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Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Appellants-Petitioners,

—v.—

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,

Appellees-Respondents.

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR CERTIORARI

Marco De Funis, *et al.* appeal from, or in the alternative respectfully pray that a writ of certiorari issue to review, the judgment and opinion of the Supreme Court of the State of Washington entered on March 8, 1973, rehearing denied, May 16, 1973.

Opinion Below

The opinion of the Supreme Court of Washington is reported in 82 Wn.2d 11, 507 P.2d 1169, and is printed in Appendix A to the Jurisdictional Statement or in the Altertive Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), or in the alternative under 28 U.S.C. §§1257(3) and 2103.

Consent of the Parties

Both Marco De Funis, *et al.*, and Charles Odegaard *et al.*, by their attorneys, have given their consent to the filing of this brief, and their letters of consent are on file with the Clerk of this Court.

Question Presented

Whether consistently with the Fourteenth Amendment to the United States Constitution, a State University Law School may extend a preference for admission solely on the basis of race to a certain number of persons who are concededly less qualified than applicants of other races.

Constitutional Provision

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Interest of the *Amicus*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed briefs as *amicus* in this Court urging the unconstitutionality or illegality of various racially discriminatory laws and practices in such cases as, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.,* 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); and *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969).

Statement

Petitioner Marco De Funis was denied admission to the Washington University Law School class of 1974, commencing in September 1971, and he, his wife and parents thereupon brought suit in the Superior Court of the State of Washington seeking an order that he be admitted on the ground that the procedures by which he was excluded were discriminatory. Following trial, the Superior Court issued such an order, but the Supreme Court of Washington reversed. On June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of the judgment of the Supreme

Court of Washington pending the disposition of an appeal or petition for a writ of certiorari in this Court.

Enrollment in the University of Washington Law School is limited overall to 445 students. The entering class is limited from time to time to the residual number remaining after second and third-year students who continue in good standing are counted. In 1971, the number of places open in the first-year class was approximately 145. Applications had risen to about 1,600. (St. 33-35*)

The task of filling these 145 places was delegated to an admissions committee consisting of five faculty members and two students. (St. 330) The Law School requires that completed applications include copies of transcripts from all schools and colleges previously attended, letters of recommendation, a statement by the applicant himself, and the applicant's score on the law school admissions test, which is nationally administered. These data and documents form the basis on which the committee acts. (St. 338, 22) By means of a formula combining the law school admissions test score and the applicant's junior and senior year college grade averages, a law school predicted first year average is established. (St. 360, 56, 181, 357)

With very few exceptions, and almost always with no further consideration, the admissions committee in 1971 admitted applicants whose predicted first year average was 77 or above. The files of applicants whose predicted first year average was below 74.5 and who were not black Americans, Chicano Americans, native American Indians or Philippine Americans were examined by the chairman of

* "St." refers to the Statement of Facts, which in this record contains the transcript of testimony.

the admissions committee alone. In the overwhelming majority of cases, these applications were rejected by the chairman without further recourse. Exceptions were made by him only for returning veterans and perhaps in one or two other cases, but no more. That left a residual category of applications, which was divided into two groups: those showing predicted first-year averages between 76.99 and 74.5 for applicants who were not black Americans, Chicano Americans, native American Indians or Philippine Americans—the group in which De Funis was included, with a score of 76.23; and those showing that the applicant was a black American, Chicano American, native American Indian or Philippine American with a predicted first year average below 76.99 as well as below 74.5. Files in the first group were assigned to committee members at random for examination and report back to the full committee, where they were eventually acted upon. (St. 340-41, 351, 342, 344) The second group, although forming part of the same residual category, was treated distinctly and separately.

