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Comments

But Some Animals Are More Equal Than Others:
A Look at the Equal Protection Argument
Against Minority Preferences

I. INTRODUCTION

"Our Constitution is color-blind," according to the senior Justice Harlan in his famous dissent in *Plessy v. Ferguson*. Since 1896 when that passage was authored the courts and legislatures of the United States have, albeit painfully slowly, come to recognize the necessary implications of the constitutional command that all citizens be considered equals before the law. After decades of judicial, legislative and congressional neglect it is probably fair to say that at least in terms of the written word of the law this command has been effectively translated into concrete form. American society has only just begun to transform the abstract ideal of equality into economic and political reality and the progress that has attended this transformation has been as slow as was the judicial and legislative recognition that was its necessary forbearer. Frustration and sometimes violence have attended the demands of those groups within society who have been the victims of the nation's failure to live up to its promise and promises. In a legal and societal context great damage has been done to the ideal itself, for a promise which has gone so long unfulfilled is perhaps no promise at all.

Against this backdrop and the rather bleak reality of unequal eco-

1. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

2. *Plessy* itself represented a defeat for early civil rights advocates. The decision upheld the "separate but equal" doctrine in the face of a fourteenth amendment challenge. The doctrine was not abrogated until *Brown v. Board of Educ.*, 347 U.S. 483 (1954).


5. *Id.*

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nomic and political opportunity it is not surprising that the govern-
ment at many levels has embarked upon programs which seek to redress
the imbalances. This effort (in some ways still in its infancy) has taken
a variety of forms, perhaps the most controversial of which is "affirma-
tive action" hiring by government itself or by private interests at the
insistence of government.\(^6\) Government activities related to economic
opportunities stimulate controversy for several reasons. Today's eco-
nomic maladies and the scarcity of jobs for even the well-educated
courages criticism, as does the mere fact that programs of this sort
are highly visible and readily perceived by those directly affected.

Affirmative action, to be sure, is not limited to the area of employ-
ment; but preferential hiring, quotas, and various methods of influ-
encing employers seem to cause more popular questioning and more
vigorous opposition than other efforts aimed at similar goals. Although
discussion in this comment will not be limited to the employment area,
some emphasis will be placed on this aspect of the topic. In addition to
its topical interest, preferences in hiring and promotion present per-
haps the strongest factual basis for the argument about to be evaluated.
All equal protection claims are bottomed upon some notion of fairness
and the employment area seems to provoke honest emotional responses
which lend themselves to serious consideration even if for no reason
other than their intensity.

The general problem being treated is whether the government, in
its effort to afford political and economic equality and redress past
injustice, has somewhere run afoul of the constitutional command that
all citizens be considered *equals before the law*. More specifically, the
question under examination may be presented as follows: how strong
is the argument that certain types of government programs which result
in preferential treatment of deprived groups are a violation of the fifth
and fourteenth amendments to the United States Constitution?\(^7\)

No attempt will be made to catalog and compare the myriad forms
which affirmative action assumes, although detail will be provided
when necessary to aid in the understanding of specific cases discussed

\(^{6}\) \textit{See} Coney, \textit{Affirmative Action Dents the National Labor Policy}, 10 Duq. L. Rev. 1
(1971).

\(^{7}\) U.S. \textit{Constr. amend. XIV, § 1 reads, in relevant part, "No state shall make or enforce
any law which shall abridge the privileges or immunities of citizens of the United States;
nor shall any state deprive any person of life, liberty, or property without due process of
law; nor deny to any person within its jurisdiction the equal protection of the laws."}

The due process clause of the fifth amendment has been interpreted to function as the
federal equivalent of the equal protection clause of the fourteenth amendment. \textit{See} Bolling
in the course of this comment. Discussion of the possible statutory objections will also be minimized. It should be recognized, however, that there may be more than a superficial similarity between claims arising under the various civil rights acts and claims whose origins are the equal protection guarantees of the fifth and fourteenth amendments.

II. THE ARGUMENT IN THE COURTS

The Supreme Court appears to be on the threshold of passing on the issue of "reverse discrimination" in *Defunis v. Odegaard* (discussed later in this section). As will be seen, a definitive decision will not only involve a difficult question on the merits, but it may have far-reaching legal effect as well. To date it has remained for lower federal courts and state judiciaries to wrestle with the problems posed by affirmative action programs.

In *Griggs v. Duke Power Co.*, the Supreme Court came closest to commenting directly on the question. The decision in *Griggs* did not involve a constitutional question, but rather the application of Title VII of the Civil Rights Act of 1964 to certain job qualifications which were neutral on their faces but discriminatory in practice. The Court concluded that the apparent neutrality of the requirements (a high school diploma and a satisfactory score on an aptitude test) would not operate to exempt them from consideration as discriminatory hiring practices if (1) they were not related to job performance and (2) they operated in reality to exclude Negro employees from initial positions or advancement.

In the course of his opinion in *Griggs*, Chief Justice Burger, speaking for a unanimous Court, made the following remark which has been described by one commentator as denoting "an unsettling reticence of the Supreme Court to bless preferential employment practices."

9. *82 Wash. 2d 11, 507 P.2d 1169, cert. granted, 94 S. Ct. 588 (1973).*
Congress did not intend by Title VII, however, to guarantee a job to every person, regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.15

Admittedly, this dicta falls far short of saying that Congress can constitutionally only command racial neutrality or "color-blindness,"16 but until a more definitive statement is forthcoming the above-quoted passage from Griggs remains the most recent and relevant indication of what the Court's ultimate position may be.

