

Book Review

Race, American Values, and Colorblind Justice

NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES, Christopher Edley, Jr. Hill & Wang, 1996. Pp. 294.

ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE, Terry Eastland. Basic Books, 1996. Pp. 229.

RACE AND REPRESENTATION: AFFIRMATIVE ACTION, Edited by Robert Post & Michael Rogin. Zone Books, 1998. Pp. 424.

Reviewed by Harvey Gee*

I. Introduction

There is no neutral ground in the contemporary affirmative action debate. Supporters of affirmative action argue that it is a tool for rectifying the effects of past discrimination and providing opportunities for groups historically discriminated against to succeed where they have been forced to fail in the past.¹ Opponents of affirmative action, on the other hand, argue that race-based preferential treatment results in reverse discrimination.² Current attacks against affirmative action focus on the

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1. See Deval L. Patrick, *Standing in the Right Place*, in THE AFFIRMATIVE ACTION DEBATE 137-39 (George E. Curry ed., 1996) (arguing that affirmative action allows minorities to compete on a level playing field); Keith Liddle, *Affirmative Action For Certain Non-Black Minorities and Recent Immigrants—"Mend It or End It?"*, 11 GEO. IMMIGR. L.J. 835, 848 (1997) (asserting that affirmative action can be defended as mechanism to place minorities and whites where they would have been without past "societal" discrimination). See also Frank Wu, *Beyond Affirmative Action*, Mar. 18, 1999 (available at <<http://www.intellectualcapitol.com/issues/issue187/item2378.asp>>) (visited Jan. 28, 2000).

2. See CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? 50 (1996) (describing affirmative action as reverse discrimination in jobs and educational opportunities); see Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 903 (1997) (noting that the most common criticism of affirmative action is that it discriminates against whites on the basis of race); William Bradford Reynolds, *An Experiment Gone Awry*, in THE

simplistic portrayal of these programs as pitting one group against another. This portrayal is one of a zero-sum game where one group succeeds only if the other fails.³

Amidst the affirmative action controversy, three recently released books address the issue head on: Christopher Edley's *Not All Black and White: Affirmative Action, Race, and American Values*;⁴ Terry Eastland's *Ending Affirmative Action: The Case for Colorblind Justice*;⁵ and *Race and Representation: Affirmative Action*,⁶ edited by Robert Post and Michael Rogin.

The volumes are as engaging and provocative as their titles suggest. However, reflecting the prevailing political trends, each book undertakes divergent approaches in examining affirmative action and race relations in this country. Christopher Edley, in *Not All Black and White: Affirmative Action, Race, and American Values*, wants to persuade the undecided that affirmative action should be understood as a reflection of "our values and our vision of America, [and] not the details of particular policies or court precedents."⁷ Conversely, in *Ending Affirmative Action: The Case for Colorblind Justice*; Terry Eastland argues for the abolishment of affirmative action by focusing on ideological colorblindness as a moral principle.⁸ He insists that affirmative action is poorly designed, and has caused a plethora of problems since its inception.⁹ Situated between the positions taken by Edley on the political left, and Eastland on the political right, are the moderate voices of affirmative action supporters featured in *Race and Representation: Affirmative Action*'s twenty-eight essays discussing race and representation in the workplace and in higher education.

The authors are well qualified to write about affirmative action. Edley and Eastland are leading authorities on the topic, and both have Washington connections. Christopher Edley teaches at Harvard Law School, and has worked as Special Counsel to President Clinton, where he led the White House review of affirmative action.¹⁰ Former Reagan Administration official, Terry Eastland, wrote his book as a Fellow at the Ethics and Public Policy Center in Washington D.C. Writing from the West Coast are Robert Post and Michael Rogin, academics at the

AFFIRMATIVE ACTION DEBATE 130-31 (George E. Curry ed., 1996) (referring to affirmative action programs as a failed experiment and calling for its abolishment).

3. See ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE OBSESSED WORLD 235 (1997) (discussing the popular portrayal of affirmative action and race relations as a zero-sum game where one group gains while another group loses ground).

4. CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996).

5. TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996).

6. RACE AND REPRESENTATION: AFFIRMATIVE ACTION (Robert Post & Michael Rogin eds., 1998).

7. See EDLEY, *supra* note 4, at 4.

8. See EASTLAND, *supra* note 5, at 35-38.

9. *Id.*

10. See EDLEY, *supra* note 4.

University of California at Berkeley,¹¹ where in 1995, the Board of Regents of the University of California voted in Resolution SP-1 to prohibit the use of race as a criterion for student admissions.¹²

Importantly, the books point out the inconsistencies inherent in affirmative action programs. Most of these inconsistencies originate from affirmative action supporters who use a number of potentially flawed rationales such as the remedy for past discrimination. Notably, as affirmative action opponents allege, beneficiaries of affirmative action tend to be those who have suffered the least, and recent immigrants.¹³ These beneficiaries include many groups who have suffered past discrimination—Japanese, Jews, and Cubans—without a direct link between that discrimination and the current socio-economic standing of the group.¹⁴ As the books illustrate, this apparent inconsistency, and others, underlie some of the divisions on affirmative action.

The differences in opinion about affirmative action began as soon as the programs were implemented. During the sixties, affirmative action combined the past discrimination, and diversity rationales to command broad support for the limited principle that White male institutions should be dismantled to insure inclusion of women and previously excluded minorities.¹⁵ Both race and sex created “caste” systems in which women, African Americans (and in various times and places, Asian Americans, Latinos, and other groups) were excluded on a wholesale basis.¹⁶ The civil rights movement won broad support for the principle that this exclusion was wrong, and that its remedy required

11. See POST & ROGIN, *supra* note 6, at 232.

12. See Bryan K. Fair, *A Chance to Act Affirmatively*, in *A LARGER MEMORY: A HISTORY OF OUR DIVERSITY, WITH VOICES* 343 (Ronald Takaki ed., 1998) (arguing that the vote to end race as a factor in University of California admissions represented a major setback for race relations in this country).