The chairman of the admissions committee testified: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate consideration." (St. 344) Files of black applicants were sent to a subcommittee consisting of a law student, himself black, and a faculty member for review and report back to the full committee. Files of Chicano Americans, native American Indians, and Philippine Americans were reviewed by an associate dean for later presentation to the committee. (St. 352) Files in this separately treated group of black Americans, Chicano Americans, native American Indians and Philippine Americans were compared only with each other and not with the rest of the

applications passed upon by the committee or by its chairman individually. (St. 351, 353, 399, 402, 409)

By this method, the trial court found, 44 black Americans, Chicano Americans, native American Indians and Philippine Americans (called "minority students") were offered admission to the law school, the vast majority of whom had lower predicted first-year averages than that of De Funis, and some of whom, had they been white, would have had their applications summarily denied, presumably by exercise of the function delegated to the chairman of the admissions committee. (Findings, XXI, XXIII, Appendix C to Jurisdictional Statement or in the Alternative Petition for Certiorari, pp. 65-66.) What is more important, the method resulted beyond question in the admission, in the aggregate, of students acknowledged to be less qualified than others who, like De Funis, were rejected.

The dean of the Law School testified that "we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding in the study of law with such academic supportive assistance that we can give them." (St. 420) But he testified candidly that "I would be misleading you, I think, if I suggested" that minority students with low credentials who are admitted are "necessarily as likely to succeed in the law school curriculum as certain of the majority students who are not admitted." (St. 418) And defining the term "qualified" as indicating "the likelihood or probability [that] the student has the potential for successful study of law according to our curriculum," the dean added: "On that basis, we do take, in my opinion, some minority students who at least, viewed as a group, have a less such

likelihood than the majority student group taken as a whole." (St. 423) There followed this colloquy, which stands uncontradicted, and indeed supported, by the record as a whole:

> Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified? A. In total?
>
> Q. In total. A. In using that definition, yes. (St. 423-24)

The number of applicants admitted in this special, separate fashion was apparently not set with precision. But there was, if not a precise number, then a zone or an order of magnitude. The chairman of the admissions committee testified that there was no fixed quota. (St. 353) So did the dean of the Law School, but he said repeatedly that the policy of the School was "to achieve a reasonable representation in the classes of persons from certain minority racial and ethnic groups. . . ." (St. 416; and see St. 426) As indicated above, the policy was not to take applicants who were unqualified in the absolute sense that they had no reasonable chance of succeeding, even with supportive assistance. But, said the dean: "We want a reasonable representation. We will go down to reach it if we can. . . ." (St. 420)

The justification for this policy, as the dean stated it, was that the minority racial and ethnic groups whom the Law School now sought to provide with "a reasonable representation" were those which had been "historically suppressed and excluded from participation in what might be thought of, I suppose, the main stream of our society, and certainly in participation in the legal arena." (St. 416) The

stated assumption underlying the policy was that these groups had been and were now culturally and economically disadvantaged, and that the usual method of evaluating applicants was consequently less than usually accurate with respect to them. (St. 416-17) But there is no pretense in this record that the assumption of cultural and economic disadvantage as applied to any particular individual applicant rested on anything but his race, or that the contrary assumption, namely, that an applicant had had the normal cultural and economic advantages, in turn rested on anything but the applicant's race. Nor is there any indication that black American, Chicano American, native American Indian and Philippine American applicants were evaluated by any special test specially suitable to them. They were evaluated separately and more leniently, but by the same test as everyone else.

The dean of the Law School at one point in his testimony referred to the term, "cultural disadvantage," as a "sort of cloak of language," (St. 417), and when asked to define the difference between a minority group and a culturally disadvantaged person or group, he replied that "the semantics of this whole thing are something of a problem." (St. 424-25) There is in this record a fully candid recognition that the Law School admissions policy singled out for separate treatment applications of certain persons solely on the basis of race, and judged them more indulgently than other applicants. There is no evidence whatever that the School evolved and applied any special test, specially suitable to culturally and economically deprived applicants and capable of assessing their qualifications as rigorously as those of other applicants were assessed. (*E.g.*, St. 399)

