The topic of debate is whether race-based affirmative action should be abolished as a national policy. It is a timely topic, made even
more so by the Fifth Circuit Court of Appeals’ recent decision in *Hopwood v. Texas.*

In *Hopwood,* the court declared the University of Texas School of Law’s affirmative action admissions program unconstitutional and enjoined the law school from considering race in any way, shape or form for the purpose of achieving diversity. *Hopwood* represents the importation of the *Croson* rationale into the realm of academic admissions, and the rejection of Justice Powell’s swing opinion in *Bakke*—the Supreme Court’s landmark affirmative action decision from the 1970s.

*Hopwood* leaves some important questions unanswered, including questions for private schools like Albany Law School. For example, should the *Hopwood* rationale extend to Title VI cases? Of course, state institutions like the University of Texas are bound by the equal protection clause, while private institutions like Albany Law School are not. Whether the *Hopwood* rationale will be imported into Title VI cases remains to be seen. Bear in mind, however, the Supreme Court, if it so chooses, has the final word.

Albany Law School is fortunate to have two of the nation’s most articulate spokesmen on each side of the affirmative action debate. Arguing in favor of abolishing race-based affirmative action is Dinesh D’Souza. Mr. D’Souza was a domestic policy analyst in the Reagan Administration. He has been featured on *This Week With David Brinkley,* *Nightline,* and other programs. He is the best-selling author of *Illiberal Education: The Politics of Race and Sex on Campus* and *The End of Racism: Principles for a Multiracial Society.*

Arguing to preserve race-based affirmative action is Professor Christopher Edley, Jr. Professor Edley, a tenured professor of law at Harvard, has rightly been called the architect of President Clinton’s pro-affirmative action agenda. He has been a senior official

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2 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). *Hopwood* was decided on March 18, 1996. See id.

3 See id. at 935 ("[T]he law school may not use race as a factor in law school admissions.").


7 As noted earlier, the Supreme Court denied the petition for writ of certiorari. See *Hopwood,* 116 S. Ct. at 2581.


II. REMARKS BY MR. D'SOUZA

I realize that I do not have much time to make my point, so I will adopt a motto that King Henry VIII used with one of his wives. He said, "I won't keep you long."

The topic of affirmative action has created a triangular conflict in our society between the Republican Congress, the Clinton Administration and a somewhat ambivalent Supreme Court—a Court which has, at least to this point, decided that race may be used as a legitimate factor in decision-making, but has limited the range and rationale for using race as the basis for public policy decision-making.

I would like to reframe the debate by trying to identify the fundamental tension or conflict, the source of this conflict and ultimately, the resolution of this conflict. I will begin by discussing two important principles in a liberal society.

The first principle is "equality of rights for individuals." Martin Luther King, Jr. had this principle in mind when he opined that all Americans want to "live in a nation where they will not be judged by the color of their skin but by content of their character." Presumably, individuals want to live in a country where they are assessed and evaluated on individual merit, a widely shared American ideal.

The second principle is "equality of results for groups." At first glance, the importance of this principle may appear questionable. However, this principle is important to those who want to live in a multi-racial society, where no groups are permanently ensconced at the top nor permanently consigned to the bottom. To avoid a racial caste system, we cannot be indifferent to how social rewards in this country are distributed between groups.

These two principles, "equality of rights for individuals" and "equality of results for groups," are frequently in tension or conflict. For example, consider the University of California at Berkeley, an institution that I have studied at some length. The University of Texas also presents an equally compelling example of this conflict.

At the University of California at Berkeley, the California Regents recently convened to outlaw the use of racial preferences. This decision has produced a lot of protest and anger at Berkeley. Why the protest? Studies have shown that if the University of California at Berkeley admitted students based solely upon merit—grades, test scores and nothing else—then the campus would be comprised mostly of two groups, whites and Asians. Asians and whites combined would constitute well over ninety percent of the Berkeley student body. The number of Hispanics would decrease considerably. The number of African-Americans on the Berkeley campus would plummet from the current level of seven to eight percent to between one-half and one percent. In other words, blacks would be virtually extinct at Berkeley.

