IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLEN BAAKE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF AMICUS CURIAE CLEVELAND STATE UNIVERSITY CHAPTER OF THE BLACK AMERICAN LAW STUDENTS ASSOCIATION

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This brief is filed by the Cleveland State University Chapter of the Black American Law Student Association with the consent of each of the litigants in accordance with Rule 42 of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The Cleveland State University Chapter of the Black American Law Student Association is composed of minority students who attend the College of Law of Cleveland State University. Most have entered the law school through the Legal Careers Opportunity Program, the law school's affirmative action program. That program rests, in part on racial

classification; and includes a goal of increasing minority population in the law school until such groups are represented in the school and profession in the same percentages as in the whole community.

We have a vital interest in the issue and think the Court should have the facts concerning the legal profession and law school admissions so that a decision can take them into account. Cleveland State has a model program, and has program statistics that support the use of racial classifications and show there are no viable alternatives. We submit our program rests on a proper analysis of equal protections, and that we can combine fact and law arguments in a way that is unavailable to the Regents of the University of California.

SUMMARY OF ARGUMENT

Our minority recruitment program has the same goals as the Davis Task Force Plan, was started in 1971 and was extended to non-minorities in 1974. It utilizes racial classifications. Among its main goals are diversity to accomplish a minority presence in the law school and the education of minorities to eliminate under-representation in the legal profession.

We adopted the current program after DeFunis, in anticipation of Bakke, and find that it is not very different from that used at Davis. We explicitly extend our program to non-minorities, but notice that Davis extended preferences to those who wanted to practice in northern California, to return to an area where health care is in short supply, and to those who might make some special contribution to the educational process.

Davis made the mistake of using two faculty admissions committees, but this mistake is irrelevant to the legal issues. The interview scores of the one committee differed from those of the other committee with the scores for the majority group, including Bakke, being higher than those for the minority. This was probably coincidence, but the Supreme Court of California wrongly concluded that Bakke was more qualified than minority acceptees and struck down the Davis Plan citing reverse discrimination. Had one committee graded all the applicants, this difference might have been nonexistent; but we, at Cleveland State, know from experience that it is extremely difficult to grade the interview results of applicants who have different

backgrounds, offer different talents to the law school, or satisfy different needs within the profession. The California Court would not have concluded the minority students were superior to the white applicants if all the minority interviews had been scored higher than those of the white applicants. But, the idea of reverse discrimination was raised and is important.

Davis is achieving its goals, but is not admitting as many Blacks and Chicanos as their percentage of the population might warrant. We at Cleveland State currently have 125 Blacks and other minorities among our student body of about 1100, and hope to do better each year, but when we increase our efforts we are accused of reverse discrimination since our black applicants have lower undergraduate grades, lower LSAT's, and lower average grades in law school. No credence is given to the fact that their attrition rate in law school is less than for others or that the community has a shortage of Black lawyers.

The facts and figures from six years of experience with large numbers of minority students, and the facts concerning the segregated city schools from which they came, their prior educational disadvantage, their economic disadvantage, and the great need of the minority community for professional service and representation have been blended into the various equal protection arguments to show that professional school minority programs are clearly within existing rules of law; and are essential to the goals codified in the Fourteenth Amendment, *Brown v. Board of Education*, and the Civil Rights Act of 1964. We request the Court affirm the concept of affirmative action in admissions and eliminate the doubt that has existed since DeFunis by reversing the decision of the Supreme Court of California.

ARGUMENT

I.

THE USE OF RACIAL CLASSIFICATIONS IN PROFESSIONAL PREFERENTIAL ADMISSION PROGRAMS DOES NOT VIOLATE ANY OF THE VIABLE TESTS OF EQUAL PROTECTIONS OF THE FOURTEENTH AMENDMENT.

All preferential admission programs to assist minority students rest on the use of racial classifications. Since racial classifications are determinative concerning which applicant is recruited, interviewed, admitted to a summer program, or given the benefit of special remedial schooling, it is essential that we thoroughly consider current equal protections rules concerning them.

Equal protections analysis is not as simple as the courts or hornbooks make it appear. It is hornbook law that classification by race is subject to strict scrutiny. But it is also true that where racial classifications have been subjected to strict scrutiny, the cases involved invidious discrimination against minorities. Since this case does not involve invidious discrimination against minorities, existing case law does not require the use of the compelling state interest test; but rather the so-called rational basis test.

While the so-called rational basis test requires a reviewing court to uphold the statute if there is any legitimate purpose which might be imagined to support it, more recent equal protection cases seem to require an examination of the actual legislative purpose as it appears from legislative history or the face of the statute, and a determination as to whether the racial classification makes any contribution to furthering the actual legislative purpose. Justice Marshall explained his understanding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98 (1973),

> To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. (citations omitted.) The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standards of review--strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of

what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protections Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protections analysis for which I previously argued--that is, an approach in which "concentration (is) placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification."

Whether there are three tests, the compelling interest test, the mean scrutiny test and the rational basis test, is open to question. But, we should consider the possibility in framing argument relative to the validity of the affirmative action programs questioned in this particular case.

II.
PREFERENTIAL ADMISSION PROGRAMS ARE NOT PER SE UNCONSTITUTIONAL.

It is possible that one might extract a fourth test from Mr. Justice Douglas' dissent in *DeFunis v. Odegaard*, 416 U.S. 312, 343-44 (1974). He says, "So far as race is concerned, any state sponsored preference to one race over another...is in my view 'invidious' and violative of the Equal Protection Clause." This has been described as a per se test, though the Court has never held that use of race is per se violative of equal protections, and racial classifications to assist minorities have been permitted. They have been approved in public school desegregation cases, *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); public employment litigation, *Morrow v. Crisler*, 491 F. 2d 1053 (5th Cir. 1974); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950

(1971); urban renewal, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 290 (2d Cir. 1968); and in college admissions, *Alevy v. Downstate Medical Center*, 39 N.Y. 2d 326, 348 N.E. 2d 537 (1976); *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P. 2d 1169 (1973), *vacated and remanded*, 416 U.S. 312, 94 U.S. 312, 94 S. Ct. 1704 (1974).

Since *Swann*, the lower federal and state courts have increasingly relied on racial classifications in constructing remedies. Admittedly, these decisions have been limited to de jure segregation situations. But there is no doubt that racial classifications are regularly approved by our courts, and not only are they used in desegregation cases but they are also used in public employment cases and situations where there is no evidence of de jure segregation. The best known of these situations involved the controversial Philadelphia Plan which required private contractors doing business with the government to adopt goals for minority employment. *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971, *cert. denied*, 404 U.S. 854. The more recent decisions compel quota hiring of qualified minority applicants on a numerical racial basis in order to ensure non-white representation in the labor force. Admittedly, this Court has never sustained such an order, but it has denied certiorari in enough cases to suggest that Mr. Justice Douglas' concern about the use of racial preferences is not a position that is likely to be supported by a majority of the Court.

According to O'Neil, the public employment and school desegregation decisions go beyond preferential admissions. O'Neil, *Discriminating Against Discrimination* 79 (1975). These decisions have required public agencies to prefer minority group members, imposed strict numerical quotas, and in public employment cases, usually cite race as the sole canon of preference. O'Neil, *After DeFunis: Filling the Constitutional Vacuum*, 27 Univ. of Fla. L.R. 315, 321 (1975).