Reversing the trial court, which had ordered that De Funis be admitted to the class of 1974, the Supreme Court of Washington held that racial classifications are not *per se* unconstitutional, if not invidious and stigmatizing; that the Law School's admissions policy does not constitute invidious discrimination any more than did the color-conscious policies mandated by *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), or by certain decisions of lower federal courts such as *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970), *cert. denied,* 402 U.S. 944 (1971); and *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); that nevertheless a compelling state interest must be shown in order to justify classifications based on race: and that three adequately compelling state interests had been shown in this case, namely, the elimination of "racial imbalance within public legal education," 507 P.2d at 1182, the production of "a racially balanced student body at the law school," 507 P.2d at 1184, and the alleviation of a nation-wide "shortage of minority attorneys," 507 P.2d at 1184. In its statement of the case, the court noted that the Law School admissions policy proceeds from the assumption that certain racial groups have been subject to segregation and discrimination in the past and have historically been suppressed. But the court did not seem to accept this assumption as in itself constituting a compelling state interest.

The court also held that there was no denial of equal protection because only certain racial groups were singled out by the Law School admissions policy, since in light of the purpose of that policy the racial classification did not need to include all racial minority groups. The court held as well that the Law School's admissions procedure did not

constitute arbitrary and capricious administrative action, since definite numerical standards were used, and modified only where racial or other considerations seemed so to require.

Justice Wright, while joining in the opinion of the court, filed a short concurring opinion, in which Justices Finley and Stafford joined, while also joining in the opinion of the court. Chief Justice Hale filed a long dissenting opinion, in which Justice Hunter joined, while also filing a short dissent of his own.

REASONS WHY THE QUESTION IS SUBSTANTIAL OR IN THE ALTERNATIVE WHY THE WRIT SHOULD BE GRANTED

I.

The decision below misreads and misapplies, if it does not squarely conflict with, prior decisions of this Court and of other courts concerning the use of racial classifications.

It is, of course, firmly settled that any racial classification emanating from "official state sources," *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967), carries the heaviest possible presumption of unconstitutionality. The kind or degree of deprivation resulting from a racial classification is immaterial; nor does it matter that the consequences of a classification fall evenly on more than one race, or on all races. *Loving* v. *Virginia, supra; Hunter* v. *Erickson,* 393 U.S. 385 (1969); *Tancil* v. *Woolls,* 379 U.S. 19 (1964); *Anderson* v. *Martin,* 375 U.S. 399 (1964). Therefore, the Supreme Court of Washington's remark that it is "questionable whether defendants deprived plaintiff of a legal

education by denying him admission," 507 P.2d at 1181, because De Funis had been accepted at other law schools, namely, two private and two out-of-state public ones, is entirely irrelevant. It was just this consideration that the Court rejected in *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 349-50 (1938); and see *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950).

Equally irrelevant is the Supreme Court of Washington's subjective impression that the Law School's minority admissions policy is not invidious or stigmatizing, 507 P.2d at 1179. The constitutionality of racial classifications does not turn on whether a legislative or administrative body, or the highest court of a state, or even this Court, subjectively regards them as invidious and stigmatizing or not. Constitutionality turns on whether classifications work any deprivation, and even if not, on whether they are justified by a compelling interest, by "some overriding statutory purpose," *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964). "Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida, supra,* 379 U.S. at 192-93. If supported by a compelling state interest a classification may be deemed to be not invidious, not stigmatizing, and constitutional. If not so supported, it is invidious and stigmatizing as a matter of law, regardless of the intent behind it.

Invidiousness, then, is not a question of fact; it is a conclusion of law. And courts would find themselves on very treacherous ground indeed if it were otherwise. Thus in the instant case, if the decisive question were whether the classification was in fact not invidious and not stig-

matizing, the answer would depend on how the classification was received by those to whom it applied. And the answer, on which this record is silent, would in truth be more than dubious. One black American who recently graduated from law school has reported:

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

Given such potential attitudes, can an openly acknowledged policy, like that of the University of Washington Law School, of applying lesser standards to a racially defined class of applicants be assumed not to be invidious or stigmatizing? See Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. OF PA. L. REV. 351, 353-59 (1970).

