1997

Advocacy Scholarship and Affirmative Action

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BOOK REVIEW

Advocacy Scholarship and Affirmative Action

THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY. 
By Paul Craig Roberts and Lawrence M. Stratton. (Washington, D.C.: 

WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION. By Charles 
R. Lawrence III and Mari J. Matsuda. (Boston: Houghton Mifflin Company, 

REVIEWED BY CHARLES F. ABERNATHY*

INTRODUCTION

Every revolution is just if measured against the problems it seeks to solve. 
Every revolution goes too far if measured against the solutions that it eventually 
proposes. Every reform creates a new injustice that makes necessary its own 
reform. These truisms do not apply only to the French Revolution and the 
Federal Rules of Civil Procedure. So it is also with the civil rights revolution 
and affirmative action or quotas.

The difficult part, of course, is knowing what, at any given point in time, 
needs changing and what changes go too far and need to be jettisoned. These 
books, The New Color Line\(^1\) by Paul Craig Roberts and Lawrence M. Stratton, 
and We Won't Go Back\(^2\) by Charles R. Lawrence III and Mari J. Matsuda, 
debate this problem of reform and overreaching in tough, advocacy-oriented 
prose. The first argues that racial reform was necessary but has gone too 
far—has even become morally self-corrupting—by its adoption of quotas and 
affirmative action. The second argues that racial reform was necessary and that 
we need more, not less affirmative action, and not only for blacks, but for 
women, Asian-Americans, Chicanos, poor people, and generally all "subordi-
nated classes.” Its title, therefore, is somewhat misleading, for the authors not 
only resist going back, they also wish to push for more quotas and affirmative 
action for additional groups.

I wanted to review these books because each in its own way makes the 
strongest case for its position, and these two books will probably become the

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1. PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND 
PRIVILEGE DESTROY DEMOCRACY (1995) [hereinafter THE NEW COLOR LINE].

2. CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR 
AFFIRMATIVE ACTION (1997) [hereinafter WE WON'T GO BACK].
benchmarks for testing ideas and arguments both for and against affirmative action. Each is very well written, entertaining to read—We Won’t Go Back is at times almost lyrical in its beauty—and scholarly in scope, though not always scholarly and not intended only for scholarly audiences. Virtually identical in length, ambition, and historical focus, these books provide complementary views that together provide a sufficient introduction to the entire current debate. Their achievements are even more substantial when taken together, and in fact they must be read together because each alone reflects the usual problem of advocacy books—it overstates the case, dehumanizes the opposition, and turns off as many readers as it may convert. To buy and place only one volume on your coffee table is to make a political statement of what one already thinks; to read both is to express a desire to think anew.

Despite their decidedly different positions, these books also bear an uncanny similarity in blueprint that makes reading the pair much more illuminating than reading one alone. The order and structure of the books are virtually identical. After setting the stage with personal biographies and a little political orientation (middle-American classic liberals opposed to privilege and entitlements for The New Color Line; politically active child of union organizers and well-educated child of professor and doctor for We Won’t Go Back), each starts with a historical view of the problem it discusses (from community goodwill to the rise of judicial activism; from the Montgomery bus boycott to the anti-affirmative-action cases of the 1970s and 1980s), and each turns to a series of events that are claimed to constitute the dramatic fall from grace that created a current evil that must be fought. These events are characteristically precipitated by evil persons (duplicitous judges; Republican governors). Finally, each turns its attention to the culture wars, broadly noting the faults of their authors’ adversaries (the “New Marxists” and “Race Crits”; racial traitors and those who engage in hate speech). The New Color Line bravely risks the condemnation of the currently ascendant academic view. We Won’t Go Back supplements unusually hot rhetoric by offering warm, human vignettes of the lives of affirmative action’s beneficiaries.

Since three of the four authors here are my colleagues at Georgetown University Law Center, I have little interest in promoting a rancorous debate with them.
Nevertheless, I want to pursue a goal that they will disapprove of: I want to show that advocacy books such as these commonly impose costs on their readers, not the least of which is the cost of buying a counterbalancing book that will help bring out the fuller truth. These books do not claim to be scholarship in the traditional sense displayed in Randall Kennedy’s *Race, Crime, and the Law,* in which evenhanded investigation and an unprejudged search for solutions determine the scope of the work. The villains here were known and the solutions chosen before the research began.

My goals are these more ambivalent ones. First, I want to show why these two books are largely effective advocacy—why they appeal to the reader—and how their appeal reflects common American ideals about privilege. Second, I want to show why advocacy books are seldom fully effective and often infuriatingly obvious in a way that alienates thoughtful readers who still have an open mind, readers who should be the prime audience for the authors’ views. Finally, I want to suggest some common problems and fallacies that make it difficult for advocates and opponents of affirmative action, such as the persons of goodwill who authored these two books, to reach common ground.

I. ADVOCACY THAT WORKS: PRIVILEGE AND THE PRIVILEGED

It is the measure of the Americanization of both teams of authors that they each aim to kill the same target, “privilege” in public and private life. The debate is all about who is privileged: each thinks it is the other.

A. THE NEW COLOR LINE AND THE PRIVILEGE OF BEING BLACK

Subtitled “How Quotas and Privilege Destroy American Democracy,” *The New Color Line* sounds some of the notes of the re-emerging communitarian movement, portraying an American society founded on a conception of the

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Georgetown University Law Center (GULC) faculty as a full-time tenured professor after leaving Stanford Law School’s faculty in 1992. He is a past president of the Society of American Law Teachers. GEORGETOWN UNIVERSITY LAW CENTER BULLETIN 16 (1997-98). Mari J. Matsuda, also a full-time tenured professor at GULC, joined Lawrence in moving to our faculty from California, leaving the UCLA law faculty. Id. at 17. Lawrence M. Stratton is an adjunct professor (part time) and teaches one course per year in legal history. Id. at 203 (listing 266 members of adjunct faculty).


12. To the extent that the authors’ rhetorical devices work on some readers, this review serves to help those persons become more critical listeners to arguments. Cf. Andrew Jay McClurg, *The Rhetoric of Gun Control,* 42 AM. U. L. REV. 53 (1992) (discussing the effective and ineffective uses of traditional rhetorical devices in the gun control debate).

13. Although I consider both pairs of authors to be persons of goodwill, neither pair thinks that of the other. See *The New Color Line,* supra note 1, at 163-70 (criticizing “race crits,” such as Matsuda and Lawrence, for their “assaults on good will”); *We Won’t Go Back,* supra note 2, at 83-84 (stating those who oppose affirmative action, as do Roberts and Stratton, are just old-fashioned racists practicing “race baiting” in a new guise).

14. These books discuss more than preferences by race, as will become clear below. Each establishes racial preferences as the touchstone of discussion, however, and for ease of presentation I focus on that topic except where to do so inadequately reflects the authors’ views.
public good and supported by twin pillars of American law: democratic processes and equality in governmental treatment of citizens. Ambitious in its sweep, The New Color Line not only opposes quotas but seeks to show what missteps in American history made it possible for quotas to take root in an American society devoted to democracy and equality.

Its chief target is the Supreme Court decision in Brown v. Board of Education, a leap of antidemocratic faith that undermined democratic processes and shifted considerable momentum to the judiciary to ignore popular ideals. But there are plenty of other targets as well, from federal district court judges who ran amok after Brown to federal bureaucrats who subverted democratic compromises justly made in Congress. All of these governmental actors misused their power to erode the most fundamental American precepts—they fought inequality and privilege, say Roberts and Stratton, by resorting to new inequalities and new privileges. Old privileges for whites were replaced by new privileges for blacks, both sets of privileges equally objectionable because based on racial status, not on individual merit.

This aspect of The New Color Line is powerful and effective advocacy. The discussion of the politics of the Brown decision popularizes a little-known secret in the history of the case. Justice Felix Frankfurter, in a fundamentally unethical action, created arguments and fed them to the Justice Department through a favored former clerk, so they would return to the Court as briefs that would likely appeal to his fellow justices. Also disturbing to observers steeped in the public good is the revelation of political posturing and political use of the social science profession that led to the publication of Gunnar Myrdal’s An American Dilemma, a book that profoundly affected Justice Frankfurter and the Court in Brown. And finally, the Equal Employment Opportunity Commission’s (EEOC) wilful undermining of Title VII of the 1964 Civil Rights Act to promote the use of quotas and statistics in defiance of Congress must cause discomfort to all those who believe in democratic government. My suspicion is

15. See The New Color Line, supra note 1, at 5-6.
16. See id. at 13-14.
19. See id. at 51-59.
20. See id. at 87-102.
21. See, e.g., id. at 135 (discussing how loan programs aiding minorities are privileges because they cure no prior discrimination against blacks).
22. See id. at 36-50.
23. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY (1944).
24. See The New Color Line, supra note 1, at 21-28. The authors see Myrdal’s book as the uncited element in Brown’s famous footnote 11, the social science that the Court relied upon but never cited. See id. at 32 (discussing oral argument questions relating to Myrdal’s book and counsel’s argument relying on study cited in footnote 11).
that readers oriented toward public morality, even those who like the result of these governmental processes, will be embarrassed and feel some shame about the way in which the goals were accomplished. That is how well this book works as effective advocacy.27

The second half of The New Color Line documents the growth of race-based affirmative action in the aftermath of Brown and the EEOC’s reorientation of Title VII toward statistical balance. There is a collection of sample programs that can be fairly called quotas, and the reader is asked to see the breadth of the effort in this direction—hiring quotas, business and contracting quotas, advertising and modeling quotas, house financing quotas, quotas for university admissions and more.28 This part of the book also links the growth in quotas to vocal supporters in academia, especially the “Race Crits” and “Fem Crits” at law schools.29 According to Roberts and Stratton, the entire movement, essentially redistributive and vaguely communistic, reinforces racial stereotyping and dehumanizes persons based on their race.30 The last chapter covers some of the recent political action in California that rolls back affirmative action31—this is the “back” to which Lawrence and Matsuda, in their title, will not go.

