

REVIEW ESSAY:
TOWARDS A TRANSNATIONAL CONCEPTION OF THE
ANTIPHONAL GROUP RIGHTS WRANGLE
PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE,
THOMAS SOWELL, (WILLIAM MORROW, NEW YORK, 1990).

*Harry Hutchison**

Such, unfortunately, is the nature of contemporary . . . American circumstances, for real examination has taken a back seat to the placation of the ignorant and those lacking enough courage to state the hard facts.¹

—Stanley Crouch

When we finally achieve the right of full participation in American life, what we make of it will depend upon our sense of cultural values, and our creative use of freedom, not upon our racial identification.²

—Ralph Ellison

I. INTRODUCTION

The language of rights has formed part of our moral, legal and political vocabulary for many centuries. The history of that language has not been one of unimpeded growth but it is probably true that it has achieved a wider currency in our own age than at any previous time. Rights are now claimed to more things and for a wider range of beings than ever before.³

These desiderata called rights, and especially statutory and judicially created civil rights, as compassionate remedies for the effects of prejudice,⁴

* Professor, University of Detroit Mercy, Law School; M.A. Wayne State University; M.B.A. University of Michigan; J.D. Wayne State University.

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1. STANLEY CROUCH, *NOTES OF A HANGING JUDGE* xv (1990).

2. RALPH ELLISON, *SHADOW AND ACT* 271 (1964).

3. PETER JONES, *RIGHTS* 1 (1994).

4. For an explication of the distinction we make between discrimination that is wrongful and discrimination that is not, see Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV.

have metamorphosed into ethnic preferences, affirmative actions, and calls for diversity.⁵ In the United States, there is an impending sense that affirmative action and group preferences may be "abruptly terminated."⁶ For some commentators, such a termination would amount to a confirmation of America's ineradicable "racism"; for other observers, termination would amount to a reconfirmation of America's "sense of fairness, its belief in racial integration and a presumption that a civically activist polity will voluntarily (if slowly) make positive social change."⁷ Importantly, some of the contentiousness surrounding affirmative action seems to stem from the arbitrary nature by which ethnic groups are included. For example, "[p]ersons with roots in northern Spain [are eligible for preferences while] those who are descended from persons living a few miles away, in southern France, [are] not. This is strange, if not bizarre."⁸

In its recent decisions in *Adarand Constructors, Inc. v. Peña*,⁹ *Miller v. Johnson*,¹⁰ *Bush v. Vera*,¹¹ and *Shaw v. Hunt*,¹² the United States Supreme Court, America's leading commentator on rights, firmly reasserts its role as the guardian of the limits to be placed on an elusive component of the rights debate: affirmative action.¹³ In *Adarand*, *Adarand Constructors, Inc.*, which

149 (1992). For a perspective on discrimination, see George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117 (1995) (suggesting inherent limits to the concept of discrimination).

5. Charles Krauthammer, *Diversity: The Degeneration of an Idea*, DET. NEWS, Sept. 5, 1995, at F5 (claiming that affirmative action, which was initially aimed at redressing the plight of African-Americans, has been transmuted beyond recognition into diversity for a wide range of groups, including immigrants).

6. Constance Horner, *What Should We Do After Affirmative Action?*, BROOKINGS REV., Summer 1995, at 7-8. Moreover, it is important to note that in California, voters were asked to decide on November 5, 1996, whether preferences are to remain legal when they voted on the California Civil Rights Initiative. See John Leo, *Finally, the People Vote on a Taboo*, U.S. NEWS & WORLD REP., Mar. 4, 1996, at 26.

7. Horner, *supra* note 6, at 7-8.

8. JAMES S. ROBB, AFFIRMATIVE ACTION FOR IMMIGRANTS: THE ENTITLEMENT NOBODY WANTED 117 (1995).

9. 115 S. Ct. 2097 (1995).

10. 115 S. Ct. 2475 (1995). See also *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

11. 116 S. Ct. 1941 (1996) (deploying the doctrine of strict scrutiny to invalidate race-conscious redistricting scheme).

12. 116 S. Ct. 1894 (1996) (deploying the doctrine of strict scrutiny to invalidate race-conscious redistricting scheme).

13. What affirmative action is, and who should be included in an affirmative action program, are the subject of some debate, as "[a]ffirmative action was initially conceived as a remedy to benefit African Americans. Although many affirmative action programs include the members of other racial and ethnic groups, little attention has been paid to the criteria for inclusion." Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 855 (1995). See also Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFRICAN-AMERICAN L. & POL. REP. 9 (UC Berkeley 1994).

was not a certified disadvantaged business, submitted the low bid on a subcontract as part of a federally funded highway construction contract. After losing the bid, Adarand Constructors filed suit against the federal government, claiming that the race-based presumptions used in subcontractor compensation clauses violated the equal protection component of the Fifth Amendment's Due Process Clause. Reversing the lower court's decision, the United States Supreme Court held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under the doctrine of strict scrutiny.¹⁴ In essence, the Court applied strict scrutiny as a barrier to further expansions of the federal preferences, just as it had earlier limited state-sponsored preferences in state contracting cases.¹⁵

Similarly, in *Miller v. Johnson*, the United States Supreme Court, animated by equal protection principles, limited the ability of state governments to construct bizarrely shaped districts to guarantee group rights where the controlling rationale was race. The Court said:

Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.¹⁶

14. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (citing Justice Powell in *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980)). The Court also cited earlier decisions in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.).

15. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

16. *Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995) (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)). The Voting Rights Act was premised on the desire to ensure the right of constitutionally protected minorities to have a voice in government.

Congress enacted it to abolish both overt restraints on voting and registration and more subtle impediments caused by districting schemes that dilute minority electoral strength. To remedy a dilutive scheme that violates the Voting Rights Act, legislators commonly create single-member districts in which the minority has a majority of the electorate sufficient to elect a candidate of the minority's choice.

