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Affirmative Discrimination: Ethnic Inequality and Public Policy, by Nathan Glazer; Discriminating Against Discrimination: Preferential Admissions and the Defunis Case, by Robert M. O'Neil

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Book Review

AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY. By Nathan Glazer. New York, New York: Basic Books, Inc. 1975. Pp. 248.

DISCRIMINATING AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE DEFUNIS CASE. By Robert M. O'Neil. Bloomington, Indiana: Indiana University Press, 1975. Pp. 271.

Liberty and equality are persistent American themes, perhaps more loudly proclaimed in a bicentennial year, but always there, always believed in. If liberty seems ephemeral and difficult of definition, equality appears to offer bedrock certainty. Equal is equal. The square need not be circled.

Alas, equality is no more readily defined than liberty, or freedom, or social justice. If equality of opportunity was once the end objective, many believe it is no longer enough. Decades, even centuries of discrimination remain to be overcome. There must be, it is asserted, "affirmative action" to provide equality beyond opportunity, reaching instead for equality in fact.

The issue has touched America's raw nerve. Everyone professes opposition to discrimination; but the effort by some to combat discrimination is stigmatized by others as "reverse discrimination." Differing viewpoints erupt into a battle of slogans:

"The Constitution is color blind.": So said Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*[1] in 1896. In 1954, when the Supreme Court of the United States in *Brown v. Board of Education*[2] forbade segregation in public schools in the United States, the decision was applauded for adopting the "neutralist" view of race advanced by Mr. Justice Harlan. More recently, it has not been so clear that the demon of racial discrimination can be contained by "thou shalt nots." The Supreme Court conceded in 1971 that race might properly be taken into account for the beneficent purpose of correcting past discrimination. The case was *Swann v. Charlotte-Mecklenburg Board of Education.*[3] In 1976 Gerald Ford instructed Attorney General Levi to find an appropriate case in which to seek reconsideration of that decision.[4]

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[1]163 U.S. 537 (1896) (emphasis added).

[2]347 U.S. 483 (1954).

[3]402 U.S. 1 (1971).

[4]N. Y. Times, May 19, 1976, at 1, col. 4. Unfortunately, the President was not quite up on his cases or doctrines. At one time he called for the reconsideration of *Brown. Id.*, May 27,

"Forced school busing": Richard Nixon may have coined the phrase, but it has been embraced by all who oppose busing, whether politicians or scholars. The phrase subtly changes the issue from one of correcting discrimination to one of interfering with individual educational rights.

"Affirmative action": Originally intended as a favorable description of the effort to overcome the effects of past discrimination, the phrase has become a rallying point for opposition to the federal government's efforts to induce more active recruitment for the employment and promotion on the merits of women and minorities.

"Reverse discrimination": Those who oppose preferential admissions or any other affirmative action program seek to discredit such efforts by this term of opprobrium. Those who favor such programs argue that it is a misnomer to speak of "reverse discrimination" when the only purpose is to compensate for previous disadvantage.

"White flight": As the proportion of white children declines in most urban school systems, it is common to attribute the racial and ethnic shift to fear of school integration. While it is true that the shift in racial composition of schools is marked, no doubt caused by movement of white families to the suburbs, it is ironic to blame integration when the fact is that the white families have markedly greater mobility than blacks and other ethnic minorities who are bound by other forms of discrimination to stay behind in center cities.[5]

Few objections are now heard to the proposition that government should not discriminate; there is even considerable support for legislative restrictions on private acts of discrimination. But when ways are sought to *overcome* the effects of discrimination, past and present, the divisions become sharp. The liberal community, once solidly behind antidiscrimination judgments by the courts and strongly sympathetic to the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Housing Act of 1968, is sharply divided. Some favor pressing on to right past wrongs, even to the disadvantage of some who have not themselves discriminated, while others would do no more than lift the barriers of overt discrimination.

That shift in attitudes is evident in Robert O'Neil's *Discriminating Against Discrimination* and Nathan Glazer's *Affirmative Discrimination.* The liberal credentials of both authors are impeccable.[6] Both are deeply committed to ending discrimination based on race, religion, sex, or ethnic origins. Their approach to the watershed question of what to do about continuing inequality is, however, very different.