The cases in this Court sanctioning racial classification on which the court below relied have uniformly shared two characteristics, both of which are signally absent in the instant case. First of all, they have sanctioned the use of racial criteria—indeed, they have decreed it—as a remedy fashioned to cure unquestioned, specific previous discrimination based on race. The remedy has followed with precision a wrong shown with precision in a record. Secondly, the cases have imposed no new deprivation on anyone else. In following the wrong, the remedy created no new wrongs; it did not impinge upon or displace any rights of others.

As the Court said in *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45 (1971): "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." The decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Education, supra,* was based on findings of "a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6. And this Court repeatedly emphasized in the course of its opinion that its focus was on state-imposed segregation. See, *e.g.,* 402 U.S. at 7, 11, 15, 18, 21. The same is equally true, with equal emphasis, of such earlier cases as *Green* v. *County School Board,* 391 U.S. 430 (1968); and *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969), and of cases concerning the right to vote, *e.g., Louisiana* v. *United States,* 380 U.S. 145 (1965).

Nor was any deprivation of which legal cognizance can be taken imposed on anyone in these cases. Children have no legal right, certainly no constitutional right, to be zoned into one school rather than another, or to be bused only for purposes of remaining segregated but not for purposes of desegregation. Desegregation of faculties, as in *United States* v. *Montgomery County Board of Education, supra,* was not remotely shown to necessitate the loss of position on the part of any teacher for racial reasons, and if reassignment based on race was involved, it impinged on no cognizable rights, since a teacher has no more a legal, let alone a constitutional, right to be assigned to a given school than does a pupil. Again, adding to the lists voters

who had been discriminatorily kept off before obviously deprives no other voter of any recognizable right.

By contrast, the record in this case contains no evidence whatever of prior discrimination by the University of Washington, by its Law School, or by the State of Washington. The record does show that for 1969-70, the University of Washington Law School reported an enrollment of 8 black students out of a total of 356. (Defendant's Exhibit 7) That comes to approximately 2.2 percent, and compares favorably with the percentge of blacks in the population of the State of Washington, which is 2.1, and in the populations of the neighboring states of Oregon, Idaho and Montana, from which perhaps the University of Washington may be presumed also to draw students. See *United States Bureau of the Census, Census of Population: 1970, General Population Characteristics,* Washington, Final Report PC(1)-B49, Table 18; Oregon, Final Report PC(1)-B39, Table 18; Idaho, Final Report PC(1)-B14, Table 18; Montana, Final Report PC(1)-B28, Table 18; cf. *Swain* v. *Alabama,* 380 U.S. 202, 208-09 (1965).

On this record, there is also no showing of any sort that the criteria used for admission, which are summarized in the predicted first-year average, are not probative of qualification and operate or have operated so as to discriminate against certain racial or ethnic groups. There was testimony, see *supra,* p. 8, entirely impressionistic in nature, that these criteria might be somewhat unsuited to culturally and otherwise deprived persons, although not to any racial group as such. But there was no testimony indicating any doubt that the criteria reliably predicted law school performance for everyone, including by and large the culturally deprived, and there was no thought

of abandoning them. There was thus not the slightest hint that the criteria were discriminatory in the sense of operating to exclude racial groups for reasons unrelated to true qualifications. On the contrary, it was conceded that the result of diluting these criteria was the admission of relatively less qualified applicants. This result is wholly different from that involved in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); indeed the decision in the instant case is at odds with *Griggs*. Speaking of Title VII of the Civil Rights Act of 1964, under which *Griggs* arose, the Court said:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." 401 U.S. at 436.

The racial classification adopted by the University of Washington Law School was no remedy for a definable wrong within the meaning of this Court's cases discussed above. Rather the racial classification was aimed at achieving certain objectives of social policy, the desirability of which was in turn derived from an assessment of historic nation-wide practices and their present consequences. And the classification did assuredly impinge on the rights of others. The grievance is not that De Funis or anyone else has a right to be admitted to a state law school or to have his application considered in accordance with any given set of mechanical, numerical or other criteria. The point, which hardly requires argument, is that De Funis no less than anyone else has a right to be considered for admission at a state law school by a method, however dis-

cretionary, that does not discriminate against him on the ground of his race or ethnic origin. The system of racial classification imposed by the University of Washington Law School operated to deprive De Funis of this right.* In this respect, again, this racial classification is critically unlike any sanctioned in this Court's cases discussed above.

