

## DEFUNIS, DEFUNCT

*Jim Chen\**

November 1998 marks the twenty-fifth anniversary of the Supreme Court's initial decision to accept a case presenting the question of race-conscious university admissions. This silver jubilee merits three cheers<sup>1</sup> for *DeFunis v. Odegaard*<sup>2</sup>—and a moment of silence upon its passing. Call it three ovations and a funeral.

Marco DeFunis, Jr., was initially denied admission to the 1974 class of the University of Washington Law School. Like many other law schools, Washington gave presumptive weight to an index based on undergraduate grades and LSAT scores.<sup>3</sup> The school's admissions procedures provided, however, that "all files of 'minority' applicants"—defined as "Black Americans, Chicano Americans, American Indians and Philippine Americans," but not other Asian Americans—be "considered by the full [admissions] committee" without regard to an individual applicant's grades or scores.<sup>4</sup> Upon finding that the minority admissions program resulted in the admission of students less qualified than DeFunis, the King County Superior Court ordered his admission to the class entering in September 1971.<sup>5</sup>

The Supreme Court of Washington reversed. It held, first, "that the consideration of race as a factor in the admissions policy of a state law school is not a *per se* violation of the equal protection clause."<sup>6</sup> Rejecting the argument

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1. That's one more cheer for *DeFunis* than the Chief Justice who oversaw the decision. See Daniel A. Farber, *Two Cheers for Warren Burger*, 4 Const. Comm. 1 (1987).

2. 414 U.S. 1038 (1973), granting cert. to 507 P.2d 1169 (1973).

3. *DeFunis v. Odegaard*, 507 P.2d 1169, 1173 (Wash. 1973) (footnote omitted), vacated, 416 U.S. 312 (1974).

4. *Id.* at 1174.

5. See *id.* at 1176-77.

6. *Id.* at 1181.

that the racial classification at work "should be considered 'benign,'" the court required "the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest."<sup>7</sup> In the end, however, the court upheld the minority admissions program, fearing that a contrary decision might "perpetuate[] indefinitely" the law school's state of "minority underrepresentation."<sup>8</sup>

The Supreme Court granted certiorari on November 19, 1973.<sup>9</sup> The threat to educational affirmative action was palpable. According to one journalistic account, "all nine Justices leaned [initially] toward holding that . . . fixed racial quotas" in university admissions "were unconstitutional."<sup>10</sup> Even Justice Marshall feared that "uphold[ing] [a] fixed quota for minorities might create an unfortunate precedent which could be used eventually to exclude minorities."<sup>11</sup> Another account reports that the Justices were deeply divided and that Justice Brennan had amassed four votes to permit some consideration of race in university admissions.<sup>12</sup> A showdown over affirmative action seemed unavoidable; neither the parties' briefs nor those of twenty-six sets of *amici* identified a serious jurisdictional defect in the case.<sup>13</sup>

The Court eventually decided the case on mootness grounds. DeFunis had all but finished his studies, and the law school asserted that not even an adverse decision would prevent his graduation.<sup>14</sup> What had begun as a debate among the Justices on the merits of affirmative action turned into a jurisdictional battle.<sup>15</sup> The original and the "strongest" proponent "of the mootness approach,"<sup>16</sup> Justice Stewart "offered to write a *per curiam* declaring the

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7. *Id.* at 1182.

8. *Id.* at 1184.

9. See *DeFunis v. Odegaard*, 414 U.S. 1038 (1973), granting cert. to 507 P.2d 1169 (Wash. 1973).

10. Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* 282 (Simon and Schuster, 1979).