This part of The New Color Line is also compelling advocacy. It works by drawing on the reader’s reservoir of traditional, liberal American values, such as fair play and freedom of conscience and speech. A few fringe actors go a long way in helping the argument: Lani Guinier with her penchant for assuming the power to announce who is “authentically” black;32 Leonard Jeffries, Jr., and his antics at CCNY;33 and a few players known only to academics who suggest that all sex is rape34 and that integration is a tool of white domination.35

All argument is effective or not in the context of widely shared values, and

27. I include these points together here to demonstrate how well the book draws on fundamental, shared values to make itself persuasive. At the same time, I would judge that not all these points are of equal value. That institutions promote research to popularize topics, as disclosed in the discussion of An American Dilemma, supra note 23, seems ordinary, and to expect the world to behave contrarily would be naive. Nevertheless, it should also be noted that the urge to misuse social science can explode in one’s face, and there can be no complaint when that finally happens. See, e.g., Mark G. Yudoff, School Desegregation: Legal Realism, Elaboration, and Social Science Research in the Supreme Court, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (observing that the consensus among social scientists is that the data relied on in Brown were defective).
28. See THE NEW COLOR LINE, supra note 1, at 163-70.
29. See id. at 145-61. For those outside academia needing background on these terms, see Mark V. Tushnet, Critical Legal Studies: A Political History, 100 YALE L.J. 1515 (1991).
30. See THE NEW COLOR LINE, supra note 1, at 163-70.
31. See id. at 170-77 (discussing Governor Wilson’s objection to quotas).
32. See id. at 148.
33. See id. at 154-55 (noting Jeffries considers whites “fundamentally materialistic, greedy, and intent on domination,” while blacks are “essentially humanistic and communal”).
34. See id. at 166 (discussing Andrea Dworkin’s view that consensual heterosexual marital sex is rape).
35. See id. at 169 (discussing Gary Peller’s view that integration reflects “the ultimate racism” by subsuming black culture). Integration, however, is also a strange construct. After Peller was hired on the GULC faculty, one colleague announced that having read his work, it was a good thing that we had further integrated our faculty by hiring a black man. This colleague is white.
this part of the Roberts-Stratton book appeals by viscerally pushing the reader to think of morality as it is deeply shared by most Americans. Roberts and Stratton feel they have an argument to make precisely because they believe that these values are widely and deeply shared—that they are democratic values—in our society.

The privileged to whom Roberts and Stratton refer, therefore, are those who receive special benefits because of the irrelevant factor of their race, and in modern American society those are blacks and others benefitted by quotas and other affirmative action. To bestow privilege in this way is wrong because both those harmed and those benefitted are judged by the same equally irrelevant factor of race rather than by their underlying merit. The argument seeks to persuade by forcing the quota advocate to confront a previously popularized value, the equality that results when race is extracted from decisionmaking; it also works because so many modern Americans actually share this value.

B. WE WON’T GO BACK AND THE PRIVILEGE OF BEING WHITE (AND RICH AND MORE)

For the authors of We Won’t Go Back, it is a different world out there, one in which privilege belongs to an array of persons sitting opposite persons of color. The Roberts-Stratton view of a community in which all persons seek the common good strikes Lawrence and Matsuda as naive idealism. Referring to sixteenth-century writings that first spoke of a new race of Americans, separate from their European forebears and interested in the common good, Lawrence and Matsuda curtly reply: “[I]f a new race called Americans had indeed arisen [from among European immigrants], it was white.” Meritocracy does not exist either: legacies (children of alumni) are regularly admitted to universities despite their lack of merit, and professions fill their ranks based on inside contacts, not merit. The hegemony of insiders is so great that only affirmative counter-privileges—offsetting privileges—can break the existing stranglehold of the existing privileged.

36. Chapter 9, which makes this argument most directly, is entitled “The Proliferation of Privilege.” Id. at 127.
37. This is the same argument made by Dr. Martin Luther King, Jr., in his famous “I Have a Dream” speech. See HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950s THROUGH THE 1980s 167 (quoting text of speech).
38. See id.
39. See PAUL M. SNIDERMAN & EDWARD G. CAMERON, REACHING BEYOND RACE, passim (1997) (discussing the wide consensus among whites on antidiscrimination as a positive value).
40. Lawrence and Matsuda state that they are maintaining their separate voices, and in line with previous statements, they consider individual voice important. We Won’t Go Back, supra note 2, at xv. The individual chapters are not labeled with the author’s name, however, and therefore in an abundance of caution I attribute all statements to the authors collectively unless there appears to be a reason to divide them and a strong indication of a chapter’s individual author.
41. See, e.g., id. at 222.
42. Id. at 210.
43. See id. at 91-101, 185-86.
44. This is equally true of sex discrimination against women. See id. at 151-67.
The counter-privileges advocated by Lawrence and Matsuda are affirmative action programs, quotas. And because the hegemony is broad and pervasive, the affirmative action must be similarly broad, offsetting "discrimination along all axes," providing benefits for principally blacks, women, certain other ethnic groups, homosexuals (if gays and lesbians want it), disabled persons, and poor people. The authors do not argue for benefits for the unqualified, though they frankly note that qualifications are difficult to measure and are themselves often based on the assumptions and viewpoint of the historically privileged. Affirmative action, therefore, is a form of compensation, or reparation, that makes right grievous and ongoing wrongs. Not to be too narrow, however, We Won't Go Back provides alternative justifications for affirmative action. It may be appropriate to accomplish some unrelated social goals, such as improving community contacts between police and the communities whose trust they must win, or improving the provision of medical services to underserved communities. Moreover, affirmative action is also good because it can be a "special treat": sometimes you just get one for no reason at all.

With exceptions noted below, We Won't Go Back works as effective advocacy because it appeals to our sense that persons should not suffer for losses which were not of their own making. The victim of a battery deserves compensation for harms deliberately directed at her, an automobile accident victim deserves compensation for harms carelessly directed at her, and even a flood victim deserves compensation—through socialized structures such as insurance—for harm visited on her without reason or plan. The third class is important, for the authors realize that not everyone will agree that blacks (and others benefitted by affirmative action) are without responsibility for their condition, so they carefully and sometimes subtly construct opportunities for the reader to overcome stereotypes of various minority groups. They sprinkle vignettes of the lives of affirmative action beneficiaries throughout the book, humanizing such persons so that the reader dare not think of faceless, stereotyped "others" who are black, women, or poor. The authors' parents and siblings also make regular

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45. Id. at 182. Those who benefit from affirmative action are admitted to receive a "moderate level of privilege." Id. Neither book draws a distinction between "affirmative action" and "quotas." Both treat the relevant issue as one of privileges bestowed; with one important reservation noted below, see infra Part IIIA1, I discuss the issues in the context acknowledged by the authors.
46. We Won't Go Back, supra note 2, at 251.
47. See id. at 249-69.
48. See id. at 91-119.
49. See id. at 233.
50. See id. at 184, 200, 251-55.
51. Id. at 102.
52. Cf. Steven L. Grover, Predicting the Perceived Fairness of Parental Leave Policies, 76 J. APPLIED PSYCHOL. 247, 252 (1991) (citing studies and research showing that persons will perceive greater justice in situations in which reparation is given to a "recipient [not] responsible for initiating a need").
53. We Won't Go Back, supra note 2, at 127. Lawrence and Matsuda regularly refer to "others" to define persons who lack privilege and would benefit by affirmative action.
appearances, and they are accurately presented as accomplished, sensitive persons of color, not lazy know-nothings lacking self-respect and goals in life. The reader can no longer pigeonhole all blacks as either involuntary victims (deserving of aid) or volitional nonvictims (undeserving of aid because they brought their problems on themselves). Instead there is a much more dynamic social construct at work in which intent of the racist and free will of the black person are only occasional elements.

The central and self-admitted "scary" thesis of We Won't Go Back, the extension of quotas to so many groups and the observation that quotas are "redistributive," relies on an appeal to widely shared values, not merely leftist politics. If compensation is just, it is just for all who have suffered loss, and that means more than simply blacks. Though they never cite the concept by name, their approach relies implicitly on Justice Thurgood Marshall's famous and intuitively appealing "sliding scale," so that the most harmed (blacks) would receive "affirmative action plus," while other less-victimized groups would receive only ordinary affirmative action or none at all if they so choose. Though the sheer size of the Big Tent creates some awkward moments, I suspect that this argument appeals to many for the same reasons that the Democratic Party's Big Tent appeals to many American voters: it spreads the benefits to be realized from affirmative action to many persons. It draws support for the same two reasons that middle-class entitlement programs draw support: many can see themselves as at least potential beneficiaries and as deserving of the help, while many others simply see that members of some of these groups deserve help or justice.