Comment, *Equal Electoral Opportunity: The Supreme Court Reevaluates the Use of Race in Redistricting in Johnson v. De Grandy*, 3 J.L. & POL'Y 497, 497 (1995). See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)). For an example of arguable logical inconsistency, see *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (arguing for single race maximization of Black voters

Whether the United States polity desires, or should desire, a color-blind political or economic system can assuredly be debated. What is not subject to debate is that the United States Supreme Court, in *Adarand v. Peña*, *Miller v. Johnson*, and other recent cases,¹⁷ deploys the doctrine of strict scrutiny to infarct federally sponsored and state-created race-based preference schemes. Accordingly, claims of race-based group rights in both the political and the economic spheres must today stride a higher hurdle.¹⁸

Given that this is an American era increasingly marked by cynical and rancorous discussions concerning preferential rights based on race and national origin,¹⁹ it is a propitious time to revisit a book that provides empirical, analytical, and international perspectives to this ineluctably expansive debate. While Thomas Sowell's *Preferential Policies*²⁰ lacks the overwhelmingly canonical appeal of Shelby Steele's *Content of Our Character*,²¹ the fire-next-time urgency of Cornel West's *Race Matters*,²² or

in a voting district); see also *Missouri v. Jenkins*, 115 S. Ct. 2038, 2091 (1995) (Ginsburg, J., dissenting) (arguing for additional non-minority students to reduce concentration of Black students).

17. See *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

18. Professor Dellinger of Duke University "acknowledged that the *Adarand* decision changed the rules not only for minority contracting provisions but for affirmative action programs in health, education, hiring, and other areas as well." Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 71.

19. For an excellent example of cynical protuberance, consider Peter Wilson, governor of California, who had been accused of, among other things, being an individual in need of a "blame strategy" to kick-start his presidential campaign. As one observer points out, Mr. Wilson, while flip-flopping on his original support of affirmative action, can be characterized in his approach as classically simple and nasty. He is distinguished as a politician who "seeks to turn a majority against the minorities which it believes threatens its dominance." Mark Lawson, *Commentary: The New Baddies Are too Close to Home for Major*, *GUARDIAN*, June 5, 1995, at 13. See also Gerald F. Seib, *Is It a Flip-Flop or an Evolution? Voters Will Say*, *WALL ST. J.*, Aug. 30, 1995, at A12.

For a somewhat more irenic if no less disingenuous approach, consider President William Clinton, who recently

unveiled his new guidelines for federal programs, saying his goal for affirmative action was "mend it, but don't end it." Programs must be restructured or done away with if they reward unqualified people, create quotas or reverse discrimination, or continue after their equal opportunity purposes have been achieved. He also recommended a new set-aside program to benefit businesses located in economically distressed areas.

Jost, *supra* note 18, at 72. See also Stuart Taylor, Jr., *Flunking The Honesty Test on Preferences*, *LEGAL TIMES*, July 24, 1995, at 27 (noting that President Clinton engages in Orwellian semantic dodges of the truth).

20. THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* (1990).

21. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1991).

22. CORNEL WEST, *RACE MATTERS* (1993).

the appealing balance of Glenn Loury's *One By One From the Inside Out*,²³ its dispassionate and empirically exhaustive international focus on the economic effects of group preferences informs and ultimately deracinates the less than irenic claims and counterclaims that seem to mark the preference/rights wrangle in the United States.²⁴

From an international vantage point, groups that receive preferential treatment are as disparate as can be imagined—from untouchables in India to Afrikaners in South Africa; yet, common patterns in preference programs for extraordinarily different people in wholly different circumstances, living in countries separated by vast distances, emerge.²⁵ To demonstrate this, Sowell develops a tripartite analytical construct. First, he empirically analyzes the reasons that animate the imprecatory demand for, and the results of, preferential policies in a wide variety of settings and in a number of disparate countries. Second, he explicates "The Illusions of Preferential Policies."²⁶ Third, he draws compelling, coherent, yet paradoxical conclusions that establish a substantive counterweight to the deformed group-rights debate.

II. EMPIRICAL ANALYSIS

The book's empirical focus is broken down into three substantive categories: (1) majority preferences in majority economies (usually the same dominant group controls both the economic system and the political system and in addition votes itself official preferences)—the "Jim Crow" era in the United States and the apartheid era in South Africa, for example; (2) preference regimes where economic dominance by one group and political dominance by another exist—Sri Lanka, Malaysia, and Nigeria exemplify this condition; and (3) economic and political dominance by one group and preferences for the economically and politically weak minority group(s)—the

23. GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT* (1995). Mr. Loury's book makes a powerful argument for Black conservatism that refreshingly is often equally as critical of White conservatives as it is of liberals. See also Claude R. Marx, *Taking Responsibility for Your Actions*, DET. NEWS, Aug. 23, 1995, at A13.

24. While Mr. Sowell's empirical analysis is primarily focused on racial and ethnic group preferences, the author indicates that empirical analysis can be extended to gender preferences and gender rights to dispel some claims of gender disparity as well. See SOWELL, *supra* note 20, at 17. For instance, in Canada, never-married women earn 99% of the income of never-married men. *Id.* See also Walter Block, *Economic Intervention, Discrimination, and Unforeseen Consequences*, in DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY 103, 111 (W.E. Block & M.A. Walker eds., 1982). Similarly, American women who remained single and worked continuously into their thirties earned more than 100% of the income of single men—even before preferential policies for women were instituted. Sowell, *supra* note 20, at 17 (footnote omitted).

25. SOWELL, *supra* note 20, at 6.

26. *Id.* at 117. For this discussion, see *id.* at 119-86.

United States, India, and Canada exemplify this category. Viewed together, the effects of these different preference regimes give rise to very similar consequences and conclusions.