These potential results would cause intense embarrassment for the deans and admissions officers at Berkeley. Why? Because Berkeley is a state university, and as a state university, it is accountable to a racially diverse California population. The California Regents are trying to achieve a balance—“equality of rights for individuals” on one hand and “equality of results for groups” on the other. This balance is referred to as proportional representation. Berkeley would like a student body that roughly approximates the racial breakdown of the surrounding community. The concept of proportional representation is not limited to Berkeley, nor is it limited to higher education. In some ways, proportional representation is the legal and moral principle underlying our civil rights law today.

Suppose an Albany-based ball point pen manufacturer is sued for discrimination. The federal government—the Equal Employment Opportunity Commission—can come and say, in effect, “Why is it the case that the work force of this company is only two percent Hispanic?” In other words, if Hispanics represent nine percent in the relevant population, this company would be presumed to be guilty of illegal discrimination. Why? The assumption is that if the company is not discriminating, then Hispanics, who represent nine percent of

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13 See id.
14 See id.
15 See id.
the relevant population, would represent nine percent of the company's work force as well.

This illustration raises some very interesting questions. Where does this peculiar assumption come from? Why assume that in the absence of discrimination every group should be represented in the work force, or every university and medium to large size company, at roughly or even precisely their proportion in the surrounding population?

Admittedly, the principles of affirmative action have been adopted to fight a long history of discrimination, a history that continues to the present day and one that is undeniable. The question that must be addressed is, "Whether America's public policy effectively fights historical discrimination by practicing it?" We seem to have a paradox which is that we are trying to eradicate the historically invidious effects of race with a process that institutionalizes race as the basis for college admissions, faculty hiring, minority scholarships, government contracts, jobs, promotions and voting districts. Is it any surprise that we live in such an intensely racialized society, a society that is a far cry from the one that Reverend King spoke about in his "I Have A Dream" speech?\(^{16}\)

The problem at Berkeley and elsewhere is that merit creates the same inequality that racism used to create. This phenomenon is creating the intense conviction among many civil rights activists and many African-American leaders that merit is the new form in which the old racism expresses itself. In other words, we want to live in a multi-racial society where groups are equal but just different. If that is the case, then the multi-cultural slogan, "Let's celebrate our differences," becomes viable. The problem, however, is that our differences can be measured in terms of almost every measure of academic achievement and economic performance. The measure could be a reading test given to five-year-olds, the Scholastic Assessment Test (SAT) taken for college admittance, Law School Aptitude Test (LSAT), Medical College Admissions Test (MCAT), Graduate Management Admissions Test (GMAT), a fire fighter's test, police sergeant's test, savings rates or rates of business formation. It does not matter which measure is used. On almost every measure available, Asians and whites come out on top, Hispanics fall in the middle and African-Americans fall to the bottom.

\(^{16}\) See King, supra note 10, at 217.
The intense debate is over the cause of these disparities. For a generation, there existed the “liberal fallacy,” which identified the cause as some terrible bias in the tests and measures. In other words, the measures of achievement were sexually or racially biased. This argument has completely collapsed in recent years as people have begun to look at these tests.

The colloquial example is the SAT, which young people take to go to college. This test consists of a verbal section and a math section. It is conceivable, in principle, that the verbal section is somewhat biased because it includes synonyms, antonyms and reading comprehension which reflect cultural artifacts that are undoubtedly the product of one’s upbringing. Fine. Ignore the verbal section of the test. Throw it out. Look only at the math section where the typical question is something like this: “If an automobile can go seventy-five miles per hour, how far can it go in forty minutes?” Can anyone with a straight face say that equations are racially biased or that algebra is rigged against Hispanics? This is absurd. Yet, every year, the same racial gaps seen on the verbal section of the test are equalled or exceeded on the math section of the test.¹

Why is merit producing the same inequality that racism used to produce? Currently, there are three positions in this debate that seek explanations. The first position can loosely be called “The Bell Curve” position after the controversial book written by Richard Herrnstein and Charles Murray.¹⁸ Supporters of this position argue that the reason for these differences in academic achievement and economic performance is that groups differ naturally, biologically and perhaps genetically. That is one position.