Racial Classifications have been upheld by this Court where a federal statute extended a benefit to a disadvantaged group. *Morton v. Mancari*, 417 U.S. 535 (1974). In *Morton*, the Court decided that the Indian had traditionally been favored by the federal government, and acknowledged that Indian preference statutes had long existed. If such a rationalization can justify *Morton*; then since most of our affirmative action programs rest

on the Fourteenth Amendment and are designed to benefit the black minority, they seemingly rest on a constitutional basis that would equal or exceed anything protective of our Indian minority. Couple that with the *Slaughter Houses Cases*, 83 U.S. (16 Wall.) 36 (1873), which very clearly extended the protections of the 14th Amendment to persons of other than African descent, and it seems clear that satisfactory precedent exists to allow us to aid any minority, black or otherwise. We should be able to rebut the argument that this racial classification is invidious and per se invalid as violative of the Equal Protection Clause.

Also, we should be able to make the argument that racial classifications are not to be restricted to remedies for unconstitutional or illegal racial discrimination only. Many desegregation cases do key in on proof of past discrimination. But neither of the Japanese relocation cases which approved the use of racial categories involved a past discrimination situation. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The court in *Hirabayashi* did indicate, however, that there were substantial dangers involved in the use of such classifications based explicitly on ethnic lines: "Distinctions between citizens solely because of their race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 320 U.S. at 100.

The Court has recently said, in *United Jewish Organizations v. Carey*, 45 LW 4221, 4226 (March 1, 1977), "...Neither the Fourteenth nor the Fifteenth amendment mandates any per se rule against using racial factors in districting and apportionment....The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." Surely, this thinking is fully applicable to affirmative action admissions cases.

It would seem arguable that if the Court can use racial discrimination as a basis for the ordering of remedies, a citizen or governmental unit should be able to use racial classifications to voluntarily establish an affirmative action or desegregation program. Chief Justice Burger said in *Swann*:

> 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 as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. *Swann v. Board of Education*, 402 U.S. 1, 16 (1971).

Also the Civil Rights Act of 1964 provides in most every Title for some sort of affirmative action, and this court in *Lau v. Nichols*, 414 U.S. 563 (1974), approved a federally assisted program that allowed the government to fix terms of money disbursement and those terms involved the use of racial classification.

Assuming the argument is accepted that racial classifications are not per se invalid under the Equal Protection Clause of the 14th Amendment, since we are not dealing with invidious discrimination against a "discrete and insular minority," *United States v. Carolene Products Co.*, 304 U.S. 144, 152, N. 4 (1938), the proper equal protections test concerning preferential admissions programs should be the rational basis test.

III.

PREFERENTIAL ADMISSION PROGRAMS SHOULD BE TESTED AND FOUND VALID UNDER ANY OF THE CURRENT ARTICULATIONS OF THE RATIONAL BASIS TEST.

When one considers the history of racial problems in this country since the Civil War it is quite clear that racial classifications have been most often used to disadvantage minority groups, primarily the black minority. This discrimination has been invidious and has served to disable and stigmatize Blacks. Given this history, it is easy to understand Harlan's "color blind" quote in his dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896); but the majority upheld the separate but equal doctrine in *Plessy* and it continued in full force and effect until *Brown v. Board of Education*, 347 U.S. 483 (1954). With the Civil Rights Act of 1964, Congress came on line with civil rights measures designed to benefit our racial minorities. By 1964, however, it was obvious that the end to enforced segregation of the races would not result in an integrated society. It was

understood that government could no longer ignore race and remain neutral in the dealings between races. Consequently, over the next decade we had the emergence of busing to achieve racial balance, benevolent quotas in employment and public housing, and preferential admission standards for colleges and universities. All of these signify the growing understanding in our society that government may no longer treat race as irrelevant and maintain any expectation of achieving integration.

Viewed in the context of the measures taken to end segregation since 1954 it seems quite appropriate to point out that preferential admission programs do not involve invidious discrimination. Where we are dealing with affirmative action, benign discrimination, or to use a current perjorative, reverse discrimination, we should repudiate the idea that using racial classifications is invidious, thereby forcing us to use the compelling interest test. The court should declare that where a racial classification is used to equalize minority participation in the good things involved in the american dream, such use of racial classifications is acceptable within constitutional law principles.

While there are many ways to articulate the rational basis test, the most commonly accepted is that a statutory classification will not be set aside if *any state of facts* reasonably may be concerned to justify it. *McGowan v. Maryland*, 366 U.S. 420 (1961). More recent articulation is whether the state law bears *some rational relationship* to a legitimate state purpose, or whether the law *rationally furthers* a legitimate state purpose, or whether the law is *rationally related* to a legitimate governmental objective. Justice Stewart said the test is whether the line drawn by the state amounts to invidious discrimination. *Geduldig v. Aiello*, 417 U.S. 484 (1974). Some of these articulations are examples of the spectrum of tests Justice Marshall was talking about in *Rodriguez*. In *Reed v. Reed*, 404 U.S. 71 (1971), Chief Justice Burger required that the classification rest on some ground of distinction having a *fair and substantial relation* to the object of the legislation. Since the original rational basis test did not consider the actual purpose of the legislation, but rather, any conceivable purpose, it would seem we do apply some variety of standards under the general rubric of the rational basis test; and this is good.

Not only did the court avoid any holding voiding affirmative

action in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), it has also avoided any significant holding in any other affirmative action case. In *Kahn v. Shevin*, 416 U.S. 351 (1974), involving discrimination in favor of widows in the grant of property tax exemption, the court upheld the sex classification. Similarly, in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), involving discrimination in favor of female naval officers the court used the rational basis test and upheld the sex classification. While these two cases involve sex discrimination they both support the use of a meaningful rational basis test where the classification can be described as benign rather than invidious. Also, we might learn something from the language used in *Weinberger v. Wiesenfeld*, 95 S. Ct. 1225 (1975). The court did not look for any possible justification for the statutory classification but determined legislative purpose as it appeared from the legislative history and the face of the statute, and was unwilling to hypothesize other purposes or accept alleged purposes without basis in the record. After an examination of the legislative purpose, the court asked whether the gender based classification made any contribution to furthering those purposes.

This newer test has been used in a number of cases. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the court upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. #1973b (e), which created a classification based on alienage. The court applied the above analysis, saying that Section 4(e) "Does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law." The court viewed this as a reform measure and upheld the alienage classification under the rational basis test of equal protection. In *Lau v. Nichols*, 414 U.S. 563, (1974), the court upheld the use of a racial classification in connection with non-English speaking Chinese students who challenged the San Francisco school authorities for failing to provide programs of instruction that would equalize their educational opportunities with students who did speak English. The court found that school board action amounted to racial discrimination within the terms of the regulation issued by the Department of Health, Education and Welfare pursuant to Title IV. *Lau* clearly stands for the proposition that school authorities must make use of racial classifications in educational programs to promote actual educational opportunity. Arguably this case extends far enough

to cover the affirmative action programs created by and for our professional schools. Once again mention should be made of the Indian preference case, *Morton v. Mancari*, 416 U.S. 535, 552 (1974), where Justice Blackman emphasized the unique legal status of Indians, and said, relative to invidious racial discrimination:

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help the Indians, were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government towards the Indians would be jeopardized."