A. Majority Preferences in Majority Economies

“Where the same dominant group has complete control of both the economy and the political system,” racial preferences are not necessarily obvious as a way of discriminating against the disfavored group.²⁷ If the dominant group wishes to discriminate, there is scant need for laws to force racists to practice racism.²⁸ On the other hand, as Sowell cogently illustrates, because discrimination in a free market economic system imposes a cost on the dominant group that discriminates, these costs inevitably provide incentives that encourage some members of the dominant group to try to escape higher costs. For example, despite government-organized boycotts of businesses owned by Jews in Nazi Germany, “even generals in uniform made purchases in Jewish shops.”²⁹ Importantly, the entire “history of middleman minorities, such as the Jews in Europe, the overseas Chinese in Southeast Asia, and the Indians in East Africa, is a history of their achieving a level of prosperity which would have been impossible without the economic patronage of majority populations hostile to them.”³⁰ While it is easy to denounce middlemen from disfavored minority groups, it is costly to pass up bargains in their shops.³¹

Similarly, in the United States, despite the possible impression left by the civil rights struggle of the 1950s, integrated public transportation was not an anomaly in the South after the Civil War. To the contrary, separation of the races in passenger transportation required the passage of statutes during the early 20th century over the objections of the streetcar owners, many of whom refused to comply. There is no reason to think that the Whites who owned and operated these for-profit streetcar companies were less racist than those Whites who sought segregation; to be sure, the opposition of White streetcar owners to segregated seating was economic rather than ideological.³² Racial separation simply represented additional cost without additional revenue.³³ In fact, due to organized boycotts of streetcars by Blacks in response to the creation of “Jim Crow” laws, segregated seating became an obvious threat to profits.

27. *Id.* at 19.

28. *Id.*

29. *Id.* at 23.

30. *Id.*

31. *Id.*

32. *Id.* at 20-24.

33. *Id.* at 21-22.

Additionally, pre-Mandela South Africa, with its politically dominant White groups, found that racial prejudice was opposed (if incompletely) by market forces. Although the Whites in South Africa have almost always been a demographic minority, they have at the same time almost always been a political majority as well as the dominant group in the operation of the economy.³⁴ Since an ounce of gold is worth the same price in the international marketplace, no matter where, or by whom, it is produced, special costs imposed by South African racial policies could not be passed on to the customers in the form of higher prices. Since Black mine workers were paid less under the existing racial policies, mining companies had an ever-present temptation to evade the discriminatory policies imposed by politicians who did not have to pay the price.³⁵ Among other efforts to exclude Blacks from the mining industry, the South African government imposed a minimum wage law for the express purpose of "keeping black workers from undercutting the wages of white workers and taking their jobs."³⁶ In Canada, at about the same time, a minimum wage law was passed in order to preclude displacement of White workers by Japanese immigrants.³⁷

As these and other cases³⁸ make clear, racism has an economic cost; such costs and price differentials act as lubricants that vitiate the effects of racism even where the majority enacts preferential policies designed to enforce discrimination. This conclusion applies not only to countries and situations in which majority preferences exist in an economy controlled by majorities, but also to other situations as well.³⁹ In the absence of laws or government policies that fortify prejudice, disparities in representation and income likely reflect the neutral judgements of the market itself in valuing the talents, skills, and/or character possessed by members of a particular group.⁴⁰

34. *Id.* at 24.

35. *Id.* at 25. See also GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 212 (1981) (noting that while capitalists in general desire the cheapest possible labor, workers from the dominant ethnic group resist lower wage competition and as such are the principal agents for the regularized pattern of racial discrimination in the industrial sphere).

36. SOWELL, *supra* note 20, at 28. For an accessible introduction to the debilitating effects of minimum wages on low wage, low skilled individuals, see FINIS WELCH, *MINIMUM WAGES: ISSUES AND EVIDENCE* (1978). For a critical race reformist perspective on minimum wages, see Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 *HARV. J. ON LEGIS.* 93 (1997).

37. SOWELL, *supra* note 20, at 28.

38. *Id.* at 41-116. See *infra* notes 47-52 and accompanying text.

39. See *infra* notes 58-74 and accompanying text.

40. Importantly, what causes skill differentials remains an unsettled issue. For example: In Russia under the czars, the German minority—about one percent of the population—constituted about 40 percent of the Russian army's high command in the 1880s, just as German generals had been prominent in the high command

Accordingly, race-preference laws in majority-dominated economies can be seen as a government effort to obstruct market forces that might undermine the prejudices of the majority. This conclusion, *a fortiori*, dispels the illusion that the market alone encourages discrimination.

On the other hand, where there is no organized private market, where the sector operates on a non-profit basis or in a government regulated arena, or where labor unions possess monopoly power limiting employment of individuals, discrimination seems more likely to thrive. For example, universities and public utilities in the United States were among the leading practitioners of employment discrimination against Blacks during the 1930s;⁴¹ employment of Blacks in the North (like employment of Blacks in South Africa) was inhibited by labor unions and the enactment of minimum wage laws.⁴² This compelling contrast between free markets on one hand and regulated, non-profit markets and union-dominated markets on the other underscores the distinction between racism and discrimination.⁴³ In free markets, incentives to employ members of disfavored groups arise (*certis*

of the Roman legions, and generals of German ancestry led the American armies in both World Wars of the twentieth century, as well as in the Persian Gulf war of 1991.

THOMAS SOWELL, RACE AND CULTURE 3 (1994) (footnotes omitted).

41. As government policies changed in the 1960s in favor of a more diverse workforce, not surprisingly, universities and public utilities became leading practitioners of preferential employment policies favoring Blacks. See SOWELL, *supra* note 20, at 36.

42. *Id.* See generally *id.* at 24-31.

43. Discrimination in this context refers to the translation of racist impulses into conduct. Elementary economic theory suggests that if a firm receives the same output from a worker at lower wages (this will be the initial result, *certis paribus*, of racial discrimination), this provides a market incentive (if it is assumed that the owner of the firm is a profit-maximizer) to employ the low-wage members of the disfavored group. As additional firms attempt this strategy, the wages of the disfavored group will rise, thus reducing the wage differential and thus reducing the economic impact of attempted discrimination. For an introduction to economic theory, see JOSEF HADAR, ELEMENTARY THEORY OF ECONOMIC BEHAVIOR (1966).