The second position is the liberal position. Proponents of this position believe that these group differences stem from the artificial imposition of society. In other words, the legacy of societal oppression, specifically racism, has artificially created this group inequality.

These two positions have been at loggerheads for the better part of a century. In the first half of the century, the biological or genetic view was predominant. In the second half of the century, the liberal view has been predominant. These views work like a seesaw—as one goes up, the other goes down. In fact, I would argue that as the liberal view today is weakening, the genetic view is getting stronger. Unrefuted data shows that on the SAT Asians and whites who come

¹⁷ See D’SOUZA, supra note 9, at 302-03.
from families making less than $20,000 a year score higher on the test, every year, in both the verbal and math sections, than do African-Americans coming from families earning over $60,000 a year.\textsuperscript{19} It is very difficult to show how racism could produce such results and therefore, people say, "If racism is not the cause, maybe there are some genetic differences." This reasoning, in part, explains the enormous success of "The Bell Curve" position.

In the debate thus far, the third position has been neglected. In my view, it is the correct position, the position with the most explanatory power. This position recognizes the cultural differences between groups. These cultural differences can be observed, experienced, measured and directly correlated with academic achievement and economic success.

I am arguing that our society is experiencing a cultural breakdown. The effects of this breakdown have been particularly harsh on African-Americans, especially poor African-Americans that are concentrated in the inner city. The inner city culture is characterized very tragically by a high rate of racial paranoia. The government is suspected of planting drugs and bringing the HIV virus into poor communities.

This inner city culture is characterized by, in some senses, an overt hostility toward academic achievement which many scholars dismiss as "acting white." Going to the Smithsonian or the library, or trying to do well in school is seen as a form of selling out or assimilation.

This culture is also characterized by a high degree of government dependency and a corresponding weakness of small businesses and entrepreneurial institutions. Additionally, this is a culture tragically characterized by a high crime rate. Crime, that we know, takes a high toll on other poor African-Americans themselves.

Finally, the normalization of illegitimacy and out-of-wedlock births to single-parent families has reached cataclysmic proportions, as high as ninety percent in some communities.\textsuperscript{20}

These problems are real. They are not the result of genetics nor the result of racism. This statement can be definitely proven by showing that these problems, for the most part, did not exist a generation ago, at least not to the same degree. Look at the year 1950, for example. In 1950, the illegitimacy rate for blacks in the

\textsuperscript{19} See D’SOUZA, supra note 9, at 456.
\textsuperscript{20} See id. at 515-16.
United States was about twenty percent.\textsuperscript{21} This rate was considerably higher than the illegitimacy rate among whites, but vastly lower, indeed, less than one third of the rate today.\textsuperscript{22} The gene pool for blacks has not changed since 1950, so there is no reason to believe that this is a genetic or biological problem at all. On the other hand, white racism was a lot worse in 1950. White racism was overt and embedded in law and policy. White racism was especially virulent in the south where the vast majority of blacks lived. Given these statistics, it becomes very hard to blame the increase in crime rates and illegitimacy rates on racism.

Something else has been going on and that something else is cultural change. The argument is that cultures develop and adapt in response to historical circumstances. When the circumstances change, a cultural adaptation can prove maladaptive or in need of change. For example, I mentioned earlier the idea of government dependency. Historically, there is every good reason for this dependency. While most whites have viewed the government as the enemy of rights—one may look at the debates over the Bill of Rights, limitations on the government such as “Congress shall not do this, Congress shall not do that.” Limiting the government is seen as crucial to protecting the security and freedom of citizens.