The highest state tribunal to pass squarely on the constitutionality of any form of reverse discrimination is the Supreme Court of Washington. In Defunis v. Odegaard,17 the white, male plaintiff was denied admission to the state university's law school while members of designated racial minorities with less laudable objectively measured qualifications were granted admission.18 In a 7-2 decision the supreme court

We also recognize that the Civil Rights Act of 1964 is not designed to serve members of a minority race to obtain special privilege or right because of race, creed or color. Reverse discrimination is equally prohibited by the Act.

Id. at 1163.

15. 401 U.S. at 430-31 (emphasis added).

16. Supreme Court dicta which arguably conflicts with the statement quoted from Griggs can be found in Louisiana v. United States, 380 U.S. 145 (1964), where Justice Black said, "We bear in mind that the court has not merely the power but the duty to render a decree which so far as possible eliminates the discriminatory effects of the past as well as bars like discrimination in the future." Id. at 154.


18. 507 P.2d at 1173-76. Brief for Respondents at 5-6, Defunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973). All applicants for admission to the University of Washington School of Law were assigned a "PFYA," or, predicted first year average. This figure was determined on the basis of a mathematical formula with variables consisting of the applicant's junior-senior college grade average, Law School Aptitude Test (LSAT) score, and LSAT writing test score. Defunis' PFYA was 76.23. Of the 311 students who were accepted by the school, 44 were "minority students." Of these 44, 38 had PFYA's lower than that assigned to Defunis. The lowest PFYA in the minority group was 67.71, a predicted average of less than a "C" level.

When the PFYAs are broken into their component parts the disparities are even more apparent. Defunis' highest LSAT score was 668 and his junior-senior grade average was 3.71. He graduated from the University of Washington Phi Beta Kappa and Magna Cum Laude. By contrast, one of the successful minority applicants had a college average of 2.63 and an LSAT score of only 418.

Non-minority applicants with PFYAs less than 74.50 were generally subject to summary rejection. Each minority member, however, was reviewed in detail and a "reasonable number" of those with the highest PFYAs were accepted regardless of where they stood vis-a-vis the non-minority applicants.

There is no mention in the Defunis opinion or in the respondents' brief of any specific reason for Defunis' rejection. Apparently there was no objection on the basis of character
reversed the trial court and held that the state university (1) could constitutionally consider racial and ethnic background as a factor in making admissions decisions and (2) had not violated the equal protection clause of the fourteenth amendment by doing so on the instant facts.

Before considering the merits of the plaintiff's claim in detail the court dealt with the threshold contention that the action of the University of Washington was per se unconstitutional. In this particular the plaintiff-respondent relied solely on Brown v. Board of Education as standing for the proposition that public education must be made equally available for all without regard to race, and therefore any de jure discrimination in the area of education must be struck down. The court replied that Brown only proscribed "invidious" discrimination, a term it defined as meaning those classifications that stigmatize a group with a "stamp of inferiority." Citing Green v. County School Board and Swann v. Charlotte-Mecklenberg Board of Education, the court noted that the Supreme Court has apparently approved of (and even mandated) color-consciousness on the part of education officials when the objective is the laudable (and mandatory) one of desegregating previously segregated facilities.

The court failed to distinguish these public school desegregation cases on the basis that in those instances no individual was denied any educational opportunity. The objective in Green and Swann was to increase the opportunities available to those students who had been effectively excluded from the systems' full benefits. No student was, as a necessary consequence of the state action, denied any opportunity except that of attending a segregated school.

The Defunis court next faced the potentially critical problem of

or personal background and Defunis' academic credentials were the only items under consideration by the law school.

20. Id. at 1179.
22. Id. at 1180, citing 402 U.S. 1 (1971).
23. The court cited Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), cert. denied, 402 U.S. 944 (1971), for the proposition that even when an opportunity is denied on the basis of race, if the purpose of the denial is compensation for past discrimination, the action is not per se unconstitutional. Porcelli is discussed later in this comment, but it should be noted at this point that the use of the case by the Defunis court seems quite valid. Porcelli was decided by a federal court of appeals and not by the Supreme Court. The Swann and Green cases represent the highest authority for the argument that some degree of "color-consciousness" is valid. These cases did not involve the denial of any opportunity and are thus apparently distinguishable.
choosing between the two established equal protection tests. The court rejected the defendant-appellant's contention that the strict scrutiny standard should not be applied because the facts of the case made it clear that the intention of the discriminating administrators was at worst benign and at best laudable. The court rejected this proposition and after recognizing the inherently suspect nature of racial criteria noted that "the minority admissions policy is certainly not benign with respect to non-minority students who are displaced by it." Thus, the court felt compelled to place the burden of showing a compelling state interest upon the defendant-appellant and removed the presumption of constitutionality because a racial classification was being challenged.

The Defunis majority had little difficulty in finding a sufficiently compelling state interest. Beginning with the indisputable proposition that minorities are under-represented in the legal community, the court found that the state had a valid and compelling interest in eliminating this imbalance through use of its educational institutions. Specifically, the court noted the important role lawyers play in the policy making sector of society and added that the peculiar viewpoints of each of society's subdivisions should have a proportionate input into the decision-making processes. As a second specific characterization of the state's compelling interest the court implied that the shortage of minority group lawyers militated against encouraging minorities to "live within the rule of law."