13. See, e.g., Midge Decter, *Benign Victimization*, 13 *POL'Y REV.* 65 (1980); Jeff Howard & Ray Hammond, *Rumors of Inferiority: The Hidden Obstacles to Black Success*, *NEW REPUBLIC*, Sept. 1995, at 17; Leonard Reed, *What's Wrong with Affirmative Action*, *WASH. MONTHLY*, Jan. 1981 at 24; Thomas Sowell, *The Plight of Black Students in America*, *DAEDALUS*, 1974 at 103. Cf. Harvey Gee, *Immigration and the New Nativism: A Review Essay*, 56 *NAT. LAW GUILD PRAC.* (1999) (book review) (discussing how the ethnic background of immigrants today, as in the past, has been used to inflame public opinion against immigration).

14. See EASTLAND, *supra* note 5, at 150-51 (questioning the appropriateness of including Hispanics and Asian immigrants in affirmative action programs that were originally implemented to address past discrimination against Blacks); see also JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA'S ASSIMILATION ETHIC* 8 (1998) (suggesting that, “[R]acial preferences encourage immigrants to think of themselves as members of groups rather than as individuals.”).

15. See RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 28 (1996) (acknowledging that though affirmative action was initially justified as compensation for past discrimination it was expanded for the new justification of diversity); Nicolaus Mills, *To Look Like America, Introduction to DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 10-14 (Nicolaus Mills ed., 1994) (outlining the history of affirmative action and noting the shift from the past compensation rationale to the goal of diversity).

16. See Jean Carey Bond, *Affirmative Action at the Crossroads: An Essay*, 53 *GUILD PRAC.* 6-8 (1996) (summarizing history of social and racial discrimination against women and racial minorities and explaining the origins of affirmative action).

“affirmative action”—at least until individuals could receive consideration on their merits.¹⁷ However, by the nineties, opponents of affirmative action would argue that affirmative action had succeeded, and was no longer necessary. They contend that most institutions include women and minorities, and will continue to do so, and that to the extent remaining institutions discriminate in ways reminiscent of the caste system of old, discrimination law is the answer—not affirmative action. Furthermore, opponents allege that the continuation of affirmative action creates a racial “spoils” system.¹⁸

Nevertheless, supporters of affirmative action argue that, even if the caste system has been dismantled, the benefited groups are a long way from equality.¹⁹ The elimination of affirmative action at the University of California at Berkeley School of Law (Boalt Hall), for example, has dramatically reduced the percentage of African Americans and Latinos admitted.²⁰ In addition, supporters argue that the purpose of affirmative action is not just to allow Blacks to be judged on the basis of the same traditional academic measures of achievement as Whites, but to transform institutions in order to dismantle the subjective measures of merit that perpetuate race and gender privilege.²¹

Further, the percentage of women in higher education would largely remain the same, but not necessarily the representation of women in police departments, government agencies, and the military.²² In turn, opponents respond that to the extent this is true it is not true because of continuing discrimination but because of: differences in ability or culture; differences in socio-economic status that we generally don't address; or past discrimination related to differences in school quality

17. See also BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 9-10 (1996) (explaining the three original motives for affirmative action: to fight discrimination, to be used as tool for integration, and to reduce the poverty of women and certain racial groups); Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 190-92 (1999) (describing the origins and original design of affirmative action). Affirmative action was initially directed primarily at employment, but it was later expanded to other areas, including admissions programs in higher education. *Id.*

18. See Charles Murray, *Affirmative Racism*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND POLITICS OF INCLUSION 204-08 (Nicolaus Mills ed., 1994) (asserting that racial preferences, instead of providing equal opportunities in education and in employment will actually perpetuate racism and discrimination).

19. See Erin Anadkat, *Affirmative Action Hailed and Attacked by Student Speakers*, THE DAILY ILLINI (Mar. 10, 1999) available at <<http://www.illinimedia.com/di/mar10/news/news05.html>> (reporting on Frank Wu's argument that affirmative action is still necessary to alleviate past discrimination that created grave inequalities amongst racial minorities and whites).

20. Chris Klein, *California's Ban on Preferences Short-Circuits Minorities at Boalt*, NATIONAL LAW JOURNAL, May 26, 1997.

21. *Id.* at 9 (arguing that “many qualifications not reflected by standardized test scores or grades may indicate that a person would be a valued member of a school community and a successful graduate”).

22. See Charles R. Lawrence & Mari J. Matsuda, *Feminism and Affirmative Action*, in WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 165 (Charles R. Lawrence & Mari J. Matsuda eds., 1997) (describing obstacles and cultural barriers to promotions faced by women in the workplace because of gender discrimination).

that are better addressed directly.²³ Therefore the anti-discrimination rationale no longer supports affirmative action.²⁴

At this point, the arguments supporting affirmative action fracture. Some supporters of affirmative action believe in traditional definitions of merit, but support special assistance for African Americans and Latinos, arguing that differences in Scholastic Aptitude Test (SAT) scores are a product of African American culture produced by discrimination and poverty.²⁵ Some African American affirmative action supporters argue that such rationales involve “blaming the victim” and a refusal to recognize how biased White definitions of merit are.²⁶ Some affirmative action opponents may also join an attack on SAT scores, but tend to view the issue as special pleading by African Americans, rather than a principled assault on the system.²⁷

II. Affirmative Action and American Values

In the midst of the differing points of view among affirmative action proponents, Christopher Edley presents his arguments for the continuation of affirmative action. Throughout *Not All Black and White: Affirmative Action, Race, and American Values*, Edley presents practical, rather than political arguments that affirmative action is the best means for overcoming discrimination.