However, for African-Americans, the federal government has been a protector, a deliverer, a guarantor of rights at crucial junctures in American history. The federal government ended slavery. The federal government ended segregation. The federal government was an employer-of-last-resort for many blacks in this century beginning with the “New Deal” and continuing through the “Great Society.” Many African-Americans justifiably see the government as an important catalyst, a transmission belt, to help them enter the middle class. It comes at no surprise that every survey shows that African-Americans, more than any other group, view the government sympathetically as a basic provider of education, welfare, government services, jobs, and so on.

This cultural orientation which made sense for a long time is today a liability. Why? Because the government no longer has the money. Public confidence in the government has declined and continues to decline. The government’s record for solving complex social problems has proven to be mediocre and in some cases abysmal.

\textsuperscript{21} See id. at 516.

\textsuperscript{22} See id. at 514-15.
While African-Americans look to government, other groups, not just the hated Koreans, but other black immigrants such as the Haitians, West Indians, and Nigerians are coming to the inner city, out-competing African-Americans and claiming the fruits of the American dream. How? By starting small businesses and using entrepreneurialship, these other blacks are finding a quicker ladder to economic success.

As a first generation immigrant to this country, I find myself amidst a multi-racial society of not just blacks and whites, of course, but Asians, American Indians, Hispanics and so on. As a long term principle, it is very difficult to establish a policy of social justice based upon whose ancestors did what to whom. Instead, a policy of social justice should embrace the concept referred to as "separation of race and state." "Separation of race and state" simply means the removal of government from the race business such that our race no longer counts for us or against us.

Historically, affirmative action had the important purpose of kicking in a closed door. Most Americans supported affirmative action for that reason. Something was needed to break the back of the old segregation and state-sponsored discrimination. But, those strong arm tactics, which might be approved of under unusual circumstances, should not become the normal way of doing business in a free society. In the event of a military emergency we might agree to let the army search our homes. However, when the emergency ends, that kind of intrusion should stop.

A generation later, a sensible re-evaluation of affirmative action is taking place. As affirmative action promiscuously multiplied, the moral justification for its existence progressively weakened. I think that what is needed is to re-think the program. Not necessarily to junk it overnight, but to experiment with all kinds of imaginative and interesting alternatives. The goal should be to establish a better set of principles for African-Americans to reach their true potential, for America as a nation to become more competitive, and for all individuals and groups to do their best in this flourishing multi-racial society.

III. REMARKS BY PROFESSOR CHRISTOPHER EDLEY, JR.

Thank you very much for the opportunity to speak, and thank you especially for the opportunity to go second. There are three or four arguments for continuing affirmative action, if it is done in the right
way, as well as several defenses to Mr. D'Souza's criticisms of affirmative action.

First and foremost, affirmative action should continue because discrimination continues. When we began work on the White House review of affirmative action, the starting point for our discussions with President Clinton was a review of the literature concerning the present-day extent of discrimination. Mr. D'Souza has already provided some of the gross statistics regarding economic and social disparities in income, wealth and other various achievements. Over the years econometricians and statisticians have tried to develop methodologies to account for these disparities by using every imaginable explanatory variable. After calculating the disparities created by those variables, the theory was that any residual disparities must be indirectly accounted for by discrimination.

Recently, however, there have been methodological improvements making it possible to detect discrimination directly. These methodologies deserve attention, particularly the "tester" or "audit" methodologies. For these studies, individuals identical in age, physical appearance, speech pattern, type of dress, resume and in every other respect, except for race, gender or national origin, are sent out to look for an apartment, apply for a loan, or apply for an entry-level job. These studies have been conducted in city after city. The results are that discrimination remains a very real fact of life.

The most dramatic results exist in the housing area where black and Hispanic testers, in contrast to their white counterparts, encountered some form of discrimination in searching for apartments fifty percent of the time. The blacks and Hispanics, but not the whites, were told that there were no apartments available, the rent was actually higher than advertised, or the apartment had just been rented. In the employment context, in the major metropolitan areas where the research has been conducted, blacks and Hispanics encountered some form of discrimination, during some phase of the hiring process, about twenty-five percent of the time. When this very dramatic, direct evidence of discrimination is combined with the evidence of statistical and econometric disparities, the overpowering conclusion is that discrimination and exclusion remain very real problems in today's economy and society.

