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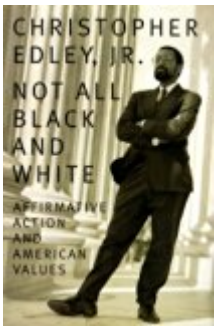
Christopher Edley, Jr.. *Not All Black and White: Affirmative Action, Race, and American Values.* New York: Hill & Wang, 1996. xix + 294 pp. $25.00, cloth, ISBN 978-0-8090-2955-6.



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Affirmative action is one of the most painfully complex and emotionally laden issues in American public life. Unfortunately, public debate on the issue, both pro and con, is replete with insufficient empirical evidence, unexamined and narrow premises, gross generalizations, and poorly defined and articulated goals. It is also too frequently punctuated by irrational, dishonest, and almost violent outbursts of partisanship. Christopher Edley, Jr., in *Not All Black and White: Affirmative Action, Race, and American Values*, argues that traditional approaches to the affirmative action discussion--in fact the terms of the debate itself--have skewed our view, handicapped solutions, and exacerbated race relations. He suggests that the United States will not be ready for a thoughtful debate about solutions until we as a society understand that affirmative action is ultimately about values and the commitments that those values demand. He does not ask Americans to commit blindly to any particular policy but instead builds an analytical framework within which to examine social commitments regarding disadvantaged groups, and their consequences, in a detailed, balanced, rational, and explicit fashion. A former White House special counsel who helped President Clinton develop his "Mend it, Don't End It" affirmative action policy, Edley is not neutral. He is openly an advocate. However, his presentation of opposing viewpoints is balanced in the best scholarly tradition, and he candidly faces the problematic nature of affirmative action arguments and polices. As a result of its honesty, *Not All Black and White*, though ultimately an argument in favor of carefully considered and constructed affirmative action programs, also serves as an effective summary and articulation of the moral, policy, and legal arguments regarding the practice, and is useful, regardless of the reader's personal policy conclusions. It is, as he intended, a book about hard choices and how to think about them, a book that will move readers and, one hopes, the country beyond the traditional debate.

Edley, now a law professor at Harvard, offers a useful summary of the history of affirmative action law. Because this society is constitutionally based, because its legal tradition favors individual liberty and limited intrusion by the state, the legal dimensions of affirmative action programs are an

integral component of the debate. Edley outlines the jurisprudence of the commerce clause, the 5th and 14th Amendments, and the statutory remedies created by the various Civil Rights acts. He explains how in race, and other areas, some of the traditional limitations born of federalism have been superseded and how both state and the federal governments have exercised constitutionally permissible oversight over the actions of individual citizens. After discussing classic cases such as *Brown v. The Board of Education* and *Regents of University of California v. Bakke*, Edley analyzes current trends. He explains how cases such as *Richmond v. Croson and* Adarand v. Constructor, Inc. Pena_ have cast a constitutional pall over many if not most affirmative action policies, by making choices that were once matters of prudential judgment and public policy into the likely fodder for constitutional litigation.

Moreover, the new tendency of courts to rely on the strict scrutiny test of equal protection jurisprudence may make it profoundly difficult for government entities to legally justify their programs. The history of racial discrimination in this country usually justifies the demand that policymakers who classify based on race demonstrate that they are serving a "compelling state interest" and that their action is narrowly tailored to serve that interest. Edley, however, argues that strict scrutiny analysis should not be applied to affirmative action programs because such policies are intended to aid, not disadvantage, a race. A lower level of equal protection scrutiny would be sufficient to assure that justice is served. Interestingly, Edley observes that distinctions based on gender need only be substantially related to an important government interest, the intermediate level of equal protection analysis. Thus, under current law, it appears as if it may be easier to justify affirmative action policies for women than it is for African Americans. In addition, there appears to be only a slim body of case law that will support preferential polices based on the importance and benefits of diversity. Under current affirmative action jurisprudence, it is becoming increasingly difficult to justify a preferential policy on anything other than "remedial" grounds, that is that preference is necessary to remedy disadvantage caused by past wrongs. Remedial policies, too, may be in legal jeopardy because many were implemented without well-documented evidence of racial discrimination and its impact. Edley is convinced that such evidence could be marshaled to face challenges to many currently existing remedial policies, but he is concerned that courts may not accept ad hoc evidence that was unavailable to policymakers when the affirmative action programs were instituted. Evidence may also be difficult to acquire, in that formal and obvious discrimination has dissipated somewhat and may therefore be more difficult to prove, even in cases where it or its effects still exist in other forms.