It is clear that Justice Blackman is validating the racial classification involved in the Indian preference situation on the grounds it is not invidious; and that it should be tested under the rational basis test rather than under the compelling interest test.

Certainly our government has shown a continued interest in the legal status of Indians but, since the Civil War our country has focused upon Blacks as great an interest. The Voting Rights Act of 1965 showed special concern for our Spanish speaking minority and the classification was upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). And, of course, *Lau v. Nichols*, 414 U.S. 563 (1974), supported the special need of the Chinese speaking people in San Francisco. In all of these cases, a racial classification was used to benefit a minority. The racial discrimination involved was termed non-invidious and the rational basis test was used in upholding the validity of the statutory classification.

The key is not the depth of our historical commitment to any particular minority, and Justice Blackman should not be so read in *Morton*. The reality is that we have had some commitment to any oppressed minority, and that as discrimination against any minority became noticeable and harmful to society, local or national lawmakers often singled out that identifiable minority for special protection and special benefit. Such benign discrimination has been part of our heritage, and should not be interdicted in any way by our judiciary. Within recent years,

special benefits have been extended to Indian, Spanish, Philippine, Oriental, Mexican, Puerto Rican, and others.

This court should uphold and support local, state or national rule makers who attempt correction of conditions that harm minority groups, whether defined by use of racial characteristics or any other.

IV.

PREFERENTIAL ADMISSIONS PROGRAMS DO NOT REST ON RACIAL CLASSIFICATIONS WHICH ARE INVIDIOUS; DO NOT CREATE SUSPECT CLASSIFICATIONS, AND SHOULD NOT BE TESTED UNDER THE COMPELLING INTERESTS TEST.

It has been argued that any governmental utilization of a classification based on either suspect criteria or which abridges a fundamental right forces use of the compelling interest test. One would then have to test the classification by subjecting it to strict scrutiny, and place on the government the very heavy burden of showing a compelling governmental interest. Even if the government can show a compelling governmental interest, the rule requires the law to be tailored narrowly and to use the least drastic means available to achieve that governmental goal; and we eliminate the presumption that the governmental action is unconstitutional. This case involves education, and education has never been held to be a fundamental right. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). However, race has usually been thought to be a suspect classification. To determine whether a class is suspect or not, we normally ask "whether the class is saddled with such disabilities or unequal treatment, or relegated to such a position of political powerlessness to command extraordinary protection from the majoritarian political process." Forrester, *Forum: Equal Protection and the Burger Court*, 2 Hastings Constitutional Law Quarterly 645, 646 (1975).

A more detailed analysis would consider the following items relative to whether a racial classification is suspect: (1) whether the classification is based on a congenital and unalterable trait; (2) whether the trait is morally neutral; (3) whether the classification is infused with moral value; (4) whether those who possess the trait deem them superior and others are stigmatized;

(5) whether that trait is possessed by a majority of those holding power; (6) whether that trait correlates poorly with the subject matter for which the classification has been created; (7) whether that classification has been used nevertheless as a basis for differential treatment so that (8) those who possess the trait get more than those who do not. Brest, *Processes of Constitutional Decisionmaking* 576 (1975).

Neither of the above definitions of a suspect class include the particular classification created by the University of California Medical School at Davis, or the classifications used by professional schools across the country concerning preferential admissions. Relative to the first definition, Baake is white and the white race has not been saddled with disabilities due to past discrimination. Neither has the white race been subject to a history of purposeful or unequal treatment. It has not been relegated to a position of political powerlessness, is the majority and does not need extraordinary protection from the majoritarian political process.

Considering the elements of the second definition, this is a racial classification which rests on congenital traits which are unalterable: and racial traits are morally neutral. Some racial classifications have been used in such a way that they have become infused with moral quality. We have a long history of the use of racial classifications to disable various minorities, including blacks; classifications imposed by whites who believe they possess traits which they deem to be superior, and used to stigmatize blacks and other minorities in our society. But, the classifications used in preferential admission programs do not do this. Our racial classification does not stigmatize either blacks or whites, is not established to disadvantage blacks by whites who deem themselves superior, and is not infused with moral value in the sense of a positive consideration for whites and a negative consideration for blacks. This racial classification is used to provide equal access into the professions for members of various minorities. It is being used by the majority to extend fair treatment to minorities in order to achieve an integrated student body and to further the goal of integrating the professions.

The trait correlates perfectly with the goal, and therefore, can be used as a basis for differential treatment. Those who possessed the majoritarian trait have not used this classification in order to get more for themselves; but rather, this racial classification is

used to extend a benefit already enjoyed by the majority to under-represented minorities in professional schools and the professions to which they lead.

It is hoped the Court will hold we are not dealing with either a fundamental right or a suspect classification and that the case could and should be disposed of on grounds there is no need to apply the compelling interest test.

There is no case among those decided by this Court where a racial classification designed to benefit a minority group has been considered suspect and voided by application of the compelling interest test. All prior cases where racial classifications have been struck down involved racial classifications developed to continue discrimination against a minority. The Court has been perfectly correct in holding that the use of racial classifications to disable a minority creates a suspect classification and creates a situation where the compelling interest test should be used. This case is not one of those.

Assuming for purposes of argument, that because a racial classification is used, the court concludes that the compelling interest test is appropriate. It is submitted that even if the compelling interest test is used, and even if the burden of proof is shifted to the government, this particular racial classification has been tailored narrowly, rests on the least drastic means, and relies on the only available alternative to achieve the compelling government interests. Hence, even if this classification is subjected to strict scrutiny, it will pass the test.

V.

EVEN IF THE COMPELLING INTEREST TEST IS APPLIED, THE DAVIS PROGRAM SATISFIES AN EDUCATIONAL COMPELLING INTEREST OF DIVERSITY WITHIN THE EDUCATIONAL PROCESS; AND A SOCIETAL COMPELLING INTEREST OF ELIMINATING MINORITY UNDERREPRESENTATION IN THE PROFESSION.

Preferential admissions programs are essential to accomplish and satisfy the following compelling governmental interest, all of which are supportive of and compatible with the Fourteenth

Amendment. If the purpose of the present classification was to disadvantage a minority, there would be no need to go further. It should be permanently stricken. Conversely, where the effect is to achieve a societal goal of racial peace and integration through improvement of the opportunity of a racial minority, there is sufficient precedent and great reason to validate the classification under the equal protection clause. Consistent with the goals, and essential to them, there is a compelling governmental interest in achieving minority representation in the student body; and maybe more importantly, in the professions to which the professional schools are the means of entry.

The facts at the Davis Medical School are representative of those at professional schools all over the country. Only one black and six Chicano applicants achieved admission to Davis through regular admission procedures from 1970 to 1974 while forty one Asians did so. Through the special admissions program, 8 Blacks, Chicanos and Asians entered Davis in 1970, 15 in 1971, 16 in 1972, 16 in 1973 and 16 in 1974. Of these 71 minority students, 12 were Asian and 59 were black and Chicano. The preferential admission program multiplied black and Chicano participation at Davis by over 800% and while 66 black and Chicano admittees, out of 450 admitted to the school, will not solve the underrepresentation problem of those two minorities, it represents a modest step in that direction.

