dissenting).

32. 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

in *DeFunis*, suggested that the case be remanded for a new trial. The purpose of such a remand was not to justify racially discriminatory admissions procedures, but rather to give the law school an opportunity to prove that its selection process was in fact nondiscriminatory.[33]

The medical school and its supporters will undoubtedly place heavy reliance on *Alevy v. Downstate Medical Center*,[34] in which the New York Court of Appeals announced:

> [I]n proper circumstances, reverse discrimination is constitutional. However, to be so, it must be shown that a substantial interest underlies the policy and practice and, further, that no nonracial, or less objectionable racial, classifications will serve the same purpose.[35]

Unlike *Bakke*, however, the record in *Alevy* did not establish the existence of a racial quota. Under the minority admissions program at issue in that case, applications of minority group members were afforded special scrutiny in the preliminary screening process, and in rating them, such factors as financial and cultural disadvantage and residence in the local ghetto community were considered. While holding that the medical school practiced reverse discrimination, the court never reached the question whether or not less objectionable alternatives existed because the petitioner had "failed to show his own right to relief, even if the entire minority program were eliminated."[36] Even in dicta the court viewed its sanction of racial preference as temporary and limited:

> We reiterate that preferential policies, laudable in origin and goal, may be laden with substantial detrimental side effects which make their use undesirable. If such practices really work, the period and extent of their use should be temporary and limited for as goals are achieved, their utilization should be diminished. Conversely, if no improvement is noted, consideration should be given to the discontinuation of the practice.[37]

The New York Court of Appeals directly confronted the issue of racial quotas in *Broidrick v. Lindsay*,[38] decided only a month after

33. As Justice Douglas stated: "I could agree with the majority of the Washington Supreme Court only if, on the record, it could be said that the Law School's selection was racially neutral." 416 U.S. at 312, 336 (Douglas, J., dissenting).

34. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

35. *Id.* at 336-37, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

36. *Id.* at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91. However, in *Bakke*, the California Supreme Court, by analogy to federal employment discrimination cases, held that discrimination having been established, the medical school had the burden of proving that the plaintiff would not have been admitted even if there were no special admissions program. 18 Cal. 3d at 63-64, 553 P.2d at 1172, 132 Cal. Rptr. at 700. The university subsequently conceded that it could not meet this burden. *Id.*

37. 39 N.Y.2d at 337, 348 N.E.2d at 546, 384 N.Y.S.2d at 91.

38. 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976).

Alevy. There it struck down mayoral affirmative action regulations requiring construction contractors doing business with New York City to meet prescribed minority hiring percentages. Noting that the mayoral regulations were in conflict with the antidiscrimination provisions of the New York City Administrative Code, the court stated:

> There is a dramatic distinction between the expressed legislative policy of prohibiting the employment discrimination and the mayoral policy of mandating employment "percentages," however disavowed unpersuasively as being quotas. Prohibition of discrimination, properly utilized, allows individual employment opportunity without invidious impediments. . . . But mandating percentages displaces the standard of individual merit with a standard that work forces reflect the ethnic composition within the relevant geographic area even if distribution based on merit would produce a different composition.[39]

Interestingly, *Alevy* is cited in *Broidrick* for the proposition that an affirmative action policy might be permitted if designed to add previously excluded minority workers to the pool of those eligible for employment in a given profession.[40] However, lest its holding in *Alevy* be given an overly expansive interpretation, the court warned that neither that opinion nor *Broidrick* found the use of racial quotas in higher education admissions programs to be constitutional.[41] In sum, a reading of *Alevy* together with *Broidrick* makes clear that the language in *Alevy* indicating a tentative approval of certain types of racial preference in professional school admissions cannot be considered as condoning a racial quota such as that involved in *Bakke*.

Despite *Broidrick*, the proponents of racially based special admissions programs will probably seek to analogize them to affirmative action programs in employment that have withstood judicial attack.[42] However, most of these cases have involved affirmative action programs in the construction trades, which have a long history of discriminating against minority groups. Furthermore, while sustaining goals and timetables for the hiring of minority group members, the courts have generally made clear that such judicially-sanctioned selection processes must be nondiscriminatory.[43]

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39. *Id.* at 647, 350 N.E.2d at 598, 385 N.Y.S.2d at 268.