Edley is clearly pessimistic about the legal status of affirmative action in the wake of cases such as *Croson* and *Adarand*, and, although he does not mention it, the Supreme Court's denial of *certiorari* in the controversial *Hopwood v. Texas* (1996). Although it is good that he does not exude false confidence over an obviously disintegrating jurisprudential situation, he would have preformed a service by more fully outlining a legal theory with which to counter current trends. An explicitly historical examination of 14th Amendment jurisprudence (for example, *Strauder v. West Virginia* [1880], *Plessy v. Ferguson [1896], Cumming v. Richmond Co. Board of Education* [1899]) might demonstrate how and why federal courts have come to hold that the 14th Amendment means that policymakers cannot distinguish based on race, rather than that they cannot distinguish based on race with the intent or effect of disadvantaging that race, a distinction that is currently imperiling affirmative action programs.

Edley, however, does not focus on the constitutional issues because he contends that the "crude scrutiny of law" is an ineffective method by which to resolve value judgments. Law, of

course, is not divorced from social values; but Edley contends that affirmative action debates are richer and involve values, ideals and aspirations--competing "visions" of what America should be like. It is a coherent moral vision of America, not reliance on legal precedent, that will allow society to decide what kinds of benefits justify which ones are costly, as it evaluates affirmative action policies. It is Edley's goal to identify and evaluate several possible visions of what constitutes American core values.

Edley critiques the standard set of arguments for and against affirmative action programs. Some critics argue that affirmative action programs are suspect because they are both over- and under-inclusive--that is, aiding well-to-do African Americans while ignoring genuinely disadvantaged whites or unfairly disadvantaging others. Others claim that the programs undermine the genuinely important notion of merit, stigmatize African Americans, and deepen racial divisions. Edley confirms that these arguments have substance and that each should be taken into consideration whenever contemplating a preferential policy. But he also explains that they are complex factors and that one's evaluation of each is intrinsically bound up with one's overall societal vision.

Edley outlines and evaluates three central visions of American race relations: color-blindness, morally equal opportunity, and diversity or inclusion. Color-blindness is a much misunderstood and misused term. Those who advocate a truly color-blind scheme typically argue in favor of vigorous anti-discrimination enforcement and against many forms of affirmative action. Preferential programs could be justified under this vision only in those cases in which there was clear evidence of racial discrimination leading to clear disadvantages, a very difficult threshold according to Edley. Color-blindness, for Martin Luther King, did not mean that we could not take consideration of race in any circumstance, but rather that the country should purge itself of its discriminatory prejudice. Edley claims that a strict color-blind scheme after generations of color-conscious discrimination cannot be portrayed as a neutral position. It is an idea that, in its pure form, came two hundred years too late and two generations too early. And although color-blindness seems to boast the advantage of leaving the merit system intact, that system has always been influenced by a wide range of subjective factors. Finally, a pure color-blind vision profoundly underestimates the degree of damage that has been wreaked upon African Americans.

Edley is more sympathetic to a vision of America and race relations that stresses both anti-discrimination and equality of opportunity. These principles, Edley notes, are widely accepted in the abstract, even if there is great dispute over their meaning, content, and application. Whereas a color-blind vision would allow remedial action to be taken only where outright discrimination has caused clear and documented injury to a specifically defined individual or group of individuals, a vision that stresses morally equal opportunity would allow a far greater range of remedies. If the American goal is to give all citizens the full and equal chance to better themselves, then it is incumbent on society to devise remedies to assuage societally produced disabilities. Since the goal would be to create real equal opportunity, there would be no reason to seek out and meet impossible burdens of proof in demonstrating direct injury and assigning guilt to a specific act of racism or discrimination. Instead, society should be willing to view race and the burdens that come with race as a central reality in American history, a history that has left African Americans less able to compete. Mere elimination of discrimination, even if that were possible, would never alleviate the environmental, inherited, psychological, economic, and social challenges faced by contemporary African Americans. This vision merely asks society to decide "[w]hich negative endowments, which disadvantages, or handicaps must be remedied in order to give us the moral satisfaction of

knowing that opportunity is genuinely equal" (p. 117).

Edley recognizes that the problems in implementing such a vision would be substantial. Some groups would demand clear evidence of the existence of the disabilities suffered by African Americans; other groups would deduce their existence from the stark pattern of racial disparity in this country in virtually every arena, and in the continued and veritable evidence of outright discrimination. Moreover, Edley feels that the call for equality of opportunity might still be resisted because it invokes the language of blame and some will feel that an individual's personal link to wrongdoing and its consequences is too remote to justify the costs of affirmative action policies.