As with our program at Cleveland State, few minority students would achieve admissions but for the preferential admissions program. Minority representation in educational programs is a compelling governmental interest in and of itself. Our law student body should be more representative of the outside world. There is educational value in exposing students to the viewpoints of their peers from differing economic, social and cultural backgrounds, particularly given the variety of people, situations and problems with which attorneys will have to deal. To repeat from *Swann v. Board of Education*, 402 U.S. 1, 16 (1971),

> "school authorities...might well conclude...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 as an educational policy is within the broad power of school authorities."

Speaking directly of legal education, the court said in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950),

> "Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned...With such a substantial and significant segment of society excluded, we cannot conclude that the education offered...is substantially equal...."

These views are shared by a great majority of educators.

Of probably more importance to society is minority representation in the professions. In the real world, minority medical care is wholly inadequate. This is evidenced by their greatly higher rate of infant and maternal mortality, and a much lower life expectancy. See Conneley, *The Health Status of the Negro Today and In the Future*, 58 American Journal of Public Health 647 (1968); *Differentials in Health Characteristics by Color*, U.S. National Center For Health Statistics, July 1965-1967 (Series 10, No. 56, 1969), at pp. 13, 15, 18.

In the legal profession the statistics are appalling. For example, there is one white attorney for each 625 persons, but about one black attorney for every 7,100. Not more than 2% of our bar is black and other minority groups are even less well represented. The ratio of lawyers to general population in California is one lawyer for each 530 citizens, yet for the Chicano community the proportion is one lawyer for each 9,482 Chicanos. O'Neill, *Racial Preferences and Higher Education: The Larger Context*, 60 Va. L.R. 925, 943 (1974).

In terms of societal interests, minimum participation in the professions lowers the income prospects of the minority community. Professional status is vitally important to the minority group's self respect and their ability to participate in the affairs of society. For minority youth, professionals offer essential role models that help define the meaning of success. For the black citizen the black lawyer or the black doctor most clearly understands the problems and difficulties of members of the black community. To a Mexican-American, the Chicano professional may be the only person with whom he can communicate in his native tongue.

As far as the lawyer is concerned, it is absolutely essential that

he be able to understand his client and the social and economic problems faced by his client relative to the legal problem that might be at issue.

From the educator's point of view there could be no greater goal than increased participation of minorities in the education process. A visible minority student population is a constant reminder to professors and administrators that they cannot ignore the problems faced by the minority population. Indeed, minority students will not allow their unique problems to be forgotten. Black Study Programs instituted at nearly every major university testify to this.

From society's point of view nothing could be more important than having adequate minority medical care and proper legal representation. The Davis program rather conclusively shows its superiority relative to all these goals.

As argued above, the professional schools have a responsibility to increase minority representations that is supportable on purely academic grounds. The schools also have a responsibility to eliminate minority under-representation that has been caused by unjustified over reliance on standardized test scores and undergraduate grade point averages as predictors of academic performance. Our reliance on standardized test scores and grade averages has unjustifiedly and disprortionately excluded minority groups from higher education; and as the special admissions programs have already proved, many of the excluded minority groups are well qualified.

Educational Testing Service in their explanatory material sent to each law school relative to the Law School Admission Test (LSAT), Validity Study Service (Copyright 1972) says at page 5,

> "...prediction based on scores and undergraduate grades is far from perfect. There will be a great number of cases where prediction misses the mark by a moderate amount and a sizeable number where actual performance will be directly opposite from predicted performance. This should be a sobering lesson to anyone tempted to think that the test scores offer and easy and complete solutions to his admission problems."

For instance, given a correlation coefficient of .40, a rather usual figure for law schools, 38% of those who predict to perform in the bottom fifth of the class actually do, but 55% perform in the middle three fifths, and 7% perform in the top fifth.

Since many highly qualified minority students have been denied admission to law school because of the use of standardized test scores and grade averages as predictors, a college or university might well claim a compelling interest in a racial classification which would eliminate this potentially illegal, and certainly immoral discrimination against minority applicants. Preferential admissions for minorities is by no means the first departure from strict rank ordering of applicants by educational institutions. Some institutions have, and still do, admit children of alumni, donors, and trustees, as well as marginal students with powerful political friends. And some have regularly admitted athletes, applicants with more leadership ability or personality than academic merit, and have depended upon geographical origin rather than merit in order to achieve geographical diversity. In view of social problems within our country, racial diversity is more important than any of the above listed departures from strict academic rank ordering of applicants. O'Neill, *DeFunis - The Larger Context*. 60 Va. L. Rev. 925, 944 (1974).

Justice Douglas argued in *DeFunis*, that there is substantial doubt concerning the validity of the various standardized test scores, and that they might be culturally biased. In the last few years we have observed such an increase in grade point averages that it is possible to conclude that extreme unmerited grade inflation has set in at the undergraduate level. *Time Magazine, Education: Too Many A's* 106 (Nov. 11, 1974). Neither the test scores nor the undergraduate grade point average represents objective criterion in any real sense. Also, the testing agencies caution us not to give determinative weight to them. Any professional school that has followed the strict rank ordering of applicants based on test scores and grade point averages cannot justify this on the basis of any sound educational premise. Since scores are fallible, the admissions officers must use other factors to determine which applicants should be admitted. From a legal point of view, it seems there is no way one could show any job relatedness between the LSAT and the practice of law. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This is true with the Medical College Aptitude Test as well.

The use of these predictors involves racial discrimination also. Brill, *The Secrecy Behind The College Boards, New York Magazine* 67 (Sept. 1974). The LSAT reflects cultural

backgrounds, and if an admissions committee gives determinative weight to it, or the grade point average for that matter, a case of de jure discrimination could result therefrom. As Justice Douglas said in his dissent, "...(A) separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences." *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974).

Not only is it possible to argue that the use of these predictors amounts to racial discrimination, it is arguable that racial discrimination in primary and secondary schools accounts, in part, for minority underrepresentation in colleges and at the graduate school level. See *Justice Delayed-Denied, HEW And Northern School Desegregation*, published by the Center for National Policy Review (1974). Moore, *Against The Odds* 47 (1970).

Also, until recent times, some states have maintained dual public college systems. Black applicants have been excluded from some private universities as late as 1970, *Bob Jones University v. Simon*, 416 U.S. 725 (1974). Every year more suits are filed against public school systems charging segregation. See *United States v. School Dist. of Omaha*, 521 F. 2d 530, n. 7, (8th Cir. 1975), *cert. denied*, 96 S. Ct. 361 (1975). Within the last few years there have been suits filed in all the larger cities of Ohio. The great majority of our minority students come from these inner city schools. See Boyd, *Legal Education: A Nationwide Study of Minority Law Students 1074*, 4 Black Law Journal 527, 539 (1975). These applicants are able to point to their attendance in segregated primary and secondary schools. Our professional schools should be able to establish sensible programs to compensate for the discrimination these applicants have suffered. It is impossible to argue that the academic community is blameless in this matter. While the professional schools may not have discriminated against particular minority applicants, some have used and are using suspect criteria in admissions and have not taken into account prior educational discrimination against minority applicants. Since segregated public schools are currently in existence and will continue to be for some time, it's obvious that actual segregation will be a problem for colleges and professional schools for at least another generation.