The conclusion to be drawn from this Court's decisions —with which the decision below necessarily clashes—is that a compelling state interest sufficient to justify a racial classification can be shown only if the classification is undertaken in the course of administering a remedy for proven prior discrimination, or at least if, while serving an allowable state purpose, it imposes no deprivation on anyone. Prior decisions of other courts, cited but inadequately analyzed by the Supreme Court of Washington, are in accord with this conclusion, and equally clash with the decision of the Supreme Court of Washington.

Thus *Carter* v. *Gallagher, supra,* rested on an express finding of past racial discrimination. The case concerned employment of firemen, and although a decree ordering the hiring of minority persons was affirmed, the court reversed an order of the district court requiring absolute preference for qualified minority persons in filling first vacancies. "The absolute preference ordered by the trial court," the Court of Appeals held, "would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of

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* This is the foundation of standing in this case. Cf. *Peters* v. *Kiff,* 407 U.S. 493 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972).

one constitutional guarantee by the outright denial of another." 452 F.2d at 330.

Contractors Association of Eastern Pennsylvania v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 584 (1971), another employment case, similarly rested on a specific finding of prior discriminatory exclusionary practices. An order establishing goals for minority hiring was approved, but it plainly provided that there was to be no discrimination "against any qualified applicant or employee," 442 F.2d at 164. Elaborate findings demonstrated, the court held, that this intention to impose no deprivation on anyone else could be realistically carried out. The labor force in question was essentially transitory and often in short supply in key trades. The findings, said the court, "disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force." 442 F.2d at 176. "Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen." 442 F.2d at 173. That is altogether different from a situation, as in this case, where 145 or so places are to be filled, and no more, and the acceptance of any less qualified applicant necessarily deprives a better qualified one of a place.

Again in *Porcelli* v. *Titus, supra,* the suspension of one method of promoting school administrators and the substitution of another was upheld in light of striking statistical evidence tending to show that the suspended method had the effect of discriminating against qualified blacks. Moreover, the trial court had found that the substituted method would not exclude anyone from consideration for

administrative positions on account of race. It was shown that "despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified. . . ." 431 F.2d at 1257, n. 4. Compare *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), where the contrary was shown, and the court, in consequence, struck down a racial balance plan as applied also to school administrators. Moreover, to the extent that race may have been a factor in *Porcelli* v. *Titus,* there was a solid basis in the record for finding that in the school system of Newark, New Jersey in 1969, race was a job-related factor. See *Porcelli* v. *Titus,* 302 F.Supp. 726, 732-33 (D.N.J. 1969).

Finally, cases such as *Offermann* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967), upheld school board policies aimed at achieving racial balance, which imposed no legally cognizable deprivation on anyone, since they closed off no one's access to a school, and no one has a right to be zoned into a particular school.

II.

The decision below distorts the remedial device of "affirmative action" which is of increasingly critical importance to the achievement of social justice and the development of harmonious race relations under law in our country. By so distorting the remedy of "affirmative action," the decision below threatens to destroy its utility.

Equality of opportunity, this Court has suggested, commenting approvingly on the purposes of Title VII of the Civil Rights Act of 1964, must not be provided "only in the sense of the fabled offer of milk to the stork and the fox." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431. To the end of avoiding the fabled perversity, legislatures and courts have evolved the remedy of affirmative action. It is, and increasingly so, a device of great importance in the developing law of race relations. It is a flexible remedy, whose application will vary with circumstances, and it is race-conscious.*

Whatever the varying circumstances of its application, however, the limits of the affirmative action remedy must