Discrimination imposes a cost in competitive labor markets. This cost can trump racism and give rise to otherwise puzzling results. For instance: (a) Jewish artisans were once more prevalent in eastern Poland, where anti-Semitism was greatest, and (b) Black artisans thrived in the American South, where racism was most blatant. In each case, there was a lack of certain types of market interference (guilds in Poland and labor unions in the United States) in comparison with less racist areas of each nation. In other words, there was more prejudice than usual in these sections of these countries but less discrimination because the costs of discrimination (in these particular occupations) were higher in competitive markets than in the controlled markets in other regions. Precisely because the market seems to work, incentives arise to preclude disfavored minorities from otherwise achieving success. Accordingly, it should not be surprising to see "Jim Crow" laws instituted in the American South or apartheid to be created in South Africa in order to "protect" the dominant groups from the "disfavored" minorities. See SOWELL, *supra* note 20, at 31. See also FREDRICKSON, *supra* note 35 at 212-13.

paribus), despite the existence of prejudice.

Therefore, societies that are seriously committed to vitiating discrimination should focus primarily on (1) the extirpation of statutes and policies which preclude the market from operating neutrally;⁴⁴ and (2) ensuring that complementary inputs are available to the group (in some cases the dominant but disadvantaged majority), in order to reduce income disparity between groups.⁴⁵ The judgment of the market powerfully underscores the relative improvements in economic status of Black Americans (a disfavored group) prior to 1964 (before the creation of preferential policies),⁴⁶ despite the economic and political dominance of White Americans.

B. Majority Preferences in Minority Economies

As Sowell powerfully illuminates, "[t]he widely known and emotionally powerful history of Blacks in the United States has led many other groups [in many other countries] to analogize their situation to that of blacks, as a politically effective way of seeking preferential treatment."⁴⁷ On the other hand, "[w]here the group seeking [group rights] is indigenous—as in Burma, Fiji, Malaysia, Sri Lanka, New Zealand, or in India's states of Punjab, Bihar, or Assam—they have analogized themselves to the American Indians."⁴⁸ Such analogies to American Indians and to African-Americans are deficient, however, in that the claims to preference are brought by ethnic groups which comprise a majority of the populace but claim to be disadvantaged by the success of ethnic minorities from the same or from other countries.⁴⁹

44. See RICHARD K. VEDDER & LOWELL GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* (1993). They cite the following statutes as causal factors in the widening of the Nonwhite-White unemployment differential: the Fair Labor Standards Act of 1938, the Davis-Bacon Act of 1931, and state legislation that led to the creation of state versions of the Davis-Bacon Act. *Id.* at 278. Accordingly, the urgent elimination of these laws that preclude the market from operating neutrally would be a positive step in improving the economic status of Nonwhites in the United States. See also CLINT BOLICK, *UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY* (1990) (developing a comprehensive strategy for extirpating laws and regulations that inhibit the market place advancement of minorities).

45. For example, preferential policies favoring Afrikaners were arguably ineffective unless accompanied by massive transfers of complementary resources including Afrikaner agricultural programs, education, and subsidized jobs. See SOWELL, *supra* note 20, at 38.

46. That is, prior to the passage of the 1964 Civil Rights Act.

47. SOWELL, *supra* note 20, at 41.

48. *Id.*

49. *Id.* at 42 (citing DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 153 (1985)). Examples of groups migrating from less fertile regions of the same country to other regions and becoming more prosperous than groups indigenous to the more fertile or more attractive regions are the Ibos in Nigeria, and the Toba Batak in Indonesia. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 153 (1985). Examples of ethnic groups from one country

In many cases, the ethnic majority was initially the advantaged group but saw its advantages erode because of the aggressiveness, greater education, or greater competitiveness of the minority group.⁵⁰ Consider Sri Lanka. The so-called "Ceylon Tamils," an ethnic minority within the island country of Sri Lanka, lived in an arid, less fertile, and less developed area of the country (formerly known as Ceylon). Accordingly, when English-language schools were established in their part of the country, they saw education as one of their best chances for improvement. By contrast, the Sinhalese majority lived in richer agricultural areas with ample rainfall, and thus they had options other than jobs in the government and the educated professions. By 1948, despite comprising less than thirteen percent of the population, the Ceylon Tamils accounted for thirty-two percent of the government-provided doctors, forty percent of its engineers, and forty-six percent of its accountants. As the economic and professional gains of the Ceylon Tamils continued, the demands for preferences, quotas, and "standardization" emerged among the Sinhalese. For example, in the early 1970s, district quotas were instituted, thereby restricting the admission of Tamil science students to the university. Additionally, entrance exam scores of Tamil students were arbitrarily downgraded to enable more Sinhalese students to gain university admission.⁵¹

Eventually, the government expanded its policies preferring Sinhalese. These policies worked. The Sinhalese majority once again saw its income exceed that of the Ceylon Tamils. Predictably, and tragically, violence ensued.⁵² As Sowell points out, Sri Lanka "has become almost a textbook example of how even unusually amicable relations between two groups can, within one generation, be turned into implacable hostility, violence, and ultimately civil war, simply by the politicization of race and ethnicity."⁵³

Importantly, Sowell demonstrates that in many countries when disfavored minorities have been allowed to compete, they, over time, have often excelled beyond the level of the dominant majority in the contest for the patronage of majority clientele,⁵⁴ thus reducing or eliminating the majority's dominance in the market-place. This success is commonplace, not only when the minority had a head start over the majority⁵⁵ but also when the minority

emigrating to another country where the native ethnic groups then claim to be disadvantaged by immigrants include the Chinese in Siam and Malaya, and the Indians in Fiji and East Africa. THOMAS SOWELL, *ETHNIC AMERICA* 123 (1981).

50. See generally SOWELL, *supra* note 20, at 41-87.

51. *Id.* at 85.