At the outset of his book, Edley addresses the age-old justification for undertaking affirmative action.²⁸ He asks, “Do the ends justify the means?” Edley uses the remainder of his book to show why the answer is “yes.” To support this claim, the author insists that racial equality will remain a daunting social and economic problem that will not be easily

23. See Laurel Jones & Greg Selby, *Affirmative Action: The Regression of Civil Rights*, 1 U.S.F. J.L. & SOC. CHALLENGES 139, 149 (1997) (asserting that disadvantaged groups likely advance themselves through hard work, education, and natural market forces rather than by relying on affirmative action, which serves to discriminate against non-beneficiaries).

24. See CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? 79 (1996) (arguing for the elimination of race-based admission and scholarship policies in higher education which have proven to be “a particularly clumsy form of social engineering”).

25. See also ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD 238-39 (1997) (exploring the practice of foes of academic affirmative action who refer to how poorly prepared some students of color are for a college education).

26. See generally Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Discrimination*, 60 B.U. L. REV. 815, 872 (1980).

27. Dinesh D’Souza observes, “[F]or a generation, there existed the ‘liberal fallacy,’ which identified the cause [of racial inequalities] as some terrible bias in the tests and measures.” See Dinesh D’Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action be Abandoned as a National Policy?*, 60 ALB. L. REV. 425, 430 (1996).

28. CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 15 (1996).

solved without affirmative action.²⁹ Edley proceeds to demonstrate why affirmative action is still necessary by providing evidence of continuing discrimination in our society:

The Black unemployment rate continues to hover at twice the rate of Whites, and is the first to rise and last to fall during recessions. In the 1981-82 recession, nearly one of every ten employed Blacks lost their jobs, more than five times the rate of White layoffs.

The median annual income for full-time employed Black males is thirty percent less than that of White males.

One of every two Black children under the age of six lives below the poverty line, compared with one in seven White children.

The average net worth (all assets, minus debts) of Black families in the United States is \$23,818, whereas White families possess an average net worth of \$96,667—over 400 percent greater than that of Blacks.³⁰

Edley also points out that the economic disparity between Blacks and Whites in America is even more daunting considering that while fewer than three percent of all college graduates are unemployed, Whites are nearly twice as likely as Blacks to have college degrees. Using raw data to show racial inequality, Edley places the burden of persuasion to end affirmative action on the opponents of affirmative action.³¹ He believes that in the absence of clear and compelling empirical data showing that the costs of affirmative action outweigh its benefits, it should remain with us.

Edley argues that most employment decisions and application selections are not made strictly on the basis of merit, but incorporate some form of generally accepted bias or preferential treatment based on nepotism or cronyism.³² These preferences are often based upon “personal preferences having only to do with taste, comfort, and convenience and nothing to do with efficiency in maximizing profits or with conventional excellence.”³³

29. *See id.* at 22. *See also* ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD 124 (1997) (explaining that the primary goal of affirmative action was to deal with the lingering effects of discrimination).

30. EDLEY, *supra* note 28, at 42-45.

31. *See id.* at 42.

32. *See id.* at 120.

33. *Id.*

Edley also addresses the benefits of the diversity rationale for affirmative action. According to Edley, "race-conscious decision making is justified not only in circumstances that suggest remedial purposes but also in contexts where there are substantial benefits to an institution or to society at large from inclusion or diversity."³⁴ He contends that we need affirmative action to promote diversity and to prevent discrimination.³⁵ Edley believes that there is still another level to the issue of inclusion. "Apart from empowering individuals to achieve their full potential, and aspiring to create communities where color no longer divides us," Edley believes we must also strive to improve the diversity of particular institutions.³⁶

To their detriment many affirmative action proponents, including Edley, conflate these rationales without acknowledging the conflicts. If, for example, the goal is diversity in terms of either making all-White institutions multi-racial or providing role models, then selection of relatively privileged members of the racial minority group promotes the goal because such persons are more likely to succeed in traditional terms. If compensation for past discrimination is the primary rationale, then the greatest benefits should go to the most disadvantaged. Should past discrimination be considered the key justification, then current practice is only loosely tailored to the rationale.³⁷ Though Edley fails to mention it, affirmative action for the purposes of diversity has a weaker moral basis than does compensation for past discrimination. Under this diversity rationale, the emphasis shifts from the entitlement of the individual to the needs of the institution.³⁸ Many academic institutions benefit from having a diverse student body, and recruit foreign nationals, among others, for exactly such purposes.

In sum, Edley's arguments are all well thought out, and persuasive. *Not All Black and White* has something for everyone. But above all, supporters, opponents, and the ambivalent will find Edley's probing analysis of the various competing views to be the book's greatest accomplishment.

34. *Id.* at 124.

35. CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 125 (1996).

36. *Id.* at 129. See also Robert A. Hauer, *Hopwood v. Texas: A Victory for 'Equality' That Denies Reality*, 28 ST. MARY'S L.J. 110, 139 (1996) (arguing that racial diversity rises to the level of compelling interest).

37. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 28-39 (1996) (asserting that diversity circumvents the heavy burden placed by the Supreme Court on racial compensation schemes, especially the requirement of providing a showing of past discrimination be produced to justify racial preferences as a remedy).

38. See Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification* 29 TEX. TECH. L. REV. 1, 3 (1998) (asserting that many educational institutions have relied on the diversity rationale to support their affirmative action programs).

