nance of man . . . which proves the absolute right to an education of every human being that comes into the world, and which of course, proves the correlative duty of every government to see that the means of that education are provided for all. 129

Equal education has to be given concreteness and specificity as educational policy. Thus, where educational policy concludes that equal education requires certain specific practices, the courts should make those practices a part of the constitutional dimensions of the equal education guarantee. The courts must ask the question: "what are the essential ingredients needed for equality of educational opportunity?" When this question is answered, the mandate of the equal protection clause will be clear.

Robert E. Godwin

Equal Protection and Benign Racial Classification: A Challenge to the Law Schools

In recent years remedial measures based on racial classifications have been initiated by the federal government and state governments and their agents to eliminate the effects of racial discrimination in areas such as schooling1 and employment practices.2 These "corrective" measures have been upheld by the courts,3 and, indeed, the courts themselves have initiated such measures.4

129. H. Mann, Readings in American Education 336 (Lucio ed. 1963) (emphasis in original). There can be little doubt that Mann envisioned the absolute right to an equal education. See note 2 supra.

1. See Ill. Rev. Stat., ch. 122, § 10213 (1972); Mass. Ann. Laws, ch. 71, § 37(c); ch. 15, § 1 (I), (J), (K); text accompanying notes 69-79 infra.

2. See, e.g., the "Philadelphia Plan," issued under the authority of Exec. Order No. 11246, 3 C.F.R. 339 (1965), under which federal contracts and federally assisted construction contracts were required to "set specific goals of minority manpower utilization."


Representative of such actions is the University of Washington Law School's admission policy designed to increase minority representation in its entering first year class. To ensure greater minority representation the Law School's Admissions Committee employed a different admissions procedure for minority applicants. This different procedure consisted of 1) full committee consideration, rather than singular consideration by the Chairman of the Committee, where an applicant's Predicted First Year Average (PFYA—consisting of junior/senior undergraduate grade point average and Law School Admission Test score) fell below a certain level; and 2) instead of random assignment of applicant files to Committee members, minority applicant files were assigned to those Admissions Committee members best suited by reasons of background and experience to give appropriate recommendations. This procedure resulted in the acceptance of 44 minority students into the class of 1974, 36 of whom were arguably less qualified than several unsuccessful Caucasian applicants. Alleging that this procedure constituted a denial of the equal protection clause of the fourteenth amendment, the plaintiff in DeFunis v. Odegard, an unsuccessful white applicant, filed suit


5. Included within the category of minority applicants were Blacks, Chicanos, American Indians, and Filipinos. Brief for Appellant at 8, Defunis v. Odegard, No. 741727 (Wash Super. Ct. King County, Sept. 22, 1971).
6. "Id" at 8, 32.
7. "Id" at 6.
8. On the sole basis of PFYA the 36 minority students were less qualified. However, as will be demonstrated, recognizing all the factors an admissions committee must take into consideration in developing admissions criteria, the minority students may not have been less qualified, and from the standpoint of the law school, were more qualified. "Id" at 36.
9. "No state shall . . . deny to any person within its jurisdiction the equal protection of the law."
11. The question of standing, although not discussed in Defunis, must be considered. It may well be that Defunis lacked standing, for even if all 36 minority applicants had been rejected and White students admitted in their place, he would not have been accepted. Defunis had been placed in the fourth quartile of the law school's waiting list,
in the Superior Court of the State of Washington for King County.

In upholding the petitioner's claim the trial court in *Defunis* relied upon *Brown v. Board of Education*. Interpreting *Brown* to hold that any racial classification is invalid per se, the trial judge, in suspect reasoning, stated:

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. The only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.

The ramifications of this reasoning when applied to efforts by a state to ameliorate a past racially discriminatory practice are obvious—the state's efforts would have to be halted. In light of this serious consequence further inquiry into the constitutional framework for the trial court decision in *Defunis* as well as an examination of an alternative basis of review of the case is crucial.

The fourteenth amendment provides that "No state shall . . . deny to any person the equal protection of the laws." However, logic dictates that laws cannot affect all classes of people equally. If legislation is "to act at all it must necessarily impose special burdens upon or grant special benefits to special groups or classes of persons." Therefore,

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13. See text accompanying notes 34-39 infra.

It is the essence of classification that upon the class are cast certain duties and
where a classificatory scheme is alleged to be violative of the fourteenth amendment the initial inquiry focuses on the criteria to be employed in evaluating the constitutional propriety of the scheme.