1976, at 24, col. 3. When the error was discovered, a correction was issued to indicate that he sought review of *Swann*, not *Brown*. *Id.*, May 28, 1976, at A11, col. 3.

[5]*See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976); Farley, School Integration and White Flight, in SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT (G. Orfield ed. 1975).

[6]Robert O'Neil, now Vice-President of the Bloomington Campus of Indiana University, is an attorney, former law professor, and former Chairman of the Council of Legal Education Opportunity (an organization devoted to assisting minority group students into law schools

Professor Glazer rejects the notion that color and group consciousness should be important determinants of public policy. While recognizing the desirability of enlarging minority group access to quality education, open housing, and employment opportunities, he would not have government (including courts) give special assistance or preference to any group. To do so, he contends, would be unjust to other racial or ethnic groups.

Vice-President O'Neil, however, insists that a helping hand is still necessary, at least temporarily, for those who have suffered most seriously the debilities of discrimination and who have correspondingly shown the least resilience. This, he contends, is a legitimate, indeed a necessary, role for government. He too invokes the principles of justice.

These two books make the most articulate case now available for their respective positions. Yet, oddly, there is little direct clash between them. Although there can be no mistaking the divergence between their clearly opposed contentions, the two authors have selected separate battle grounds. O'Neil limits himself to the topic of preferential admissions, now the nearly universal policy of colleges and universities in giving preference in one way or another to members of certain "disadvantaged" or "minority" groups who seek admission to institutions of higher education. The issue is not whether special recruitment efforts should be made to help correct the imbalance of blacks, Chicanos, Puerto Ricans, American Indians and others in colleges and universities. No one disputes the desirability of those efforts. But when a school adopts an admissions quota for any such group, or considers applications on a two-track basis, the argument is advanced that others, better qualified, are being wrongfully excluded. Where the school is state supported or even aided by public funds, the argument is made that the equal protection clause of the fourteenth amendment to the Constitution of the United States has been violated.

The Supreme Court of the United States marched up to the edge of decision of the issue in *DeFunis v. Odegaard*[7] which is the centerpiece of discussion in the O'Neil book. But the Supreme Court marched right back down the slope it found too slippery for decision. O'Neil demonstrates convincingly that the Court's five-to-four conclusion that the case was moot is not persuasive. Whatever damage the opinion may have done to the already poorly defined doctrine of mootness, we are probably fortunate that the Court left the issue open, permitting further reflection on this most difficult issue. We may assume that the Court found the question not so easy as it might have seemed when review was granted. And surely the Court must have perceived that the question of preferential admissions cannot be examined apart from affirmative action in employment, school busing, and housing, in each of which there is an established body of law

which might otherwise find their qualifications insufficient). Nathan Glazer, Professor of Education and Social Structure at Harvard University, is also co-editor of *The Public Interest.*

[7]416 U.S. 312 (1974).

that favors government intervention, taking race into account to serve purposes intended to be beneficent. O'Neil is probably correct in his speculation that the almost embarrassingly thin mootness argument may not have satisfied any member of the five-man majority, but was the only point on which all could agree as a temporary escape from the risk of premature decision.[8]

If O'Neil deals with an important but unshaped area of the law, Glazer undertakes the more difficult task of advancing views that run against the current of legislative and judicial determinations. Glazer does not deal directly with preferential admissions. But there is no mistaking what his view would be, just as O'Neil makes no secret of what his views would be on the matters central to Glazer's discussion.

Glazer develops his principal thesis from his perception of the major trends of American thought and political action, culminating in a consensus by the mid-1960's that involved three propositions:

> *First,* the entire world would be allowed to enter the United States. [At least since the 1950's.] The claim that some nations or races were to be favored in entry over others was, for a while, accepted, but it was eventually rejected. And once having entered into the United States - and whether that entry was by means of forced enslavement, free immigration, or conquest - all citizens would have equal rights. No group would be considered subordinate to another.
>
> *Second,* no separate ethnic group was to be allowed to establish an independent polity in the United States. This was to be a union of states and a nation of free individuals, not a nation of politically defined ethnic groups.
>
> *Third,* no group, however, would be required to give up its group character and distinctiveness as the price of full entry into the American society and polity.[9]

The strength of Mr. Glazer's argument is that he gives a scholarly imprimatur to the often inarticulate views of millions of white Americans that too much is being done for some racial and ethnic minority groups to the disadvantage of other ethnic groups not brought within the charmed circle of government protection. The areas that he selects for comment are employment, school busing, and housing.