Implicit in the Defunis opinion is approval of the general notion that the state may constitutionally discriminate on racial grounds if the

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24. 507 P.2d at 1181-82. The two tests are discussed in detail in the next section of this comment.
25. Id. at 1182.
26. Id.
27. The court quoted the following passage from Loving v. Virginia, 388 U.S. 1, 10-11 (1967):
   The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious discrimination in the states. . . . [A]t the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate . . . .  
507 P.2d at 1182.
   The court's use of this passage is arguably in conflict with its prior definition of "invidious discrimination." The court concluded earlier in the opinion that the plaintiff's claim that the admissions policy was per se unconstitutional must fail because the discrimination being challenged was not "invidious," i.e., no label of inferiority attached as a result.
28. 507 P.2d at 1183.
29. Id. at 1184.
aim of the state activity is compensation for the effects of a pattern of past discrimination in the private or the public sectors.\textsuperscript{80}

The \textit{Defunis} litigation has not yet ended. On November 19, 1973 the Supreme Court of the United States granted certiorari and thus brought before it a case which squarely presents the argument under consideration in this comment. Speculation on the probable outcome of such a sensitive issue would be of questionable value, except, perhaps, for those who enjoy playing at guessing games. A full appreciation of the difficulty of the problem, however, requires a look at how the lower courts have confronted the question.

Federal courts have dealt with the problem of reverse discrimination arguments in a variety of different contexts. In \textit{Porcelli v. Titus},\textsuperscript{81} white teachers challenged the action of the Newark school superintendent in discarding promotion lists that had been in effect for a number of years. The school officials "frankly admitted" that their new promotion criteria included a consideration of race, in addition to other, less objectionable factors.\textsuperscript{82} In dismissing the teachers' argument the court of appeals advanced the central proposition that discriminatory state action "in furtherance of a proper governmental objective" is not necessarily violative of the fourteenth amendment.\textsuperscript{83} The court in \textit{Porcelli} never involved itself in a detailed consideration of whether a "proper governmental objective" was in fact being served in the case before it. Instead the court quickly ended the inquiry by noting that fully integrated faculties and school administrations are objectives that are within the "thrust" of \textit{Brown}.\textsuperscript{84} Thus, the \textit{Porcelli} court also rejected the notion that the constitution commands state "color-blindness," even when the action in question undeniably denies some opportunity to members of the non-preferred group.

30. A vigorous dissent was offered by Chief Judge Hale (with one additional member of the court joining and filing a separate dissenting opinion). A large portion of the dissent is devoted to exposing the questionable conduct of those persons involved in the screening process at the university. On the major question posed by \textit{Defunis}, the dissenters seemed to take the view that when state action results in the denial of an opportunity the constitution should be applied as though it were color-blind, or, to use the court's term, "neutral." The Chief Judge said:

\begin{quote}
Mr. Defunis came before the bar of the Superior Court much as did the petitioners, parents of school children, in \textit{Brown v. Board of Education} ... asking that he not be denied admission to the university law school because of race or ethnic origin.\\
\textit{Id.} at 1200.
\end{quote}


32. \textit{Id.} at 1256-57.

33. \textit{Id.}

34. \textit{Id.}
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In Contractors' Association v. Secretary of Labor, the Third Circuit Court of Appeals passed on the validity of the much-publicized "Philadelphia Plan" for minority representation in the building trades. In Contractors' Association the plaintiff-petitioners were compelled by the Department of Labor to provide an affirmative action hiring program as a condition precedent to being awarded contracts for federally funded projects. The directive was challenged on a multitude of grounds, of which only one is important for the purposes of this comment.

The plaintiffs argued that the equal protection guarantee which is implicit in the due process provision of the fifth amendment prohibited the government from forcing them to accord minority recruitment a special priority. The court abruptly dismissed this contention by characterizing the order as "valid Executive action designed to remedy the perceived evil . . . ."

Carter v. Gallagher provided what is probably the most detailed treatment of the constitutional objection to affirmative action yet undertaken by the federal courts. In Carter the Eighth Circuit had difficulty making up its mind, with a rehearing en banc having the effect of significantly altering the final disposition of the case. The first (panel) opinion, authored by Circuit Judge Van Oosterhout, invalid-

36. See Comment, The Legality of the Revised Philadelphia Plan, 30 Mo. L. Rev. 114 (1970). In addition to a thorough discussion of the particular problems raised by the Philadelphia Plan, this comment offers an interesting discussion of the statutory objections to affirmative action available by reference to 42 U.S.C. § 2000e-2(j) (1970), which reads:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

39. 442 F.2d at 177. See United States v. Electrical Workers Local No. 212, 472 F.2d 634, 636 (6th Cir. 1973), which summarily dismissed the argument and in doing so relied on the summary rejection in Contractors' Association.
dated the district court's order requiring the Minneapolis Fire Department to compensate for past discrimination by employing an absolute hiring preference in favor of Blacks, Indians and other minority groups (i.e., the next twenty employees hired had to be members of minority groups.) Judge Van Oosterhout affirmed the finding of a pattern of discrimination against minorities but felt compelled to invalidate the remedy fashioned by the trial court because of constitutional objections. He felt the fourteenth amendment clearly prohibited any government discrimination based on race and found no justification for a preference in the "compensatory" theory advanced by the defendants.

The first opinion in Carter made the distinction which the Defunis majority failed to make between the instant cases and school desegregation cases such as Swann v. Charlotte-Mecklenburg Board of Education. In Swann and other cases cited to the Carter court no individual was denied any opportunity as a result of government color-consciousness. In a preferential hiring situation, unless demand for labor exceeds supply, some applicants must necessarily be denied employment.