II. THE LIMITS OF ADVOCACY SCHOLARSHIP

I have enjoyed my colleagues' books and have learned much from them. Advocacy books have their place. Nevertheless, these books—the best of their genre—also demonstrate the limits of "advocacy scholarship." As rhetorical adventures go, advocacy books often share three defects: romanticization of the self, demonization (or unfair denigration) of opponents, and myopia of the heart (an inability to see oneself as seen by others). These are related defects that go to an author's intellectual empathy, an essential openness to the views of others.

54. See, e.g., id. at xviii (discussing Lawrence's professional family); id. at ix-xi (discussing Matsuda's activist parents and disabled-veteran grandparent).

55. See id. at x-xi, 77, 225. Lawrence remarks with great understatement, "Our [black] culture, our identity, is not entirely of our own making." Id. at 225.

56. Id. at 273.

57. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 119-22 (1973) (Marshall, J., dissenting) (arguing the level of scrutiny in an equal protection case should vary according to factors such as the character of the class affected, the importance of the governmental benefit/harm to those affected, and the asserted state interests); Dandridge v. Williams, 397 U.S. 471, 517-29 (1970) (Marshall, J. dissenting) (same).

58. WE WON'T GO BACK, supra note 2, at 192.

59. Id. at 258-59. The authors never define "affirmative action plus." It is a problem for their thesis, as discussed below. See infra notes 140-48 and accompanying text.

60. See Grover, supra note 52, at 248 (citing studies establishing that "an egocentric bias leads people to evaluate resource distribution schemes that benefit themselves as fair").
A. ROMANTICIZING THE SELF

I assume that everyone romanticizes or puffs himself, his friends, his world, but it is a serious problem for advocacy books and an especially serious problem for advocacy books about race. This is because the romanticization of the self is a real or potential manifestation of one’s own insularity and narrow-mindedness, two universal character traits that permit residual race consciousness to survive even among persons of goodwill, such as these authors.

We Won’t Go Back repeatedly offers romanticized depictions of the authors’ selves, families, and ethnic communities. Parents are idealized—but so are their stories, which are accepted uncritically and turned into race-based and class-based parables. One author’s mother admits to her child that she stole peanut butter from her employer’s refrigerator, but only because she was not paid enough, or only “because they did not give me enough to eat.” In one respect this romanticizing is not only necessary, but a core element in accomplishing three important goals set by the authors: overturning stereotypes about persons of their backgrounds who benefit from affirmative action; demonstrating that persons of their backgrounds are in fact capable, moral, and hard-working; and popularizing the message that minority progress can and should be initiated and controlled by minority communities. Presenting some very accomplished siblings and parents helps those causes, but the authors’ persistent readiness to excuse bad conduct by romanticizing the motives of self, family, and community eventually becomes unrealistic.

61. One author, for example, trumpets straight-A grades in law school and claims never to have held a job that he or she was “unqualified for.” We Won’t Go Back, supra note 2, at 91. But see infra notes 166-69 and accompanying text (apparently using “qualifications” to mean “minimal qualifications”).

62. One author describes regular meetings between a father and other well-known black professionals in which conversations focused on “honest and rigorous analysis and criticism,” never gossip or fanciful conversation. We Won’t Go Back, supra note 2, at 132-33. Siblings include a published sociologist, id. at 284 n.2, and a “brilliant teacher,” id. at 225, not your ordinary American working family.

63. People of color are regularly depicted as working “harder than anyone else.” Id. at 38. Civil disturbances and burnings by blacks are just, and merely “the voice of the unheard.” Id. at 17 (quoting Dr. Martin Luther King, Jr.). Black students who shout down white students at a public meeting are not responsible for their conduct, for they are acting justly in the context. Id. at 223-24.

64. Id. at xvii-xix.

65. See id. at 7.

66. See, e.g., id. at 38.

67. See id. at 19-20, 30-31, 212.

68. Lawrence has an additional problem of persuasion that is created by his attempt simultaneously to show that he comes from an accomplished family and that his opponents, not himself, are the privileged of society. Some white persons may find it difficult to conceive that the grandson of an Episcopal priest, son of a doctor, son and sibling of other professionals, and spouse of a law professor, who is himself a law professor, is a victim in this society. I am somewhat inclined toward Lawrence’s view, on the knowledge that even professional blacks receive no immunity from racism, but the very ambitious agenda in presenting blacks as consistently accomplished carries with it the potential for loss of credibility. See id. at 223 (claiming black students who shout down a white professor should not be held responsible for their acts; black students who shout down white students in discussion with famous black filmmaker cannot be held responsible for their acts, even though filmmaker himself thought dialogue was appropriate and nonracist).
however, the self-centeredness at the heart of romanticization of the self comes uncomfortably close to the same human urges that promote racism, sexism, and the other ills that these authors decry. The art of puffing oneself and one's cohorts carries the implicit message that persons outside the circle are "others," as alien to Lawrence and Matsuda as minorities are to majority society.

Romanticizing the self is not an immediately apparent problem for The New Color Line because the authors consciously appeal to an ecumenical vision of American society that is egalitarian, selfless, and oriented toward full democratic participation by the entire community. By implication, the authors present themselves as objective, evenhanded, and civic-minded persons. One might argue that this is itself a romanticization of the self, but there are some indications that more overtly romanticized views have occasionally crept into the text. Roberts tries to establish his bona fides on racial sensitivity by telling the story of sneaking a dark-skinned Arab friend into movie theaters by wrapping his head in a turban, thereby avoiding a movie operator's otherwise certain efforts to exclude the Arab friend as a perceived black person. The point appears to be that Roberts has always known what racism is and has successfully gamed the system in order to resist its effects. He also notes that many whites in his hometown "formed lifelong relationships with black household employees, who became de facto members of the families." Such romanticized visions of friendly racial interaction that must drive Lawrence and Matsuda crazy, and such stories are equally unlikely to persuade many fence-sitters of the author's racial sensitivity.

The romanticization of self, friends, and one's own community is an objectionable rhetorical device for two reasons. First, it asks the reader to believe that an argument is worthy because it is made by worthy persons, not because it has intrinsic merit. An idea may come from any source, and knowing that source

69. See id. at 33. Lawrence, for example, un-self-consciously refers to the fact that he always "root[s] for the team" with black players. See id. at 67. He states that the coaches he admires are "race men," which "has nothing to do with not liking white folks. It has a lot to do with loving black folks and yourself." Id. at 68. Despite this circle-closing justification for his feelings, his coauthor, in the succeeding chapter, criticizes white-dominated law firms for "tend[ing] to look for someone like themselves." Id. at 101.

70. See KENNEDY, supra note 11, at 7 (noting that advocates of a color-blind Federal Constitution may actually be more excited about black crime than all crime).

71. THE NEW COLOR LINE, supra note 1, at ii.

72. See id.

73. When I say "intrinsic," I include context—that is, time and place, but mean to divide that context from the individual speaker's public persona. Lawrence and Matsuda might object that there is no such division. See WE WON'T GO BACK, supra note 2, at ix-xi (noting that all racial consciousness is contextual); id. at xix (rejecting the "notion that there is one universal authority"). I agree to a certain extent, but my point is subtler. Although one context (such as race) plays a substantial role in determining one's personality, competing contexts (respect for education, friends) as well as individual personality traits (shyness, aggressiveness) affect the way in which all factors are blended to make a whole person as he or she is perceived by self and others. See id. at xi (discussing white racist who agreed to vote for black mayoral candidate because of his views on education). Lawrence and Matsuda do an excellent job, especially in some of their vignettes, of breaking down stereotypes and persuading
may prejudice our views but ultimately tells us little or nothing about the injustice of the position. Second, romanticized depictions are essentially false depictions. Stealing does not always occur because people have not been paid adequately as nannies or housekeepers, and lifelong friendships with maids establish few bonds of equality across racial lines. Successful public policy must be based on something more than a scene from a John Wayne movie or a romance novel.

B. DENIGRATION OF OPPONENTS

Denigration of opponents, as seen in these books, falls into two rhetorical subcamps: guilt by association and personal vilification. These are fine lines because sometimes one’s opponent is a rat and saying so promotes the search for a greater truth. How is this fine line tread in The New Color Line and We Won’t Go Back?

1. Charges of “Marxism” and Counter-charges of “Red-Baiting”

The attempt to caricature an opponent by linking his position with widely despised others has a long, ignoble, and often very successful history. Though the Cold War has at least temporarily ended, communism and virulent anticommunism seem like good anchors to tie around an opponent’s neck, so we see The New Color Line linking affirmative action to “Marxism,” while We Won’t Go Back returns the compliment with a charge of “red-baiting” aimed at those who link affirmative action with communism. Guilt by association is only unfair when there is no pertinent association, and so the question is whether there is such an association underlying the charges made here.

When The New Color Line charges that affirmative action is a tool of potential opponents of affirmative action that those who like affirmative action are complex persons worthy of support and admiration. But the romanticization of family and friends is intended to do something more, to induce readers to like affirmative action because they perceive its adherents as likable.

74. Goodwill by association is the sibling of guilt by association. Recent newspaper stories reported that Sweden had sterilized many persons during the mid-twentieth century using laws modeled on those in Nazi Germany. Dan Balz, Sweden Sterilized Thousands of ‘Useless’ Citizens for Decades, WASH. POST, Aug. 29, 1997, at A1. Yet similar laws were also in force, with Supreme Court approval, in the United States. See Buck v. Bell, 274 U.S. 200 (1927). Associating the Swedish practice with American standards during the time does not make it more just, and associating it with Nazi practices makes it no worse.