III. Replacing Affirmative Action With Colorblind Justice

Responding to Edley's enthusiastic embrace of affirmative action is Terry Eastland's fervent criticisms against any racial preferences. In *Ending Affirmative Action*, Eastland argues that affirmative action has evolved far from its original purpose to remedy the ill effects of past discrimination against African Americans.³⁹ Eastland believes that by the early 1970s, affirmative action was wrongly extended to cover additional minority groups and women, and over the years its backers have offered additional justification, such as overcoming "overrepresentation" and the achievement of "diversity."⁴⁰ According to Eastland, "The nation has paid a steep price for departing from colorblind principle, for affirmative action has turned out to be a bargain with the devil."⁴¹

At the core of the book is Eastland's argument that affirmative action supporters are misguided in their belief that affirmative action is still necessary.⁴² Eastland argues that although affirmative action programs were instituted as temporary remedial measures, these programs have endured into the present with no end in sight.⁴³

Affirmative action supporters constantly refer to its programs as being "voluntary."⁴⁴ However, according to Eastland, the programs are far from being voluntary.⁴⁵ Here, he cites to the Labor Department's enforcement of a 1965 executive order requiring nondiscrimination and affirmative action on the part of federal contractors, who employ roughly a third of the nation's workforce.⁴⁶

The purpose of the Labor Department programs is not to root out proven discrimination but to overcome "underutilization," defined in complex terms involving a variety of demographic considerations. Basically, if the numbers of minorities and women "utilized" by a federal contractor are below their "availability," as the Labor Department calculates it, then the contractor must correct

39. See TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* 7 (1996).

40. *Id.* See also Pete Wilson, *The Minority-Majority*, in *THE AFFIRMATIVE ACTION DEBATE* 171-73 (George E. Curry ed., 1996) (opining that affirmative action has caused university admissions policies to overemphasize the single factor of biological race over traditional standards of merit to society's detriment).

41. *Id.*

42. *Id.* But see Victor M. Hwang, *In Defense of Quotas: Proportional Representation and the Involuntary Minority*, 1 *UCLA ASIAN AM. PAC. ISLAND L.J.* 1, 2 (1993) (arguing that the conservative attack on racial quotas is actually an attack on equality).

43. See *id.* at 14.

44. See EASTLAND, *supra* note 39, at 12.

45. See *id.*

46. See *id.*

this “underutilization” through hiring and promotion “goals and timetables.”⁴⁷

Ultimately, Eastland makes an appeal to readers who believe that racism no longer exists or those who insist on ideological colorblindness. He argues that “colorblind law forces the search for political consensus into nonracial territory.”⁴⁸ Eastland also believes that “in a nation in which economic and political power is now being more widely shared among people of different races and ethnic groups—a trend likely to continue—colorblind law makes eminently practical sense.”⁴⁹

Curiously, Eastland’s strict interpretation of the Equal Protection Clause illustrates a conflict of values. He shows that special racial, ethnic, and gender-based preferences have introduced a new approach to promoting equality in our country—one that places the focus on equality for groups and equality of result. This creates the dilemma of forcing the two values against each other: affirmative action supporters tend to emphasize equality of result, while Eastland and other conservatives favor equality of opportunity.

For the most part, Eastland relies on case studies in an effort to bolster his claim that affirmative action benefits relatively privileged racial minorities, and harms innocent victims. For instance, Eastland introduces the reader to victims of reverse discrimination such as Cheryl Hopwood, who was denied admission to the University of Texas Law School. The University of Texas had an affirmative action program, which set aside fifteen percent of the approximately five hundred seats in the class for African Americans and Mexican Americans.⁵⁰ According to Eastland, “Because [Cheryl Hopwood] is white she had not been able to compete with all applicants for admission.”⁵¹

Moreover, Eastland believes that cases such as *Hopwood v. State of Texas*,⁵² guarantee the salience of race and ethnicity in the life of the nation. He therefore suggests that such cases will make it difficult to overcome the very practice that the Civil Rights Movement once condemned: that of referring to and judging people in terms of their racial or ethnic backgrounds.⁵³

Eastland is appalled at how minority applicants to the University of Texas were given an unfair advantage over non-minorities in the admissions process, which resulted in reverse discrimination. He contends that because the law school applications of African Americans

47. *Id.*

48. *Id.* at 158.

49. TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 158 (1996).

50. 78 F.3d 932, 945 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996).

51. *See* EASTLAND, at 4.

52. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996).

53. *See* EASTLAND, *supra* note 49, at 8.

and Latinos were treated differently, the members of the two minority groups competed only among themselves. As Eastland believes, had they competed among all other applicants to the 1992 entering class, under the same standards, many fewer African Americans and Latinos would have gained admission to the Texas law school.⁵⁴ Such a result would reinforce the convictions of affirmative action opponents that racial minorities are “unqualified” to compete with Whites.

In an aside, Eastland downplays the notion that a denial of admission to the University of Texas Law School, without the assistance of affirmative action, meant a total foreclosure to legal education for minority groups in the 1992 applicant pool. It only meant that these candidates would have to attend lower ranked law schools. Here, he suggests that the African Americans and Latino applicants admitted under affirmative action who were not qualified to study law at the University of Texas based upon their academic qualifications alone, were still competitive enough to win admission under non-affirmative action standards at almost two-thirds of the nation’s law schools.⁵⁵

Along these same lines, Eastland believes that affirmative action serves to stigmatize beneficiaries who could succeed without it.⁵⁶ Eastland contends that at the same time, it stigmatizes those eligible for it that are not beneficiaries.⁵⁷ He argues that “[a]n abiding truth about much affirmative action is that those who are its ostensible beneficiaries are burdened with the task of overcoming it—if, that is, they wish to be treated as individuals, without regard to race.”⁵⁸ But in doing so, Eastland downplays the difficult moral judgments about the use of race.