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24 See id. at 47-48.
Second, in addition to discrimination, there are certain personal preferences that may or may not be illegal as well. These personal preferences remain poisoned by the toxins of our racial differences, that is the racial divide in America. This refers to the subtle and subjective preferences that affect everyday decisions that people make about whom to hire, invite to dinner, have as a member of a country club, and with whom to do business when hiring a subcontractor. In these subtle decisions, there may be no smoking gun of racial animus, yet there is the inevitable play of the familiar “birds-of-a-feather-flock-together” phenomenon in which people are attracted to do business and socialize with folks who are like themselves. These personal preferences continue to be tainted by racial problems. The old saying is that the most segregated institutions in America are our houses of worship, perhaps only second to our funeral parlors. Over and over again patterns of social and economic activity are driven by subjective personal preferences. Whether or not these preferences are labeled as discrimination, this undeniable driving force has significant economic and social consequences, such as denying opportunity to people who are trying to climb the ladder and get through the door.

Now, taking these first two points together, the continuing presence of discrimination and the very real fact of poisoned personal preferences—poisoned, but perfectly understandable personal preferences—what are we to do? Affirmative action originated from an understanding which first emerged in the Johnson Administration and then accelerated under the Nixon Administration. This understanding recognized the need for affirmative action as a mechanism to break open the door to opportunity. The observation was made that simply prohibiting discrimination—thou shalt not discriminate—was not an effective way of fighting these difficult to detect forms of discrimination or simple personal preferences. These difficult to detect phenomena could not be addressed solely with the iron fist of law enforcement, as ineffectual as that is in many circumstances, but instead affirmative action was needed as a way to create genuine opportunity. Therefore, the continuing prevalence of discrimination, personal preferences and other forms of exclusion supports the continuing rationale for affirmative action.

The third argument supporting affirmative action is the diversity or inclusion argument. Some of our discussions with President Clinton were focused on whether or not the only moral justification for affirmative action was to remedy past discrimination or to remedy the continuing effects of past discrimination. I pointed out,
Well, Mr. President, you seemed to say during the transition that you wanted a cabinet that looked like America. Now when you said that you wanted a cabinet that looked like America, were you saying that you wanted to give a job to Ron Brown because he had been a victim of discrimination? No. You were saying it because you thought if your cabinet reflected, to some extent, the diversity that is America, it would be better as a cabinet and it would be better at providing you with the advice you need in order to be the Commander-in-Chief.

Similarly, when the Chicago Police Department wants to use affirmative action to have more police officers who can work more effectively in the African-American or the Latino communities, it is doing so in part because the police department is trying to overcome its own history of discrimination. But the police department is also doing it because they recognize that the Chicago police will do a better job as a law enforcement agency if its diversity to some extent reflects the diversity of the community they are trying to serve. The organization will be better if it is more inclusive. This argument is also commonly used to support diversity and inclusion in higher education. The idea is that the quality of the educational process will be enhanced by virtue of the openness and inclusivity.

The fourth argument is one of practicality and it really builds on top of the first three. If we want effective measures to end discrimination and its lingering effects, and if we want effective measures to bring about diversity and inclusion, then what will those effective measures be? Many proponents of affirmative action strongly believe that the only effective measures are race-conscious measures. On the other hand, many opponents believe that race-neutral measures are almost as effective at breaking down barriers to opportunity and bringing about a measure of diversity and inclusion. I am much closer, as you would imagine, to the former argument, believing that all of our experiences suggest that much more is needed than the hortatory directive of "Thou shalt not discriminate." Class-based and income-based measures alone are insufficient. These measures will be diluted and, undoubtedly, under-funded, as long as conservatives control the political process. Discrimination still exists and personal preferences continue to be poisoned. Diversity and inclusion are critical. Thus, as a practical matter, affirmative action is still needed.