The first opinion also distinguished cases which ordered relief for identified individuals or class members who had successfully prosecuted claims of discrimination. After impliedly admitting that the many decisions falling in this category may have had the effect of denying positions to non-minority workers, the court characterized these decisions as instances in which the individuals to whom relief had been granted had been wrongfully denied employment advantages in their

41. 452 F.2d at 318-22.
42. Id. at 325. Judge Van Oosterhout said:
Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that section 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by Griggs . . . .

Id. (quoting the passage from Griggs which was discussed earlier in this comment).

On the notion of compensatory justice, the Judge said:
Under the court's minority preference provision, a White person who, in a subsequently conducted examination fairly conducted and free of racial discrimination, obtains a higher rating than a minority person is denied employment solely because he is a White man. The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant on the basis of race.

Id.

43. 403 U.S. 1 (1971).
44. 452 F.2d at 325.
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particular cases. In the instant case the defendants were seeking to sustain an order which incorporated a broad preference whose design was to compensate for a long history of discrimination, to the immediate benefit of a large but individually unidentifiable group.46

This distinction raises some questions. What difference should it make whether an individual plaintiff proves that he had applied for a position and was wrongfully rejected in one case, or whether it is proven that an entire group was summarily denied consideration in another case—so long as the racial basis for the discrimination is nonetheless proven? It can be argued that the cases granting relief to specified individuals are necessary if any judicial remedy is to be available to enforce the fourteenth amendment or the many civil rights acts. A broad preferential hiring order, on the other hand, suffers from a defect akin to overbreadth and affords relief to individuals who may have never had any contact with the discriminating employer, to the detriment of a relatively large group of majority group applicants who had no direct connection with the discriminatory practices other than perhaps a collective role as benign beneficiaries.

Judge Oosterhout's opinion accepts, without much discussion, the distinction between Carter and the case of the usual relief afforded successful civil rights plaintiffs.

After a rehearing, the court significantly modified the original decision and fashioned a substitute remedy for the discredited order of the district court. The original order had required that the fire department hire twenty minority group members before any Whites were hired, with additional allowances for minorities provided after compliance with the first portion of the order. The order substituted by the court en banc included a ratio hiring schedule which required that one out of every three new firemen hired be minority group members until twenty had been accepted.47

The second Carter court accepted the proposition that an absolute preference (as included in the original order) was "probably unconstitutional." In the court's language, "we hesitate to advocate one constitutional guarantee by the outright denial of another."48 In the very next sentence of the opinion the court acknowledged the "legitimacy" of erasing the effects of past discrimination and described the

46. 452 F.2d at 325-26.
47. Id. at 331.
48. Id. at 330.
problem as one "accommodating these conflicting considerations." Thus, something less than an "outright" denial of equal protection was not necessarily unacceptable.

The balance of the second opinion gives the reader cause to suspect that while the court had some misgivings about allowing any preference at all, the circuit judges felt that enough authority existed to justify some affirmative relief to the entire class of minority group members. They drew the line at the "absolute" preference, however, and could find no authority to justify such an order. The court seems to have balanced its doubts about preferential hiring with the strong countervailing concern it had with redressing what seemed to be a long standing systematic practice of racial discrimination. The result was a compromise of sorts, with the author of the first opinion and one additional judge dissenting and holding out for no preference at all.

The two dissenters saw in the court's new remedy a difference in degree but not substance. In their view, while not as many Whites would be disadvantaged by the new formula, the same basic constitutional infirmity was present.

The United States District Court for the Northern District of California is one of the few courts where reverse discrimination claims have succeeded. In *Anderson v. San Francisco Unified School District*, the plaintiff-employee argued that the school district's policy of granting promotional preferences to minority group members violated the fourteenth amendment. The court agreed, although it made some curiously inconsistent statements in the process.

The defendant in *Anderson* had embarked on a program aimed at achieving a minority-white ratio in its administrative staff which corresponded to the ratio in the district's overall population. The court recited the "key issue" as "whether or not a classification which is based on race is valid." Starting out vigorously, the court said "preferential treatment under the guise of 'affirmative action' is the imposition of one form of racial discrimination in place of another." Appearing to take the ultimate step, the court also proposed that "no one race or

49. *Id.*
50. Of the 535 members of the Minneapolis Fire Department at the time suit was brought, none were minority group members. The minority group population of the city represented 6.44 per cent of the total number of inhabitants. *Id.* at 323, 328.
51. *Id.* at 332.
53. *Id.* at 249.
54. *Id.*
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ethnic group should ever be accorded preferential treatment over another."\(^{55}\)

The court then qualified its position and noted that such discrimination has been allowed, but only to correct past discriminatory practices.\(^{56}\) Since in the court's view there had not been an adequate showing of such practices in the case before it, the white plaintiffs were granted the requested injunction.

Advocates of the reverse discrimination argument had to settle for little more than a technical victory in the *Anderson* case, for the defendant's proof problems and the court's arguably narrow viewpoint were probably responsible for the result. One suspects that the real reason for the low number of minority administrators in the San Francisco school system is the same reason acknowledged in the *Defunis* case with regard to the legal profession, the *Contractors' Association* case with regard to the skilled trades, and the *Carter* case with regard to firemen. While the San Francisco district may not have actively engaged in deliberately denying opportunities in the past, the disproportionately low number of minority people in all learned and skilled positions is traceable to a society-wide heritage of prejudice. The difference in approach in *Anderson* is apparently a requirement that the defendants be actively engaged in oppression before a claim of reverse discrimination will be denied.

