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## Where's the Politics?: Introduction to Williams, Eastland, Days, and Rabkin

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## WHERE'S THE POLITICS?· INTRODUCTION TO WILLIAMS, EASTLAND, DAYS, AND RABKIN

NEAL DEVINS\*

The essays that follow this introduction are the work of journalists, academics, and former government officials who have each spent a great deal of time thinking about, writing on, and participating in the making of public policy affecting civil rights.<sup>1</sup> The richness and diversity of their thinking on this subject explains their participation in this project. Indeed, in conjunction with the publication of this law review symposium, these individuals will as-

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1. Juan Williams is a *Washington Post* reporter who writes about race. He is the author of *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987) and is presently at work on a biography of Thurgood Marshall. Drew Days, now at the Yale Law School, served as the Carter Justice Department's Assistant Attorney General for Civil Rights. He is the author of numerous commentaries on civil rights politics, including *Fullilove*, 96 *YALE L.J.* 453 (1987), and *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 *HARV. C.R.-C.L. L. REV.* 309 (1984). Terry Eastland, now at the Ethics and Public Policy Center, is a former Reagan Justice Department official. He is the author of *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* (1992) and a coauthor, with William J. Bennett, of *COUNTING BY RACE* (1979) and the author of a host of newspaper columns and magazine articles on civil rights. Jeremy Rabkin, a professor of government at Cornell University, has testified before Congress and government agencies on various civil rights topics. He is the author of *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989) and numerous scholarly and popular articles on civil rights.

semble as a group to discuss civil rights politics. One would expect from this group an intricate and far-ranging examination of what elected government and the courts have done and should do through civil rights policy making.

It seems especially appropriate that such a discussion take place at this time. The Clarence Thomas confirmation fight and subsequent Supreme Court decisions again call attention to judicial leadership on civil rights matters. The reach of governmental authority in this area also lies at the heart of a ferocious battle fought over the 1991 Civil Rights Act's use of numerical proofs of discrimination.<sup>2</sup> The Rodney King verdict and its aftermath, too, are inextricably linked to problems of inequality. Finally, election years either invite or serve as an excuse for "big picture" looks at various aspects of governmental policy making.<sup>3</sup> Yes, the stage was certainly set for a battle royale over the accomplishments, failures, and consequences of the civil rights records of the Rehnquist Court, the Bush administration, and the Congress, to unfold in the pages of the *William and Mary Law Review*.

The stage remains set. Juan Williams, Terry Eastland, Drew Days, and Jeremy Rabkin all have written insightful, provocative, and purposefully disturbing pieces. None of them, however, stays within the familiar bounds of public policy analysis—offering an assessment of the past few years with a corresponding recommendation of how Washington can participate constructively in this field. If anything, this group is extraordinarily skeptical of what government and the courts can and should do in advancing national solutions to civil rights problems.

Jeremy Rabkin, tiring of the "ritualistic" and possibly "misdirected" debate over race preferences,<sup>4</sup> questions the usefulness of judicial attempts to impose universalistic norms under a civil rights banner. Proclaiming that the issue is not "whether courts will allow policies that take account of race but whether courts will

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2. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified at 42 U.S.C. §§ 1981-2000e).

3. For such a "big picture" analysis of Bush civil rights policy, see Ruth Marcus, *What Does Bush Really Believe?*; *Civil Rights Record Illustrates Shifts*, WASH. POST, Aug. 18, 1992, at A1.

4. Jeremy Rabkin, *Racial Progress and Constitutional Roadblocks*, 34 WM. & MARY L. REV. 75, 75 (1992).

allow policies that take account of reality,"<sup>5</sup> Rabkin decries equal protection and due process precedents for "blocking the path" of innovative local reform.<sup>6</sup> For Rabkin, it is plain wrong for courts to invoke supposedly universal constitutional norms and stand in the way of inner-city schools for black males, expulsion from public housing of now-accused but twice-convicted drug dealers, and other promising reforms.

Drew Days and Juan Williams, in contrast, see universalistic court-ordered norms as essential.<sup>7</sup> Nonetheless, neither Days nor Williams seeks salvation in the courts. Williams, speaking of "the opinions and attitudes we have employed to distance ourselves from the glory of the Bill of Rights,"<sup>8</sup> contends that no law or court order can mandate equality of opportunity effectively. Real reform, instead, requires heartfelt belief. For Williams, formal equality means little in a world where popular opinion once prevented judges and juries from finding whites guilty of racially inspired violence and today inspires the "demagoguery of a Willie Horton advertisement."<sup>9</sup>

Days, too, is cautious in his embrace of universalistic court-ordered norms—specifically the "integrative ideal" of *Brown v. Board of Education*<sup>10</sup> that black and white students learn together. Focusing on recent attempts by the black community to distance itself from *Brown* through such devices as the establishment of schools for black males and the preservation of traditionally black colleges and professional schools, Days sounds a mixed message. On one hand "[e]xpeditious cannot legitimize racial segregation" of black male academies.<sup>11</sup> On the other hand, he recognizes both that *Brown* could not overcome continuing racism and that the continued invocation of *Brown* will curtail opportunities for blacks seeking legal education.<sup>12</sup>

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5. *Id.* at 80.