52. *Id.* at 85-86.

53. *Id.* at 87.

54. *Id.*

55. See *id.* at 88-89. Sowell identifies "Indian dentists and Chinese businessmen in Malaysia, Lebanese middlemen and exporters in Sierra Leone, German piano-makers from Australia, to America and Russia." *Id.* at 89.

arrived as immigrants and displaced existing classes of people.⁵⁶ This internationally verifiable economic achievement by disfavored minority groups confirms the results discussed in the prior subsection. Such results once again eviscerate the assertion that group preferences are warranted on the grounds that large disparities in representation are solely due to discrimination. To the contrary, majority group under-representation must be explicated by factors beyond discrimination, as the dominant majority "either controls the institutions in which the disparities occur or forms the bulk of the clientele on whose patronage the minority depends."⁵⁷ Assuredly, where a disfavored minority group starts out as the economically and politically disadvantaged group and later acquires dominance in the market, it is foolhardy to attribute their subsequent accomplishment to racial discrimination against the majority.

C. *Minority Preferences in Majority Economies*

Recent government-sponsored preferential policies include those for minority groups in economies dominated by majority individuals and groups. Examples include the Sephardim in Israel, the untouchables in India, the Maoris in New Zealand, and Blacks in the United States.⁵⁸ To be sure, in a self-interested world,⁵⁹ minority preferences in majority-dominated economies—which must originate outside the beneficiary group—would seem anomalous. Consider India's untouchables. Historically, severe restrictions against touching caste Hindus (the preferred group) were placed on the untouchables. In its most severe form, this caste system precludes the shadow of an untouchable from falling upon a caste Hindu.⁶⁰ To counter these morally indefensible policies, India instituted, among other things, quota programs to increase the proportion of untouchables in various professions.⁶¹ Despite these programs, India soon had to face the problems of under-

56. *Id.* Examples of such displacement include Jewish businessmen in Argentina, Japanese fishermen in Canada, and Irish politicians in America. *Id.*

57. *Id.*

58. *Id.* at 90.

59. See ADAM SMITH, *WEALTH OF NATIONS* (1937).

60. SOWELL, *supra* note 20, at 91. In India:

There is not a uniform national pattern, either in behavior or in the definition of an untouchable. Moreover, untouchables are by no means a single homogeneous group, any more than the other castes are. In India, there are literally thousands of local castes, of whom more than 1,000 were placed on the schedule or list of untouchables drawn up by the colonial government for purposes of ameliorative policies. Some groups are considered untouchable in some parts of the country but not in others and some groups of untouchables observe untouchability toward other groups of untouchables.

Id. at 92-93 (citing Barbara R. Joshi, *Ex-Untouchable: Problems, Progress, and Policies in Indian Social Change*, PAC. AFF., Summer 1980, at 196-97).

61. SOWELL, *supra* note 20, at 96-101.

utilization. In survey after survey of medical and engineering schools, most Indian universities were not able to fill their quotas, despite the lowering of entrance standards.⁶² Similarly, government jobs reserved for untouchables were not taken due to the "lack of qualified candidates."⁶³

In his observations on the failures of the Indian quota regime, Sowell shines as he demonstrates that "these facts all reflect the same need for complementary inputs—whether money or education performance or job skills—as a prerequisite for taking advantage of the benefits reserved for particular groups."⁶⁴ This wrenching "need for complementary resources is demonstrated by the fact that, among those who do use the quotas, the more prosperous of the scheduled castes [untouchables] use a disproportionate share."⁶⁵

In the United States, since President Lyndon Johnson's Executive Order in 1965 establishing the Office of Federal Contract Compliance, which first created "guidelines,"⁶⁶ the federal role in ensuring diversity in the workplace and in educational institutions has metastasized to permeate virtually every arena of American life. While the impact of such remedial policies has not always been clear, some analysis seems warranted. First, Sowell demon-

62. *Id.* at 97.

63. *Id.*

64. *Id.*

65. *Id.* at 98. Also note that in the United States:

[T]here are dozens of American colleges and universities in which the median combined verbal SAT score and mathematics SAT score total 1200 or above. As of 1983, there were fewer than 600 black students in the entire United States with combined SAT scores of 1200. This meant that, despite widespread attempts to [ensure black] "representation" [that was] comparable to the black percentage of the population (about 11 percent), there were not enough black students in the entire country for the Ivy League alone to have such a "representation" *without going beyond this pool*—even if the entire pool went to the 8 Ivy League colleges.

Id. at 108. Given the number of "top-tier institutions across the country competing for these and other black students, there was no realistic hope [in the near term] of approaching a proportionate 'representation'" of such students without widespread lowering of admissions standards for such students. *Id.* This pattern, of course, echoes the facts concerning the Sinhalese in Sri Lanka. *See id.* at 108.

More recently, average scores on the SAT and on the ACT have indicated that most minorities continue to lag behind the average scores achieved on such aptitude tests. CHRON. HIGHER EDUC., ALMANAC ISSUE, Sept. 1, 1995, at 12.

For an incisive and captivating argument in favor of complementary resources, see LOURY, *supra* note 23, at 107. While simultaneously opposing (1) a return to a so-called color-blind approach to the disparity between races and (2) affirmative action, Loury states "that direct and large-scale intervention aimed at breaking the cycle of deprivation and the limited development of human potential among the black poor is the only serious method of addressing the racial inequality problem in the long run." *Id.*