* There may even be circumstances when it might be permissible to take race or ethnic origin into account for job- or function-related reasons, as anti-discrimination legislation may also sometimes do. See, *e.g., Porcelli* v. *Titus, supra,* 302 F. Supp. at 732-33; *Freeman* v. *Morton,* Civ. No. 327-71 (U.S. District Court for the District of Columbia, 1973); *Mancari* v. *Morton,* Civ. No. 9626 (U.S. District Court for the District of New Mexico, 1973); cf. *B.P.O.E. Lodge No. 2043 of Brunswick* v. *Ingraham,* 297 A.2d 607 (Sup. Ct. Me. 1972), *appeal dismissed,* 93 Sup. Ct. 1893 (1973). Cases arising in such circumstances present a wholly different problem from the affirmative action and preferential treatment issues discussed in the text above.

be clearly established to be those set by the leading cases discussed in the previous section of this brief, else the remedy will end up destroying itself. Without these essential limits, the remedy of affirmative action will collapse into the very evil it seeks to cure; and then surely the impulse to abandon it altogether will be irresistable. In the instant case, those limits have been plainly transgressed. This is a polar case. The lines of distinction in this area are often thin and can often be perceived with assurance only in the light of experience. The instant case, however, stands at an extremity, well outside a clearly defined line. It calls for a firm assertion of the limits indicated in prior decisions of this Court and in other leading cases. Only thus can the future utility of the remedy of affirmative action be ensured.

The importance and pervasiveness of the problem are demonstrated by the volume of litigation, and the need for guidance is shown by the occasional tone of groping uncertainty that is evident in some of the decisions, although we have found no case of the extremity of the instant one.* For illustration of the significance and magnitude of the problem in the field of higher education, in which the instant case arises, see the article by President John H. Bunzel of California State University at San Jose, *The Politics of Quotas,* CHANGE, October, 1972, p. 25.

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* See, *e.g.,* in addition to cases cited in the previous section of this brief, *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *National Labor Relations Board* v. *Mansion House Center Management Corporation,* 473 F.2d 471 (8th Cir. 1973); *Southern Illinois Builders Association* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972); *N.A.A.C.P.* v. *Allen,* 340 F. Supp. 703 (N.D. Ala. 1972); *Pennsylvania* v. *O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *modified,* 473 F.2d 1029 (3d Cir. 1973); *Erie Human Relations Commission* v. *Tullio,* 357 F. Supp. 422 (W.D. Pa. 1973).

It is proper and may be necessary to follow the specific proven wrong of prior discrimination—not, as noted, shown in this case—with an equally specific remedy, which might include a race ratio as a starting point. Even so, as the Court pointed out in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 24, the Constitution requires no "particular degree of racial balance or mixing," and "that approach would be disapproved. . . ." Again, it may be proper for school authorities to conclude that "in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 16. That is not to justify, however, imposition of such a ratio as a means of excluding better qualified applicants from admission to a limited number of places in a state school, rather than as an assignment policy. Similarly, even in the absence of proof of prior discrimination, it is proper and may be necessary to require an employer or a university to cast a wider recruiting net than in the past, and to set a goal for minority recruitment which may act as a spur. But it is one thing to enforce such a policy on the basis of a finding that there is an adequate existing pool of qualified minority persons and that the new recruitment policy will not exclude any qualified candidates for reasons of race. It is quite another thing, without any pretense at remedying proven prior discrimination, and even when such past discrimination can be shown to have existed, to require the employment or the admission to a school or to any other position of unqualified or less qualified persons solely on the basis of their race. When this is done, a cost is paid in loss of efficiency and in injustice.

Loss of efficiency and productivity is no help to anyone. And in a society in which men and women expect to succeed by hard work and to better themselves by making themselves better, it is no trivial moral wrong to proceed systematically to defeat this expectation; the more so as for some groups that do not now benefit from affirmative action programs prejudice has only recently been overcome, and the expectation that members of such groups might rise by merit has just begun to be fully met. In many employments artificial qualifications have been erected, or wrong ones, unduly bound to middle-class culture and insufficiently related to true efficiency, and these ought properly to be reexamined. But to reject an applicant who meets established, realistic and unchanged qualifications in favor of a less qualified candidate is morally wrong, and in the aggregate, practically disastrous.