6. *Id.* at 79.

7. Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 60-61, 71-72 (1992); Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 10-14 (1992).

8. Williams, *supra* note 7, at 31.

9. *Id.* at 13.

10. 347 U.S. 483 (1954).

11. Days, *supra* note 7, at 62.

12. *Id.* at 55, 65-66.

Terry Eastland joins Rabkin, Williams, and Days in doubting that court edicts and federal mandates will solve our civil rights ills. Eastland's focus is political leadership, and he contends that "neither political party has given reason to believe that it can provide the kind of leadership necessary to take us beyond affirmative action."<sup>13</sup> His lament, however, is fundamentally more optimistic than any of the other essays; he believes that federal intervention can make a positive difference.<sup>14</sup> Eastland also unhesitatingly endorses the universalistic "antidiscrimination" value, that "the mere fact of a person's race is morally uninteresting."<sup>15</sup> He hinges his cases against both affirmative action and Democratic and Republican leadership on this antidiscrimination value. Eastland also points to the antidiscrimination value in distinguishing race-based preferences from "[a]ffirmative action that takes into account individual circumstance such as racial discrimination, economic hardship, or family disintegration . . . ."<sup>16</sup>

Eastland's attempt to separate the individual from the group lies at the heart of all four essays. Williams, while also endorsing a race-neutral affirmative action plan, rests his proposal on group difference: white advantage and society's responsibility to black Americans.<sup>17</sup> Days recognizes that *Brown's* repudiation of education along group lines may well harm black interests. Finally, Rabkin argues that the crisis of the inner cities demands that civil rights' obsession with antidiscrimination, the integrative ideal, and other universalistic standards give way to real world solutions.

Today's civil rights wars, too, center on the tug and pull between individual opportunity and group outcomes. Nonetheless, it is hardly surprising that none of the essays seriously treats the 1991 Civil Rights Act or other Bush-era civil rights controversies. Recent political battles are undoubtedly significant but quite often

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13. Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 49 (1992).

14. *Id.* at 34, 47.

15. *Id.* at 46.

16. *Id.* at 48.

17. Williams, *supra* note 7, at 24-26, 28-31. Williams' race-neutral proposal extends eligibility to all of "the poorest people." *Id.* at 31. Eastland would limit eligibility to individuals who can demonstrate that they have "worked hard to overcome" disadvantage. Eastland, *supra* note 13, 48.

dull. With a few notable exceptions, these battles are repetitive, acrimonious, and seemingly unending. Witness the civil rights controversies that have embroiled the Bush administration.<sup>18</sup> In an attempt to win favor with divergent civil rights constituencies, President Bush openly has embraced contradictory positions on civil rights issues. For example, with respect to minority scholarships, minority business set-asides, and race preferences in broadcasting, the Bush administration is a strong advocate of affirmative action. In sharp contrast, the Justice Department has filed numerous briefs attacking affirmative action. Finally, President Bush's statements on numerical proofs of discrimination are at war with themselves; initially calling proposed civil rights legislation a quota bill for utilizing such proofs, he later capitulated on this so-called quota issue.

Bush administration indecision on civil rights matters is indeed acute, but federal civil rights enforcement is too massive and too diffuse to expect consistency.<sup>19</sup> Even the supposedly ideological Reagan administration sent mixed messages on race preferences.<sup>20</sup> The 1992 elections are not likely to alter this state of affairs. Whether they should is another matter.

The essays which follow send a strong message. By focusing their energies on other matters, Williams, Eastland, Days, and Rabkin suggest that federal civil rights politics has grown stale. Certainly, the action seems to be elsewhere. Whether the solution is to recalibrate or abandon federal efforts and/or universal constitutional norms is quite another matter. These essays, fortunately, are of great use in exploring this question.

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18. See Chester E. Finn, Jr., *Quotas and the Bush Administration*, COMMENTARY, Nov. 1991, at 17.

19. See Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1750 (1991) (reviewing HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* (1990)).

20. See HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* 207 (1991); Jeremy Rabkin, *Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15.