Courts have traditionally employed two criteria or standards of review. In cases concerned primarily with business or economic regulations, courts apply a restrained equal protection standard involving a two pronged test. The first inquiry is whether the classification employed has a permissible purpose. This is almost always answered affirmatively, for the courts consider any reasonably conceived state of facts existing at the time the classification is employed as justifying the classification. The second inquiry is whether the classificatory scheme has a fair and reasonable relation to the purposes of the statute.

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18. It is suggested in Developments, that "the requirement of permissibility seems little more than a caveat intended to make the formula logically secure against the assertion that 'this classification is valid because it is rationally related to the purpose of promoting inequality.'" Id. at 1081.

19. Since Morey v. Doud, 354 U.S. 457 (1957), no business or economic regulation has been found violative of the equal protection clause under the traditional standard of review. However, in two recent cases not concerned with business or economic regulations, the Court has struck down state statutes under this standard of review. Reed v. Reed, 404 U.S. 71 (1971); Eisenstadt v. Baird, 40 U.S.L.W. 4303 (U.S. March 21, 1972). This may indicate that meeting this standard will no longer be a perfunctory exercise.

so that all those subject to it are treated equally. Even though the classification scheme may actually be over- or under-inclusive, as long as any rational relation between the classification and the permissible state purpose can be found, the classification will be upheld.

Where a classification is based on "suspect" criteria or affects a fundamental interest, a different standard of review is invoked. Here


22. Overinclusiveness results where individuals not in the same position with respect to the purpose of the law are benefited or burdened by defining a class encompassing more than those persons similarly situated. Thus, in Korematsu v. United States, 323 U.S. 214 (1944), while a military order placed all Japanese-Americans in concentration camps to reduce the danger of subversion and sabotage, certainly only a small percentage of those so placed were subversives. See generally Tussman & tenBroek at 347-48; Developments at 1086.

23. Underinclusiveness results where individuals in the same position with respect to the purpose of the law are not benefited or burdened by defining a class encompassing less than those persons similarly situated. Thus, in Goesaert v. Cleary, 335 U.S. 464 (1948), the Court upheld a Michigan statute which barred all women from receiving bartending licenses except wives and daughters of male bar owners. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 483 (1937). See generally Tussman & tenBroek at 347-38; Developments at 1084-1086.


the courts subject the classification "to the most rigid scrutiny," requiring a showing of a compelling state interest in order to justify the classification. The state has a "heavy burden of justification" to prove not only that the statute's or practice's purpose cannot be achieved by an act or criteria of a non-suspect nature or by infringing on a fundamental right, but also that the import of the public interest in the particular enactment or practice outweighs, in the balance, the burden placed on those who are either subject to the classification or whose rights are burdened.

It is instructive to note that racial classifications are not deemed invalid per se as the Court suggested in *Strauder v. West Virginia,* but rather are considered as being merely "suspect." Despite language

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30. This burden was met in *Korematsu v. United States,* 323 U.S. 214 (1944), where the state's compelling interest to prevent subversion and sabotage during wartime justified placing Japanese-Americans residing on the west coast in concentration camps. *See generally Developments* at 1130.
31. 100 U.S. 303 (1880). In *Strauder* the Court stated: "What is this but declaring that the law in the States shall be the same for black as for white; that all persons, whether colored or white, shall stand equal before the laws of the States. . . . *Id.* at 307.
in a number of cases to the effect that the Constitution prohibits classifications based on race from ever being invoked, resort to the label "suspect" alone would suggest that the Court does not deem all racial classifications invalid. Thus, the trial judge's assertion in De Funis that "the fourteenth amendment could no longer be stretched to accommodate the needs of any race" appears to be erroneous.

The language of Brown v. Board of Education is not necessarily inconsistent with this result. The adjudicative backdrop of Brown was not Strauder, but rather Plessy v. Ferguson, wherein the Supreme Court had held that "separate but equal" in public accommodations was permissible. Plessy, having succeeded Strauder, appears to have overruled it, if not explicitly, at least implicitly. Furthermore, if the Court


34. What purpose would rigid scrutiny of a suspect classification serve unless classifications could at times pass constitutional review; see Gagan, De Jure Integration In Education, 11 Catholic Law. 4, 12 (1965).