If this is, in fact, the reading the court intended, a widespread adoption of this view might cause major problems for affirmative action, for ill will and bad faith are sometimes difficult to prove. Statistics, on the other hand, have been a major (and sometimes the only) weapon available to affirmative action advocates and civil rights lawyers. The *Anderson* approach runs counter to the fairly well-established principle that ill will or bad faith are not absolutely required if a claim of unconstitutional discrimination is to be sustained.\(^{57}\)

\(^{55}\) Id. at 249-50. The court's language was very clear. In other passages Judge Conti said:

The questions that must be asked in this regard are: Must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all, if, in the process, we deny equal opportunity to some?

*Id.* at 249.

No race or ethnic group should ever be granted privileges or prerogatives not given to every other race. There is no place for race or ethnic groupings in America.

*Id.* at 249-50.

\(^{56}\) *Id.* at 250.

\(^{57}\) With regard to the position that there is no "mens rea" element required in proof of a fourteenth amendment violation, see Hawkins *v.* Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972); Bradley *v.* Milliken, 398 F. Supp. 582, 592 (E.D. Mich. 1971).
At least one additional court has sustained the argument we are examining. The southern district court of Florida in *Ray Baillie Trash Hauling, Inc. v. Kleppe*, acknowledged a claim of unconstitutional discrimination in the proper context. The plaintiff, a small businessman, was confronted with the United States government's policy of letting small government contracts to "socially or economically disadvantaged persons." Suit was brought against the Administrator of the Small Business Administration and the Secretary of the Air Force by a white garbage hauler who had been totally excluded from the bidding on a hauling contract for Homestead Air Force Base.

With relatively little discussion the court agreed with the plaintiff's fourteenth and fifth amendment arguments. Faced with "no evidence" that the favored minority businessmen had been discriminated against in the formation and operation of their concerns, the court noted that the exclusion of Whites from the program was quite explicit and quite unconstitutional.

No attempt has been made in the preceding pages to exhaustively discuss all of the existing case law in the area. Different courts have dealt with the problem in different contexts and with varying results. This section has been provided to supply a framework which includes the most significant decisions, exemplary decisions, and those few decisions which have dealt in detail with the argument under examination.

As a general observation it seems fair to say that the cases do not support a claim of equal protection violation in most "affirmative action" contexts. In fact, the affirmative programs and remedial court orders have fared rather well in all but a few of the reported decisions.

Still, much depends upon the facts and the particular situation which is the subject of the protest. The "absolute quota" or exclusionary preference seems to represent a demarcation line over which most courts are extremely reluctant to pass. Except for the dissenters in *Defunis* and both the majority and the dissenters in *Carter*, the tribunals have avoided speculating on this line and very little detail has been provided. The *Carter* court simply refused to cross, noting that the "absolute preference" was "probably unconstitutional," and in any

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60. 394 F. Supp. at 202.
61. The most notable deviants are *Ray Baillie* and *Anderson*, discussed in the textual material related to notes 52-60 supra.
event the vindication of one constitutional right by the "outright denial" of another was a questionable course of conduct. It is reasonably clear from the cases that something less than the "outright denial" of the fourteenth amendment rights of white or male claimants is acceptable to most courts which have dealt with the problem, although a court such as Carter, by tempering its position, impliedly acknowledges some merit in the argument against the preferences. Thus "flexible quotas," long and short term "hiring goals," and hiring which is prospectively tied to percentages and ratios have generally survived court challenges. The water below the line, however, is not crystal clear.

First, there is a basic division in the overall manner in which courts have attended to the question. Some courts, such as Defunis and Carter, feel compelled to discourse at length about what seems to them a difficult problem (perhaps due to the existence of serious internal disagreement). Other courts—and this is the majority—are satisfied with a rather cursory dismissal or affirmance of the argument (this group is exemplified by Contractors' Association, Ray Baillie, Anderson and Porcelli). Since the Supreme Court has granted certiorari in Defunis, it appears that the issue is destined to become the object of a major Court decision. While there is some strength in numbers, the "we are not impressed" approach to a recurring problem adds little to the building of a conceptually solid case for government invoked preferences.

Second, and probably a necessary by-product of the cursory manner in which the argument is frequently treated, there is a certain carelessness in the way the courts have applied equal protection theory. Defunis, for example, is perhaps the only case which honestly and visibly begins with the logical preliminary determination of which standard of review to apply to the challenged situation. Most courts seem to address themselves to the sufficiency of a "rational basis" or "compelling interest" only indirectly—by reference to either a general compensatory justice theory or the notion that the redress of past injustice is a "legitimate" concern. This cursory treatment of a question which

62. 452 F.2d at 330.
63. Most lower courts have failed to deal with the problem seriously, in the sense that they have not acknowledged its social significance or its potential legal magnitude. Regardless of the ultimate disposition, lower courts should have given the matter more studied thought and analysis than is evident in the opinions in Contractors' Association, Ray Baillie, Anderson and Porcelli. An acknowledgement of the significance of the argument can be found in the Supreme Court's decision to grant certiorari in Defunis.
is at the very least of great topical interest might be the result of several possible situations. In the courts' view the question may be insubstantial; it may be considered substantial but well-settled; it may be an area some courts would like to avoid, for whatever reason; or there may have been a problem with the vigor of the advocacy (like Contractors' Association, many of these cases involved statutory arguments or arguments based upon different constitutional provisions.)

Third, there remains largely unanswered the argument made in the *Carter* dissent that preferences which are less than "absolute" present a difference in degree but not kind. Fourteenth amendment claims have not traditionally been viewed in terms that lead to a conclusion that a particular instance of racial discrimination is not "severe enough," or of such a reprehensible nature that the constitution forbids its practice. Under traditional analysis the courts have first addressed themselves to a consideration of the appropriate burden of justification and then proceeded to consider whether the alleged basis was in fact "rational" or "compelling," as the case required.

