IUSTITIA

Volume 3 | Number 2 Article 6

10-15-1975

# Robert M. O'Neil's Discriminating against Discrimination: A Review

Karen Ruse Strueh
*Indiana University School of Law*, kstrueh@sbcglobal.net

# Robert M. O'Neil's *Discriminating against Discrimination:* A Review

KAREN RUSE STRUEH

It is difficult these days to find anyone who will deny that racial minorities have been discriminated against in the area of educational opportunities. Few will deny the desirability of enhancing these opportunities and increasing the number of minority persons in the various professions. But very few will agree on the means that are appropriate to accomplish this desirable end. Robert O'Neil has tackled the awesome task of pinpointing and evaluating the policy considerations that affect the tough choices involved in formulating standards for admissions to professional school programs that will promote academic quality but at the same time allow entrance to larger numbers of minority students. And he admirably comes to a conclusion—that preferential admission policies are the only effective alternative we have today.

When I was an undergraduate in the mid to late sixties, few people questioned how the increasing numbers of minority students came to be in college. We were only happy to see them there at all. But in the last few years the numbers of students seeking admission to graduate programs, and particularly law schools, has soared to the point where increased competition means that many students who ten years ago would easily have been admitted to the school of their choice now are lucky to get in anywhere. When Marco DeFunis found himself in that position in 1971, he sued the University of Washington Law School for admission and very quicky became the center of a storm of national controversy over the constitutionality of "reverse discrimination"—*i.e.*, discrimination in favor of minority groups rather than against them.

O'Neil uses the DeFunis case as the background for his discussion of preferential admission standards in higher education despite his recognition of the ironies involved in that case. For the original basis for the lawsuit had nothing at all to do with minority admission policies. DeFunis alleged only that many students had been admitted with qualifications (based on grades and standardized test scores) much lower than his, and that as a resident of the state of Washington *he* was entitled to preferential admission. At the trial court level, the law school's practices

regarding minority applicants became known and it was clear that many of the students admitted with lower qualifications had been given preference because of their racial backgrounds. Despite the fact that many other students with higher qualifications than DeFunis had also not been admitted, the university was ordered to admit him on the grounds that he had unfairly been denied admittance because of his race.

By the time DeFunis's case reached the state supreme court, it had attracted national attention, and briefs *amicus curiae* were filed by numerous national civil rights and labor organizations, as well as legal and educational institutions. O'Neil notes that the alignment of these groups on either side of the dispute was unpredictable. Many groups which had been in the forefront of the fight against racial discrimination stood opposed to the type of beneficial discrimination involved. As O'Neil puts it,

> The case was either very simple or very hard--one could say either that the constitution was color blind and forbade all racial classification, or one could try to differentiate subtly between classifications that hurt and those that helped minorities. (p. 15)

There was extremely little precedent from prior court decisions for the court to use as guidance, but the implications of the case as a precedent for the future were enormous, in the area of employment as well as education.

The author's review of how the constitutional requirement of equal protection under the law has been interpreted and applied is very illuminating. In chapter four he discusses the three standards which might be applied to the university's use of racial classification in determining whether to admit a particular student.

*The per se test: all racial classifications are invalid.* Much has been made of Mr. Justice Harlan's dissenting statement in *Plessy v. Ferguson*—the famous 1896 "separate but equal" school segregation case—that "our constitution is color-blind, and neither knows nor tolerates classes among citizens." This was the standard applied by the trial court in holding that discrimination in favor of as well as against racial groups violates the constitutional guarantee of equal protection. However, the Supreme Court in the past has resisted the temptation to apply this relatively simple test in the area of racial classifications.

*The rational basis test.* At the other extreme, the Supreme Court has frequently upheld classifications which discriminate between groups of citizens on proof of no more than some plausible governmental interest served by a classification which has some rational basis. This is particularly true in the area of economic regulation. The Court has imposed harsher standards only when the classification is "invidious" or affects the exercise of some "fundamental" human interest such as the right to vote (but not including that to an education). While racial classifications are generally considered "invidious", it is argued that when the purpose is to aid minorities, the lenient rational basis test is appropriate.

*The compelling state interest test.* This third possibility is the one usually applied when fundamental interests or invidious classifications are involved. It places a heavy burden on the state or body making the classification to show that its consideration of race is necessary to accomplish a compelling state interest. What

type of interest is compelling enough to meet this test is unknown, since as O'Neil points out, the Supreme Court has never upheld a classification on which this standard was imposed.