75. As Randall Kennedy has recently shown in his brilliantly conceived and executed RACE, CRIME, AND THE LAW, supra note 11, at 12-21, there is a perverse popular association of blacks and crime, but fighting that battle can only be made more difficult if one seeks to prove that all blacks are blameless for all criminal acts.

76. See, e.g., WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2 (speech by Marc Antony linking Brutus to the deceased Caesar).

77. See THE NEW COLOR LINE, supra note 1, at 145 (referring to advocates of affirmative action as “The New Marxists” in the title for chapter 10); id. at 146 (tying such advocates to the old “Soviet Union”).

78. See WE WON’T GO BACK, supra note 2, at 216 (authors’ proposal is opposed by “Red baiers”).
 Marxism, there is some historical fire to the label but also an essential present truth. Legal rules with affirmative action implications have redistributive consequences when they are implemented.\textsuperscript{79} Lawrence and Matsuda themselves often appreciatively describe affirmative action as “redistributive,”\textsuperscript{80} and are very aware that such an admission makes their proposals sound “scary.”\textsuperscript{81} Especially when pressed toward affirmative action for poor workers, one of their expanded topics for more quotas, the position in \textit{We Won't Go Back} becomes classically Marxist by redistributing according to need.\textsuperscript{82}

It is difficult to see, therefore, that the charge of a link between affirmative action and Marxism is “red-baiting.”\textsuperscript{83} In his history of the critical legal studies movement, Professor Mark V. Tushnet notes a linkage between “crits” and leftist-oriented parents, a link strong enough for him to call his colleagues, with an apparent smile, “red diaper babies.”\textsuperscript{84} His point is not that “crits” are born disloyal, but that quite often the views of parents are passed through to children, though perhaps diluted. When Roberts and Stratton attack the “crits” and their offshoots’ association with affirmative action,\textsuperscript{85} they make even less of a familial connection. Their point is true: affirmative action is redistributational, known to be so, and thus has socialist elements.\textsuperscript{86}

\textsuperscript{80.} \textit{WE WON'T Go BACK}, supra note 2, at 83, 251-53, 273.
\textsuperscript{81.} Id. at 273.
\textsuperscript{82.} \textit{KARL MARX, CRITIQUE OF THE GUTHA PROGRAMME} 10 (New York Int'l Publishers 1938) (1875) (“to each according his to needs”).
\textsuperscript{83.} Those who remember the early days of the black civil rights movement know of its actual connection to leftist causes, see, e.g., \textit{Herndon v. Lowery}, 301 U.S. 242 (1937) (noting black liberation and communist organizing efforts in the South), and the much wider attempt to tie the cause to the Soviet Union and Marxist totalitarianism. See \textit{TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63}, at 468-69 (1988) (discussing FBI report attempting to link Rev. Dr. Martin Luther King, Jr. with communists); \textit{id.} at 565 (same); \textit{id.} at 596 (same); \textit{id.} at 853 (reporting that President John F. Kennedy asked King to cease communications with persons whose names might indirectly link King to communism). This historical knowledge is what makes Lawrence and Matsuda sensitive to charges of Marxism, and it is the apparent impetus for their counter-charge of red-baiting. By standing behind redistributional policies and aligning themselves with “critical” academic views, the authors of \textit{We Won't Go Back} show interests that most persons would characterize as leftist. See \textit{WE WON'T Go BACK}, supra note 2, at 133; \textit{see also infra} note 84. Their only point in alleging “red baiting,” therefore, must be that they are not related to the Russian brand of totalitarian Marxism that flourished in the U.S.S.R.
\textsuperscript{84.} See Tushnet, supra note 29, at 1516 (stating that “crits” represent less a movement than a “political location for a group of people on the Left” who believe in common that “law is politics”; many adherents’ parents were leftists, and their children appear to have inherited a diluted version of their views). In a revealing parallel to Tushnet’s remark about “red diaper babies,” Matsuda refers to her parent’s union-organizing and civil rights activities and labels herself and siblings as “picket-line babies.” \textit{WE WON'T Go BACK}, supra note 2, at ix.
\textsuperscript{85.} \textit{THE NEW COLOR LINE}, supra note 1, at 146-48.
\textsuperscript{86.} Rather than call opponents red-baiters, supporters of affirmative action might point out that, as in secondary education and social security, socialization of costs and redistribution of benefits are positive goods. In fact, that appears to be the Lawrence-Matsuda argument. See \textit{WE WON'T Go BACK}, supra note 2, at 185-86 (suggesting that universities should take an active role in redistributing benefits of American society). Charges of red-baiting obscure the needed discussion about what to socialize and what to leave to private choice. \textit{See infra} Part IIIA1.

Surprisingly, there seems to be much more serious name-calling going on in *We Won't Go Back* than in its counterpart on the right. Aside from the problematic references to Marxists noted above, *The New Color Line* treats opponents as seriously mistaken and even morally objectionable, but never is there a schoolyard name yelled out. *We Won't Go Back*, on the other hand, indulges in so much radical-chic labeling that by the end I almost expected to see a 1968-style reference to "Chiang Kai-shek and the running dogs of capitalist imperialism." While these slurs against Justice Clarence Thomas are quoted as the words of others, Lawrence reports them—repeatedly—with the same mixture of glee and anger common in epithet calling. Finally, in the author's own words, Justice Thomas is lashed for the "extremity of his betrayal" of blacks. Were these the only examples, perhaps the reader could be persuaded that the slurs were necessary to the story line, as Hollywood writers usually say about (female) nudity in movies, but similar denigration of opponents flavors the entire book. Opponents

87. The surprise arises not because of the stereotype that conservatives are more epithet-prone than others, but because no epithets were expected from the Lawrence-Matsuda team. See Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 474-76 (arguing regulation of racial epithets constitutionally permissible and desirable); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2379 (1989) (discussing need for sensitivity to harm caused by epithets). In line with the antisubordination thesis of the authors, see infra note 89, it may be true that their antiepithet rule applies only to speech directed against subordinated groups, leaving the subordinated free to use epithets against others. See id. Nevertheless, some of the epithets quoted below are directed at other blacks, thus placing them in violation of the authors' own rule. See infra notes 90-95 and accompanying text.

88. See supra note 91 and accompanying text.

89. Matsuda at one point declares in almost self-caricature of radicalspeak that "[w]e oppose subordination on all axes." *We Won't Go Back*, supra note 2, at 251. "Subordination" and "antisubordination" are repeatedly used concepts in the authors' theoretical justification for affirmative action, e.g., id. at 186, though the terms are never defined. Moreover, given that the authors intend to promote affirmative action for blacks, women, and disabled persons, see infra text accompanying notes 140-43, 148-54, it is difficult to infer what "subordinated" really means. Disabled persons, for example, are pictured as the close relatives and partners of powerful people, such as President George Bush, or powerful people themselves, such as Senator Robert Dole. See *We Won't Go Back*, supra note 2, at 292 n.14. If antisubordination is the goal of affirmative action, it is difficult to understand why those in the circle of the powerful should be beneficiaries of affirmative action. I assume, therefore, that subordination is a complex term.

90. *We Won't Go Back*, supra note 2, at 135. Before Deion Sanders made "do-rags" (cloths to cover one's hairdo) popular among highly paid athletes, the wearing of a handkerchief on the head was often seen among lowly paid unskilled workers and farmhands, frequently African-Americans.

91. Id. Roberts and Stratton take on Justice Thurgood Marshall in much the same way that Lawrence and Matsuda take on Justice Thomas, for the purpose of belittling ideas by belittling the persons who espouse them. See *The New Color Line*, supra note 1, at 34 (discussing Judge Henry Friendly's letter confiding to Justice Frankfurter that then-judge Marshall was inadequate for his job). But there is no epithet. Cf. id. at 130-32 (criticizing justices of the same race as authors, again without epithet).

92. See *We Won't Go Back*, supra note 2, at 139. Dinesh D'Souza and former Secretary William Bennett, also opponents of affirmative action, fare somewhat better than Justice Thomas; they are engaged only in "silly hyperbole and... pseudo-intellectual assault." *Id.* at 107.
who talk about multiculturalism, for example, are a part of a "copout at least and a deliberate reinvigoration of white supremacy at worst," while other opponents are "[a]ntiunion propagandists." The name-calling and innuendo degrade at times to opinionated inconsistency: one vignette lauds a young Puerto Rican lawyer who works for the Ford foundation directing outsiders' money into admired community projects, yet a hated student journal that has received Ford Foundation money is described as an "externally funded right-wing newspaper . . . ."