Throughout his book, Eastland fails to differentiate conventional racism with efforts to remedy it. In particular, he refuses to move beyond a strict interpretation of the Equal Protection Clause of the Fourteenth Amendment, which forbids government from denying any person the equal protection of the laws.⁵⁹ Eastland seems unable to realize that in order to overcome discrimination, the issue of race must first be addressed. Had Eastland gone beyond a mere normative approach in his analysis, perhaps he would have understood that the University of Texas did not apply its admission program in a

54. *See id.* at 9.

55. *See id.*

56. *See id.* Richard Kahlenberg echoes Eastland by observing that, “[W]hen racial preferences are used to achieve integration, the preferences, by their very nature, may send a negative message to both Blacks and Whites that Blacks cannot make it on their own.” RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 65 (1996). *But see* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1259 (1998) (stating the complexities of any interpretive study of stigma caused to affirmative action beneficiaries prevent drawing any conclusions).

57. *See* TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* 9 (1996).

58. *Id.* at 10.

59. U.S. CONST. amend. XIV, § 1.

discriminatory manner.⁶⁰ Undoubtedly, a more interpretative approach examining the long history of discrimination against African Americans and Mexican Americans at the University of Texas, would not have given much credence to Eastland's assertions of the stigmatizing effect of affirmative action.⁶¹ By not seriously considering the various rationales and benefits of affirmative action, Eastland arbitrarily dismisses them as insignificant and valueless.

Eastland's conclusion that racial diversity in higher education can never be a compelling interest, does not reflect a true understanding of the University of Texas Law School's admissions program. The necessity of diversity is demonstrated by the one simple truth: that while the offspring of parents and grandparents who attended the University of Texas School of Law can receive a preference solely because of their relationship to White school alumni, African American and Mexican American applicants would most likely not benefit from such a preference.⁶²

Readers are likely to notice that Eastland's discussion of Asian Americans in various chapters of the book seem inconsistent. In his earlier sections, Eastland argues that immigrants, especially Asians and Hispanics are not entitled to be affirmative action beneficiaries,⁶³ however, in later sections, Asian Americans are in effect, miraculously transformed into being "victims" of affirmative action. This is most visible where Asian Americans and whites are grouped together in having to share the burden caused by offering racial preferences to African Americans and Mexican Americans in the *Hopwood*

60. Even after *Hopwood*, diversity remains a legitimate goal in the admissions process. See Barbara Bader Aldave, *Hopwood v. Texas: A Victory for "Equality" that Denies Reality—An Afterword*, 28 ST. MARY'S L.J. 147, 148 (1996) (stating that though the Fifth Circuit Court of Appeals had jurisdiction over the *Hopwood* case, it did not have the right nor the power to repudiate the constitutional holding of *Bakke*, which held that diversity is a compelling state interest).

61. Cf. Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 878 (1997) (contending that no evidence the which proves that the majority of affirmative action beneficiaries are stigmatized).

62. *Hopwood v. Texas*, 861 F. Supp. 551, 555-57 (W.D. Tex. 1994). Both the Department of Health, Education, and Welfare and the Officer for Civil Rights (OCR) initiated investigations into the area of higher education, with the University of Texas becoming a target in 1977. *Id.* at 556. After finding that Texas was delinquent in addressing the issue of desegregation and that African Americans and Mexican Americans were severely underrepresented in higher education, OCR initiated the "Texas Plan," designed to recruit underrepresented minority applicants to Texas schools of higher education. *Id.* See also David Montejano, *Maintaining Diversity at the University of Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 360 (Robert Post & Michael Rogin eds., 1998) (discussing long history of de jure discrimination to exclude Mexican Americans and Blacks from admission to the University of Texas). See also Frank H. Wu, *Winks and Nods Open Plenty of Doors*, ABA JOURNAL, Feb. 1998, at 96 (describing how some students are given advantages in the university admission process because of their families' business or political connections).

63. See TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 150-51 (1996).

controversy.⁶⁴ Apparently, Asian Americans can be elevated to “honorary white” status when convenient to do so.

In the end, Eastland’s review of legal precedent and legislative debate is both thorough and scholarly. In comparison to other recent writings by the most vocal affirmative action opponents, Eastland’s contribution is tame.⁶⁵ If nothing else, *Ending Affirmative Action* successfully presents strong arguments against affirmative action, but it seems to miss the opportunity to offer any better alternatives.

IV. Race and Representation

Confirming that the affirmative action debate is moving beyond the traditional Black and White framework rooted in the Civil Rights Movement of the 1960s, *Race and Representation: Affirmative Action* is the definitive reader on the debate, at least for those who support the cause. Notably, because there is a virtual absence of essays, which argue against affirmative action, there is little to offer to readers who are still undecided on the issue. The anthology edited by Robert Post and Michael Rogin nevertheless represents a diverse and rich sampling of the many progressive perspectives on affirmative action.

The anthology is divided into two parts: the first part discusses race and representation in the workplace and in higher education, and the second part of the book analyzes the role that the *Hopwood* decision and California’s recent Proposition 209⁶⁶ have had in curtailing racial diversity in university admissions.

Among the highlights are the essays by Barbara Christian, Miranda Oshige McGowan, Rachel Moran, and a collaborative work by Michael Omi and Dana Takagi. These essays extend the parameters of the debate, and bring the conversation on race to higher levels.