III. Some Notes on Equal Protection

Traditionally equal protection claims have been subject to alternative standards of review. Frequently described as a "two-tiered" analysis, the formula requires courts to decide at the outset whether they should apply the "minimal scrutiny" or the "strict scrutiny" standard to the facts before them. In this respect the courts are usually faced with an "either-or" proposition.

The minimal scrutiny standard can be defined generally as follows: state action which has a discriminatory effect is constitutionally offensive if it does not bear a rational relationship to the achievement of a valid state objective. In applying the standard the Supreme Court

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64. The usage of the word "traditional" in this section should be qualified. Courts frequently refer to the "minimal scrutiny" or "rational basis" test as the "traditional" approach, in contrast to the "strict scrutiny" or "compelling state interest" approach. The genesis of this second tier is more recent. Since the "strict scrutiny" standard seems to have become a permanent part of equal protection theory, the term "traditional" will be used to refer to both standards considered together as a unit.


66. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). See Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1973), where the author proposes a reformulation of equal protection theory and concludes that there is some basis in recent decisions of the Supreme Court for believing that the Court is moving toward a new standard. Under Gunther's analysis the gap between minimal and strict scrutiny would be closed through the elimination of "hypothetical" justifications. Substituted would be a "means oriented" approach which concentrates on the
has taken the view that the requisite relationship can be established if "any state of facts reasonably may be conceived to justify it." The actual motivation of lawmakers or government officials may be irrelevant, and what are in fact hypothetical considerations may serve as a successful defense to a fourteenth amendment claim. The objective thus sought to be furthered must, of course, be "valid" or "legitimate" (e.g., a proper exercise of the police power). The challenged action enjoys the usual presumption of constitutionality and the party asserting the claim has the burden of showing that the test is not met by the challenged classification.

The second tier of the formula is the strict scrutiny or "compelling state interest" standard, which, as its name implies, places the claimant in a much better position. The standard of review may be summarized as follows: state action which has a discriminatory effect is constitutionally offensive unless justified as being necessary for the accomplishment of a goal in which the state has a compelling interest, provided: (1) the classification which forms the basis of the discrimination is "inherently suspect;" or (2) the state action involved interferes with a "fundamental right" or interest of the person who asserts the violation. In addition to the obviously more difficult task of demonstrating a compelling interest, the discriminating party loses the presumption of constitutionality and has the affirmative burden of demonstrating that interest. The Supreme Court has refused to create a long list of "fundamental rights" or "suspect criteria," any of which might trigger the application of the harsher standard. For our purposes it is sufficient to note that race has traditionally been viewed as the most suspect of the suspect criteria.

Defunis is apparently the only case which explicitly deals with the problem of choosing the correct standard of review. As noted above, that court had little difficulty in arriving at the conclusion that the "minority group" classifications constituted a clear use of racial criteria, triggering the applicability of the strict scrutiny standard. At first question of whether the challenged state action is "substantially related" to the accomplishing of a valid purpose.

At least one court has already agreed with Gunther's perception of "evolving doctrine."

See Borass v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973).

67. 366 U.S. at 426.
70. See Borass v. Village of Belle Terre, 476 F.2d 806, 813 (2d Cir. 1973).
72. 507 P.2d at 1182.
glance the analysis seems correct, for no matter how compelling the interest being advanced by the minority program, the inescapable fact is that the program very explicitly made use of racial criteria.\footnote{73. See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 10 (1973), where the author concludes that no Supreme Court case has directly invalidated a law through use of wealth as a suspect criterion. Wealth differentials would seem to be more easily defensible bases for affirmative action programs than racial or ethnic criteria.}

There is, however, room for disagreement on this potentially critical question (it is much more difficult to conceive of the argument succeeding if the minimal scrutiny standard is applied). Before pulling the "suspect criteria" trigger too quickly a court might do well to pause to consider why the Supreme Court has taken such a dim view of racial classifications. A reasonably strong argument may be made that the Court, by declaring racial classifications inherently suspect, was doing no more than acknowledging the sad history of racial prejudice in America. It can be argued that compensatory discrimination against majority group members is much less likely to be based on totally irrational considerations and is therefore not within the ambit of cases holding the strict scrutiny standard applicable when minorities are the object of racial discrimination. Since the only other standard presently available is the minimal scrutiny standard, the courts must either apply it or formulate what is essentially a new suspect criterion category (which they are usually very reluctant to do).\footnote{74. Id. at 12-13. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973).}

The counter-argument might challenge the initial interpretation of the Supreme Court's intentions and substitute the view that the Court was really only acknowledging the basic proposition that all racial classifications are morally reprehensible and out of place in the prevailing American legal and political philosophy. The reported cases are devoid of argument along these lines, with only Defunis treating the propriety of using the strict scrutiny standard.\footnote{75. 507 P.2d at 1181-82. With the rise of the feminist movement in recent years, government has shown some interest in affording women job preferences. In its last term a majority of the Court refused to elevate sex to status as a suspect criterion. See Frontiero v. Richardson, 411 U.S. 677 (1973). For the present, it seems that any complaints raised by males will be decided under the minimal scrutiny standard. There appear to be no reported decisions outside of the racial area. See Proposed Constitutional Amendment, U.S. Code Cong. & Ad. News 833 (Supp. Apr. 20, 1972), which reads:

Section 1. Equality of Rights under the law shall not be abridged or denied by the United States or any state on account of sex. Sec. 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article. Sec. 3. This amendment shall take effect two years after the date of ratification.