This disturbing proclivity for name-calling and mudslinging characterizes much advocacy scholarship. The authors of such a work can become so fully convinced of the justice of their position that their opponents become dehumanized. The surprise in finding such attitudes in the Lawrence-Matsuda work is that these professors at other points in their book sound genuinely open invitations to dialogue, and when criticized previously for their harsh words, they have responded with shock that their book was not received as the "religious and ethical[]" book that "affirms the human family" they envisioned. The tragedy of the use of these slurs and denigrations is that they add nothing to—and even subtract from—the power of the authors’ stories. The way Matsuda describes the interracial neighborhood of her childhood shows a warmth and sensitivity for others and their complex racial feelings that cannot be misunderstood; Lawrence’s description of friends who aided his youthful boycotts is similarly moving. The vignettes about Anthony Romero, whose full-grown father was called "Chico" in his son’s presence at work, and Bernadette Gross, the self-made female carpenter who sees failure only among women who allow "unfairness [to] consume[] them," present compelling

93. Id. at 180.
94. Id. at 107. Those who aspire to a liberal ideal of a color-blind society are pursuing the “old-time politics of race-baiting,” while politicians who oppose immigration and social programs are similarly racist. Id. at 84.
95. Id. at 219. Lawrence and Matsuda also use “McCarthyism” as a familiar refrain. Id. Public universities are “supported disproportionately by working people’s taxes.” Id. at 42. There is also a repetitious allegation that opponents—never the authors—are engaged in rhetorical games. See, e.g., id. at 49 (noting opponents’ arguments are “rhetorical, not factual”); id. at 74 (noting opponents rely on “rhetorical ruse”).
96. See, e.g., id. at iii, 277.
98. We Won’t Go Back, supra note 2, at x-xi.
99. Id. at xiv. Lawrence’s writing reaches a moving, inspiring zenith when he discloses his personal feelings about racially conscious experiences. See, e.g., id. at 140 (describing being forced to read Little Black Sambo in preschool where he was the only black student). In one of these passages Lawrence empathizes with Justice Thomas who, when young, was called “America’s Blackest Child,” deemed by Lawrence a “racial slur” made by other black students. Id. at 140-41. There is never a hint of denigration in these powerful and moving passages, and that demonstrates that the practice is unnecessary to Lawrence’s work.
100. Id. at 36.
101. Id. at 147.
stories that put to lie the assumption that one can only elevate oneself by personally putting down others.

I suspect that the radical jargon in We Won't Go Back is just an excessive permutation of The New Color Line's charge of Marxism. There is a certain need in advocacy books to assume not just the arguments, but also the stance of the advocate—to swagger a bit, to establish one's bona fides with those already converted to one's side. 102 This is analogous to speeches at a political gathering, where Republicans feel it necessary to exalt the interests of the "unborn" while Democrats praise teachers' unions. Yet every politician knows, as should these authors, that the act of solidifying one's base runs the risk of alienating others. 103 The other possibility is that advocacy authors simply have so little detachment that they cannot see themselves and their arguments as others will see them.

C. MYOPIA OF THE HEAD AND HEART

Both The New Color Line and We Won't Go Back suffer from intellectual myopia symptomatic of advocacy books, for as substantial as their contributions are, they sometimes show no awareness of their weaknesses as seen by others. The authors thus miss the opportunity to clarify their thoughts, to anticipate criticism, or to make their discussions more sophisticated. This weakness is very visible in these books' discussions of privilege. Not only does each team see the other as privileged, 104 each appears unable to even comprehend that others could perceive them as privileged. 105

In The New Color Line the privileged are minorities who benefit from affirmative action programs, not the authors (a graduate of an "elite engineering school" who served as Assistant Secretary of the Treasury under President Ronald Reagan 106 and the son of a college president who graduated from the

102. The Lawrence-Matsuda book stakes out a position so convincingly "1968" that even old liberal, Farmer-Labor Party unionist Hubert Humphrey is deemed an unregenerate rightist on the issue of affirmative action. Id. at 15.

103. Saying something like "[w]e oppose subordination along all axes" sends signals of kinship to some, but it cannot possibly persuade fence-sitters because it is just political cant. It has meaning only to those who already know the political litany of the axes or groups actually covered. I suspect that the authors would approve discrimination against murderers and pedophiles in the form of jail terms imposed on their actions but not others'.

104. See supra Parts IA-B.

105. Six years ago I hosted a visiting Russian attorney, and wishing to show her that not all of the District of Columbia was like the swanky midtown area where she worked, I took her to Anacostia to show her some federally subsidized housing projects in one of the most economically depressed parts of the city. "How many families live in each apartment?" she asked. When I answered "one," she asked how many families share each kitchen. After I tried again to show her the difficulties I perceived for the residents, she brushed me away. "What privileged people these are," she said. Her parents, both engineers, shared a two-room apartment with her; two neighboring families joined them in sharing a kitchen, and all of them thought of themselves as privileged within the Russian context where many families with less important jobs still waited for apartments as grand as theirs.

106. The New Color Line, supra note 1, at iii, dust jacket.
University of Pennsylvania and Georgetown University Law Center\(^{107}\)). Their discussion of the ideals of the American meritocracy appear not only romanticized, but also focused like tunnel vision on the single issue of privilege for minorities. A wider perspective would note at least two issues. First, the American meritocracy, if not outright exclusionary of blacks, is at least inclusive of only the relatively privileged in American society; it is not a meritocracy (when it is a meritocracy) of all comers. One does not get to compete for powerful and interesting jobs unless one is born within a zone of privilege that makes it possible to go to college, get an advanced degree, and impress others within similar backgrounds.\(^{108}\) An undesirable sliding scale is at work: one's chances to participate decline the further away one is from the privileged zone, and though this distance may be offset by personal hard work, it takes more hard work the further one is away from the most privileged part of the zone. Second, the American meritocratic ideal is subject to many exceptions, of which affirmative action is only one. The university legacy about which Lawrence and Matsuda write is one important exception,\(^{109}\) but many more could be cited. Law professors arrange for friends to be hired, even when not highly meritorious,\(^{110}\) incumbents in law firms hire those who are similar to themselves,\(^{111}\) and supervisors hire their brothers-in-law and sisters-in-law (regardless of merit).\(^{112}\) To complain about the privilege of affirmative action is to pick out one target in a very crowded field.\(^{113}\) The authors' point can only be that this is the most egregious or objectionable privilege, but there is little or no discussion of this point and no comparative data to prove it.

The authors of *We Won't Go Back* share an equal inability to see themselves as privileged, very privileged. Lawrence attended "a fashionable and progressive" private school while his parents were in "graduate and professional

\(^{107}\) Id. at iv-vi.
\(^{108}\) Cf *We Won't Go Back*, supra note 2, at 185 (discussing how the college admissions process tends to re-create the elite). I would say that the college admissions process at least gives the current elite power to create (or influence creation of) the future elite. Cf. *The New Color Line*, supra note 1, at 139-40 (stating that accrediting authorities influence admissions to create desired future elite).
\(^{109}\) *We Won't Go Back*, supra note 2, at 91-101.
\(^{110}\) See Tushnet, * supra note 29, at 1521 (discussing coalitions that might be formed to promote hiring of his political group). The politicking that goes on in faculty hiring is not limited to crits. As I once remarked to a friend, I am not completely convinced that Critical Legal Studies correctly predicts the behavior of most judges, but I am certain that it accurately describes the hiring actions of many faculties of law.
\(^{111}\) See *We Won't Go Back*, supra note 2, at 101. What Lawrence and Matsuda say is equally true of faculties and admissions. See id. at 105-06.
\(^{112}\) Id. at 109. It is somewhat mystifying that Lawrence and Matsuda do not oppose nepotism (except when it adversely impacts those whom they wish to protect) given their opposition to privilege.
\(^{113}\) To be fair to Roberts and Stratton, their thesis is not merely that quotas harm our society, but, in the words of their subtitle, "How Quotas and Privilege Destroy America" (emphasis in original). At least some of the book concerns how other privileges, such as those exercised by the Supreme Court or federal bureaucrats, also destroy democratic institutions. But as I discuss below, their focus on democracy as a vehicle for promoting meritocracy attaches a magical quality to democracy that is unwarranted. Democracy is that form of government in which all the people get what a majority of the voters deserve, as the citizens of the District of Columbia and some other nonfunctional cities are well aware.
school,” and the private education allowed him to “escape the substandard schooling in our neighborhood public school, where the vast majority of the students were Black and poor.” Matsuda’s family was also able to choose to move away from a culturally diverse area of Los Angeles in order to obtain “safer schools” and a “better life.” Both authors received extensive graduate educations and have taught at some of the nation’s most prestigious schools. In a single sentence, the authors note that perhaps middle-class persons of color enjoy a “moderate level of privilege,” but virtually every other page argues that persons opposite themselves are the truly privileged.

My point is not that these authors are evil and narrow-minded people, quite the opposite. What we see in these works of “advocacy scholarship” is that even persons of generous good nature can become so convinced of the correctness of their positions that they fail to treat others with the same respect they insist must be accorded to themselves. These authors’ worlds are dominated by their topics. For Roberts and Stratton, democracy and equality are so important that they crowd out all other considerations; for Lawrence and especially Matsuda, “antisubordination” is all-consuming. In the field of “advocacy scholarship” there is often no room for a well-meaning opponent on the opposite side, much less for a range of options merely different from what the advocate-scholars propose.

III. PROBLEMS AND SOLUTIONS

Having discussed the limits of advocacy books, I now turn my attention to what is advocated in these books. As I have noted earlier, their accomplishments are substantial. The problem for me is not what these books do, but how far they wish to go in doing it. Their reach toward solutions necessarily causes conflict, but conflict is normal. This, however, is intractable conflict.