40. *Id.*

41. *Id.* at 649, 350 N.E.2d at 599-600, 385 N.Y.S.2d at 269.

42. *See, e.g.*, Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

43. For example, in *Contractors Association of Eastern Pennsylvania*, the plan at issue expressly provided: "This commitment is not intended and shall not be used to

The courts have been less cautious in ordering racial quotas or quota equivalents as a remedy in employment discrimination cases.[44] An increasing number of courts are coming to realize, however, that the racial quota is no less destructive of individual aspirations, no less a divider of society, and no less a moral wrong because those excluded are white. For example, in *Kirkland v. New York State Department of Correctional Services*,[45] the United States Court of Appeals for the Second Circuit, in striking down a promotional quota, stated:

> One of the most controversial areas in our continuing search for equal employment opportunity is the use of judicially imposed employment quotas. The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.
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> The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the "discrimination inherent in a quota system."[46]

While the United States Supreme Court has authorized the granting of restitution to identifiable victims of discrimination,[47] it has not passed

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discriminate against any qualified applicant or employee." 442 F.2d at 164. In *Associated General Contractors of Massachusetts, Inc.*, the court viewed the contract requirements there at issue as affording "racial preference" or "special treatment" to minority group members. However, it cautioned against "unrealistic minority hiring goals" which "might impose an unreasonable burden . . . upon qualified workers who were denied jobs because they were not members of the racial minority." Further, it warned that "equal opportunity is an illusive concept, but at its core it carries the simple mandate that opportunities should be open to all on the basis of competence alone." 490 F.2d at 18.

44. *See, e.g.*, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

45. 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 97 S. Ct. 73 (1976).

46. *Id.* at 427. In Equal Employment Opportunity Commission v. Sheet Metal Workers Local 28, 532 F.2d 821 (2d Cir. 1976), the Second Circuit, relying upon *Kirkland*, enunciated the following rule: "[T]he imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of 'reverse discrimination' will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons." *Id.* at 828. Interestingly, the court indicated that the facts in *DeFunis* would not have justified "reverse discrimination" under this rule. *Id.* In Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976), the New Jersey Supreme Court struck down hiring and promotional quotas imposed by a state administrative agency as violative of both the New Jersey law against discrimination and the New Jersey Constitution. The court, among other things, observed that the use of quotas to right past wrongs raises the spectre of conflicting interests among minority groups. It declared: "We are a state of minorities." *Id.* at 24, 367 A.2d at 843.

47. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). The Court held that "identifiable applicants who were denied employment because of race after

upon the constitutionality of racial quotas in employment even as a remedy for past discrimination. The Supreme Court has recently sanctioned the use of racial quotas and redistricting under the Voting Rights Act.[48] However, in the context of a case involving de jure segregation in a public school system,[49] the Court sustained the use of mathematical ratios as a "starting point in the process of shaping a remedy"[50] but specifically declined to endorse a fixed racial balance or quota.[51]

In *Griggs v. Duke Power Co.*,[52] the Court construed Title VII of the Civil Rights Act of 1964 as prohibiting "[d]iscriminatory preference for any group, minority or majority."[53] This ruling was recently reiterated in *McDonald v. Santa Fe Trail Transportation Co.*[54] Absent the showing of a compelling state interest, traditional equal protection analysis yields the same result under the Fourteenth Amendment when state action results in a discriminatory racial classification.[55] It remains to be seen to what extent the Court will find the use of racial quotas as a remedy for past discrimination compatible with the prohibition against "discriminatory preference."

No past discrimination against minority group members was shown in *Bakke*,[56] however. It therefore seems safe to predict that the Court will not countenance the medical school's racial quota unless it is convinced that there is no less invidious way to achieve social progress.