11. *Id.*

12. See Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court* 33 (New York U. Press, 1988).

13. See Louis H. Pollack, *DeFunis Non Est Disputandum*, 75 Colum. L. Rev. 495, 498 (1975).

14. See *DeFunis v. Odegaard*, 416 U.S. 312, 317-19 (1974).

15. See Schwartz, *Behind Bakke* at 33 (cited in note 12).

16. *Id.*

case moot.”<sup>17</sup> As President Nixon’s four appointees—the Chief Justice and Justices Blackmun, Powell, and Rehnquist—acquiesced in this compromise, “[e]ven the liberals breathed a sigh of relief that the case was gone.”<sup>18</sup> (Relieved though they might have been, the liberals took pains to protest the mootness decision.)<sup>19</sup>

On April 23, 1974, the Court vacated the judgment below and remanded the case to the state supreme court.<sup>20</sup> On remand a fractured Washington Supreme Court denied DeFunis’s motion to designate the case a class action<sup>21</sup> and instead reinstated its original judgment.<sup>22</sup> A few interested observers took quiet pleasure in how the case ended not with a bang but a whimper.<sup>23</sup>

A mere four years later, the *Bakke* decision<sup>24</sup> fulfilled the *DeFunis* dissenters’ prediction that educational affirmative action would “inevitably return” to the Court.<sup>25</sup> Whereas *DeFunis* had allowed an aggrieved white student to graduate without addressing the merits of affirmative action, *Bakke* approved race-conscious admissions in the name of “diversity” even as it ordered its plaintiff admitted to his chosen university. Although the Court has never revisited the question of affirmative action in a university setting,<sup>26</sup> an entire generation of legal commentators has devoted more attention to *Bakke* than perhaps any other Supreme Court decision.<sup>27</sup>

17. Woodward and Armstrong, *The Brethren* at 282 (cited in note 10).

18. *Id.*

19. See *DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting); *id.* at 348 (Brennan, J., joined by Douglas, White & Marshall, JJ., dissenting).

20. See *id.* at 320 (*per curiam*).

21. See *DeFunis v. Odegaard*, 529 P.2d 438, 441-42 (Wash. 1974); cf. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980) (“[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff’s substantive claim, even though class certification has been denied.”); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (“[A] controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.”).

22. See *DeFunis*, 529 P.2d at 444-45.

23. See Pollak, 75 Colum. L. Rev. at 495 (cited in note 13).

24. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

25. *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting).

26. See, e.g., *Texas v. Hopwood*, 518 U.S. 1033 (1996), denying cert. to 78 F.3d 932 (5th Cir. 1996); *Kirwan v. Podberesky*, 514 U.S. 1128 (1995), denying cert. to 38 F.3d 147 (4th Cir. 1994); cf. Akhil Reed Amar and Neal Kumar Katyal, *Bakke’s Fate*, 43 U.C.L.A. L. Rev. 1745, 1746 (1996) (“[T]he . . . Court has said a lot about contracting and rather little about education.”).

27. See, e.g., Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory*

Over the past two decades, *DeFunis* has gotten lost in the constitutional cascade that followed *Bakke*. Legal scholars have obsessed over the affirmative action guidelines outlined in *Bakke* and ignored the Court's close call in *DeFunis*. Such are the perils of an academic tradition that favors grand theory over less glamorous questions of practice, procedure, and pragmatic consequences.<sup>28</sup> Then again, to the extent that *Bakke* is "the Kama Sutra of educational affirmative action,"<sup>29</sup> why would—or *should*—scholars waste any time on the relatively pedestrian decision in *DeFunis*? Understandable though the preference for *Bakke* over *DeFunis* might be, it has blinded us to three noteworthy aspects of the *DeFunis* decision. A single word expresses each of these: mootness, *Realpolitik*, and honesty.

Although *DeFunis* is regarded as a paragon of the passive virtues,<sup>30</sup> the sheer complexity of its relationship with mootness doctrine prevents us from treating it as a clear triumph of jurisdiction over substance. With the passage of time, *DeFunis* has taken its place in mootness doctrine as a case of relatively modest stature. The Court conceded that the law school's "voluntary cessation of [its] admissions procedures"<sup>31</sup> would not moot the case, a position well grounded in prior and later cases.<sup>32</sup> *DeFunis* does appear, especially when viewed in conjunction with a 1973 case raising issues of mootness,<sup>33</sup> to have represented a transi-

and *Affirmative Action's Destiny*, 59 Ohio St. L.J. 811, 906 (1998) ("What a colossal waste this fixation has been"); Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 Wm. & Mary L. Rev. 147, 159-60 (1994) (describing the act of reading legal scholarship on affirmative action as "a depressing experience").