The Courts discussion in other cases further supports this contention. See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964), where the Court suggested that racial classifications might be permitted if "there clearly appears in the relevant material some overriding statutory purpose" justifying treatment on a racial basis. Id. at 192; Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967). See also W. DOUGLAS, WE THE JUDGES 398-99 (1956), where Justice Douglas suggests that racial classifications are, at times, permissible; Vierra, Racial Imbalance, Black Separatism, and Permissible Classification By Race, 67 Mich. L. Rev. 1553 (1969), where the author states:

The decisions of the Supreme Court do not establish a rigid principle of constitutional color-blindness. Rather, the opinions although not yielding a clear neutral principle suggest that in appropriate circumstances—usually described in terms of 'justification'—the state and national governments may classify by race. Id. at 1605-06.


37. 100 U.S. 303 (1880).

38. 163 U.S. 537 (1896).

39. The outright prohibition in Strauder against racial classifications could no longer be constitutionally authoritative after Plessy since the concept of separate-but-equal necessarily entails racial classifications.
had intended to revive *Strauder* and activate other absolute prohibitions against the use of racial classifications, one must question why it went to such lengths in detailing the psychologically deleterious effect of even "separate but equal" segregated public school facilities on Blacks. An argument can in fact be made that *Brown* dealt with the problem of unequal education due to segregation, rather than with the unlawfulness of racial classifications per se. The *Brown* Court stressed the importance of the fact that the discrimination was in the arena of public education, thus leaving open to speculation whether *Plessy* was still valid in other areas. If racial discrimination alone was enough to warrant invalidating a segregated school system, then the Court's discussion in *Brown* of the importance of public education would have been merely surplusage.

The *Brown* opinion said nothing about barring affirmative action to remedy past unlawful discrimination. Moreover, it is questionable whether one should apply the language of *Brown*—designed to attack a system of school segregation—to bar an affirmative plan designed to remedy discrimination. As the appellants in *DeFunis* pointed out, this precludes the achievement of the very goals *Brown* attempted to insure.

The question that should be asked is not whether a racial classification is invalid per se, as the trial judge so held in *DeFunis*, but rather what standard should be invoked to assess the constitutionality of an

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40 See cases cited in note 33 supra.

41 See generally Developments at 1089.


The Court's opinion . . . placed emphasis upon the intangible factors that make the *Plessy* doctrine inapplicable to the public schools. Education is an experience and not merely an enjoyment of public facilities. But with respect to common carrier and public recreational facilities, the emphasis is upon the enjoyment of the physical facilities and services so that it is more nearly possible to speak of equality of enjoyment within the pattern of segregation.

*Id* at 1154


[There appears to be no reason to believe that the sense of inferiority engendered by segregation in recreation is any less than in education, although its manifestations will of course be different.

*Id* at 724.


45 Brief for Appellant, *supra* note 5, at 17.
affirmative state program designed to remedy discrimination. At the very least, an affirmative action plan employed to offset past discriminatory practice, whether de facto or de jure, should be evaluated under the stricter equal protection theory. However, even taking into consideration the arguments why the strict scrutiny approach should be employed, it is asserted that the reasonableness test is the correct approach to use when judging a benign racial classification.

There are a number of reasons why a strict scrutiny as opposed to a reasonableness test should be applied even where a racial classification is benign. A fundamental objection to a benign or special treatment program is that it offends basic concepts of individualism. It has been suggested that the equal protection clause confers equality upon individuals rather than groups. This concept of individualism implies that when judging equality of treatment, the focus of review should be upon individuals not races, for race is supposedly irrelevant to a compelling public purpose. Thus, while it would be consistent with this concept of individualism to review an individual minority student's application on different standards, it would be inconsistent to implement such a procedure for all minority applicants across the board. Additionally, a benign classification may also have the effect of perpetuating the premise of inequality between races in that the use of racial preferences may rein-

46. See text accompanying notes 25-36.
47. See text accompanying notes 17-24.
49. See Shelly v. Kraemer, 334 U.S. 1 (1948), where the Court stated:
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 law is not achieved through indiscriminate imposition in inequalities.
Id. at 22.
50. See Developments at 1112. However, because of past discrimination one's race may be a proper guide for his needs. (See United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 891-92, aff'd en banc, 380 F.2d 385 (5th Cir. 1966), cert. denied, 389 U.S. 40 (1967)). For example, if most Black children in a school district have received an inferior education due to exclusion from White schools, a measure that requires the school board to provide remedial classes for all Black children would seem to provide a fairly reliable means of overcoming hardships imposed by previous discrimination.
force pre-existing racial prejudices.\textsuperscript{51} Certainly the use of benign classifications is counter-productive to the goal of eliminating a "color-blind" judgment of individuals.\textsuperscript{52} Furthermore, it has been argued that to allow the government to introduce racial classifications is directly contrary to the assertions of the plaintiff's attorneys in Brown that the Constitution bars differential treatment on the basis of race.\textsuperscript{53} Racial classifications are deemed to be dangerous for it is difficult to ascertain whether a classification is truly benign,\textsuperscript{54} and even if it was benign at one time, the classification "tomorrow . . . might well prove a precedent for a much less happy result."\textsuperscript{55}