The bright line between a beneficent policy of affirmative action and a policy that is a moral wrong and a practical disaster is starkly illustrated by the record in the instant case. With the best will in the world, no doubt, the University of Washington Law School instituted a policy that amounted to the establishment of a quota, no matter what "cloak of language" was ingenously used by the Law School to disguise the fact from itself as well as from others. The size of the Law School entering class was fixed to within approximately five places, and there was never any consideration given to expanding it. (St. 115, 333-34) Minority and non-minority applicants went, as we have shown, through separate evaluative procedures. The most desirable students were chosen from both the minority and the non-minority groups, but the candidates in one group were never compared with candidates in the other. The

admissions committee was therefore faced with two groups of students it wished to accept, and one class in which to put them. Somehow a decision had to be reached to apportion some part of the fixed number of places in the class to one group, and the remainder to the other. Undoubtedly the number of places allotted to minority applicants was not exactly the same from year to year, and undoubtedly the decision was made as loosely and implicitly as possible. But in the absence of any comparison between the two groups of applicants, the decision had to be made. A quota is no less a quota because it is undeclared and because it is subject to annual adjustment, or because it is called "reasonable representation."

It is true, as noted earlier, that the dean of the Law School testified that the School would "go down to reach [a reasonable representation] if we can, but we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding. . . ." (St. 420) But a quota is still a quota even if occasionally there are not enough applicants to fill it. An entirely separate admissions procedure based on race and leading to separate acceptances was used in this case. In effect, the entering class at the University of Washington Law School in the fall of 1971 was two classes, one of minority students and one of majority students, recognized and chosen as such.

If the School's purpose had been to restrict the number of minority students below the number who would be admitted in the absence of the quota, the practice would be unconstitutional beyond question. This was not the purpose, obviously. But a quota is a two-edged instrument.

It cannot help but be, regardless of the motive of its user. The aims of the policy in this case, as the Supreme Court of Washington approved them, were the achievement of a racially balanced student body, and the alleviation of a shortage of minority attorneys, which can certainly be read as meaning the achievement of a racially balanced profession. Not dissimilar purposes were cited, in equally good faith, no doubt, by President A. Lawrence Lowell of Harvard and others in the 1920's, when a number of private universities sought to impose quotas—restrictive ones, to be sure—on the admission of Jewish students. See 74 *Literary Digest* 28, July 8, 1922; Yoemans, ABBOTT LAWRENCE LOWELL 209-16 (1948).

Of course, the aims were different then. To recruit is different than to restrict recruitment. But balance and representation—concepts that abandon the criterion of merit—cannot avoid restriction as well as recruitment, so long as the number of places to be filled is limited. The purpose of President Lowell of Harvard was to restrict, and the purpose of the University of Washington Law School was to recruit, but the point is that restriction is inevitably implicit if the number of available places remains stable and the criterion is not merit but race or ethnic origin. And the point is that the same policy objective of producing balance and representation, pursued in equally good faith, supports the restriction as much as it supports the recruitment.

It remains only to note a particular irony in the policy of the University of Washington Law School. The policy is based, as we have noted more than once, not on any proven past discrimination, but on an assessment of historic conditions of disadvantage prevailing as to certain

groups. Yet despite this premise, the policy is applied to only four racial groups. The irony of assuming in the State of Washington that a history of discrimination and disadvantage is an attribute only of these groups and not of Asian-Americans will be pointed up by a glance at *Terrace* v. *Thompson,* 263 U.S. 197 (1923), the land-ownership restriction case, which arose in Washington, and by the realization that Gordon Kiyoshi Hirabayashi was, in 1942, a student at the University of Washington. *Hirabayashi* v. *United States,* 320 U.S. 81, 84 (1943). The irony is of constitutional dimension. Given the assumptions and the purposes of the policy in question, there arises, to say the least, a serious equal protection problem. See *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

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