

Color Blind — Or Not?

NOT ALL BLACK AND WHITE: Affirmative Action and American Values, by Christopher Edley Jr., Hill and Wang, 294 pp., \$25.

BY DAVID J. GARROW

ONE OF MY MOST memorable souvenirs from 15 years of university teaching is a photocopy of the cover of a job applicant's file folder. A search committee was considering six semifinalists for a junior professorship with an African-American studies emphasis. Although no racially exclusionary language had appeared in the published advertisement, search committee members explicitly understood that the position would be filled only if they chose a "person of color." Then one committee member read the six files carefully enough to realize that one semifinalist was not a "person of color" and scrawled a warning on the offending folder. "APPLICANT IS A WHITE MALE," inch-high letters advised. A few days later, the committee chairman disclosed that there were now five finalists; the white male "has been eliminated from the pool."

Reading

Christopher Edley's "Not All Black and White" reminded me of those photocopies. Was this racial discrimination? You bet — and this particular example was uncommon only in the explicit, ham-handed manner in which the search committee unwittingly documented its work.



Photo by David Barry

Christopher Edley

Edley — a black Harvard Law School professor who worked in the Carter administration, helped lead Michael Dukakis' 1988 presidential campaign and headed the Clinton White House's 1995 review of federal affirmative-action policies — would insist that this example is misleadingly unrepresentative of anything that regularly happens in the real world. But anyone who's had any experience in academia or journalism — to name just two professions — could attest that in actual human practice there's often a significant minority advantage in graduate-school and job-candidate deliberations.

Edley's hope is to offer a frank but persuasive brief in support of present-day affirmative-action programs. In some part he succeeds, in that he honestly but passingly acknowledges downside problems and concerns. But his straightforward stance as a partisan advocate almost inescapably results in a book that will be largely unpersuasive to those who are uncertain or ambivalent in their feelings about racial preferences.

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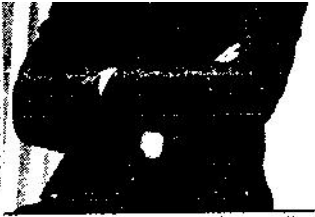


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Until at least the late 1960s, it was liberals who answered "no" to the question "Are people of different races fundamentally different?" And it was conservatives who responded with some version of "yes." Now, for almost two decades, those stances have been reversed. Edley asserts that "in the United States today, any black man or woman is likely to face continuing, serious disadvantages because of race, relative to white peers." If one thinks in terms of rental housing or hailing taxi-

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EDLEY

cabs, Edley's assertion is undoubtedly correct, but if one examines that claim in light of higher education and middle-to-upper-middle-class employment options, Edley's argument sounds strained and overstated.

Edley readily concedes that, in practice, affirmative action "can become an inflexible emphasis," but he insists quite baldly that "a flat rule prohibiting consideration of race is inconsistent with common good judgment." Nonetheless, he accurately acknowledges that "Hiring and admission decisions made with sincere attention to both merit and opportunity will result in the advancement of first-rate people, but if there is a lazy or cynical inclination simply to produce colored folks and achieve numerical goals, the results are painful."

Yet Edley's programmatic bottom-line always trumps his analytical concessions. Yes, he says, "there is indeed a moral cost to race-based decision-making," but "the black-white disparities in our society" are of such a "morally unacceptable" scale that government use of racially preferential policies ought not to be challenged.

Perhaps surprisingly for a law professor (but not for such a Democratic Party veteran), Edley voices a strong preference for *political* determinations rather than judicially determined legal or constitutional decisions. Confessing that he wants to "put the matter of courts, law and litigation to one side," Edley revealingly allows that "rights rhetoric is necessarily an unreliable strategy for persuasion in the affirmative-action debate." When one thinks back

to how much of the black freedom struggle, from well before *Brown v. Board of Education* right through to the Voting Rights Act of 1965 and the Civil Rights Act of 1968, was explicitly premised on an invocation of constitutional and indelible human rights, Edley's different perspective is all the more strikingly dramatic.

Edley notes the Supreme Court's 1995 decision in *Adarand Constructors v. Peña*, in which the court ruled that any racially preferential government policy would be tested against the most difficult and stringent standard of constitutional review. "In some respects," he writes, the decision "turned the world upside down, because many matters previously in the realm of policy choice and prudent judgment were now matters of constitutional analysis." Yet Edley seems unwilling to admit how consistently federal courts now turn a sharply critical eye toward racial-preference programs. "Adarand" was not the first such Supreme Court holding, and subsequent rulings by federal appeals courts — striking down preferential law-school admissions in Texas and discriminatory teacher layoffs in New Jersey — promise that this trend may well gain further legal strength.

Edley's refusal to argue his case in legal terms reflects how strongly America's constitutional values call into question any government use of race, whether "affirmative" or not. Edley offers a policy advocate's case, but his unwillingness to confront the "rights" issues illustrates how black America's one-time favorite battleground has become a field that affirmative-action proponents fear to contest. ■