If a compelling state interest in employing a particular classification could be illustrated, the affirmative action, though based on a racial classification, would have to be upheld.\textsuperscript{56} However, to apply the standard of strict scrutiny is to ignore the distinction between affirmative action designed to offset past discriminatory practice and actions designed to implement and maintain discriminatory practices. While most courts have held that a state or its instrumentality does not have an affirmative duty to eliminate de facto segregation,\textsuperscript{57} local schools that

\textsuperscript{51} Kaplan, supra note 48, at 379-80.

\textsuperscript{52} However, there are arguments to the contrary. A member of a minority group cannot stand on equal terms with another unless he or she has had the same opportunities to advance in society as others have had. To achieve equal status racial preference may have to be stressed until equality results. Moreover, members of the majority can both better understand the discrimination of the past and present and the positive desire of their government to achieve equality when benevolent racial classifications are affirmatively employed. In the end, if the measures succeed in aiding minorities to obtain equal opportunities within all of society the use of racial classifications may be worth the cost. See Developments at 1113.

\textsuperscript{53} See Kaplan, Segregation Litigation And The Schools—Part II: The General Northern Problem, 58 Nw. U.L. Rev. 157, 188 (1963).

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} See notes 32, 34 supra.

initiate action to overcome it, have been granted discretion in their policy-making. The rationale for permitting such discretion, and the standard to be applied in evaluating the constitutional propriety of the exercise of that discretion has been proffered by Judge J. Skelly Wright:

The function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational and because in our society it would not stigmatize whites.

Thus, where there is no constitutional duty to act to undo segregation, and a state or its agency uses a racial classification "to insure against, rather than to promote deprivation of equal educational opportunity," a court should not find a denial of equal protection. The assertion by Justice Harlan in *Plessy* that the constitution is color-blind cannot be viewed as a limitation on affirmative actions. The Constitution, in the context of *DeFunis*, may very well be "color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevance of color to a legitimate governmental purpose."

Closer examination of the "suspect classification" theory supports this analysis. Racial classifications are considered suspect because when...
witnessed from an historical viewpoint they have been used to discrimi-
nate against politically impotent groups who have been concomitantly
subjected to prejudicial behavior. But where an attempt to remedy past
discriminatory behavior is made, the political system, rather than stig-
matyzing the race, is working to offset such stigmas through the vehicle
of remedial legislation. Additionally, racial classifications have been
considered “suspect” because “race is a characteristic generally thought
to be irrelevant to any legitimate public purpose.” Consequently, when
there is a demonstrable showing of need in a certain area, race may be
an appropriate consideration in fulfilling that need and hence relevant
to a legitimate public purpose. Viewed in this light, the use of a reason-
ableness approach would afford the state greater flexibility in respond-
ing to that need.

A number of courts have dealt with voluntary attempts by the state
to eliminate de facto segregation through the use of racial classifica-
tions. While giving expression to the reasonableness approach, most
have failed to explicitly define the test employed in evaluating these
attempts. However, two courts have recently delineated the standard
to be used. In *Tometz v. Board of Education*, the Illinois court, in
holding that legislation requiring school boards to revise school attend-
dance zones to take racial balance into consideration was permissible,
adopted a traditional approach stating that the proper test should be
“one of reasonableness.”

The court in *School Committee of Boston v. Board of Education* reviewed

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64. See United States v. Caroline Products Co., 304 U.S. 144 (1938), wherein the
Court discusses:

... whether prejudice against discreet and insular minorities may be a special
condition, which tends seriously to curtail the operation of those political pro-
cesses ordinarily to be relied upon to protect minorities, and which may call for
a correspondingly more searching judicial inquiry.