28. Cf. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 Chi. Kent L. Rev. 953, 958 (1997) (noting that scholarship in administrative law, which is increasingly concerned with questions of "how best to regulate," looks "less like *legal* scholarship" (emphasis in original)).

29. Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. Colo. L. Rev. 1123, 1127 (1997).

30. See, e.g., Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 512-13 (1975); Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907, 911-16 (1983) (arguing that the Court intentionally avoided deciding *DeFunis* on its merits in order to shield affirmative action programs from direct attack); cf. Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 45 (Addison-Wesley, 1990) (using *DeFunis* to describe mootness doctrine and to locate the doctrine's role in "Burger Court jurisprudence"). See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 115-98 (Bobbs-Merrill, 1962).

31. *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).

32. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 487 (1980); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

33. Compare *DeFunis*, 416 U.S. at 318-19 (declining to treat the question raised by

tion in the Court's thinking on cases "capable of repetition, yet evading review." Earlier cases waived mootness objections whenever the defendant's alleged misconduct might harm any member of the public.<sup>34</sup> Later cases insisted, in accordance with *DeFunis* and *Roe v. Wade*,<sup>35</sup> that the recurring injury befall the plaintiff.<sup>36</sup> Finally, the Court's chosen remedy in *DeFunis*—a decision to vacate and to remand for further proceedings in state court<sup>37</sup>—has since fallen out of favor. The Court now prefers to dismiss cases that become moot while on review from a state court, thereby preserving the underlying state court judgment.<sup>38</sup> This outcome in *DeFunis*, which was open to the Justices, might have transmitted a different message to the public.

In an age in which defensive settlement of a dreaded Supreme Court case has become a leading civil rights strategy,<sup>39</sup> *DeFunis* aptly symbolizes the subtle subversiveness of the passive virtues. This much remains constant: the passive virtues of judicial avoidance cannot forever forestall the aggressive vices of academic debate. Like *Naim v. Naim*<sup>40</sup> before it, *DeFunis* could delay but not defuse an explosive racial controversy.<sup>41</sup> Even if *Bakke* had never come along, *DeFunis* had already sparked the powder keg. No matter what the Justices would do later, *DeFunis* put affirmative action on the docket in the court of legal commentary. Nothing, after all, stops professors from writing

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*DeFunis* as one "capable of repetition, yet evading review") (quoting *Southern Pacific Terminal v. ICC*, 219 U.S. 498, 515 (1911)) with *Roe v. Wade*, 410 U.S. 113, 125 (1973) (applying this exception to mootness doctrine in order to review a challenge to a statute banning abortion). See also Schwartz, *Behind Bakke* at 33 (cited in note 12) (reporting that Justice Stewart distinguished *DeFunis* from *Roe* on mootness grounds during the Justices' conference on *DeFunis*). See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).

34. See, e.g., *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

35. 410 U.S. 113 (1973).

36. See *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-57 (1976); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

37. See 416 U.S. at 320.

38. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989).

39. See *Piscataway Bd. of Educ. v. Taxman*, 118 S. Ct. 595 (1997), vacating as moot *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996).

40. 350 U.S. 985 (1956).