Not only are the above compelling governmental interests, but in view of the Civil Rights Acts and governmental policies that

have permeated our society, a workable affirmative action obligation is essential and, of itself, amounts to a compelling governmental interest. Regardless of past discrimination on the part of an individual professional school, it seems a university board of governors might well regard a preferential minority program as a key ingredient in its current responsibility. All state institutions receive some federal funds and have a legal obligation to develop and apply affirmative action plans. 45 C.F.R. section 80.3(b)(6) July 5, 1973. The Civil Rights Acts require the universities to take positive steps to identify and recruit women and minorities for faculty and administrative positions.

It will be impossible to significantly increase the pool of minority applicants for faculty and administrative positions unless the universities are able to expand minority participation in their various graduate school programs. Of importance to some universities would be the fact that without affirmative action programs they would risk the loss of federal funds for programs they already have instituted. The law seems clear: one may use racial classifications in an attempt to fulfill the commitments which federal law now imposes. 45 C.F.R. 80.5(j) July 5, 1973, Rev. Order No. 4.

The California Supreme Court admitted that integrating the medical school and the profession was a compelling government interest. It admitted that integrating the medical school provides diversity to the student body and will influence the profession so that it will become aware of the medical needs of the minority community; that minority doctors will provide role models for young minority group members; and it concluded that since minority applicants seem to be willing to serve minority communities there is a great likelihood they will so fashion their careers.

The court denied the fact that a black physician would have a greater rapport with black patients was legally important. In view of the reticence of many black citizens to go to white doctors or lawyers, it would seem that the Supreme Court of California was wrong on this point; that it is of compelling interest that black citizens have black doctors and lawyers available to represent and serve them. Carl Character, President of the National Bar and a practicing Attorney in Cleveland, reported that only about

25 of 160 black lawyers in Cleveland are serving other than in government or in the minority community; and that 95% of the clientele of these 135 black attorneys are black. Goldman, in his book entitled *A Portrait of the Black Attorney in Chicago* 28 (1972) confirms that none of the black attorneys in his study reported that more than one-fourth of their clients were white. Other ethnics practice in their own community. While there is nothing that compels these individuals to practice within their own community, it seems quite natural that they should want to and and that their community should desire that they do so.

VI.
THE CLASSIFICATIONS ESTABLISHED BY DAVIS ARE NARROWLY TAILORED AND DIRECTLY RELATED TO THE GOALS ARTICULATED BY THE MEDICAL SCHOOL FACULTY.

The compelling interests test also requires that we analyze the racial classification to see if it is closely related to the various goals, tailored narrowly to accomplish these goals, and whether or not the classification amounts to the least drastic means available to achieve one of these compelling governmental interests.

The interests involved in preferential admissions programs are all racially oriented; we desire to achieve increased minority representation in the student body for education reasons, and in the professions for societal and professional reasons.

Minority representation is essential to ensure that special views and needs of minority groups are made available to fellow students, teachers and to the professions as a whole. Increased representation will better minority economic conditions; will provide desirable role modes for young minority group members; and minority professionals do serve and represent the minority populations from which they come.

No matter whether we look at legal or medical statistics, we find that the minority populations are not properly served by white members of the profession. The evidence for this is that mortality statistics for minority groups are considerably more horrible than for majoritarian groups.

Certainly NAACP legal activity since the 30's has proven the great utility of and need to have lawyers lead movements to secure equal rights for minority groups.

In a more narrow sense, though equally important, researchers and educators suspect that admissions programs based on scores, either standardized tests or undergraduate grade point averages, may very well discriminate against minority groups in our culture. Brill has suggested that the LSAT may have a cultural bias that amounts to as much as 133 points; and the same bias probably extends to the undergraduate grade point averages; that is, unless one subscribes to the view of Shockley or Jensen. See Brill, *The Secrecy Behind the College Boards, New York Magazine* 67 (Sept. 1974); Jensen, *The Culturally Disadvantaged: Psychological and Educational Aspects* at page 225 in Ekwall, *Psychological Factors in the Teaching of Reading* (1973); Shockley, *Dysgenics, Geneticity, Raceology: A Challenge to the Intellectual Responsibility of Educators*, 297-307 (*Phi Delta Kappan*, January 1972).

Our experience at Cleveland State University suggests that more minority group members are forced to hold part-time jobs in order to pay for their education than majority group members. Some go to school one term and then drop out the next in order to replenish their money supply so they can continue their higher education. These kind of interruptions have detrimental consequence's for one's grade point average.

There are other reasons why blacks and other minority students are educationally and culturally disadvantaged. All across the country one finds minorities are relegated to the inner cities and are products of neglected, segregated inner city schools. Blacks are a part of a culture which lacks traditional family environment because of the economic discrimination that goes along with minority status. And, because of economic discrimination, they come from families which place less emphasis on education and middle class values than on economic survival. It must be obvious that a family interested in economic survival cannot provide the stimulus for the kind of academic achievement which has been used as the principle criteria for admission to college and graduate school programs. Moore, *Against the Odds* 24 (1970).

Let us list some current statistics. In 1960 black families earned 55% of what white families earned. In 1970, the gap had closed to

61%, but by 1974 the gap had widened so that the black families were earning only 58% of what white families earned. Thirty percent of black families are below the poverty line, whereas only 11% of the white families are below that line. Only half of the black families below the poverty line receive any kind of welfare assistance. *The Negro Almanac: A Reference Work on the Afro American*, 467-470 (3rd Revised Ed. 1976). Over half of the minority group law students come from families with incomes of under $10,000. Boyd, *Legal Education: A Nationwide Study of Minority Law Students* 1974, 4 The Black Law Journal 527, 548 (1975).

Out of the 212 minority students that we have admitted through LCOP most come from the north and are the products of the inner city school systems that have been so much in the news of late. Cleveland has just recently been found to have been operating a segregated school system. On Tuesday, March 8, 1977, Columbus was found to have been guilty of de jure segregation. A desegration order has recently been handed down concerning Youngstown and Dayton school systems; Cincinnati is currently in litigation, and litigation is being threatened in Akron. Hence, most of our current applicants can complain that they have been discriminated against by the educational system.

In view of this different heritage, reason suggests that it is impossible to judge minority group candidates by the same standards as majority group candidates. Hence, racial classifications are essential if admissions programs are to be racially neutral. Thus, the Davis Admissions Program which is set up on a two-track system is not only justified but is essential. Any educator must do what is necessary to eliminate the possible racial discrimination that attaches to continued use of scores or grades as substantial determinants in the admission process.

It is also true no proof exists that undergraduate grade point averages or standardized test results have the kind of job relatedness that might allow our continued use of them as substantial determinants. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). But see *Washington v. Davis*, 965 S. Ct. 2040 (1976). *Davis* held that the civil service test score could be used even though it had disproportionate impact on minority groups because the test score was a useful indicator of training school performance thereby precluding the need to show validation in terms of job preference. While it may be true that test scores and

undergraduate grades have the same kind of relatedness with first year law school grades, it seems extremely doubtful that Davis forces us to use either as long as there is substantial doubt among us that the tests have validity relative to future success in professional practice.

