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AFFIRMATIVE ACTION FOREVER

The principle of equal treatment without regard to race is one that is close to my heart. Accordingly, one of my favorite books on a legal subject is Andrew Kull's *The Color-Blind Constitution*. (I learned of the book at the time of its publication through Judge Alex Kosinski's 1993 New Republic review/essay.) It is a book that is by turns inspiring and maddening. I recommend it without reservation to readers interested in the subject.

The book is full of surprises. For example, Kull devotes two chapters to the separate but equal doctrine approved by the Supreme Court in the 1896 case of *Plessy v. Ferguson*. The case represents the bygone era of Jim Crow, yet at the outset of his discussion of the case Professor Kull makes this astounding observation: "The majority opinion in *Plessy* makes a comfortable target, and it is routinely vilified. But in its broad holding, as opposed to its particular application, *Plessy* has never been overruled, even by implication. On the contrary, it announced what has remained ever since the stated view of a majority of the Supreme Court as to the constitutionality of laws that classify by race."

The principle of equal treatment was adopted as the law of the land in the great civil rights legislation of 1964 and 1965, or so we foolishly thought at the time. It may even have been the law for a minute or two. Then the federal government began building the whole edifice of affirmative action and racial preferences that we live with today and that has been addressed by the Supreme Court in a number of important cases. Certainly insofar as higher education is concerned, the affirmative action regime and the treatment of students based on the color of their skin are entrenched more deeply than ever under the shibboleth of "diversity."

Yet a question remains. Does the affirmative action regime harm its intended beneficiaries? Because the regime operates under conditions of secrecy and deceit, as though it conceals a great shame — see, for example, Tim Groseclose's Ricochet post "'Independent study' shows UCLA is cheating on admissions" — the answer to that

question has been a subject of intense controversy. UCLA law professor Richard Sander and legal reporter Stuart Taylor deliver a devastating answer to the question in *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*.

Sander and Taylor recently spoke at a Cato Institute forum that also included an ardent opponent of racial preferences (Roger Clegg) as well as an equally ardent supporter (Alan Morrison). C-SPAN's video of the forum is accessible here; the Cato video is accessible here. The Cato video is embedded below.

The forum runs 90 minutes, just about all of it worth your time, although you can pick up the gist of Sander and Taylor's argument in the first ten minutes. The book and forum are especially timely as the Supreme Court takes up yet another affirmative action case, Fisher v. University of Texas.

One of the lessons of Kull's great book as I understand it is that the Court wants to retain for the judiciary the discretion and authority to approve varieties of racial discrimination. The ideal of the color-blind Constitution remains perennially on the horizon, like a mirage. *To paraphrase George Wallace*, affirmative action today, affirmative action tomorrow, affirmative action forever.