41. See Jim Chen, *Diversity and Damnation*, 43 U.C.L.A. L. Rev. 1839, 1855 (1996) ("Just as the Court ducked the miscegenation issue in *Naim v. Naim*, it evaded the question of preferential university admissions in *DeFunis v. Odegaard*." (footnotes omitted)). The Court, of course, invalidated laws against interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967).

about a topic that the Supreme Court has chosen to duck. The case attracted two preeminent legal scholars, John Hart Ely<sup>42</sup> and Richard A. Posner,<sup>43</sup> whose reactions to *DeFunis* arguably exhausted all available arguments in the affirmative action debate before it began. There was a time, remote though it may seem now, when *DeFunis* alone fueled the affirmative action debate.<sup>44</sup> It is true that many a scholar “desperate for a topic for a tenure piece”<sup>45</sup>—or even a topic for a job talk—has fallen into the trap of writing on affirmative action. Mere repetition, however, expunges none of the lethal qualities of a siren song. No one should write on educational affirmative action who cannot first demonstrate that he or she can augment the arguments adduced so long ago by Ely and Posner.<sup>46</sup>

The fourth Justice among *DeFunis*’s dissenters gives us a second reason to laud the case. Ely and Posner did not stand alone in reaching the merits underlying *DeFunis*; Justice Douglas joined them. He succinctly articulated what has become the standard attack on educational affirmative action: an applicant for admission to a public university has “a constitutional right to have his application considered on its individual merits in a racially neutral manner.”<sup>47</sup>

Progressives today often condemn Justice Douglas’s *DeFunis* dissent as an “angry” and “vehement” attack on affirmative action.<sup>48</sup> But these critics rarely acknowledge the depth of Justice Douglas’s ambivalence about the subject. During the conference on *DeFunis*, Justice Douglas’s “typically maverick view[s]” emerged; in one breath he criticized both race-conscious admissions and the use of

42. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974).

43. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. Ct. Rev. 1.

44. See generally Robert M. O’Neil, *Discriminating Against Discrimination: Preferential Admissions and the DeFunis Case* (Indiana U. Press, 1975); Ivor Kraft, *DeFunis v. Odegaard: Race, Merit, and the Fourteenth Amendment* (Uncommon Lawyers Workshop, 1976); *DeFunis Symposium*, 75 Colum. L. Rev. 483 (1975).

45. Daniel A. Farber, *Gresham’s Law of Legal Scholarship*, 3 Const. Comm. 307, 309 n.9 (1986).

46. As with all other articles “present[ing] . . . a meta-theory about [legal] scholarship,” this “Article’s thesis . . . does not apply to itself.” Daniel A. Farber, *The Case Against Brilliance*, 70 Minn. L. Rev. 917, 930 n.56 (1986).

47. *DeFunis*, 416 U.S. at 337 (Douglas, J., dissenting).

48. E.g., Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. Legal Educ. 103, 109 n.35 (1992).

standardized tests.<sup>49</sup> Before the Court settled on its mootness resolution, he evidently “circulated an opinion ruling out affirmative action, withdrew it the next day, and then substituted a draft saying that race could be taken into account.”<sup>50</sup> In the opinion he actually published, Justice Douglas advocated considerable “leeway” for admissions officers who rendered “educational decision[s]” according to “proper guidelines.”<sup>51</sup> He thus foreshadowed the “plus factor” approach that would eventually prevail in *Bakke*,<sup>52</sup> without succumbing to the fiction that a putatively flexible preference policy would operate any differently than quotas.<sup>53</sup> His proposals to abolish the LSAT<sup>54</sup> and to administer direct tests of an applicant’s propensity to work in underserved communities<sup>55</sup> resonate with many contemporary proposals for reform.<sup>56</sup> Like President Clinton after him, Justice Douglas ultimately decided to try mending affirmative action without ending it.<sup>57</sup>

A decade before *DeFunis*, Justice Douglas had signaled his hostility to race-conscious measures in a voting

49. Schwartz, *Behind Bakke* at 33 (cited in note 12).

50. Woodward and Armstrong, *The Brethren* at 282 (cited in note 10).

51. *DeFunis*, 416 U.S. at 344 (Douglas, J., dissenting).

52. See *id.* at 340-41 (“There is . . . no bar to considering an individual’s prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful . . . career.”); cf. Larry M. Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards*, 27 Wayne L. Rev. 1, 7 (1980) (describing Justice Powell’s opinion in *Bakke* as “reminiscent of the Douglas dissent in *DeFunis*”).