Professional schools should not be forced to use these very limited objective indicators. While the courts may not want to prohibit their use at this time, it is hard to imagine that the court would feel constrained to force elimination of other criteria so as to leave schools with no other alternative but to use standards that are discriminatory against some minority group.

A view of reality also dictates that we not rely on undergraduate grade point averages or LSAT either. The bulk of our black applicants come from segregated inner city schools. Whether this is de jure or de facto segregation is irrelevant because the segregated schools traditionally are three years behind the suburban white schools in reading skills. Figurel, *Better Reading in Urban Schools* 30 (International Reading Association 1972). Rutledge, *The Relevance of Reading to the Technological Revolution* 9, 14 (In Perspectives in Reading, Reading and Revolution (1970)) cites the Kerner Commission on Civil Disorders as finding that by the sixth grade, Negro students are 1.6 grades behind in reading skills, and by the 12th grade, 3.3 grades behind; and that many have left school.

We are 23 years past Brown, possibly have eliminated the dual school systems of the south, but we haven't eliminated the segregated school in the north. Successful desegregation suits have been brought in many of the large cities of the north, but for some reason the systems become nearly as segregated as they were prior to suit. Most of our black applicants, therefore, start college with much lower educational achievements than their white counterparts.

Most undergraduate educational systems follow some concept of open admissions so under-qualified minority applicants can attain admission in the college systems of their respective states, but often not in the academic tracts. In Ohio, for instance, many minority students can currently be found in the technical and vocational colleges.

Minority students do obtain some remedial help at these technical and vocational schools, but our university is finding that the academic achievement of the minority students who

transfer from them is not as high as the academic achievement of the regularly admitted student. Our remedial program for the minority applicant who achieves direct admission to Cleveland State University is no better. It is designed to bring them up to minimum matriculation standards, but it does not even attempt to bring them up to median levels. They cannot be expected to have as high a grade point average or standardized test scores when they seek to be admitted to professional schools.

Since *Brown* there has been some interest in increasing minority representation in education, industry, public service, and government. Admittedly, the Civil Rights Acts of 1964 mandated affirmative action responsibilities. These affirmative action requirements compel expanded opportunity for minorities at all levels, including professional levels. The thrust of governmental action since *Brown* has been to create legal responsibilities to increase minority representation. A racial classification is the only way that this can be accomplished.

Justice Douglas said in *DeFunis* that we don't want to prepare black lawyers and doctors to serve and represent black populations. But facts exist showing that white lawyers and doctors do not serve and represent minority populations. Unless we have concluded that improved medical care and legal representation for minority groups is a low priority item, use of racial classifications to increase minorities in professional programs and the professions is absolutely compelling; and, jobs are available for minority professionals even though the job market is rather soft for the average white graduate.

We submit that the interests mentioned are compelling; have been since the adoption of the Fourteenth Amendment; and that the goals of the Fourteenth Amendment have only recently been addressed in any sort of meaningful way in American society.

As far as education is concerned, public school systems are currently being forced to provide integrated opportunity for minority applicants, but there is no satisfactory evidence that the remedies available to our court system in desegregation suits will provide inner city minority applicants with better educational opportunities than they have had in the past. It is essential, therefore, that the professional schools do not rely on the kind of criteria that relate directly to prior inadequate educational opportunity for minorities. That being true, it seems arguable

that racial classifications have been shown to be the only way of achieving the various compelling governmental interests that we have discussed above.

VII.
NEITHER DISADVANTAGE NOR ANY OTHER CLASSIFICATION IS AN ALTERNATIVE TO THE USE OF A RACIAL CLASSIFICATION FOR PROGRAMS DESIGNED TO ELIMINATE MINORITY GROUP UNDERREPRESENTATION.

Various alternatives to the use of racial classifications in admissions have been suggested. None are acceptable or they actually rest on the covert use of racial classifications.

An alternative often mentioned is open admissions. It is aimed directly at initial opportunity for admission, requires vastly expanded first year classes, and of necessity, is coupled with a higher attrition rate. It is a false promise in the sense that those who are more weakly prepared will have the lowest grades and will be academically dismissed in order to reduce the total school population so that the available physical resources will be adequate to complete the education for those who survive. Rather than use admissions standards, open admissions substitutes first year grades to accomplish the same weeding out purpose. Open admissions will result in near total exclusion of minority persons in professional school programs. Those who come to professional programs with lesser academic skills will not be able to compete for high grades against those who come with the best of undergraduate preparations even though they are as intelligent.

A second suggestion is that we enlarge the number of seats available in our professional schools or increase the number of schools; but there has been an increase in the numbers of medical and law schools, and in the number of students educated at each.

Total enrollment at all approved law schools in the United States has grown from 68,386 in 1969 to 116,991 in the fall of 1975. The population of medical students has increased from 37,769 in 1969/1970 school year to 56,244 in the 1975/1976

school year. During these years, the number of first year medical students has increased from 10,401 to 15,351, while first year law student population has increased from 29,128 to 39,038. *Law Schools & Bar Admission Requirements, A review of legal education in the United States - Fall 1975*, 45 (1976) 236 Journal of the American Medical Ass'n, 2957, 2961 (1976).

Even though the numbers educated in our professional schools are many more than they were ten years ago, the vastly increased number of applications from applicants with much higher scores has resulted in making it even more difficult for the minority applicant to get in. For instance, at Cleveland State University College of Law we have had over 2,000 applications in each of the last two years for approximately 360 first year seats. Almost all of our applications came from students who had predicted first year indexes that showed they were fully qualified.

In the last four years, only two blacks were admitted via the regular admissions process while our special program recruited and admitted 148. None of these 148 blacks would have gained admission without a program that used racial classifications. Medical school statistics are as startling, but are adequately set out by the litigants.

Programs developed to secure minority representation in the professional schools are essential now, even though they were not a decade ago when the schools were able to handle those applicants who might want to attend. But it wouldn't make any difference if we once again doubled the number of professional schools, any majority group student who is excluded because of a minority recruiting program would have exactly the same legal argument against such a preferential program as he has now.

Justice Douglas also mentioned special recruiting, remedial school, and summer preparatory programs to better prepare minority applicants for professional schools. These programs are extremely important but they are not alternatives to special admissions programs. Because of these programs, minority students have at last been assured they will no longer be excluded from professional schools because of their race. The existence of these programs has encouraged minority applications in ever increasing numbers. While Cleveland State College of Law has had a greatly increased number of minority applicants, and has accepted the best of those minority applicants, in two recent years every minority LCOP applicant had a lower predicted first year

average than every majority group applicant who was admitted either through our special interview program or through the regular admissions program.

Recruiting, summer, and other remedial programs are absolutely essential to admissions; are designed to attract and increase minority representation; and have, in fact, encouraged the greatly increased number of minority applications that we now have. But they use rather than are alternatives for racial classifications.

It has been suggested new admissions tests be used that are not culturally biased and which do not discriminate against minority groups. Princeton Testing Service has been asked to develop such tests and has been unable to do so. There are no prospects that such tests can be developed. Since there is substantial doubt that the current admissions tests are job related or that a new one would be, it is possible that a new test would be suspect under the rule developed in *Griggs*.