66. SOWELL, *supra* note 20, at 103-04.

strates that, contrary to the conventional view, the migration of Blacks from the South to the other parts of the United States, and the input of more and better education, largely explain the relative improvement of African-American incomes during the period between 1940 and 1970. Furthermore, the upward trend in African-American wages relative to those of Whites preceded the passage of the Civil Rights Act of 1964.⁶⁷ Additionally, while the numbers of Blacks in professional and other high level occupations rose significantly after the passage of the Civil Rights Act of 1964, "the number of blacks in such occupations increased even more rapidly in the years *preceding* passage of the Civil Rights Act of 1964."⁶⁸ Interestingly, "[t]he largest gains in black wages relative to those of whites between 1960 and 1970 occurred in private sector industries *less* regulated by government and *less* likely to be government contractors."⁶⁹ In addition, Black males with more education and more job experience have advanced in income, both absolutely and relative to Whites, while Black males with less education and less job experience have retrogressed relative to Whites over the same span of years.⁷⁰ Consistent with the effects of preferential policies elsewhere, such as those in Sri Lanka, India, and Nigeria, one should expect that the more fortunate members of the preferred group will gain and that the less fortunate members of favored groups will lose; and thus, income disparity should be exacerbated by the creation of preferential group rights.⁷¹

Indeed, less fortunate but preferred *groups* lose in competition with more fortunate groups in terms of skills, education, and cultural attitudes. For instance, both Puerto Rican and African-American groups have fallen further behind the average for all Americans in terms of relative economic advancement during the era of preferential policies, while women, especially White women (the most fortunate preferred group), have progressed substantially.

Using the examples of India, the United States, and other countries that enact preferential policies favoring minorities, Sowell exposes the deficiencies of these policies:⁷² (1) the beneficiaries of such policies are unlikely to be the most needy members of preferred groups or members of the most needy group; (2) in order for group preferences to work in terms of improving the economic status of under-represented groups, additional, effective, comple-

67. *Id.* at 113. See also Chinhui Juhn et al., *Accounting for the Slowdown in Black-White Wage Convergence, in WORKERS AND THEIR WAGES: CHANGING PATTERNS IN THE UNITED STATES* 107 (Marvin H. Kesters ed., 1991).

68. SOWELL, *supra* note 20, at 113.

69. *Id.*

70. *Id.*

71. See *id.* at 113-14. This pattern of retrogression by the less fortunate members of preferred groups is consistent with the experience of untouchables in India, the Maoris in New Zealand, and the Malays in Malaysia. *Id.* at 114.

72. *Id.* at 103-12.

mentary resource deployment is a prerequisite; (3) preferential policies, even when defined as temporary, tend not only to persist but also to expand in scope—embracing more groups, increasing group polarization, and leading to fraudulent claims of group membership as standards are lowered in order to increase the statistical representation of groups;⁷³ and (4) consistent with the evidence from prior subsections touching on preferences for majorities, racism alone fails to explain disparities in income for minority groups.⁷⁴

III. IMPLICATIONS AND ILLUSIONS OF PREFERENTIAL POLICIES

Beyond the largely empirical discussions of majority preferences in majority dominated nations, of majority preferences in minority dominated countries, and of minority preferences in majority dominated societies, Sowell explicates how preferential programs, which seemingly are animated by dispassionate consideration of outcomes, are instead propelled by illusions. He briefly examines widely held myths concerning knowledge, control, morality, and compensation.

Sowell first considers the illusion that societies possess “far more control of complex social interactions than anyone or any institution has been capable of exercising.”⁷⁵ Explicit evidence of the vitality of this illusion is proffered by referring to Pakistani preferences that were proposed to “ameliorate socioeconomic differences between East Pakistan and West Pakistan.”⁷⁶ Preferential policies advanced as a vehicle to improve the statistical representation of East Pakistanis in employment and school admissions were advocated in 1949 as a temporary measure to be phased out over a five- to ten-year period. These measures were instead extended in 1984 to 1994, despite the fact that East Pakistan broke away in 1971 to form the independent nation of Bangladesh.⁷⁷

This illusion of control, exemplified by the failure of the Pakistani

73. See generally *id.* at 90-116. Two-thirds of Americans qualify for preferences. *Id.* at 122.

74. Alternative explanations of income disparity abound. For instance, one observer of the United States economy states that “[t]o the extent that unions are successful, they redistribute income toward their members, who are predominantly white, male, and well paid, at the expense of consumers as a whole, taxpayers, nonunion workers, the poor, and the unemployed.” MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 29 (1987).

75. SOWELL, *supra* note 20, at 119. Because the United States government lacks sufficient knowledge about morally unwarranted discrimination, some observers have proposed, and some courts have accepted, the view that any action by a decision maker having a disparate impact on a group is illegal in the absence of compelling justification. For a commentary on this perspective, see Alexander, *supra* note 4, at 212-16.

76. SOWELL, *supra* note 20, at 121.

77. *Id.*

program, is premised on the illusion that societies possess "far more knowledge than anyone possesses."⁷⁸ Most advocates of preference programs fail to understand that the establishment of preferences also creates disincentives. For instance, proponents of preferences justify such policies on the ground that prior discrimination warrants preferences to increase opportunities for "qualified" individuals to acquire skills, while ignoring the fact that the existence of preferences creates disincentives which may limit the acquisition of skills and increase a sense of entitlement. Consider this query by a member of a preferred group in the Indian city of Hyderabad: "Are we not entitled to jobs just because we are not as qualified?"⁷⁹ In addition, as one observer points out, the most virulent White supporters of early racial preferential policies in South African mines were those who had trouble becoming qualified for promotions, and "who therefore relied on being White instead."⁸⁰

Other illusions concern morality and compensation. For instance, preference programs have been sustained on the basis of the morality of protecting a group's innate superiority. Such claims have been maintained in disparate settings, such as the "Jim Crow" American South, Nazi Germany, and pre-Mandela South Africa. In these cases, such arguments were animated by the need "to evoke a sense of solidarity within a group already possessed of the political power needed to give themselves special benefits."⁸¹ Assuredly, programs maintained on the basis of group solidarity run the very real risk of eroding a sense of national solidarity and cohesion.