53. See *DeFunis*, 416 U.S. at 332-33 (Douglas, J., dissenting); Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 560-61 (1975); cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 379 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that there is no material difference between a fixed quota and a “plus factor” approach, except that the fixed quota is more obvious and honest).

54. See *DeFunis*, 416 U.S. at 340 (Douglas, J., dissenting).

55. See *id.* at 341.

56. Cf. Larry M. Lavinsky, *DeFunis v. Odegaard: The “Non-Decision” with a Message*, 75 Colum. L. Rev. 520, 533 (1975) (“Justice Douglas has sought to shift the focus of the selection process from racial preference and quotas towards one in which the educationally, culturally and economically disadvantaged, no less than other applicants, are afforded an opportunity for admission commensurate with their ability and potential.”); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 Rutgers L. Rev. 1089, 1115 (1993) (“Justice Douglas’s *DeFunis* opinion appears to be the genesis of the concept of basing affirmative action on socio-economic factors, rather than race.”). See generally Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (BasicBooks, 1996) (proposing class-based affirmative action as a substitute for the race-based variant).

57. See *DeFunis*, 416 U.S. at 344 (Douglas, J., dissenting) (“I cannot conclude that the admissions procedure of the Law School of the University of Washington . . . is violative of the Equal Protection Clause of the Fourteenth Amendment.”).

rights case made obscure by the passage of time. Justice Douglas's dissent in *Wright v. Rockefeller*<sup>58</sup> posited that "government has no business designing electoral districts along racial . . . lines" under any circumstances.<sup>59</sup> He anticipated and squarely rejected the "benign intent" argument invoked in later affirmative action cases.<sup>60</sup> He surely would have mocked the "separate but better off" theory that motivates minority student housing and other racially exclusive measures in many universities today.<sup>61</sup> The seeds that Justice Douglas planted in *Wright* would bloom three decades later in the astonishing flurry of voting rights decisions beginning with *Shaw v. Reno*.<sup>62</sup> Quite significantly, Justice Goldberg joined Justice Douglas in *Wright*<sup>63</sup> and wrote a separate dissent that Justice Douglas joined in turn.<sup>64</sup> In this alliance between two of the Warren Court's leading liberals lurked the kernel of two divisive debates—affirmative action and race-conscious redistricting—that would eventually split the heirs of the civil rights movement<sup>65</sup> and the Democratic Party.<sup>66</sup> Scholars are only beginning to realize the true instability of the disparate racial, gender-based, and economic components of the modern progressive coalition.<sup>67</sup>

We ought not be surprised that *DeFunis*, *Wright*, and attitudes about official race-consciousness have all come full circle during the span of a single human generation. Twenty-five years is a relatively long time for the Supreme Court to complete a constitutional hiccup. *Hammer v. Dagenhart*,<sup>68</sup> *Wolf v. Colorado*,<sup>69</sup> and *National League of*

58. 376 U.S. 52 (1964).

59. *Id.* at 66 (Douglas, J., dissenting).

60. Compare *id.* at 61 ("Racial segregation that is state-sponsored should be nullified *whatever may have been intended.*" (emphasis added)) with *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (subjecting "benign race-conscious measures mandated by Congress" to intermediate rather than strict judicial scrutiny).

61. See *Wright*, 376 U.S. at 62 (Douglas, J., dissenting).

62. 509 U.S. 630 (1993); see also, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Holder v. Hall*, 512 U.S. 874 (1994); *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

63. See *Wright*, 376 U.S. at 59 (Douglas, J., dissenting).

64. See *id.* at 67 (Goldberg, J., dissenting).

65. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1327-28 (1986).

66. See Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 Cal. L. Rev. 893, 897-98 (1994).

67. See, e.g., Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 Ohio St. L.J. 731 (1997).

68. 247 U.S. 251 (1918), overruled, *United States v. Darby*, 312 U.S. 100 (1941).