It has also been suggested that admissions criteria be racially neutral; and that the professional school use a category based on 'disadvantage' rather than race. While it is true that some minority applicants have been economically disadvantaged only 22% of our students qualify for or receive any financial aid, and any definition that keys in on no more than economic disadvantage would be unrelated to the goals we think important. If the definition of disadvantage is to be phrased in terms of overcoming obstacles relative to past racial discrimination, then 'disadvantage' also relies on a racial classification.

Assuming that admissions used disadvantage rather than race, its obvious that we would have to vastly expand the special admissions programs to maintain minority representation in the schools. A direct result of an expansion in special admissions programs for the disadvantaged would be to further restrict the admission of the high score applicants such as Baake who now feel discriminated against because they did not score high enough to be admitted in the programs as they are now constituted.

The category has the distinction of being both underinclusive and overinclusive at the same time. It is underinclusive in the sense that it would eliminate, as does the Davis Program, the best prepared minority applicants who cannot point to any kind of a familial or economic disadvantage in their background. These

advantaged minority applicants can argue they have been disadvantaged in their development because of racial discrimination that still exists in our society. The disadvantaged category is also overinclusive in that it includes majority group members who have nothing to do with any of the compelling state interests that are related to increasing minority participation in professional progams and in the professions.

If racial discrimination is really the key to the problems of the minority students, then for the majoritarian group members merit, as determined by undergraduate grade point averages and high test scores, may be the most appropriate test. We currently find many economically disadvantaged white applicants with high undergraduate point averages and high test scores. The only thing that can account for lower test scores among minority groups is the existence in our society of the kind of racial discrimination that disadvantages all minority group members whether they come from an advantaged family or not.

Our experience at Cleveland State University suggests that the Davis Plan which excludes advantaged minority group members from consideration for admissions through their Task Force Admission Program is not sound. The advantaged minority applicant who is better prepared has a better chance of succeeding in the professional school than his more disadvantaged minority group colleague, and has less need for summer preparatory programs and special remedial programs.

In this decision the court might acknowledge that discrimination in education has been so pervasive that most minority group members who survive through primary and secondary schooling, and who attain bachelors degrees, are superior prospects for graduate professional education despite their scores and undergraduate grade point averages. This group also includes those minority group members who come from so-called advantaged families. All affirmative action programs should recruit the better prepared minority group applicants as well as those who are qualified but who have weaker credentials.

It should be acknowledged that inner city primary and secondary schools are totally inadequate, and that there is such concensus on this that the judiciary might take notice of it. Even so, alternatives often suggested are that remediation should be done at the primary and secondary school levels. Of course it should be, but it hasn't been. Despite the 23 years that have

passed since Brown, anti-discrimination suits are still being brought all across the country. I think nothing more needs be said than that any arguments that suggests others should remedy the underrepresentation of minority groups in professional schools and in the professions is totally specious. To suggest that we rely on public school educators to remedy this situation at primary and secondary levels is a wholly immoral suggestion in light of post-Brown experience.

I can think of no other alternative that has been suggested by authors who have considered preferential admissions. Only those programs that use racial classifications have been or can be successful, and they are the only programs that are narrowly tailored relative to the compelling interests involved. We submit that the Davis Task Force Program is valid under any equal protections argument.

VIII.
SINCE RACIAL CLASSIFICATIONS ARE VALIDLY USED, FAIRNESS DICTATES THAT THE PROGRAM INCLUDE A GOAL OR QUOTA TO ENCOURAGE IMPLEMENTATION AND TO BE A YARDSTICK AGAINST WHICH SUCCESS CAN BE MEASURED.

If there are no alternatives to the use of racial classifications, we must construct fair systems in which different criteria will be applied to minority group than to minority group applicants. For majoritarian group members, merit will be determined generally on basis of grades and scores, while for minorities, merit will be determined on the bases of interview results and accomplishments tested relative to prior disadvantage or discrimination.

Where there is no substantial relation between the criteria applied to one group and that applied to the other, goals or quotas are necessary to guarantee fairness for both groups. Also, if our desire is to increase minority group representation in professional schools and the profession, some yardstick against which to measure success must be incorporated in the plan. In employment plans, goals and quotas have been used. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *Morrow v. Crisler*, 491

F.2d 1051 (5th Cir. 1973), *cert. denied* 419 U.S. 895 (1975). Quotas have been authorized by various courts as remedies for past discrimination.

> "No one is denied any right conferred by the Constitution. It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils."

NAACF v. Allen, 493 F.2d 614, 619 (5th Cir. 1974). *See* Goodman, *Equal Employment Opportunity: Preferential Quotas and Unrepresented Third Parties*, 44 Geo. Wash. L. R. 483, 500 (1976).

Some of these cases have allowed proof of past discrimination by use of current employment statistics which show minority group underrepresentation. This is coupled with a shifting of the burden of proof to the employer to show that none of his policies were discriminatory. Since most employers are unable to satisfy this burden, proof of past discrimination has been predicated on statistics alone.

The statistics available in the professions concerning gross underrepresentation of minority groups is as startling as the underrepresentation that has existed in the employment cases. Since a plaintiff can not prove past disrimination concerning Davis or most other professional schools, the courts might refuse to use a quota as a remedy. But whether the court might use a quota as a remedy is not the answer as to whether the school should be able to adopt one. In view of the disproportionate entry of minority groups, the right of a professional school to decide to use a goal or quota should be protected and affirmed. Carl Goodman, General Counsel, United States Civil Service Commission has pointed out

> "In this connection, a valid distinction can be drawn between real numerical goals and quota systems, despite the reservations expressed by Attorney General Levi. A goal is a numberical objective based upon the number of vacancies expected and the number of qualified persons available in a given job market. Goals do not require an employer to hire an applicant who is unqualified or less qualified than another."

Goodman, *Equal Employment Opportunity: Preferential Quotas and Underrepresented Third Parties*, 44 Geo. Wash. L. R. 483, 513 (1976).

If what Davis has established is favorably described as a goal, precendent is available to support its validity. If it is pejoratively described as a quota, past discrimination cases can be cited where quotas have been validated. That Davis has been able to meet its goal in each of the three years is a tribute to its planning and commitment and need not be viewed as showing they have a quota.

Assuming, however, that a school does establish a quota, is the program invalid per se? I submit that the court should approve such a program. Quotas have been used with success in employment and reapportionment cases. *United Jewish Organization v. Corey*, 45 L.W. 4221, 4227 (March 1, 1977). They represent a commitment to which one may aspire in order to make progress in curing underrepresentation, and they also provide a yardstick against which to measure progress. If desegregation of some professional schools meets as much resistance as the desegregation of public schools, it will be necessary to use quotas as intermediate floors against which to measure the progress of the particular affirmative action program. Courts have found the imposition of quotas essential to secure compliance from unwilling employers. I submit that it is rational and acceptable for a professional school to voluntarily establish a quota for its admission committee. There may be no other way to motivate a committee to accomplish minority representation unless it is understood that accomplishment will be measured under a yardstick which has already been established.

The Davis Plan presents facts which support the validity of the established goal or quota. Prior faculty planning determined that 16 minority applicants were to be admitted through their special Task Force Program from the 628 who applied. The percentage is almost identical with that in the regular admissions program where 84 out of 3,737 applicants were admitted. Also, if one defines a quota as the minimum number to be accepted through a minority program, the use of a quota is not invidious. I submit that the court should approve the use of quotas, but should carefully point out that a professional school should never be allowed to use a quota to limit minority group participation in professional educational programs.