Conclusion

For the last quarter of a century, our nation, spearheaded by the Supreme Court, has been engaged in an effort to make the twin ideals of equality under law and equality of opportunity a living reality by

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the effective date and in violation of Title VII of the Civil Rights Act of 1964" may, and, in most circumstances should, be awarded seniority status retroactive to the dates of their employment applications. *Id.* at 750. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 413 (1975).

48. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221 (U.S. Mar. 1, 1977).

49. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

50. *Id.* at 25.

51. *Id.* at 24. *See* Winston-Salem Bd. of Educ. v. Scott, 404 U.S. 1221, 1227 (1971).

52. 401 U.S. 424 (1971).

53. *Id.* at 431.

54. 96 S. Ct. 2574 (1976).

55. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

56. 18 Cal. 3d at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697. Under the Court's recent holding in Washington v. Davis, 426 U.S. 229 (1976), mere underrepresentation of minority group members or the possibility that they were disproportionately affected

eliminating once and for all the blight of racial discrimination. What is so controversial and potentially destructive about special admissions programs like those involved in *Bakke* is that they utilize racial quotas and preference, the traditional engines of discrimination, as the vehicle for social progress. But, even assuming that such programs can succeed in producing qualified professional people in large numbers, an assumption that has not been proven, their social cost is high indeed. They denigrate the individual, exalt immutable birth characteristics, stigmatize those preferentially admitted,[57] and victimize those excluded because of their race.

All of this might be justified if there were indeed no other way to assist minority group members to participate fully in the mainstream of American life. However, that has yet to be demonstrated. Justice Douglas's opinion in *DeFunis* and that of the California Supreme Court in *Bakke* contain a variety of suggestions for encouraging the enrollment of minority group members in professional schools without the use of racially discriminatory procedures.[58] Officials of the NAACP Legal Defense and Education Fund and the Mexican-American Legal Defense Fund have acknowledged that they "could live with" a program based on disadvantage.[59] Yet, as previously noted,[60] the academic community has apparently not seen fit to develop a "real body of experience in dealing with a disadvantagement approach to special admissions."[61]

At a time when employers, both private and public, are being required to re-evaluate criteria for hiring and promotion in order to

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by certain admissions criteria would be insufficient to establish discrimination in an equal protection context. There must be a showing of "an invidious discriminatory purpose." *Id.* at 242.

57. Justice Douglas in his *DeFunis* opinion spoke of the "stigma" inherent in "[a] segregated admissions process"—the implication "that blacks or browns cannot make it on their individual merit." 416 U.S. at 343 (Douglas, J., dissenting). In an article in the opinion-editorial section of the *New York Times*, David L. Evans, Senior Admissions Officer of Harvard, complained: "So much has been written about the illegitimacy of special recruiting efforts for minority students, black students' disillusionment and 'reverse discrimination' that the mere *presence* of blacks at selective institutions has more and more begun to imply substandard credentials." He added: "Black students who come to Harvard far too often receive the coolest, most ambivalent reception given to any upwardly-mobile ethnic group that has ever entered these ivied walls." N.Y. Times, Nov. 24, 1976, at 33, col. 1.

58. 416 U.S. at 340-41 (Douglas, J., dissenting); 18 Cal. 3d at 54-56, 553 P.2d at 1165-67, 132 Cal. Rptr. at 693-95.

59. *See* The Washington Post, Nov. 11, 1976, at A1, col. 5; *id.* at A13, col. 1; *id.*, Nov. 20, 1976, at A13, col. 1.

60. See text accompanying notes 4-7 *supra.*

61. SPECIAL ADMISSIONS, *supra* note 4, at 8.

remove discriminatory bars, it is unseemly for the academic community to persist in its use of racial quotas and preference without a similar re-evaluation. The process will not be simple or inexpensive. However, as Justice Douglas observed in *DeFunis*, "[W]e have never held administrative convenience to justify racial discrimination."[62] The stakes are far too high for a society desperately trying to rid itself of racial discrimination to accept on faith the claim that the only way to achieve equality in the professions is by practicing still more racial discrimination.

62. 416 U.S. at 341 (Douglas, J., dissenting).