*Id* at 154 n.4. See also Hobson v. Hansen, 269 F. Supp. 401 (1967), *aff'd sub nom.*

65. See *Developments* at 1108.

66. *Id.*

67. See text accompanying notes 89-115 *infra.*

68. See e.g., Offerman v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378
F.2d 22 (2d Cir. 1967); Pennsylvania Human Relations Comm’n v. Chester School


70. *Id.* at 597, 237 N.E.2d at 502.

more explicitly defined the test to be employed. This controversy was provoked by a Massachusetts racial imbalance law which required that statistics on the racial population of each school district be reported to the state board of education. If the statistics revealed the presence of a racial imbalance in the schools (defined as where any one school was more than fifty percent non-white), then the state board was required to order that a plan be implemented by the local committee to end the racial imbalance. In evaluating the constitutional propriety of this effort by the state to curb de facto segregation, the court applied a traditional standard of review, holding that the elimination of racial imbalance was a reasonable legislative objective:

The purpose is within the constitutional powers of a state legislature. The heart of the matter is whether the means are reasonably related to the objective and hence are free of sound constitutional criticisms.\(^\text{72}\)

The court, moreover, explicitly rejected the "strict scrutiny" standard of review since racial factors were taken into consideration by the state only in so far as an attempt was being made to alleviate past educational deprivations.\(^\text{73}\)

The New York and New Jersey courts appear to have employed the reasonableness approach in judging state or local school board actions designed to curtail de facto segregation. Cases in which racial balancing was attempted through rezoning of school districts,\(^\text{74}\) pairing of schools,\(^\text{75}\) busing of students\(^\text{76}\) and voluntary transfer plans\(^\text{77}\) were upheld

\(^{72}\) 352 Mass. at 697, 227 N.E.2d at 733.

\(^{73}\) Id. at 698, 227 N.E.2d at 734.


\(^{75}\) In Addabbo v. Donovan, 22 App. Div.2d 383, 256 N.Y.S.2d 178, aff'd, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, cert. denied, 382 U.S. 905 (1965), it was held
by the courts as long as there was a reasonable basis for the state or local board action. Equal educational opportunity realized through racial balancing was considered a proper objective, hence obviating the necessity to scrutinize the state or school board’s action. In fact, to our knowledge in only one case concerned with a voluntary plan by a state or its instrumentality to eliminate de facto segregation was a strict scrutiny approach explicitly employed, and in this case the strict scrutiny test was satisfied.

The use of a reasonableness approach received additional support from the Supreme Court’s decision in Swann v. Charlotte Mecklenburg wherein an affirmative plan (busing) to desegregate the Charlotte school system fashioned by a federal district court was upheld. Writing for the Court, Chief Justice Burger stated:

School authorities are traditionally charged with broad power to formulate and implement educational 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 for the district as a whole. To do this is within the broad discretionary powers of school authorities. . . . Since the federal court formulated the plan in Swann, an attempt by a state administrative body to itself remedy unequal treatment of mini-

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81. Id at 16 (emphasis added).
ties was not at issue. Hence, this case would have little direct precedential value in terms of upholding the power of the state instrumentality to prepare affirmative action plans; however, it is instructive for purposes of the inquiry. If a federal court can act to eliminate segregation on a local level, certainly state authorities who have a greater knowledge of local needs and whose resources are much more readily adaptable to local problems can do the same.  

Similarly, the Supreme Court assessed the validity of the 1965 Voting Rights Act, passed by Congress pursuant to section 5 of the fourteenth amendment, under the reasonableness test and not the strict scrutiny test. The Act, which had the effect of nullifying a New York election law requiring the ability to read and write English as a precondition to voting eligibility, was held to be constitutional under a reasonableness test because the Congressional measure was "plainly adopted to furthering these aims of the Equal Protection Clause." Singling out those who completed the sixth grade in Puerto Rico in schools where the language of instruction was not English was deemed to be a positive measure enforcing rather than restricting or diluting the fourteenth amendment. When this approach is applied to the context of the DeFunis case, an affirmative action plan adopted by a state instrumentality, if the admissions policy is deemed both to extend benefits and to be predicated on a benign or remedial purpose, the reasonableness test would appear to be the appropriate standard of judicial inquiry. If the reasonableness test is applied in evaluating the benign racial classification, then it will most likely be upheld. Clearly, there is a rational basis for concluding that such minority applicants, being disadvantaged and whose presence would add to the total educational environment of the school, were a suitable object for the remedial admissions policy.