The Washington state supreme court applied the compelling interest test, but held that the law school had met it because of three purposes. First, the university might properly seek to overcome the past effects of racial discrimination (regardless of whether it had ever had an exclusionary policy). Second, the state had an overriding interest in providing law students with a legal education that would adequately prepare them to cope with the societal problems with which they would be confronted upon graduation. And finally, the current shortage of minority lawyers and judges required race-conscious ameliorative steps to allow minorities equal representation within the legal system. Though the law school won this round, DeFunis was allowed to remain in school while he appealed.

The U.S. Supreme Court declined to decide DeFunis's case on its merits, but rather dismissed it as moot. By the time the case came up for hearing, the Court felt that because of his impending graduation from law school, he no longer had a personal stake in the outcome of the litigation that required the Court to reach a decision. As a result, the constitutional status of such preferential admissions programs is still undetermined. O'Neil therefore delves into the arguments for and against "reverse discrimination." At first glance, the justice of "giving a break" to members of groups who have been denied many benefits in the past regardless of their individual qualifications seems self-evident. But the recent, largely unforseen contraction of the job market and the drastic increase in competition for the relatively fixed number of graduate school openings have greatly complicated the effects of applying such a seemingly fair policy. For it is no longer possible to discriminate in favor of minorites without discriminating against members of the majority.

It is frequently suggested that there are better ways to increase minority opportunities. O'Neil carefully delineates and weighs the alternatives in chapter six. Indeed, the compelling interest test seems to impose the burden of adopting the least restrictive alternative method of accomplishing that interest. Some have suggested that merely abolishing racial restrictions will be sufficient to increase minority representation. O'Neil finds this approach inadequate:

> The short answer to this suggestion is that "nondiscrimination" has been tried and found wanting. At most colleges and universities in the North and West, where racial exclusion has never been practiced, enrollments have remained at token levels until admissions officers became color conscious. . . . "benign neglect" has been the rule, and pitifully low minority enrollments have been the result. (p. 113)

Since it has been shown that standardized tests do not adequately measure performance or aptitude of minorities, it is also suggested that they be eliminated from the admissions process. But the utility of the tests for initial screening purposes, given the thousands of applicants to be considered, makes them virtually irreplaceable. And they do seem to be quite adequate as predictors for the majority of students. O'Neil sees a remedy not in abandoning them but in trying to improve their utility for minorities. Other alternatives weighed and found wanting include open door admissions, expansion of the junior college system, increasing the

number or capacity of black colleges, giving preference generally to "disadvantaged" students, and giving preference on an individual basis as the scale-tipping factor. Many insist that the ultimate solution lies in providing better pre-college education for minority students, and the author agrees that this is certainly the best solution. The only drawback is the time involved, since "[a]t the rate at which progress is being made toward this goal today, it will be at least a generation and probably more before anything like equality will occur." (p. 123)

Once the author concludes that preferential admission policies are necessary, he examines the practical problems involved in implementing them: Who may or should be preferred? In what form should the preference be extended? How much of a preference is appropriate? How long should preferential policies last? What are the practical responsibilities of an educational institution that adopts preferential policies toward the students admitted thereunder? He emphasizes the variety of considerations that affect each determination, depending on the goals and facilities of the institution involved.

*Discriminating against Discrimination* is written for the general, rather than the academic, public. O'Neill is a very capable writer and manages to explain the creakings of our legal machinery in a way that makes it seem, if slightly archaic, at least not totally incomprehensible. His analysis of how and why the Supreme Court "decided not to decide" the DeFunis case is fascinating. His lucid discussion of the constitutional issues involved should be understandable even for the layman, and it does not seem overly simplistic. My major complaint about the book is its lack of source citation even when direct quotes and statistical data are presented. There is a bibliographical essay that indicates generally the sources relied on for each chapter, however it is far from adequate for the legal researcher interested in pursuing the subject further. But as an example of how a legal scholar can write intelligently and intelligibly for a lay audience, *Discriminating against Discrimination* shines.

Robert M. O'Neil, *Discriminating against Discrimination* (Bloomington, Indiana: Indiana University Press, 1976) 271 pp.