While Sowell's discussion of illusory compensation claims should be amplified, the author skillfully depicts the experience of the Japanese in the United States and Canada and compares African-Americans to Puerto Ricans in the United States. These discussions severely undercut the notion that preferences are warranted on the ground that contemporary descendants suffer the effects of past wrongs and such wrongs must, accordingly, be offset by compensatory preferences.⁸² The fallacy of this viewpoint is its implicit failure to comprehend that the contemporary socioeconomic position of groups in a given society often bears no relationship to the historic wrongs suffered.⁸³ For example, despite severe anti-Japanese discrimination, Japanese family income in both Canada and the United States exceeds the

78. *Id.* at 119. See also F. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976).

79. SOWELL, *supra* note 20, at 68 (quoting MYRON WEINER, *SONS OF THE SOIL* 229 (1978)).

80. *Id.* at 123.

81. *Id.* at 145. For an article that seeks to illuminate the economic power of claims of group superiority, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1005 (1995).

82. SOWELL, *supra* note 20, at 149.

83. *Id.*

income of the descendants of the perpetrators of discrimination.⁸⁴ Moreover, African-American income exceeds Puerto Rican income in the United States, despite the fact that the historic wrongs suffered by African-Americans exceed that of Puerto Ricans.⁸⁵ Paradoxically, under the United States' present preference regime, recent immigrants from identifiable ethnic minority groups qualify for affirmative action, despite the impossibility that these groups can make plausible claims for remediation.⁸⁶

As one commentator illumined:

For a long while, economists, like specialists in other fields, often took it for granted that groups of individuals with common interests tended to act to further those common interests

More recently, the explicit analysis of the logic of individual optimization in groups with common interests has led to a dramatically different view of collective action.⁸⁷

If the interest is really common, "the furtherance of that common interest will automatically benefit each individual in the group, whether or not he has borne any of the costs of collective action to further the common interest."⁸⁸ On the one hand, the most highly educated and the most highly skilled members of preferred groups demand more preferences while concurrently garnering disproportionate shares of the benefits; on the other hand, less educated or less skilled members of the preferred group incur disproportionate shares of the cost while the preferred group as a whole, at least in some cases, falls further behind the average in terms of relative income. This situation should be surprising only to the most naive among us. Economists and public choice scholars have known of this situation for some time.⁸⁹ What is apparently new is that Sowell has verified these facts empirically. Given, then, the accuracy of Sowell's empirical analysis, one important conclusion

84. *Id.*

85. *Id.*

86. Krauthammer, *supra* note 5, at F5. Since minorities comprise up to 75% of recent immigrants to the United States, a large portion of the benefits of racial preference programs designed to remedy past discrimination inevitably flow to recent immigrants. Indeed, by law, immigrants can not be excluded from preference regimes. See ROBB, *supra* note 8, at 5-120.

87. Mancur Olson, *Collective Action*, in *THE INVISIBLE HAND* 61 (John Eatwell et al. eds., 1989).

88. *Id.*

89. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472-73 (1988) (arguing that an important goal of a legal system that desires to promote social stability and social welfare is to increase the transaction costs facing parties who seek enactment of legislation that employs the machinery of the state to effect coercive wealth transfers from one group to another).

emerges: if group-oriented policies are to be morally justifiable, the benefits of such remedial programs must be made to predominately flow to the less skilled, the less educated, and the less fortunate among us.

Attaining this objective will be difficult. Again, Sowell points the way by stating that, while the American public seems to express disapproval of outright "set-asides," it accepts "resource transfers designed to enable disadvantaged groups to meet standards . . . while attempts to bring the standards down . . . are overwhelmingly rejected."⁹⁰ Despite preferential policies having been repeatedly rejected in public opinion polls, most Americans have strongly supported "special educational or vocational courses, free of charge, to enable members of minority groups to do better on tests."⁹¹ Such an approach is not necessarily color blind nor race conscious. Instead making complementary resources available demonstrates a salutary movement toward the extirpation of income disparity that can be labeled *disparity conscious*. The necessity of complementary inputs is poignantly illustrated by the phenomenon that, despite preferential policies, Black American income has fallen relative to the average during the period following the exhilaration of the civil rights movement.⁹² Additionally, as the experience of the Ceylon Tamils illustrates, components of success include competitiveness, aggressiveness, and a cultural appreciation for competition.

IV. CONCLUSIONS

Readers who revisit this important book will be rewarded by the author's international focus and willingness to state the hard facts. Both of these perspectives seem absent in the current debate over group rights. By relentlessly focusing on outcomes rather than justifications, by steadfastly examining incentives rather than hopes, Sowell compels readers to take the problems of group rights seriously. Dispensing with illusions, Mr. Sowell imperils the vitality of recreant and protuberant arguments emanating from all sides of the group rights chasm. Sowell examines the paradox of policies designed to reduce inequality, which, under certain circumstances, increase disparity even for members of the less-fortunate but preferred groups, as well as the irony of policies initially animated by a desire to reduce inter-group friction, but which over time increase it. While explicitly illustrating lacunae in our knowledge, and while cogently demonstrating that free markets, contrary to the prevailing hegemony, do not preclude the advancement of disadvantaged groups, Sowell provides results that depend less on which

90. SOWELL, *supra* note 20, at 165.

91. *Id.*

92. See generally Juhn et al., *supra* note 67, at 107-43. Black male wages have actually declined relative to White males during the 1980-1987 period, which followed a period of dramatic decreases in wage disparity from 1963-1980. *Id.*

group dominates or on which group suffers from disparity, than on the inherent shortcomings of group rights.