However, even under a strict scrutiny approach, where the State of Washington would have to show a compelling state interest in order to

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82. The Washington Supreme Court held in State ex rel. Citizens Against Mandatory Busing v. Brooks, 80 Wash.2d 121, 492 P.2d 536 (1972), that Swann allows school authorities to affirmatively act through racial classifications to achieve a racial pluralism in school populations.
84. "The Congress shall have power to enforce by appropriate legislation, the provisions of this Article."
86. Id. at 653.
87. Id. at 657.
88. See note 19 supra.
justify the benign admissions policy, the policy should pass constitutional muster. This contention requires that the state interest be examined.

There is a compelling need for minority law students in the legal community. It is asserted that law school special admissions policies designed to answer this need should be constitutionally upheld even if the strict scrutiny test were applied. Adequate justification to support the stringent test can be found in three compelling state interests: the state's desire to insure that all its citizens receive proper legal services; the state's interest in seeing that law schools fulfill their educational obligations to both their student bodies and society; and the state's duty to see that all its citizens obtain a fair measure of administrative and political representation.

There is a severe shortage of minority lawyers in the United States. While this shortage is easily understood when one considers the many factors which have prevented and continue to hinder minority students from seeking a legal education, the magnitude of the scarcity may not

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89. For an argument that it is irrelevant to measure the shortage since it is so severe, see Sumners, Preferential Admissions: An Unreal Solution to a Real Problem, 1970 U. TOLEDO L. REV. 377:

There is no need to define exactly what constitutes 'shortage' or to discuss the question whether the number of minority lawyers should be exactly proportionate to the minority population. The number of minority lawyers is now so small that there is a shortage by definition, and we are obviously years from having to confront the question whether the shortage no longer exists.


90. Law School is an expensive proposition and the correlation between being both poor and a member of a minority group is high. O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 YALE L.J. 699, 730 (1971); TIME, Jan. 5, 1970, at 32. Counseling practices in the junior and senior high schools have channeled minority students into technical and vocational trades. O'Neil, supra at 730. Malcolm X vividly described this so typical pattern. When his eighth grade teacher asked him if he had been thinking of a career he indicated he would like to be a lawyer. The teacher, surprised, said half-smiling:

. . . One of life's first needs is to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You're good with your hands. . . . Why don't you plan on carpentry.

AUTOBIOGRAPHY OF MALCOLM X 36 (1966). Discrimination in hiring and advancement of minority lawyers has deterred minority students from seeking entrance to law school. Shuman, A Black Lawyer's Study, 16 HOW. L.J. 225, 260 (1971); McGee, Black Lawyers And The Struggle For Racial Justice In The American Social Order, 20
be as readily apparent. 91

This shortage has resulted in a need in the minority community for both more lawyers and better legal counseling—which the state must satisfy in order to provide adequate legal services for all its citizens. More lawyers are needed because the minority community is patently underrepresented. 92 The white, middle-class community has far greater access to attorneys. 93 For instance, in New York City in 1970 there was


91. Through August, 1971, there were 350,000 lawyers in the United States—only 4,300 were Black. National Bar Foundation, Black Lawyers, Judges, Professors, & Students, (August 7, 1971) (unpublished memorandum). As of 1970, there was a particular shortage of Black lawyers in the South. In Arkansas there were ten Black lawyers out of a total Black population of 357,000 and in South Carolina eleven Black lawyers out of a total Black population of 789,000. 116 CONG. REC. 7996 (daily ed. Sept. 2, 1970). Even in the urban areas, where Black lawyers tend to congregate, (Note, Negro Lawyers in Virginia: A Survey, 51 VA. L. REV. 521, 523-24 (1965)), Black citizens are underrepresented by legal counsel. See text accompanying note 96 infra. The situation is similar if not worse for Spanish speaking Americans and Indians. See note 94 infra. Through 1968 not one Indian had ever received a law degree from the Universities of Utah, Arizona or New Mexico. No Indian was practicing law in New Mexico or Arizona, even though the total Indian population of these two states was over 135,000. Special Scholarship Program in Law for American Indians, 1968 University of New Mexico brochure at 4. However, steps have been taken to improve the situation. By the 1969-70 academic year 71 American Indians were enrolled in law schools. A.A.L.S. BULL. NEWSLETTER No. 70-2, May 4, 1970, at 3.

92. It has been estimated that “even if the size of the profession could be kept constant, an additional 30,000 Negro attorneys would need be trained before the Negro could achieve parity in the legal profession.” Gelhorn, supra note 90, at 1073. In 1967, Denver, with a nine percent Chicano population, had ten Chicano attorneys, accounting for one-half of one percent of the total number of lawyers in the city. University of Denver College of Law, Progress Report to the Ford Foundation: Law School Preparatory Program for College Graduates of Spanish American Descent 3 (mimeo 1967). See also note 91 supra.