In Chapter 2, *"Affirmative Action in Employment: From Equal Opportunity to Statistical Parity,"* the problem Mr. Glazer perceives is that the bureaucrats and the federal courts have sought to impose quotas for

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[8]R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION 40 (1975).

[9]N. GLAZER, AFFIRMATIVE DISCRIMINATION 5 (1975). Elsewhere he describes these three propositions as "a classic Hegelian series of thesis, antithesis, and synthesis. . . . For the three sets of decisions create an ambiguous status for any ethnic group. The combination of first, you may become full citizens; second, you may not establish a national entity; third, you may establish most of the elements of a national entity voluntarily without hindrance, does not create an easily definable status for the ethnic groups." *Id.* at 28.

hiring and promotion that go beyond the requirement of the Constitution, the intention of Congress, or the expressed will of the Chief Executive. He argues that American employers have been required to favor some groups at the expense of other groups and at the sacrifice of excellence. In short, "preferential hiring," in the judgment of Mr. Glazer, is likely to lead to "the creation of fixed ethnic-racial categories, the danger of freeing them, and the danger of their spreading."[10]

The purity of the "leave each racial and ethnic group to its own resources" argument is marred somewhat by his attempt to justify that status quo approach by the suggestion that the racial and ethnic groups aided by Title VII of the 1964 Civil Rights Act are doing all right economically. But all his statistics about closing the gap between black and white husband-wife families[11] fly in the face of common knowledge and widely disseminated census data about the continuing disadvantage suffered by blacks and certain ethnic groups.[12]

Mr. Glazer is strangely silent about women, who have litigated Title VII issues at least as vigorously as minority groups. Discrimination against women has been well documented; government and judicial assistance has been essential to righting the balance.

Moreover, despite a generally restrained tone of common sense, Mr. Glazer occasionally allows his feelings to come through. For example, when complaining about hiring preferences for blacks, he has this to say:

> If more blacks were given these jobs, perhaps less would be on the street, or drug addicts, or killing unoffending shopkeepers. It is one thing to be asked to fight discrimination against the competent, hard-working, and law-abiding; it is quite another to be asked to fight discrimination against the less competent or incompetent and criminally inclined.[13]

In Chapter 3, *"Affirmative Action in Education: The Issue of Busing,"* Mr. Glazer takes full aim at the federal courts, applauding the efforts of Congress and President to slow down the process. In arguing that the courts have misunderstood the Constitution, he slips into the simplistic view that judicial interpretation of the Constitution depends on the personal views of the Justices. For example, Mr. Glazer states:

> What the Court decides is constitutional is very much affected by what it thinks is good for the nation. If it thinks that the education of black children can only be improved in schools with black minorities, it will be very much inclined to see situations in which there are schools with black majorities as unconstitutional. If it thinks race relations can only be

[10] *Id.* at 73.

[11] *Id.* at 41-43.

[12] *See, e.g.,* N. Y. Times, Sept. 26, 1976, at 1, col. 4 (census figures for 1975 reveal an increase of 2,500,000 in the number of poor persons and a median income of black families that was only 62 per cent that of white families).

[13] GLAZER, *supra* note 9, at 67.