A. REFORMS THAT BEGET NEW PROBLEMS

Having identified their social ills, these authors move aggressively with remedies. Roberts and Stratton have discovered that firefighters spray water on

114. We Won’t Go Back, supra note 2, at 139-40.
115. Id. at xi.
116. See id. at xiii, 92; see also supra note 10.
117. We Won’t Go Back, supra note 2, at 182 (referring to privilege associated with affirmative action).
118. It is somewhat ironic here that though three of these authors are my colleagues at Georgetown University Law Center, only the authors of We Won’t Go Back are privileged tenured full professors. Stratton serves as a non-tenure-track adjunct professor while working for a small nonprofit organization. Cf. The New Color Line, supra note 1, dustjacket; supra note 10.
120. See We Won’t Go Back, supra note 2, at 186, 251, 261.
121. If the authors of The New Color Line are really serious about democracy, how would they respond to a landowner’s claim of expropriation of property? See infra note 135 and accompanying text. For a sampling of vilified alternative views in We Won’t Go Back, consider those of liberal Democratic Party leader Hubert Humphrey, We Won’t Go Back, supra note 2, at 15, and iconoclastic Senator Daniel Patrick Moynihan, id. at 47.
burning houses and that this often causes even more damage to the blazing structure than the fire itself; they wish to ban all firefighting. Lawrence and Matsuda have discovered that firefighters save some houses that would otherwise burn to the ground; they now want to flood every house on the block. In other words, each has done a creditable job of identifying a major social problem that threatens our society, but both offer cures that work only in the context of the narrowly focused worlds that they press on the reader. In the three subsections that follow, I try to confront three major issues of remedy raised by these books, and suggest that there are alternatives available that go underappreciated in these pieces of advocacy scholarship.

1. Banning Quotas Versus Socializing the Costs of Affirmative Action

*The New Color Line* works dramatically well in publicizing some issues that are discussed only in academic circles, and even seldom raised there. In addition, the authors show how antidemocratic "leadership" of the elite classes can create, as well as solve, problems. Although it is difficult to prove their major assumption—that American society would have abolished the vestiges of slavery and racial discrimination through democratic means—it is an argument that is widely circulated in this and related fields. Nevertheless, their ultimate position against affirmative action would proscribe virtually all effective democratic solutions to the problem of racial discrimination, except prophylactic future rules of color blindness, because any directed assistance would be unequal treatment. There is something strange and false about an argument that makes it most difficult for a democracy to solve its most vexing problem.

As a matter of social policy, something more is necessary to solve our problems related to race than simply banning all future racial discrimination. Whether one uses the parable of the milk-drinking fox and stork or the image of a shackled runner, there is in American constitutional democracy something unseemly about leaving wrongs unrighted. This is also the constitutional assumption in the Reconstruction Amendments. The drafters of the Thirteenth, Fourteenth, and Fifteenth Amendments envisioned that curative legislation would be necessary, and contemporaneous Congresses passed

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122. See supra text accompanying note 22 (recounting Justice Frankfurter’s role in the *Brown* case).
126. See *WE WON’T GO BACK*, supra note 2, at 24 (quoting President Lyndon B. Johnson’s famous 1967 Howard University speech).
127. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").
128. U.S. CONST. amend. XIII, § 2; id. at amend. XIV, § 5; id. at amend. XV, § 2. For purposes of the
legislation manifesting their understanding that the Amendments entitled them to take affirmative measures that helped former slaves or victims of the former slave system. The notion that Congress has power to adopt only prohibitory legislation restating the negative phrasing of the Reconstruction Amendments has literally zero judicial support. Yet under the thesis put forward in The New Color Line, any compensatory “privilege” bestowed on blacks would be objectionable, whether school tuition vouchers, scholarships, job-training programs, housing subsidies, or any other racially directed subsidies. The legislature would be permitted to address directly lesser problems (discrimination against the poor, for example, a much more fluid group in American society), but not the more serious, long-lasting problem of racial discrimination.

The problem, then, is this: how can one be obedient to both the constitutional textual provisions banning unequal treatment of individuals, and to those granting the authority to remedy problems of racial discrimination in an affirmative, remedial manner? In social policy terms, is there a mechanism succeeding discussion, I assume that, as with federal jurisdiction under Article III and some federal legislative power under Article I, Section 8, these remedial powers are not exclusive. Cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that constitutional analysis for affirmative action plans is same regardless of whether plan is sponsored by federal or state governments).

129. See Kenneth M. Stampp, The Era of Reconstruction, 1865-77, at 99-114 (Bantam ed. 1967) (discussing Republican radicals in Congress, their legislative successes, and their rejection of President Andrew Johnson’s narrow view of congressional power to help freed slaves); id. at 119-54 (describing politics and legislation of Radical Reconstruction). Even the Supreme Court decisions that struck down civil rights legislation in the post-war period assumed that other legislation, more than merely declaratory of the constitutional text, would be constitutionally permissible. See, e.g., The Civil Rights Cases, 109 U.S. 3, 14 (1883) (holding legislation “corrective of any constitutional wrong” is assumed to be permissible). This rubric of permitting congressional legislation that goes beyond the prohibitory terms of the Reconstruction Amendments is orthodox constitutional law today even among conservatives. See City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997) (holding Religious Freedom Restoration Act unconstitutional because not remedial of a Fourteenth Amendment violation, but citing with approval precedents establishing remedial power of Congress to adopt affirmative remedies exceeding their prohibitory terms).

130. When the argument was last made by a party in South Carolina v. Katzenbach, 383 U.S. 301 (1966), it was rejected by both majority and dissent alike. Id. at 327 (stating majority’s rejection); id. at 355 (stating dissent’s rejection).

131. Another way of conceiving this issue would be to say that the Roberts-Stratton thesis would permit racial problems to be solved, but only indirectly by solving problems of poverty generally. This formulation reveals still further problems. First, the generality of the solution dissipates the resources that would otherwise be targeted on the more serious problem, racial discrimination. Second, racial problems do not correlate only with poverty, as rich blacks also suffer racial discrimination, so the indirection leaves part of the most serious problem unsolved. Third, and distastefully for social conservatives, see supra notes 79-86 and accompanying text (noting intellectual link between affirmative action and Marxism), by inducing an indirect focus on general poverty, Congress would be forced to adopt a massively wider redistribution of societal resources than would be necessary through racially specific affirmative action programs. Of course, the greater the number of topics controlled by an affirmative action agenda, the less valid is my third point. Cf. supra notes 47, 56-60 and accompanying text (discussing breadth of Lawrence-Matsuda affirmative action recommendations).

132. A creative argument, implicit in some of the arguments made by Roberts and Stratton, might posit that the enforcement sections of the Reconstruction Amendments have become unconstitutional over time, that is, that there is no longer a factual predicate extant that would permit the affirmative assertion of targeted, blacks-only remedial power and that, therefore, the only still-operative compo-
for reconciling the need to cure past problems of racism while also taking account of the expectational interests of those who fear quotas? Conceptually, there is a solution, and that is to socialize broadly the affirmative relief that is granted. As Roberts and Stratton note, there is a substantial reaction against affirmative action among those not benefitted, and as Lawrence and Matsuda note, this may be a recognizable response to the sense of individual financial loss and economic insecurity that results from potential loss of jobs or other government benefits. This suggests that opposition is based on a reaction against the unfair personalizing of costs that should be spread more widely and absorbed as general social costs. The same balancing of interests occurs under the Supreme Court's Takings Clause precedents. When an elderly hardware store owner must give up her land to build a bike trail for privileged suburban bikers, the store owner, privileged though she may be, may rightly object that the government is forcing her to bear burdens that should be born by the collective. Similarly, workers who lose their individual jobs and livelihood to remedy societal discrimination object that they have been singled out to pay a cost that all of society should pay. My point is that there are balancing mechanisms, no less difficult to implement than others favored by conserva-

133. See THE NEW COLOR LINE, supra note 1, at 163 (discussing that many issues in modern American society transcend race); WE WON'T Go BACK, supra note 2, at 67-87 (acknowledging argument that racial discrimination no longer exists, but calling it "The Big Lie"). The issue raised by this creative argument has analogues in other areas of constitutional law, see, e.g., Woods v. Miller, 333 U.S. 138, 143 (1948) (noting Hamilton ruling might create extra federal power "for years and years" while such post-war effects were felt and alluding to this as creating a potential for "abuse[]" and evasion of "constitutional responsibilities"); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 158 (1919) (noting that Congress's War Power includes power to deal with post-war problems traceable to war, but not treating issue of time limit for such power). For me, on the issue of race the creative argument fails because it is demonstrable that current racial problems are traceable to our legacy of slavery and segregation. Cf. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (discussing legacy of poor schools). On other topics of discrimination, the record might be different. Cf. City of Boerne v. Flores, 117 S. Ct. 2157, 2168-70 (1997) (discussing lack of current pervasive problem of religious discrimination disentitles Congress to adopt affirmative legislation protective of religious adherents but not nonbelievers).

134. See THE NEW COLOR LINE, supra note 1, at 2-4, 171-77.

135. See WE WON'T Go BACK, supra note 2, at 57.

136. See DOLAN v. City of Tigard, 512 U.S. 374, 384 (1994) ("One of the principal purposes of the Takings Clause is 'to bar government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.'" (citation omitted)).