*Cities v. Uesery*<sup>70</sup> all retreated into bad legal memory in less time. *Metro Broadcasting*, the most aggressive of the Court's affirmative action decisions, died after a mere five years.<sup>71</sup> If indeed "[o]ur Constitution is a covenant running from" generation to generation, "[e]ach generation must [reject] anew . . . ideas and aspirations" not fit to "survive more ages than one."<sup>72</sup>

Honesty, a rare commodity in the affirmative action debate,<sup>73</sup> is the third and final reason to revere *DeFunis*. The University of Washington confessed at oral argument that none of the students who benefited from its law school's minority admissions program "would have been admitted" had their applications been "considered under the same procedure as was generally used."<sup>74</sup> For much of the next quarter century, universities would abandon the candor that characterized the University of Washington's defense in *DeFunis*. Georgetown University swiftly punished a student who had the audacity to report the truth about its law school admissions office.<sup>75</sup> Violent debates turn on the extent to which racial considerations affect admissions decisions.<sup>76</sup> Only slowly has the American academic establishment come to confess its dependence on affirmative action in ensuring more than token numbers of black, Hispanic, and American Indian students.<sup>77</sup>

The academy's addiction to affirmative action may be coming to an abrupt end. On November 3, 1998, nearly a

69. 338 U.S. 25 (1949), overruled, *Mapp v. Ohio*, 367 U.S. 643 (1961).

70. 426 U.S. 833 (1976), overruled, *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

71. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)); cf. Neil Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 *Tex. L. Rev.* 125, 128 (1990) (predicting accurately that *Metro Broadcasting* was the most doctrinally unstable of the Supreme Court's affirmative action decisions).

72. *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992).

73. See Farber, 82 *Cal. L. Rev.* at 933 (cited in note 66).

74. *DeFunis*, 416 U.S. at 325 (Douglas, J., dissenting).

75. See Michel Marriott, *White Accuses Georgetown Law School of Bias in Admitting Blacks*, *N.Y. Times* A13 (Apr. 15, 1991).

76. Compare Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 *N.Y.U. L. Rev.* 1 (1997) with Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education"*, 15 *Const. Comm.* 11 (1998).

77. See William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton U. Press, 1998).

quarter century after the grant of certiorari in *DeFunis*, Washington voters approved Initiative 200, a referendum barring race- and sex-based preferences in the public sector. In response to the passage of I-200, the University of Washington has suspended the use of race and ethnicity in admissions. The university has also confessed that 88 of the 373 black, Hispanic, and American Indian students in its current freshman class would not have been admitted under a race-blind admissions system.<sup>78</sup> In issuing "more complete published standards for admission," the University of Washington has finally fulfilled the wishes expressed by several sympathetic state judges so many years ago.<sup>79</sup>

And so the sun sets on affirmative action at the University of Washington, almost twenty-five years to the day after the Supreme Court decided to review the practice. The passage of Initiative 200, especially when viewed in conjunction with the passage of California Initiative 209,<sup>80</sup> repeats the three salient themes of *DeFunis*: mootness (albeit in an informal rather than doctrinal sense), conflict between the legal theory and the political reality of official race-consciousness, and cold, hard honesty. In death as in its brief life, *DeFunis* merits a tribute befitting an unsung hero.

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78. See Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. Times A25 (Nov. 10, 1998).

79. *DeFunis v. Odegaard*, 507 P.2d 1169, 1189 (Wash. 1973) (Wright, J., joined by Finley & Stafford, JJ., concurring), vacated, 416 U.S. 312 (1974).

80. See generally *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 U.C.L.A. L. Rev. 1335 (1997). Unlike California Initiative 209, Washington Initiative 200 carries the legal weight of a statute rather than that of an amendment to the state constitution. Lacking the status of fundamental law, Initiative 200 must be construed *in pari materia* with other state laws. More important, perhaps, it is vulnerable to repeal by ordinary legislation.