The ratification of this hybrid equal protection provision might be viewed in connection with the discussion of the thirteenth amendment in text pp. 598-99 infra.}

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One of the major problems involved with presenting an analysis of how equal protection theory applies in the inverse discrimination situation is the lack of a clear, organized approach by those courts which have confronted the argument. While different courts may utilize different terminology, the "compelling interests" advanced to defend preferential treatment seem in the end to reduce themselves to a single general proposition: irrational prejudice has been so pervasive throughout the history of the nation, and has given rise to political and economic inequality of such magnitude, that the state's interest in redressing the imbalance is compelling. In a weaker form the argument can be framed in terms of "compensation" for past discrimination, but properly put, the proposition seems to rely to some degree upon a pragmatic consideration of the real damage done to society by the operation of irrational discrimination.

The specific elements of damage are not difficult to catalog. To the victims, perhaps irreparable damage has been done to the self-respect and personal identity which all but the most callous would concede is every person's justifiable expectation. Generations of scholars, humanists, artists, statesmen and scientists have failed to bear fruit. Violence and civil unrest have attended repression, and squalor has become a tolerated condition of life for large portions of the population.76

In the long range view perhaps the greatest societal detriment has been the damage done to the ideal of equality itself, and herein lies the dilemma facing those judges who appreciate the magnitude of the conceptually difficult problem posed by the white, male complainant. In the words of the Carter court, one should be hesitant to promote one constitutional right by the outright denial of another.77

Courts have been faced with similar problems before, and they have reluctantly balanced the interests involved, sometimes assigning a certain primacy to one of the competing guarantees. The disturbing difference in the problem under examination is that each of the two conflicting claims is a demand for equal treatment. The court must weigh one person's demand for equal protection against society's interest in achieving extra-legal equality for another. At best, this is an uncomfortable position to be in; any disposition leaves the loser with a bitter taste in his mouth and serious doubts about the vitality of his rights. The theory is not rendered whole by answering that one claim-

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76. See Kerner Report, supra note 4, at 115-42.
77. 452 F.2d at 330.
ant has experienced that bitter taste so many times before that it is now someone else’s turn—although this may be a fair layman’s characterization of the compelling interest in question.

Dictum in Green v. Connally\(^7\) offers one apparent way out of the predicament:

There is a compelling as well as a reasonable governmental interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.\(^7\)

A decision denying the argument under examination might well take a form similar to the above statement, since the bare fact that affirmative action often accords minorities some advantages is almost indisputable. The solution is almost too easy, for taken at face value, the proposition that the government’s interest in “interdicting” racial discrimination is pre-eminent does not indulge in specificity on the question of “discrimination against whom?” There seems to be no way for a court to decide the question without elevating the fourteenth amendment rights of one suspiciously classified group over the rights of another. If a distinction existed in the nature of the rights asserted, or in the mode of classification, a court might be able to find its way through the problem without significantly altering equal protection theory. Such does not seem to be the case.

One escape hatch to the courts is a liberal reading of the thirteenth amendment’s prohibition on slavery.\(^8\) Assuming the white protestant’s claim to be prima facie valid, the fourteenth amendment can be “overridden” by the thirteenth and any direct effect on equal protection theory can be avoided.\(^8\) The indirect effect might be considerable and such an approach would involve taking the thirteenth amendment farther than it has yet gone. In the final analysis use of the thirteenth

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79. Id. at 1167. See also Shelton v. Tucker, 364 U.S. 479 (1960), for the proposition that even first amendment freedoms, which are often assigned an inherent primacy, may be restrained indirectly when in conflict with action necessary to counter racial discrimination.
80. U.S. Const. amend. XIII, which reads:
Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.
amendment might provide the most honest rationale, because a resolu-
tion in favor of minority preferences will be tantamount to a holding
that while everyone is entitled to even-handed treatment, Blacks are to
be afforded a special legal position. The thirteenth amendment at least
offers a constitutional basis for assigning a certain primacy to the group
itself, if not to its substantive rights.

Relying on the historical bases of the thirteenth and fourteenth
amendments does leave some questions unanswered. Should the argu-
ment of the white, male, or majority group member fare better if a
sexual preference is in question? Will it be stronger if Indians or
Chicanos (who were not part of the historical basis of the Civil War
amendments) are being afforded a challenged preference? The various
societal detriments which would form the basis of the government's
compelling interest under traditional fourteenth amendment analysis
would seem to have equal force when applied in these other contexts.

IV. SOME FINAL NOTES

Aside from some problems raised by the manner in which existing
cases were decided, and the problems inherently involved in a decision
between competing claims for equality, some additional considerations
merit discussion.

Many affirmative action schemes assume disadvantage exists in the
case of each member of the preferred group to which the disadvantage
appears to apply generally.\(^2\) Preferential treatment, in whatever form
it takes, may sometimes be determined by virtue of membership in
the group rather than by individualized determination. Efficiency may
be served by this blanket treatment, but such procedure is uncomfort-
ably reminiscent of the kind of racially based generalizations that have
been traditionally condemned by opponents of racial discrimination.\(^3\)

82. The situation in Defunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), provides
a good example. The dissenters took note of this point, 507 P.2d at 1192.
83. See Justice White's majority opinion in Stanley v. Illinois, 405 U.S. 645 (1972), an
equal protection case, where he said:

Procedure by presumption is always cheaper and easier than individualized determi-
nation. But when, as here, the procedure forecloses the determinative issues of com-
tentence and care, when it explicitly disdains present realities in deference to past formal-
ities, it needlessly risks running roughshod over important interests of both parent and
child. It therefore cannot stand.