137. The analogy between affirmative action and Takings Clause cases may be even more substantial than I have suggested in the text. Quotas have been criticized in part because the persons whose interests are adversely affected are often politically powerless whites. Privileged white parents may support affirmative action in education, for example, safe in the knowledge that the losers will be poor whites and that their children will continue to gain selective admission. Cf. WE WON'T Go BACK, supra note 2, at 52-53 ("real winners" in affirmative action programs at elite colleges are "the country's economically and educationally privileged"); see also MARK V. TUSNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 12 (1987) (suggesting that the Brown decision was a triumph by one subset of whites over another regional subset). Socializing the costs of affirmative action therefore imposes its costs, as in Takings Clause cases, on all members of society.
tives,\textsuperscript{138} that foster a less single-minded solution to problems of racial discrimi-
nation.\textsuperscript{139}

2. Politicizing Affirmative Action by Creating a Big Tent

The single-mindedness of \textit{We Won't Go Back} creates problems for itself because the authors take its thesis—there are many inequalities in American society that must be remedied—to its logical conclusion: quotas for everyone they favor (except gays and lesbians, about whom the authors are unsure and would defer judgment). It is not simply the breadth of the proposal that is problematical, it is how Lawrence and Matsuda envision the implementation of their regime. In a nostalgic review of their days in California, the authors speak warmly of memories of blacks, Hispanics, Asians, and others gathering in caucuses to divide the places that would be allotted to each group's members:

At the University of San Francisco Law School, Asian students argued among themselves about whether the social position of a third-generation Japanese American from Hawaii was sufficiently different from that of a second-generation Chinese American from rural California to merit different treatment in the school's affirmative action program. Those same students left their Asian caucus to make the case to other students of color why Asians should receive any affirmative action consideration at all, which required educating colleagues about institutionalized racism and violence against Asians. At the University of California, Los Angeles, Asian students made this case to African-American students, and twenty-five years later their voices crack with

\begin{quote}
138. A principle of maximum socialization, as with all abstract principles, might be difficult for legislatures and courts to implement, as shown by analogous cases under the Takings Clause. \textit{See} Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (explaining difficulty in deciding which costs are individual and which should be socialized). \textit{But cf.} Franks v. Bowman Transp. Co., 424 U.S. 747, 791 (1976) (stating cost-socializing rightful-place seniority, which does not oust white incumbents from jobs to replace them with black discriminatees, correctly balances interests of incumbents and discriminatees). As I suggested in a brief comment 20 years ago, when I last ran the risk of entering this debate, the line between what is personal and objectionable, and what is general and acceptable, is not a clear one. In fact, the key to the process may well be merely submerging the cost as deeply as possible to make it more general, more shared. \textit{See} Charles F. Abernathy, \textit{Affirmative Action and the Rule of Bakke}, 64 A.B.A. J. 1233 (1978). In any event, I do not offer this approach as an answer so much as an alternative, respectable to conservatives, that would validate both the prohibitory text of the Fourteenth Amendment (as supported by Roberts and Stratton) as well as that Amendment's creation of a remedial power over racial problems. \textit{See supra} notes 128-30 and accompanying text.

139. There is no certainty that broadly socializing the costs associated with affirmative action would placate its foes. \textit{See}, \textit{e.g.}, Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994) (holding scholarships targeted for blacks and paid from state treasury are unconstitutional, applying same constitutional test applicable to other affirmative action). There is some irony here, however. The plaintiff in Podberesky cannot conceive of scholarships for blacks as an extra effort paid by all of society (a socialized cost) because he has already begun to think of scholarships as an entitlement for himself, a social benefit. The social state ironically makes further socialization for racial solutions less acceptable because so many people see themselves as competitively reliant on the social state. Any change on this point would require alteration of some basic liberal principles of constitutional law. \textit{Cf.} William W. Van Alstyne, \textit{The Demise of the Right-Privilege Distinction in Constitutional Law}, 81 \textit{Harv. L. Rev.} 1439 (1968) (documenting declining success of arguments based on governmental discretion to award its largess).
\end{quote}
emotion as they describe how their Black colleagues were moved to give up places set aside for Blacks in order to include Asian Americans in affirmative action at UCLA. This process—the lifelong alliances formed and the understanding gained—was more important than the outcome.

Figuring out whom to include, in what numbers, according to what criteria, at what cost, are institutional decisions that must take into account many factors, including the history of discrimination at that institution, in that local community, and in the country at large; the present role of the institution in perpetuating inequality; and the unmet needs of communities traditionally excluded from that institution. The principle we should choose to guide this process is antisubordination.140

It is the very image of such caucuses that must drive Roberts and Stratton, as well as many other Americans, into opposition of affirmative action and quotas, for they can think of nothing worse than to make life a regular meeting of Iowa caucuses to decide the distribution of social advantages according to race, sex, disability, poverty, immigrant status, lingual status, and possibly sexual orientation. It is not just a matter of transaction costs,141 it is a matter of functionality and fairness. First, this approach to life sets off a competition for most-creative victim that would make tabloid television programs seem like anthems to self-confidence. These demeaning rituals142 would require persons to reveal some of the most intimate aspects of their lives to be judged by other persons largely unknown.143 Even if the persons to be benefitted could hammer out their division of seats, there is the precursor question: how was that number of seats decided and by whom? Because of the scarcity of resources, invariably the idealized version of horse-trading described above would create competition among the groups the authors wish to aid. Earlier in their work the authors describe Professor Lani Guinier’s bitterness over her father’s rejection from Harvard because he finished second in a competition for the college’s one black seat. Should the Asian caucus agree that more blacks should enter college and therefore reduce its quota to one, I suspect that the person who loses admission

140. We Won’t Go Back, supra note 2, at 266.
141. The scene described by Lawrence and Matsuda, however, calls to mind the observation, variously attributed, that the problem with socialism is that it requires too many late-night meetings.
142. At the very least, individual personalities, or perhaps even culturally inculcated practices of demeanors, would lead to wide variations in yearly quotas depending upon how freely certain advocates cried out to be heard by the group. The caucus system itself might therefore operate to disadvantage certain groups.
143. Unlike American constitutional law, see Dandridge v. Williams, 397 U.S. 471, 484 (1970) (refusing to invalidate state economic regulations resulting in disparate distributions of funding according to the size of recipient’s family), German constitutional law recognizes affirmative rights to governmental assistance, and the provision of individualized assistance can occasion governmental mandated inquiries into what Americans would deem quite personal matters. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 335-59 (2d ed. 1997) (discussing information-gathering statutes, privacy, and transsexual identification, etc.); id. at 348-62 (discussing German abortion rights).
because of that sensitive decision would not feel much different from Lani Guinier’s father.144

There is, of course, the argument that in the scenario described in We Won’t Go Back, minorities are at least making the choices for minorities. I doubt the persuasiveness of this vision. In an earlier section of We Won’t Go Back, the authors tell a story about Micronesian judges to demonstrate the proposition that costs and remedies must be communally shared. In this story, “[f]ault is irrelevant” when a young man dies; the owner of the car who struck and killed the boy, if fortunate, will himself “have a son to work the taro fields of the family who lost a son,” who “will work for them all his days, as part of [the driver’s] apology.”145 The problem with the caucus-based division of quota allocations, as with so many exclusionary affirmative action plans, is that seldom if ever are the administrators disadvantaging themselves; the excluded person (a prospective unknown future applicant, for example) is always some unseen “other” person. And that other person, like the unseen son in the tale from Micronesia, serves out his life—his only life—in the taro fields to which his father has consigned him.

The tale of the taro field comes easily to Lawrence and Matsuda because they reject “classical philosophers who ground their ethics in the individual.”146 I suspect that many Americans reject the justice of this tale, however, because they treasure the independence of self in American society that gives each person his freedom to start anew, without being consigned to lesser status to pay off his father’s debts.147 Lawrence’s and Matsuda’s parents’ sacrificed part of the social good fight to win better living conditions for their children,148 and I suspect that Lawrence and Matsuda would also find a way to keep a child from the taro field.

3. Antisubordination Is Nothing, Everything, or Neither

As I stated above, Roberts and Stratton offer a difficult option when they ask society to “go cold turkey” on its cognizance of race, leaving in place the

144. See also KOMMERS, supra note 143, at 179-80 (acknowledging split in Chinese-American community over affirmative action, especially as it limits opportunities for some members).
145. Id. at 232.
146. We WON’T GO BACK, supra note 2, at 242. Part of me considers this assertion only cant, for elsewhere the authors assiduously cultivate the notion of the individual experience and its importance in shaping social views and law. See, e.g., id. at xix (rejecting blended “voices” because “[o]ur politics compel” that authors write “in their own voices, from their own subjectivity”); id. at xx (arguing the “choice of multiple voices is not just style; it is substantive”).
147. American law and society may be quite principled in its attention to nuance in such cases, and hold opinions about them that are not irrelevant to the affirmative action debate. Were a father at fault in killing another’s child, compensation would be due, and the father would pay, perhaps much to the detriment of his own son who would receive a diminished inheritance. But any unpaid debt would not be passed to the son. Cf. Plyler v. Doe, 457 U.S. 202, 220, 223 (1982) (finding state law disentitling some children of “illegal entrants” to attend public school unconstitutional because such children are “not accountable” for their parents’ act of immigration).
148. See supra notes 114-16 and accompanying text.
discriminatory structures of the past. The authors of *We Won't Go Back*, on the other hand, are quite frank in their view that “antisubordination” is the controlling principle,149 and should lead to expanded and extended affirmative action and quotas. There is also a third way here. Both teams of authors have focused (as usual for American lawyers) on what legal rules government should create, thereby overlooking the power of aggregated private, individual conduct.

Psychologists, sociologists, and others now widely agree that race is a “social construct.”150 In other words, the differences that are presently ascribed to “race” in America are far more significant than biological evidence can in fact substantiate.151 Even the recognizable differences, such as skin color, are themselves the product of prior laws and social constructs that inhibited reproductive interaction along “racial” lines and thus froze into place the current social construct of race.152 The social constructs that created racism, however, may be dissolving. The geographic divides and resultant insularity that once made ethnic subgroups a more palpable and genetically significant factor in human existence153 are now gone in America. To the extent that culture might divide groups at times of reproduction,154 that too is increasingly transcendable as taboos against interracial marriage decline.