Edley contends that the most tenable vision of America supporting affirmative action polices in some situations is the value of diversity, or as he prefers, "inclusion." He argues that liberals in the past have been too quick to rely on a diversity/inclusion justification with little if any explanation. Because there is a moral cost to all forms of affirmative action, he explains, it is vital to explain explicitly why inclusion is a moral and social good. The inclusion justification may be more effective because it does not rely on the language of guilt, remedy, and rights. There are specific ways in which inclusion will benefit both society and individual institutions. Inclusion is an important antidote to the divisive, yet sometimes non-discriminatory, tendency to associate and divide ourselves into groups of people like ourselves. However, inclusion and familiarity create tolerance, a civic virtue central to the American ethos. It is both an acknowledgment and a tutor of the notion that we are part of a national community. There is, in addition, instrumental justification for inclusion. A police force, in order to be trusted and effective, must have a personnel roster that roughly reflects the population that it serves. Similar claims could be made for the legal and medical professions; to meet their professional obligations, they must both possess insight and engender trust. Although the demonstrable instrumental value of inclusion is somewhat less obvious in university enrollment, interaction between different groups produces learning and creativity, certainly one of the goals of academia.

Edley admits that it may be difficult to measure the benefits of inclusion in some contexts; therefore he insists that policies enacted on those grounds carefully weigh the costs of the preferential measure. And while inclusion will always warrant some weight as a justification, it will never be as compelling as a policy justified as remediation for clear cases of discrimination. But, for Edley, the justification of affirmative action policies should always be a case-by-case endeavor. On one hand, thin justifications and small benefits should always incite a very close scrutiny of the costs of a program. On the other hand, if the costs associated with a preferential policy are demonstrably low, then the justification for the policy may seem less important. Edley closes his discussion with an extended commentary on the value and creation of a community ethos. If various parties discussing affirmative action viewed the problem through the lens of communalism, they would be more likely to see racial inequity not as a black versus white issue, but as a community predicament that requires a community response. Such a view would banish divisive and problematic rights rhetoric and legalistic complications and open the way for genuine solutions.

Edley's argument that the affirmative action discussion should focus not on rights but on values is convincing. His intellectual objectivity, even in the face of his own heartfelt commitment, is admirable, and he appears genuinely concerned about the full range of moral, social, and economic costs to implementing affirmative action policies. Edley observes that many participants in the affirmative action debate believe that much could be resolved with better empirical evidence. How-

ever, he cautions against believing that better empirical evidence will create a solid consensus.

While granting this, I believe his position underplays the value of good empirical data. For example, what is the real injury suffered by a white male who does not get into Yale Law School? Does he end up in a low tier, low prestige law school? Or does he merely end up at Harvard? And if so, how much has he been wronged? Edley is correct that such information and how it is viewed is value laden, but it could go far toward resolving at least some aspects of the debate. And, although he emphasizes the difficulty in obtaining such information in a usable fashion, he ultimately advocates a much grander and arguably more problematic remedy--the creation of a sense of community.

Edley's discussion of community, its merits and its creation, is eloquent and inspiring. Many readers will be convinced by it. But convincing some citizens, even most, that the good society is one in which community and inclusion are central may not be enough. One still must contend with those members of society who are not convinced. It is one thing to construct a robust and persuasive argument that community is a worthwhile value, but it is altogether another to ensure that the value is internalized. The reality of a substantial minority of dissenters, even under the most optimistic scenario, underscores the inadvisability of Edley's dismissal of the libertarian strain of American social and political thought. Although there are many grounds on which to question libertarian, individualistic, and self-interested sentiments and beliefs, it is a position that is both well developed and prevalent, and worthy of a response. Edley hopes for a conversion, a "moral transformation." But, how does society answer questions of policy in the meantime? While it is true that rights talk frequently blurs important moral considerations, the option to pursue one's perceived rights legally will remain for the foreseeable future. America--even one that substantially shares a vision that elevates community and inclusion--will be forced to give an audience to those individuals who feel they have been wronged by affirmative action policies. Edley successfully checkmates the rights arguments as a moral issue. As a legal issue and practical reality, he is, sadly, less successful. However, the very improbability of impending mass conversion increases the importance of Edley's insightful and honest guidance on how to view and analyze existing and future affirmative action policies in the short term.

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