In “Camouflaging Race and Gender,” Christian contends that the debate has become needlessly racialized.⁶⁷ She argues that all too often, many believe that the controversy concerns only race, to the detriment of

64. See *id.* at 175. This particular point was originally brought to my attention by Professor Frank Wu of Howard University School of Law. A fuller analysis of the *Hopwood* case as it relates to Asian Americans is found in my earlier work. See Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 648-52 (1997).

65. See generally CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996); DINESH D’ SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTICULTURAL SOCIETY* (1995); PAUL C. ROBERTS & LAWRENCE M. STRATTON, *THE NEW COLORLINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY* (1995).

66. Bill Jones, Secretary of State, Proposition 209 in California Ballot Pamphlet, General Election, Nov. 5, 1996.

67. See Barbara T. Christian, *Camouflaging Race and Gender*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 231 (Robert Post & Michael Rogin eds., 1998).

the efforts by women to obtain equality of opportunity.⁶⁸ Christian's thesis appears correct.

The United States has a long history of discrimination against women that has excluded many from employment and educational opportunities.⁶⁹ Affirmative action has worked to remedy this discrimination by giving opportunities to women previously denied opportunities they deserved based upon merit.⁷⁰ White women, in particular, have moved forward in opportunity and income as a direct result of affirmative action.⁷¹ However, like racial minorities who have made significant progress in recent years, women too, remain far short of reaching equality.⁷² Significantly, women hold a pivotal role in the debate.⁷³ If all women supported affirmative action, it would be very difficult for politicians to oppose it. According to some leading affirmative action proponents, "[T]he political power of women united, combined with men of color and progressive White men, would render any challenge to affirmative action futile."⁷⁴ Yet the arguments to abolish affirmative action are made possible primarily by women's ambivalence.⁷⁵ This ambivalence is costly, for women have the most to lose if affirmative action ends.

Similarly, Miranda Oshige McGowan in "Diversity of What?,"⁷⁶ analyzes the mismanagement of affirmative action programs to promote diversity. In the process, she explains how the diversity rationale for affirmative action may actually be skewed. McGowan examines the process in which universities attempt to create a diverse student body, and demonstrates how their efforts can end up being counterproductive. She cites "the lack of symmetry between the definition of racial groups within schools' affirmative action programs and the self-definition of persons within these groups."⁷⁷ Within this matrix, universities choose between looking at a group's self-identification or the dominant social

68. *Id.*

69. See Judy L. Lichtman, Jocelyn C. Frye, & Helen Norton, *Why Women Need Affirmative Action*, in *THE AFFIRMATIVE ACTION DEBATE* 175-77 (George E. Curry ed., 1996).

70. *Id.* See also Alice Kessler-Harris, *Feminism and Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 73 (Nicolaus Mills ed., 1994) (describing how much White women benefited from affirmative action between 1970 and 1985).

71. *Id.*

72. See Heidi Hartmann, *Who Has Benefited?*, in *THE AFFIRMATIVE ACTION DEBATE* 93 (George E. Curry ed., 1996) (arguing that substantial sex segregation in the labor market persists).

73. See Lichtman, Frye, & Norton, *supra* note 69, at 180.

74. See Charles R. Lawrence & Mari J. Matsuda, *Feminism and Affirmative Action*, in *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 152 (Charles R. Lawrence & Mari J. Matsuda eds., 1997).

75. See Alice Kessler-Harris, *Feminism and Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 78 (Nicolaus Mills ed., 1994) (concluding that women on both sides of the affirmative action issue occupy ambivalent positions).

76. See Miranda Oshige McGowan, *Diversity of What?*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 237 (Robert Post & Michael Rogin eds., 1998).

77. See *id.* at 241.

perceptions of racial groups alone.⁷⁸ She asserts that the dangers of relying on race and ethnicity as proxies for diversity of social experience and social affiliation, which may not be an effective means of promoting such diversity, undermines the idea of affirmative action based on race or ethnicity.⁷⁹

According to McGowan, a diverse student body in the admissions process at many colleges and universities is presented as desirable because having a student body and faculty that hold many different viewpoints and approach issues from different perspectives will promote learning and lead to the production of greater knowledge for all.⁸⁰

She concludes by suggesting that if schools only rely on dominant social understandings of race and ethnicity, their affirmative action programs will be handicapped. Instead, schools should be aware that actual group identities and social affiliations of students and applicants do not always correlate to skin color.⁸¹

To further illustrate her argument, McGowan refers to Asians as an example of how racial categories can undermine the goal of diversity. She argues that both Asians and Asian Americans may not view themselves as such; and, therefore, the racial categorizing system (designed to encourage diversity) utilized by a university would be ineffective.⁸² She also addresses the problematic stereotyping of Asians as the model minority. McGowan believes that “[t]o say that Asians are a model minority is to ignore that the category contains wide disparities in wealth and education, many of which track national origin divisions and recentness of immigration.”⁸³

The thrust of the anthology is its illustration of how the affirmative action debate can no longer be framed as a Black and White issue by including Latinos, Asian Americans, and women. Affirmative action is an issue that affects everyone; however, only recently have the discussions included Latinos, Asian Americans, and other non-Whites. Significantly, in *Race and Representation* are a pair of engaging essays

78. *Id.* Ian Haney Lopez offers a compelling analysis of the social construction of racial identity. See generally IAN HANEY LOPEZ, *WHITE BY LAW* (1996).