Given that “[t]he powerful moral vision that generated America’s civil rights movement is on the brink of disintegration,”⁹³ given “that civic harmony among racial and ethnic groups is among the most salient global challenges of the next half-century,”⁹⁴ and given the vituperative claims by observers currently echoing from all sides of the group rights divide, it is chimerical to believe that the truths illumined by Sowell alone will free either America or the rest of the globe. It is, however, important to realize that, whilst many commentators rail for or against affirmative action, racial preferences can have very minimal impact in terms of income distribution *unless* constituent members of preferred groups possess skills that are valued in the marketplace. In many cases, group preferences can be seen as a form of regressive income redistribution that not only redistributes income from the least fortunate to the most fortunate members of the preferred groups, but also effectively redistributes income from the less skilled groups to the more skilled groups.⁹⁵ Such a redistribution is “in effect . . . a redistribution of power from the individual to the State.”⁹⁶

Since preferences reward those with marketable skills, the prime beneficiaries of redistributive preferences are individuals and groups that possess such skills. Accordingly, one of the poignant ironies of the American preference wrangle concerns the frequent invocation of the term “racial preference” by group rights opponents who fail to recognize that the prime beneficiaries of redistributive preferences are likely to be members of their

93. Horner, *supra* note 6, at 7.

94. *Id.*

95. This paradoxical result can be expressed through an example. As the competition for minority students heated up during the recent decades in the United States, many Black students who scored above average on the SAT were recruited by top-notch universities and colleges. These minority students had the capability of doing very well at good, but less demanding, schools. Instead, they were placed in the most demanding environment. Unfortunately, in more than one case, after five years of schooling, 70% of these students failed to graduate. Assuredly, a graduate of a good university is likely to be more valuable in a market economy than a drop-out from a demanding one. Accordingly, it is possible to argue that one of the unintended results of preferential admissions is that fewer Black students attain a college degree. Since education is one of the factors that affects economic success in the United States and most other market-oriented countries, affirmative action may have the paradoxical and undesired effect of reducing the number of skilled members of the preferred group and hence lowering the average income of the preferred group relative to the average of nonpreferred groups. See *supra* note 65 and accompanying text. See also SOWELL, *supra* note 20, at 109. For a recent judicial opinion that concurrently restricts the availability of preferences in an academic setting, and declines to move in the direction of compensatory resource deployment, see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

96. BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* 72 (1990).

own racial class.⁹⁷ Honest observers of the group rights debate must conclude that this invocation should not be taken seriously unless coupled with implacable opposition to all forms of invidious discrimination as well as support for policies which go to the heart of economic disparity among groups and individuals. Opponents of group preferences must champion policies (including non-governmental and non-coercive ones) that increase the complementary inputs available for the most needy among us, which extirpate laws that inhibit the marketplace advancement of minorities, and which raise the standards and the academic readiness of disadvantaged groups and individuals.⁹⁸ Otherwise, their moral qualms concerning group rights will, deservedly, inherit the wind.

On the other hand, group rights proponents, blinded by the myth that the market is antithetical to minority advancement and impelled by the unshakable dream of ever-expanding group rights, refuse to confront inefficacious programs and paradoxical policies. Accordingly, effective and honest discourse—characterized by a willingness to state the hard facts about the causes and cures of income disparity among individuals and racial groups⁹⁹ and about proposals, including the creative use of freedom,¹⁰⁰ which have the capacity to reduce such disparity—become evanescent in the thicket called “racism.” Meanwhile, truly disadvantaged individuals and groups fall further behind as group preference programs redistribute income from the less fortunate to the more fortunate among us. Moreover, group rights advocates must come to understand this conclusion born of an examination of international and American evidence: government cannot necessarily make us equal;

97. For example, as preferences expanded to include women in the United States, racial minorities, especially Black Americans, were relatively disadvantaged, since women (especially White women) possessed, on average, more initial skills and more initial education than many members of disadvantaged racial minorities. In addition, many group rights opponents underestimate the extent that past racial preference regimes, such as “Jim Crow” and segregated schooling, constitute massive complementary resource transfers to White Americans, thus especially raising the average income of some Whites in the United States. By way of analogy, see SOWELL, *supra* note 20, at 39 (discussing preferences coupled with massive transfers of resources favoring Afrikaners that improved the relative incomes of Afrikaners).

98. See generally BOLICK, *supra* note 44, at 47-86.

99. See generally SOWELL, *supra* note 40, at 81-116. See also Glenn Loury, *Individualism Before Multiculturalism*, 121 PUB. INTEREST 92 (Fall 1995) (arguing, among other things, that character counts).

100. Among the proposals to improve the academic preparedness of minorities include the creation and expansion of school voucher programs. For at least one view, see Harry Hutchinson, *Private Schools: Let Competition Heat Up*, in EDUCATIONAL CHOICE FOR MICHIGAN 47 (Lawrence Reed & Harry Hutchinson eds., 1991) (available at The Mackinac Center for Public Policy, 119 Ashman Street, Midland, Michigan 48640).

it can only recognize, respect, and protect us as equal before the law.¹⁰¹

While affirmative action, group rights, and other preferential approaches based largely on ethnicity may be morally and empirically problematic, they were animated (at least initially) by compassion.¹⁰² Compassion, however, cannot irretrievably cloud truth, nor should truth eviscerate compassion. What is urgently required, given the current exponential expansion of the minority "underclass"¹⁰³ in the United States, is the recognition that our compassion, as informed by the verifiable effects demonstrated by Thomas Sowell, can lead America to a more coherent conception of the group rights wrangle, to an awareness of the pitfalls of group rights policies, and to more effective and less divisive remedies for income disparity. Otherwise, the antiphonal chasm that separates group rights proponents and opponents—the abyss that ineffably divides White, Black, Asian, Hispanic, and other Americans—will accrete until this fragmented country, like many others in the global village, becomes inexorably drawn to the fragrant aroma of the conflagration next time, as America unifies only in the scent of its self-immolation.

Hopefully, an internationally grounded perspective will prevent the United States and other countries from treading down the path that leads to Bosnia. In any case, history will give an authoritative assessment of whether the United States and the world are capable of learning from the past.

101. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring).

102. See SOWELL, *supra* note 20, at 90-91.

103. For example, the percentage of Black children in poverty rose from 39% to 46% during the period from 1974 to 1993. The percentage of the Black population living in so-called "underclass" areas has nearly doubled during the period from 1970 to 1990. HERBERT STEIN & MURRAY FOSS, *THE NEW ILLUSTRATED GUIDE TO THE AMERICAN ECONOMY* 134-37 (2d ed. 1995).