93. This fact is borne out when one considers the correlation between race and poverty. Gelhorn, supra note 90, states: “Legal services are still the reserve of the middle and upper incomes.” Id. at 1074. See also LAW AND POVERTY 1965: REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 44-46 (1965):

[P]rivate lawyers do not serve any substantial segment of the poor; in New York
one white lawyer for every 334 white persons, but only one Black lawyer for every 2180 Black persons. Moreover, while white attorneys could provide legal services for the minority community, in some sections of the country they are actually dissuaded from representing minority clients through community pressure. This is especially true in the fields of civil rights and social welfare where social, political, and economic factors have kept white lawyers from serving the minority community. Furthermore, the inability of many members of minority groups to pay for legal services has restricted the number of attorneys available to members of these groups.

Better legal counseling is also needed because the white lawyer faces inherent disadvantages in representing minorities. The white lawyer is less able to comprehend the background of the problem at hand (because of cultural and linguistic difficulties), is unable to effectively interview witnesses from the minority community and cannot adequately establish an understanding relationship with his client. These problems are accentuated when the more personalized role of the attorney comes into play. Certainly, these are problems the minority lawyer does not face.

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94. City where more than half of the residents have an income below $5000, only 5% of the Bar reported the medium income of their clients below that amount. *Id.* at 45. Dorsen & Gillers, *We Need More Lawyers*, JURIS DOCTOR, April, 1972, at 7, 8.
97. *Id.* at 1074. Gellhorn has indicated that even considering the government sponsored and voluntary legal service programs, the need for attorneys in the minority community is not being met. Not all sections of the country have these services available nor is representation provided in all types of cases.
99. Some commentators argue that minority clients have little confidence in minority attorneys because the latter are less educated and will face discrimination in court. *Id.*

But see Toepfer, *Harvard's Special Summer Program*, 18 J. LEGAL EDUC. 443 (1966):

There are reasons why a special effort should be made to attract Negro students to study law. In the effort to provide equal rights and opportunities for Negro citizens, there are heavy responsibilities and burdens for lawyers to carry. These can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community. In bringing legal counsel to the poor, in administering criminal justice, as well as in the struggle for civil rights, an increased number of Negro lawyers can make a great contribution.

*Id.*
Secondly, the state has a compelling interest to see that law schools within its jurisdiction provide legal training which will result in the availability of effective legal services for all its citizens.\textsuperscript{100} As the Supreme Court recognized in \textit{Sweatt v. Painter}, to achieve a proper educational environment, law schools must ensure that participants in the educational process represent as fairly as possible the "individuals and institutions with which the law interacts."\textsuperscript{101} Further, the Court indicated that the law school does not adequately prepare its students if they are "removed from the interplay of ideas and the exchange of views with which the law is concerned."\textsuperscript{102} The appellants in \textit{DeFunis} take note of these comments:

The Court showed a profound appreciation of the nature of legal education. Law is not a body of fixed principles that can be transmitted by a teacher to a passive group of students. It is at best a process of thought, a way of perceiving and attacking problems within a general commitment to reasoned conflict resolution.\textsuperscript{103} Thus, a legal education can only serve its purposes when there is extensive communication among all those involved in the legal process, and this "depends above all on the quality and texture of the student population."\textsuperscript{104} With a student population reflecting a cross-section of those whom the legal profession will represent, the law school will perform its function for white students who will be better able to understand the perceptions, needs and desires of minorities and, at the same time, be prepared to more adequately handle the multifarious problems the law will present to them.\textsuperscript{105} Moreover, the law school will also fulfill its obligation of providing society with minority lawyers willing to assume responsibilities heretofore not properly served by the legal profession. Furthermore, an additional benefit resulting from increased minority representation in the law schools will be more minority law professors.\textsuperscript{106} The law school faculties are presently predominately Caucasian.\textsuperscript{107}

\textsuperscript{100} Brief for Appellants, \textit{supra} note 5, at 29.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} Brief for Appellants, \textit{supra} note 5, at 29.
\textsuperscript{104} \textit{Id.}
\textsuperscript{106} Brief for Appellants, \textit{supra} note 5, at 29-30.
\textsuperscript{107} As of August 1971, there were 3100 law professors in the United States—102 were Black. National Bar Foundation, \textit{supra} note 91.
Legal education will be improved when the views of minority professors are reflected in the classroom and in general law school policy.\textsuperscript{108}