79. See Miranda Oshige McGowan, *Diversity of What?*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 246 (Robert Post & Michael Rogin eds., 1998). See also Viet Dinh, *Multiracial Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 280, 287 (Nicolaus Mills ed., 1994) (arguing that race based affirmative action in higher education actually works as a “race-as-merit theory,” which encourages perpetual race consciousness, as a component of merit). Dinh criticizes affirmative action primarily because he believes that race is a poor predictor of societal disadvantage, and, as a result, affirmative action creates antagonism arising from the competition among ethnic groups for a larger share of entitlements.

80. See McGowan, *supra* note 76, at 237. See also Chang-Lin Tien, *Diversity and Excellence in Higher Education*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 237, 241 (Nicolaus Mills ed., 1994) (discussing the compelling educational reasons for diversifying university campuses).

81. See McGowan, *supra* note 76, at 246.

82. See *id.* at 243-44.

83. See *id.* at 244.

addressing affirmative action as it relates to Latinos and Asian Americans, and presenting the argument that the traditional notions of race relations in this country must change.

First, Rachel Moran in "Underrepresented," explores the phenomenon of how Latinos, representing the nation's second largest minority group, have been ignored in discussions about race relations. Given their unique history and identity, Moran contends that Latinos together with Asian Americans, occupy precarious places within racial analysis and discourse. She believes that the presence of Latinos in the debate has been elided because the civil rights model and the immigration model are used to define their identity, and entitlements have required them to conform to the experiences of other racial and ethnic groups.⁸⁴ Even though Latinos are not a monolithic racial group, the U.S. Census nevertheless identified them as one ethnic group.

Moran focuses on the shortcomings of the civil rights model, which is rooted in the Black experience. Moran believes that the use of this Black/White paradigm implies that Latinos have been treated similarly to African Americans, but in reality they are more like White ethnic immigrants.⁸⁵

Moran proceeds to reveal that the Latino immigration and assimilation experience in America has not been the same as that of earlier White ethnic immigrants.⁸⁶ For example, she suggests that to Latinos, the terms of the invitation to come to the United States have often been ambiguous.⁸⁷ According to Moran, Latinos have not been offered to join the American citizenry. Instead, she states that "[they] have been offered the opportunity to work on a temporary basis with every expectation that they will return to their home countries."⁸⁸

Furthermore, Moran critiques the mainstream belief that because Latinos tend to maintain their language and culture, they are not assimilating on the same terms as earlier generations of immigrants.⁸⁹ Moran argues that Latinos' "status as immigrants is [further] undermined by alluding to their potential claims under a [traditional] civil rights model."⁹⁰ She explains that "Latinos' difficulties stem to a substantial extent from a fear that they are unassimilable because of their

84. See Rachel F. Moran, *Unrepresented*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 251 (Robert Post & Michael Rogin eds., 1998).

85. *Id.* at 254.

86. See *id.* at 261.

87. *Id.*

88. *Id.*

89. Historically and in modern times, Latinos and Asian Americans are treated as perpetual foreigners, and not as "Real Americans."

90. See Rachel F. Moran, *Unrepresented*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 262 (Robert Post & Michael Rogin eds., 1998). See also Linda Chavez, *Just Say Latino*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 174, 178 (Nicolaus Mills ed., 1994) (reporting that Hispanic advocacy groups believe that all Hispanics will gain if the pool of Latinos eligible for benefits is expanded to include immigrants).

distinctive ethnic identity.”⁹¹ Though Moran does not mention it, the Latino experience of being ignored within the traditional civil rights model parallels the Asian American experience.

Notably, Moran’s thesis that the Black/White paradigm of race relations must be dismantled is extended in “Situating Asian Americans in the Political Discourse on Affirmative Action,” whereby Michael Omi and Dana Y. Takagi make the case that Asian American issues have been ignored because of the prevailing hegemonic Black/White paradigm of race relations.⁹² In their essay, Omi and Takagi criticize the liberal progressives and the conservatives on their use of Asian Americans in the debate. They contend that one consequence of this racial politicking is that Asian Americans are left out of the debate, or portrayed as innocent victims.⁹³

Omi and Takagi, and other Asian American legal scholars have identified the primary reason why Asian Americans are not receiving attention: the model minority myth.⁹⁴ Since the 1960s, the dominant image of Asian Americans within mainstream American society has been one of a monolithic racial group that has achieved economic, educational, and social success through hard work and perseverance, without turning to assistance from the government or racial preferences.⁹⁵

The most damaging impact of the model minority myth is that policymakers looking at the overrepresentation of Asian Americans in higher education, especially in California, assume that Asian Americans do not need affirmative action.⁹⁶ Thus, Asian Americans are automatically excluded without any analysis whatsoever.⁹⁷

91. *See id.* at 262.

92. *See* Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 271 (Robert Post & Michael Rogin eds., 1998).

93. *Id.* at 274. Andrew Hacker, *Education: Ethnicity and Achievement*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 214, 218-20 (Nicolous Mills ed., 1994) (relaying that many Asian Americans complain of glass ceilings that have been set to limit their presence on some University of California campuses).

94. *See* ANGELO ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 158-59 (1998). *See also* Pat. K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24 (1994) (arguing that society’s perception that Asian Americans do not experience discrimination is fallacious); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 243-45 (1995) (exploring the historical and modern stereotypes of Asian Americans); Harvey Gee, *The Other Minority: Asian Americans and Affirmative Action*, ASIAN WEEK, Mar. 7, 1997, at 5 (arguing that the primary reason why Asian Americans are not considered in the affirmative action debate is because the model minority myth hides the reality of the pervasive discrimination against Asian Americans).

95. ANCHETA, *supra* note 94, at 58.

96. *See* Gale Holland, *California’s Asian Students Face Quandry*, USA TODAY, Aug. 23, 1995, at 11A (discussing the great increase of Asian American students on California campuses and how this phenomenon will affect the affirmative action debate).