Indeed, one might fairly say of the Bill of Rights in general, and the due process
clause in particular, that they were designed to protect the fragile values of a vulner-
able citizenry from the overbearing concern for efficiency and efficacy which may char-
acterize praiseworthy government officials no less, and perhaps more, than mediocre
ones.

Id. at 656.
It can be argued that allowing racial qualifications to mandate preferential treatment is fundamentally unfair, as well as a denial of equal protection. In the *Defunis* context, for example, it would seem fundamentally unfair to grant admission preference to the child of economically able or even wealthy minority parents while denying this advantage to the child of low income white parents. Yet the procedure followed in *Defunis* could result in precisely this situation and was upheld. One suspects that wealth or some other economically measurable factor would be much less offensive than racial criteria while still producing a significant impact in terms of minority admissions.

When preferential treatment is upheld as a valid means of rectifying the effects of past discrimination an additional (though presently academic) question arises as to how long the preferred treatment is to be available, *i.e.*, when will the compelling interest cease to be so compelling. Supporters of affirmative action—by virtue of their support—must concede that to some degree the desired results will be achieved. What remains is the rather speculative question of when, and by what measure, the injustice being redressed will be deemed to have been sufficiently compensated.

One potentially serious by-product of a decision clearly upholding preferential treatment is the effect on the popular conception of the law. Outside of some of the more celebrated rights of the accused, and the first amendment, the command of equality before the law is one of the relatively few protections which can claim a high profile. To a layman the issue may seem simply drawn; a decision upholding inverse discrimination seems strangely out of place in a society which has given a great deal of attention and affirmation to the notion that individual merit should control educational and economic opportunities.

The problem runs directly to the moral authority of the courts, and while one cannot expect open insurrection, it will be very difficult to explain why one group should be afforded greater legal protection than another on the basis of race. If ethnic considerations are wrong working one way (the argument will maintain), they are wrong working the other way. It is unlikely that talk of compelling state interests or higher constitutional priorities will have much effect on the cynicism which might be encouraged. A public that can relegate the fourth amendment to status as a "technicality" will quite likely not find solace in the contortions of a court struggling with our conflicting claims.
There is some security to be found in holding to a purist’s view of the equality guarantee, i.e., to adhere to the idea that the constitution should be color-blind. When the courts move to justify a denial of the letter of equal protection as a necessary incident to the affirmation of its spirit they step into potentially dangerous territory.84 If the letter of the fourteenth amendment can be dismissed by virtue of countervailing considerations in one area, why, for example, should the courts maintain a rigid, mathematical application in the area of reapportionment? It is likewise possible that the traditionally harsh view courts have taken on racial classifications challenged by minority claimants may suffer some modification. Overt classifications have almost never overcome the burden of demonstrating a compelling state interest, and our problem would constitute a rare and major exception to this marked trend. At least some basis for more lenient scrutiny would be available should courts become disposed to avail themselves of it.

There is little doubt that lower court precedent supports most forms of affirmative action. There is also little doubt that a credible compelling interest can be proposed in support of preferences. Yet one not a partisan may feel disturbed by something in the very nature of the problem itself. Perhaps George Orwell puts us on the problem in Animal Farm when he has the dictatorial rulers of the barnyard erect a sign reading “All animals are equal—but some animals are more equal than others.” Given an equal plane of scrutiny as to the sufficiency of justification, and an identical mode of discrimination, reaching different conclusions because of the particular ethnic characteristics of claimants seems fundamentally inconsistent—and the proposition that inconsistent treatment based on racial criteria is in some sense unfair seems to be the basic thrust of the equal protection guarantee. There is always likely to be a residual uneasiness when the word “equal”

84. See Graglia, Special Admission of the “Culturally Deprived” to Law School, 119 U. Pa. L. Rev. 351 (1970), where the author says:
Discrimination in favor of some racial or ethnic groups necessarily is or appears to be discrimination against others. Perhaps discrimination in favor of a minority can be distinguished from discrimination against a minority, but America consists of minorities and I fear claims that could be made or conditions justified if this distinction should be generally accepted. True and complete elimination of racial discrimination is as close as I had hoped to see the approach of the millenium.
Societally approved racial discrimination, even as a temporary expedient to rectify past racial discrimination, dilutes the purity of that goal and undermines our most basic ideal that individual merit and individual need should be the only relevant considerations for societally distributed rewards and benefits.
Id. at 352.
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is interpreted to mean something other than what the plain meaning implies. Yet this is what precedent and a compelling interest analysis may require of the Court. Perhaps this is good cause to be happy that, at least in this instance, the job of judging belongs to someone else.

Richard William Perhacs

Author's Note: On April 23, 1974, in a per curiam opinion, the Supreme Court decided not to decide the constitutional issue in Defunis v. Odegaard (42 U.S.L.W. 4578). The Court avoided the question by noting that Defunis' imminent graduation from law school rendered his appeal moot. Justices Brennan, Douglas, Marshall and White dissented convincingly on the mootness determination and Justice Douglas, in a separate dissenting opinion, volunteered his observations on the merits of the case. The opinion of Justice Douglas (42 U.S.L.W. at 4580) seems to reflect the difficult nature of the question, and probably provides insight into the majority's decision to escape—for the time being—from the equal protection dilemma posed by Defunis.

R.W.P.