Finally, the state has a compelling interest that all its citizens receive not only efficient legal services but also administrative, political, and community representation. Lawyers play a significant role in administrative positions,\textsuperscript{109} politics,\textsuperscript{110} and the community at large.\textsuperscript{111} At the same time, minorities are disproportionately represented in these areas.\textsuperscript{112} The state must seek to correct this imbalance by providing means whereby a greater number of minority lawyers will be available. With more minority lawyers assuming positions in these fields, governmental policy will better reflect the interests of the minority community\textsuperscript{113} and, in turn, minority groups will begin to understand that the government will better serve their needs.\textsuperscript{114}

Thus there is a compelling need for minority law students and lawyers. By establishing a preferential admissions policy the law schools will answer the state’s interest in reducing the severe shortage of minority lawyers and in providing a comprehensive legal education for all law students. Moreover, the result will be a greater percentage of minority lawyers to meet those numerous legal problems faced by members of minority communities which, at the present time, are not being suffi-

\textsuperscript{108} Katz, \textit{supra} note 105.

\textsuperscript{109} The American Bar Association has indicated that ten percent of American lawyers are employed in governmental capacities, including service as judges and prosecutors and in various types of civil service positions. It has additionally pointed out that a legal background is recommended for various kinds of policymaking and agency positions in the executive branch. \textit{American Bar Association, Careers in Law, The Lawyers Role in Society 17} (1968). \textit{See also} Edwards, \textit{The Black Law Graduate}, 69 \textit{Mich. L. Rev.} 1407 (1971).

\textsuperscript{110} There has always been a high percentage of politicians with law degrees—25% of state legislators, over half of the House of Representatives, and 70% of the Senate. American Bar Association, \textit{supra} note 112, at 18.

\textsuperscript{111} O’Neil, \textit{supra} note 90, at 728; Brief for Appellants, \textit{supra} note 5, at 31.

\textsuperscript{112} For instance, only 0.3% of all elected officials in the United States are Black, with 60% of those Blacks elected serving in local capacities. \textit{Joint Center for Political Studies, National Roster of Black Elected Officials} (1971). Of the 20,059 judges in the United States as of August, 1971, only 280 were Black. \textit{Black Lawyers, Judges, Professors, & Students} \textit{supra} note 91; Brief for Appellants, \textit{supra} note 5, at 31.

\textsuperscript{113} \textit{See} Edwards, note 109 \textit{supra}.

\textsuperscript{114} The growth in the number of minority lawyers will also serve as an impetus for those in the minority community who aspire for a legal career. The desire will not ebb so quickly and the promise will not seem as distant. There will appear to be “an avenue and an evidence of advancement.” O’Neil, \textit{supra} note 90, at 728.
ciently resolved. Finally, with additional minority lawyers, administrative agencies and the local, state and national governments will be provided with minority representatives, who in turn will be better equipped to answer the needs of the minority community and the needs of the state.

By responding to these compelling state needs through preferential admissions standards, law schools will perhaps reject qualified white applicants.\(^1\) However, in order to meet the state's compelling interest for more minority students, law schools must recognize race among the factors considered for acceptance.\(^2\) This recognition of race as a factor is not unique; admission committees have traditionally considered criteria of a non-numerical nature.\(^3\)

The use of race as an admission criterion represents a recognition of those special contributions minority students can and must make to the law school and the profession. A greater emphasis on those qualities which cannot be measured by numerical indices will permit minority students greater access to law schools, improve the quality of legal education for all students, and permit the minority community to achieve adequate legal, political and administrative representation. Moreover, an increasing body of literature in the field of educational measurement suggests that numerical indicators of academic ability may not necessarily be accurate for those outside of the mainstream of the dominant culture and that a single measure for all groups may not be warranted.\(^4\)

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115. This statement is understood when one recognizes that only a small percentage of law school applicants are members of minority groups (Brief for Appellants, supra note 5, at 32); the total number of applicants is far greater than the law schools resources and capacities (Rudd, That Burgeoning Law School Enrollment, 58 A.B.A.J. 146 (1972)); and if numerical factors were alone considered as criteria for admissions there would be few minority law students (for example, if numerical factors were alone considered at the University of Washington Law School, at the most, there would have been one minority law student in the 1971 entering class).

116. Brief for Appellants, supra note 5, at 32.

117. E.g., employment record, recommendations, extra-curricular activities, etc.