97. ANCHETA, *supra* note 94, at 40.

On the one hand, the authors argue that the Right's representation of Asian Americans is disingenuous.⁹⁸ They suggest that the true purpose behind the Right's strategic use of race is to avoid the ever-volatile issue of race.⁹⁹ The Right represents Asian Americans as the "model minority" and "as an 'innocent' group wronged by racial preferences."¹⁰⁰

On the other hand, Omi and Takagi illustrate that their analyses is far from being partisan by criticizing the Left for their insistence on what the authors termed a "shared interests" model of politics.¹⁰¹ The progressive forces hope that Asian Americans will broaden the political coalition of affirmative action and diversity supporters, and in the process, expand the united front of opposition to the Right.¹⁰² They disagree with the assumption held by the Left that Asian Americans share a similar social location to African Americans.

The authors proceed to explain that Asian Americans are subjected to a different type of racism. Simply put, "they are often the objects of *resentment* by other groups who perceive that they do 'too well.'"¹⁰³ According to Omi and Takagi, this attitude has led to political disenfranchisement, exclusionary laws in the late nineteenth to early twentieth century, and limits placed on immigration and foreign capital investment today.¹⁰⁴

"Both the Right and the Left have wrestled with how to situate Asian Americans in affirmative action debates and how to frame particular strategic representations of them."¹⁰⁵ Their efforts illustrate "the complexity of race in the current period when the bipolar model of race relations has revealed an increasing inability to comprehend the patterns of conflict and accommodation that now occur between, and

98. See Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 274 (Robert Post & Michael Rogin eds., 1998). See also Charles R. Lawrence & Mari J. Matsuda, *Affirmative Action, Class, and Interethnic*, in WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 193 (Charles R. Lawrence & Mari J. Matsuda eds., 1997) (arguing that right-wing politicians portray Asians as unfortunate victims of quotas, the undeserving beneficiaries of preferences, or the example that proves affirmative action is not needed).

99. Omi & Takagi, *supra* note 98, at 274. See also Harvey Gee, *Fighting for Equality: Why Asian Americans Vote Against the California Civil Rights Initiative*, 6 UCLA ASIAN PAC. ISLAND L.J. (forthcoming 2000) (reporting on the use of Asian Americans as a wedge group in the affirmative action debate by former California Governor Pete Wilson and Senator Bob Dole).

100. *Id.* This was the strategy used by former California Governor Pete Wilson and former U.S. Senator Bob Dole in the 1996 California Civil Rights Initiative Campaign ("CCTIC"). See Harvey Gee, *Race Tack, Asian Americans Have As Much to Gain From Affirmative Action as Other Ethnic Groups*, S.F. DAILY JOURNAL, Nov. 16, 1999, at 4.

101. See *id.* at 276.

102. *Id.* at 277.

103. *Id.* at 276.

104. See *id.* at 277. See also Harvey Gee, *Beyond Black and White: Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759, 771-73, 784-87 (1999) (summarizing and describing the historical and contemporary nativism faced by Asian Americans).

105. See Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 278 (Robert Post & Michael Rogin eds., 1998).

among, [different racial] groups.”¹⁰⁶ Omi and Takagi conclude that a new analytical model is needed to obtain an understanding of the present complexities of racial location and interests.¹⁰⁷ This new framework would not merely use race as the essential feature, but rather, it would interpret how groups are constructed and represented.¹⁰⁸ Such a paradigm would also allow a more inclusive understanding of how social policies impact different groups. This new approach should reflect the increased visibility of Asian Americans and “how they are implicated in a range of racial issues,” which extend beyond the shadows of Black/White relations.¹⁰⁹

V. Conclusion

All in all, the three books are excellent resources for those interested in understanding the affirmative action debate. The books are well written, and their arguments are compelling. The informative arguments offered by the books show why the contemporary affirmative action debate is likely to continue.

The debates over affirmative action are actually about larger race issues in this country. In particular, society as a whole needs to remind itself of the goals of affirmative action and the permanence of racism in this country. As the volumes have illustrated, any examination of the racial history of the United States reveals how our society has created stereotypes and barriers that make it difficult for racial minorities and women to participate fully and fairly in society. Nevertheless, recent Supreme Court cases and statewide ballot measures barring state and local governments from using race in hiring, contracting, and school admissions¹¹⁰ reflect the growing view of many Americans that society should become “color-blind” and that the initial step in achieving a so-called colorblind society is to dismantle all affirmative action programs.

Undoubtedly, *Hopwood* and the California Civil Rights Initiative Campaign have created a pall over the future of affirmative action. Whether affirmative action in any form remains in existence in the next century is uncertain. But if the currently fashionable color-blind

106. *See id.* at 278-79.

107. *See id.* at 279.

108. *Id.* *See also* Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1060 (explaining why the Black/White civil rights paradigm needs to expand to accommodate the modern day racially complex world).

109. Omi & Tagaki, *supra* note 105, at 279.

110. *See eg.*, Tom Brune, *Locke Keeps Diversity as Goal*, THE SEATTLE TIMES, Dec. 1, 1998, at B1 (discussing passage of Initiative 200, which will prevent Washington state from considering race and gender in making decisions on hiring, contracting, and college admissions); Tom Brune, *I-200 Forces Matched Foes on Ad Outlays*, THE SEATTLE TIMES, July 21, 1999, at B1 (describing University of California regent, Ward Connerly, and his successful efforts to stop government racial and gender preferences in California, and his support of similar initiatives in Florida).

movement continues to gain strength, it appears that affirmative action will become a relic of the past, and the vast inequalities caused by the long history of discrimination against women and minorities will likely continue.