A rational, personally focused approach to America’s problems of “race” might call for persons opposed to the existing social construct to live their own daily lives as though race did not presently exist. Under this approach, an emphasis on multicultural or biracial identification would actually be a way-station along the route to less racial intolerance, not a “copout” as Lawrence suggests.155 Following this regimen presents some grave problems to less-evidently biracial “blacks,” as well as “whites,” who must fight daily against persistent pressure to stereotype and abuse. But if aggregated on a massive scale, this approach could be as incrementally successful as affirmative action,

149. *We Won’t Go Back*, supra note 2, at 28, 101-02, 266. But see supra note 89 (authors leave term ambiguous and undefined).


151. *See* Jones, supra note 150, at 14-21 (stating more genetic diversity is detectable between persons within “racial” groups than among members of different groups).

152. IAN F. HANEY-LOPEZ, *White by Law: The Legal Construction of Race* 116-25 (1996) (discussing antimiscegenation laws, immigration-control laws). The same could perhaps be said of other groups identified as victims of subordination in *We Won’t Go Back*, e.g., Hispanics and lingual groups.

153. *See* Jones, supra note 150, at 8 (alluding to biological origins of population groups).

154. *See* HANEY-LOPEZ, supra note 152, at 117.

155. *We Won’t Go Back*, supra note 2, at 180. Again, I suggest that Lawrence may have stated his beliefs more stridently than is warranted. The allusion to multiculturalism as a “copout” is followed by a vignette that speaks lauditorily of a “multicultural university,” *id.* at 203, and a chapter that appears to approve of “multiculturalism,” *id.* at 209-28.
especially if, as stated by the authors of *We Won't Go Back*, such programs are often only ruses to benefit elite "whites." 156

This personal approach to diminishing the importance of race responds to the fear that racially conscious affirmative action will perpetuate exactly the "racial" consciousness at the root of our current dilemma by extending racial consciousness far into the future. 157 The specter of an America in which there is a "marching season" to celebrate aggrievements 600 years old, as in Northern Ireland, or prolonged fighting between mutually, periodically subordinated groups, as in Bosnia or Israel, is one that might lead a reasonable person to devalue "antisubordination," "democracy," and other governmentally focused remedies to our "racial" problems.

B. UNNEGOTIATED SOLUTIONS: WHY PEOPLE DO NOT TALK

Earlier I explained that the sometimes-authoritarian attitude of the Lawrence and Matsuda book, its dismissive underlying tone, discourages others from entering the debate because it immediately dismisses their bona fides. 158 Yet their work only deepens a silence already in place. Most citizens, excepting fervent conservatives like Roberts and Stratton, avoid debate or serious discussion of affirmative action and quotas. When there is debate, it is often ineffective as persuasion, even among persons of goodwill. Let me suggest why the problems at issue here may be intractable. In doing so, I hope to go beyond the usual basic issues of self-interest, entitlements gained and lost, and fear of being publicly branded a racist or general bigot.

1. Subordination and Racial Consciousness

Even as applied to groups of persons rather than individual psyches, subordination becomes a subjective and illusive concept. Many of the most animated students in my Civil Rights class come from minority groups that affirmative action supporters seldom, if ever, include—Jews, Irish-Americans, and Italian-Americans in particular. 159 These groups suffered widespread discrimination

156. *Id.* at 52-53.

157. Although the authors of *We Won't Go Back* give no firm date for ending reparations-linked affirmative action, they refer to an often-used baseline, the "centuries" during which "white supremacy" was built. *Id.* at 26-27. It would be fair to assume, given this comment, that they would take a similarly long view of the curative period for affirmative action for sex discrimination and that based on ethnicity, lingual status, and disability.

158. See *supra* notes 89-95 and accompanying text.

159. *We Won't Go Back* reflects the prevailing view of these groups among affirmative action supporters: they are simply "whites." *WE WON'T GO BACK, supra* note 2, at 210. Irish-Americans appear in the text as racists, *id.* at xi. Jews as childhood friends, *id.* at xi. A listing of civil rights groups from the 1960s fails to mention the Anti-Defamation League or any Italian-American groups. *Id.* at 19-22. Chapter 10, with its listing of groups to be assisted by extending affirmative action, also omits these groups. See *id.* at 249-69. One vignette offers a portrait of a "white, Jewish[.] male," but it is decidedly different form the other vignettes: the subject is not a victim who needed affirmative action, but a professor who benefitted when affirmative action enriched the diversity of his world. *Id.* at 204.
themselves until recently, and many of these students have home-and-hearth stories of deprivation that may rival those of the authors of We Won't Go Back.\(^{160}\) Although I tend to agree that visually identifiable ethnic groups have a much more difficult and lengthy experience escaping discrimination, modern affirmative action supporters overlook the fact that when these immigrants came to America, they were also considered non-white or uncivilized, and their features were thought to be equally distinctive.\(^{161}\) Many such students probably see Lawrence's family life as being particularly financially and socially privileged as compared to their own, and at least among educated persons, they see a much greater overlap between blacks and their ethnic group than Lawrence and Matsuda appear to perceive. Any argument that they are privileged falls on deaf ears—ears as deaf as Lawrence's and Matsuda's must be when it is suggested that American blacks are materially privileged as compared to Russians.\(^{162}\)

Among persons customarily called "whites," there is a similar lack of sensitivity toward black racial consciousness. A significant number of them, especially those living and working in areas with few blacks (and in modern America, that is many whites), are relatively incognizant of their own race, and this leads them to believe in color-blindness in a way that seems perfectly normal to Roberts and Stratton, but affected to Lawrence and Matsuda. As members of the majority who suffer no consequences from their perceived race (aside from the effects of affirmative action), these persons live lives with significant periods of inattention to race. Because it is a tangential concern in their lives, they see consistent racial consciousness as self-accentuated, and thus see the views of "race men"\(^{163}\) as being false much as Lawrence and Matsuda deem color-blindness to be.

Given these perceptions of group self-recognition (or non-self-recognition), it is unsurprising that most self-cognizant groups will tend to make decisions about justice based on the benefits that their group will realize under any proposed social reordering.\(^{164}\) The authors of these two books, therefore, may have unreconcilable views because they hold vastly different degrees of racial consciousness and perceive themselves as belonging to different groups; thus, they perceive any distribution that favors their group as being more "just," regardless of other factors.\(^{165}\)

\(^{160}\) Largely in recognition of our nineteenth-century ancestors' broad definition of race and wide-spread practice of ethnic discrimination, the Supreme Court has adopted a wider interpretation of Civil War era civil rights laws to cover such discrimination. See, e.g., St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (interpreting 1866 Civil Rights Act and discussing discrimination in 1860s).

\(^{161}\) See supra note 150 and accompanying text.

\(^{162}\) See supra note 105 and accompanying text.

\(^{163}\) See We Won't Go Back, supra note 2, at 68 (describing persons regularly concerned with remedying racial problems of blacks).

\(^{164}\) See, e.g., Grover, supra note 52, at 248 (collecting the work of psychologists supporting this proposition).

\(^{165}\) I purposely use "may" in this sentence because some studies actually show that among Americans, some prefer a method of equal distribution even when it harms their self-perceived group. See id. (citing studies).
2. Qualifications and "the Qualified"

There is also the question of qualifications. With Lawrence and Matsuda, it appears that "qualified" means "minimally qualified" or perhaps even "potentially qualified," and in any event "qualifications" rarely accurately reflect ability or merit. Speaking in those terms, it is somewhat easy to understand why they think that qualifications are less important: they can be acquired by all persons. It follows that the distribution of societal privileges should be random and reflect population percentages, so that departures from such figures immediately raise the specter of racism. To Roberts and Stratton, on the other hand, qualifications are based on personal merit and earned by hard work. With this view, it is difficult to accept any argument that the benefits and privileges of ability should be distributed at random, whether by lottery or affirmative action.

This relative difference in appreciation of qualifications is an especially difficult chasm to bridge when the extremes of the distributional range of qualification are reached. To Roberts and Stratton, Justice Marshall is regarded as a "fine individual," but just not up to the burdens of his job near or at the top of the federal judiciary. Lawrence and Matsuda, on the other hand, treat quite seriously their own suggestion that music concerts "showcase 'the best' musicians and allow audiences of less-than-best music fans to play along." Similarly, they seriously suggest that "premier institutions" could invite both "gifted mathematicians and nuclear physicists" along with "interested nonexperts to come to the same [facility] to study and contribute to research at their own level." This gulf of appreciation for qualifications, even at the extreme of relevance and need where they might be thought to be most visibly relevant, makes it unlikely that these persons will speak to each other in a constructive manner any time soon.

CONCLUSION

I admire the substantial contributions that my colleagues have made to the affirmative action debate. Their "advocacy scholarship" forcefully makes the
case for their views in a way that will make these books the new leaders of their genre. Like a first-week, first-year law student who is attracted to a majority opinion until he reads the dissent, I find attraction in both these irreconcilable theses. Joining Roberts and Stratton, I believe that reformers should be held to the same high standards that they demand of others, but joining Lawrence and Matsuda, I believe that continuing effects of racial discrimination comprise the most serious social problem of our day.

I also know what I fear. Doing little or nothing, as Stratton and Lawrence implicitly suggest, leaves wounds to fester. On the other hand, I am unwilling to send anyone's child to the taro fields: the goal is to liberate each of us from debilitating classifications, not to reinforce them. Group consciousness, like alcohol, can be a pleasant little diversion or a serious addiction. It may be too much, and perhaps not even good, to insist that everyone be a teetotaler, but nightly drunkenness invites addiction.