Given our sad experience with the very slow integration of public school systems, it seems realistic for the court to protect the right of a professional school to establish a quota relative to inclusion of underrepresented groups within its population. Hence, the Davis Program, even if we describe it as using a quota, is valid relative to all the current Equal Protections Rules.

IX.
EXPERIENCE AT CLEVELAND STATE UNIVERSITY DEMONSTRATES THAT MINORITY PREFERENTIAL ADMITTEES TO LAW SCHOOL ARE NOT LESS QUALIFIED AND THAT A GREATER PERCENTAGE OF THEM COMPLETE LAW SCHOOL THAN OF THOSE WHO ARE REGULARLY ADMITTED.

It is essential we do not interdict the viable affirmative action programs we now have, and that we eliminate the increased fear of lawsuits currently decreasing the viability of existing minority programs. The uncertainty that has existed since DeFunis must be eliminated immediately.

This uncertainty has apparently caused minority admissions in medical school to decline. According to Leonard Lear in his article in the monthly magazine, *Sepia*, March, 1977, minority admissions in medical schools have declined from 10% in 1974/1975 to 9% in the 1975/76 class and he estimates the number is down again in the fall of 1976. He cites the medical schools' increasing fear of lawsuits from rejected white applicants as the reason for the decline.

The Davis Task Force Plan has been adequately described, but I would like to describe our program and how it works. The title of our program is Legal Career Opportunities Program, LCOP for short. It was adopted by the faculty and includes the following goals: (1) the recruitment and selection of intellectually qualified students, (2) from diverse, social, economic, cultural and racial backgrounds, (3) from groups who are now underrepresented in the legal profession; or (4) who evidence an intention to provide legal services to groups or in areas now without legal representation. Also, we affirmatively provide for (5) recruitment to alleviate obstacles faced by individuals from

groups who have been subjected to social, economic, cultural, or racial discrimination. And in order to eliminate the destructive vestiges of past discrimination, we pledge (6) to increase minority group representation each and every year until such groups are represented in the law school and legal profession as in the whole community.

We have a faculty admissions committee that normally consists of six faculty and two student members. The faculty has authorized that we extend our LCOP program to as many as 25% of our first year class of approximately 360 students. There is substantial extra work involved in making sure applicants provide evidence relative to the stated goals, and of course there is a great amount of extra work involved in the interviews. We interview approximately 3 or 4 applicants for each of the 90 positions that we intend to fill through LCOP.

The program has been in existence since 1971 and in 1974, it was extended from a strictly minority program to the program described above. Attrition statistics for the minority portion of our program was approximately 33% in 1971, 31% in 1972, 10% in 1973 and 8% in 1974. Those figures should be compared with an attrition rate in our regular program of 30.2% in 1971, 24% in 1972, 22% in 1973, and 23% in 1974. Attrition statistics for those who started in the fall of 1975 approximate 20% of each group, however, our past experience has shown that many of the students placed on probation, return and successfully complete law school; and that a substantially larger number of minority students do this than those students in the regularly admitted group. In 1974 and 1975 we reserved half of the program for minority applicants and half for non-minority. In 1976 we approved extension for minorities to 60% of the Program.

We do not consider ourselves successful as to the non-minority part of our program. We do not find that the ethnic groups of our highly ethnic city are underrepresented in the law profession, and we find various ethnic groups adequately represented among our regularly admitted students. Consequently, we achieve diversity as far as the various subgroups that fit the majority class without granting special preference.

We have used our program to grant admission to majority group members who first learned another language and do not test as well in English as they might otherwise. We have also admitted applicants who presented evidence of their intention to

practice in the small county seats or in rural areas. The non-minority part of our program has also been used to include applicants from Appalachia who seem to have been subjected to substantial obstacles because of the isolation of Appalachia from the rest of society.

We have found, however, the attrition rate of our non-minority program is approximately the same as the attrition rate for the regular admission program. Consequently, our thinking is that the interview program is not accomplishing anything more than the regular admissions program. Still we intend to keep the non-minority potential of our program because we should include students who intend to practice in rural areas; and fairness dictates that we should include majority applicants who have overcome disability and seem qualified to be successful even though their indicators do not measure up with the majority of applicants who apply at our school.

Since 1971, we have enrolled 212 minority applicants through LCOP and 18 minority applicants through the regular admissions process for a grand total of 230. Of these minority applicants 18 withdrew during the special, pre-law summer preparatory program leaving 212 minority applicants who started law school. Of these 212 who started law school, 11 transferred to other law schools and at last report were satisfactorily completing their legal studies. One hundred and twenty-five are currently enrolled at our law school, 50 have graduated, and 26 who have been dismissed or have voluntarily withdrawn. Some of these 26 may be readmitted and may successfully complete law school.

Of the 50 minority applicants who have graduated, 25 have taken and passed a Bar Examination, 4 took out-of-state bar examinations and have not reported whether they passed or not; and 5 chose not to take any bar examination at all. Sixteen took the Ohio Bar and failed, though our experience has been that many will pass on a subsequent try. The percentage of majority group students who fail in the Ohio Bar averaged somewhere between 10% and 15%.

Admittedly, therefore, the failure rate of the minority students is somewhat greater, but the figure should not be surprising. The average LSAT of our regular admittees for the last four years has been approximately 600. The average undergraduate grade point average during the same four years has varied between 2.95 in

1973, 3.08 in 1974, 3.12 in 1975 and 3.24 in 1976. These figures should be compared with an average LSAT Of approximately 435 for our minority applicants and undergraduate grade point averages of 2.6 in 1973, 2.67 in 1974, 2.85 in 1975 and 2.61 in 1976. The average LSAT of the minority student was 155 points lower than that of the regular admittee and the average undergraduate grade point average was .42 lower than that of the majority group student. Given these very substantial differences, it is perfectly understandable that the minority group student will have lower grades during law school and will do less well on the bar examination.

Our program has added a substantial number of minority group members to the school and the profession and will add a great many more in the future if nothing is done to reduce its potential. We do not think that our minority group student is less well qualified than our regularly admitted student because his test scores are lower. We think the California Supreme Court's statement that minority group members were admitted who were less qualified than Baake is absolutely outrageous. Davis used one committee to evaluate minority group applicants, and another committee to evaluate majority group applicants. Such a small percentage of both were ultimately accepted that there is no question but that all are supremely qualified. Only if the same committee, none of whom were latently racist, using identical standards, had graded both groups could there be any argument that the scores would be relative. There are no facts which suggest Baake was more qualified than the minority students who were accepted. There is no reverse discrimination in this case.

CONCLUSION

In summary, the Davis Task Force Program is valid under the strictest scrutiny of Equal Protection. Even so, since this classification is designed to insure equal treatment for an underrepresented minority, the Court should apply the Rational Basis analysis. Professional school decision making should be protected, and schools should be encouraged to develop and apply fair criteria in admissions as has Davis. Affirmative action programs often must establish rather definitive goals or quotas to be effective; and this court should validate such plans, including quotas, providing the quotas are consistent with the need to expand opportunities for minority groups who have been and are underrepresented in the program.

The decision of the California Supreme Court should be reversed.

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