> improved if all children attend schools which are racially balanced, it will be inclined to find constitutional a requirement to have racial balance.[14]

It is scarcely necessary to observe that this is not what the Supreme Court has said. Nor is it surprising to learn that one who sees constitutional doctrine so malleable would argue that constitutional principles should be revised to accord to his views about ethnic freedom of choice. In his words:

> The judges should now stand back and allow the forces of political democracy in a pluralist society to do their proper work.[15]

In Chapter 4, *"Affirmative Action in Housing: Overcoming Residential Segregation,"* Mr. Glazer asserts that neither Congress nor the judiciary has done much to interfere with private choice of residential location, which is just where he would leave the matter. In his view, if blacks live in segregated ghettos in center cities, that may be a product of poverty, which is regrettable but factual; or it may be a product of preference, consistent with his beliefs about ethnic grouping. If government policy has contributed to de facto housing segregation, but without specific discriminatory intent, that also may be regrettable, but should not be subject to legislative or judicial intervention. In what must have been an unguarded moment Mr. Glazer argues that "the large, depressed section of the black population" is a "problem" that makes "the central city dangerous and unpleasant, and, to many, immoral to boot. . . ."[16] Therefore, he concludes

> I do not see how we can expect anything but resistance - from black and white - to the overruling of local governmental powers in order to open up the suburbs.[17]

Probably he is right in predicting resistance by the favored against opening up opportunities for the disfavored. But what else is government for but to protect the weak against the strong? This is not even a case of equality of condition against which Mr. Glazer inveighs, but a simple case of equality of opportunity.

Mr. Glazer's arguments have powerful appeal to those who feel threatened by governmental efforts to open up opportunities for the disadvantaged and to even out disparities in employment, education and housing. Until the objections he raises are convincingly answered, it will be difficult to move forward, with anything like a consensus in favor of government intervention to affect the status quo.

The appeal of *Discriminating Against Discrimination* is that Mr.

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[14]*Id.* at 94.
[15]*Id.* at 129.
[16]*Id.* at 167.
[17]*Id.*

O'Neil seeks, through education, to assist individual minority group members to join the mainstream establishment and thus to strengthen the establishment itself. The importance and timeliness of the book lie in the fact that the issue addressed, although crucial to the forward movement of American higher education, cannot be given a clear answer in terms of constitutional doctrine. We know Mr. Glazer's answer: Do nothing to discriminate, and do nothing to prefer. But it is not clear that the constitutional command will reject what has become common practice in American higher education, searching for new ways to broaden the base of the educational constituency. Mr. O'Neil reminds us of an especially significant aspect of the tests used as part of the admissions process:

> Even if traditional entrance and admissions criteria are not *discriminatory* (that is, biased in content), there is little question they are *exclusionary* to minority groups.[18]

In a way Mr. O'Neil's objective is not very different from the goals of Mr. Glazer. If we are to have a pluralistic society, in which all racial and ethnic groups participate fully, it is necessary to be educationally creative. Proof is ample that vigorous recruitment is not enough—at least not yet and probably not for some time to come. Without the various forms of preference that have been tried since the mid-sixties, it is well understood that the medical schools, the law schools, other professional schools, and at least the selective colleges and universities would have been nearly all white. If all those forms of preferences are made impossible of future implementation, those schools will again become white enclaves.

To act in reliance on some principle of objective excellence, when we know so little about testing, is to deprive our schools and the public of pluralistically diverse elements among the educated members of our society. To deny full participation to important segments of America is to invite racial separation and even conflict. Accordingly, the search must continue for ways to surmount what is concededly a dilemma of constitutional as well as educational dimension.

Options continue to narrow as courts disapprove various preferential programs that smack more of quota than of deliberate election of cultural diversity.[19] Mr. O'Neil's book provides a welcome opportunity to examine both sides of a complex social/constitutional issue. While he fairly presents the pros and cons, there can be no question that he finds more persuasive the arguments in favor of some kind of preferential admissions program.

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[18]O'NEIL, *supra* note 8, at 106 (emphasis in original).

[19]*See, e.g.*, Bakke v. Regents of the University of California, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 45 U.S.L.W. 3553 (U.S. Feb. 22, 1977) (No. 76-811); Hupart v. Board of Higher Education, 420 F. Supp. 1087 (S.D.N.Y. 1976). *But cf.* Alevy v. Downstate Medical Center, 39 N.Y. 2d 326, 384 N.Y.S. 2d 82 (1976).

Nor can there by any doubt that those are also the sentiments of the reviewer of these two excellent books.

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