Let me turn and respond to some direct challenges that Mr. D'Souza mentioned. First, it is often argued that affirmative action
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does nothing to solve the problems of the underclass and, therefore, affirmative action should be abolished. The problem with that argument is that affirmative action does benefit the underclass, although not as much as its architects had hoped or intended. But it does do some good.

For example, there is a positive effect in blue-collar employment and wage rates. This was shown in econometric studies during the seventies and into the eighties. There is also an effect in corporate and public policies which are designed in board rooms and around conference tables. If we can integrate the discussions in those rooms and around those tables, it is more likely that things benefiting the underclass will be undertaken. This has certainly been my experience during my time in government with the Carter Administration, the Dukakis Campaign, and the Clinton Administration. That is the way the world works. Decisions depend on who is at those tables and in those conference rooms. Affirmative action in those rooms, for example, having a cabinet that looks like America, will change the policy outcomes and the allocation of resources. Changing the person making the loan decisions at a bank will change the way in which a bank makes decisions about what communities to invest in, and the risk characteristics of commercial loans to consider. In other words, the decision-making power in America can be influenced by affirmative action.

In addition, the most important response to the argument that the underclass is not benefiting, and therefore, we should toss affirmative action overboard, is that we should not expect affirmative action to solve every problem facing the opportunity agenda. Do not expect affirmative action to be the single answer that brings us to our ultimate goal of racial justice. Affirmative action is simply one tool among many. Affirmative action is not an alternative to job policies, nor is it an alternative to a full-scale attack on any social or cultural impediments to opportunity. Nevertheless, affirmative action should remain as long as needed.

Another frequent criticism of affirmative action is that its goals, while intended to be flexible in theory, become rigid quotas in practice. Contrary to the notion of merit, these rigid numerical straightjackets are demeaning, stigmatizing, and illegal. The response to this criticism is as follows. Point number one is that quotas or rigid numerical straightjackets are illegal in almost every circumstance under current law. If an affirmative action program is being administered in a way that creates rigid numerical straightjackets, then this program is illegal and should be stopped.
Supporters of affirmative action should not be in the business of defending quotas. There is a right way to administer affirmative action and a wrong way. Quotas are the wrong way.

The next point is whether affirmative action programs that are designed to be flexible become rigid in practice. The evidence, what evidence there is, suggests otherwise. The evidence suggests that this sort of reverse discrimination occurs very infrequently. The cases, administrative complaints, and interviews conducted with employers show very few instances of reverse discrimination. Is there resentment? Yes, there is resentment. The question is whether this resentment is grounded in reality. The evidence suggests there are very few instances of resentment grounded in reality. It is important for people who support affirmative action to denounce rigid quotas and advocate the proper use of affirmative action. Institutions pursuing affirmative action must make the needed investments in training their workers so that affirmative action is done the right way. If a lazy personnel manager in a corporation is hiring by the numbers in a rigid way, it is illegal. It needs to be fixed and addressed. We have an obligation to weed that out.

Another issue is merit. Opponents argue that affirmative action is inconsistent with merit. Well, the problem starts with the definition of merit. Mr. D'Souza is quick to equate test scores with merit and I am not. Test scores are simply one factor in deciding who will make a good lawyer, or even, a good student in a law school. It is one consideration. Test scores at most law schools fall within the margins at stake in the Hopwood decision. Hardly any law professor would contend that this range of scores is a relevant predictor of being a successful law student, much less a successful lawyer.

I am in favor of merit, but affirmative action done the right way is consistent with the true definition of merit. If you use a paper and pencil test to find out who is going to be a good sergeant in a police department, you can be assured of a lot of silly decisions. It may be that for the years when the paper and pencil test was being used and when minorities may have been disproportionately disadvantaged by that paper and pencil test, there were also a great number of white male applicants that would have been terrific police

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26 See id.
It was arbitrary and unfair, just not illegal.

One of the things that affirmative action has forced institution after institution to rethink are their abbreviated and arbitrary definitions of merit. By challenging the old concept of merit, institutions can develop a better concept of merit that will more accurately identify the promising law students and lawyers of the future. Affirmative action has vastly improved the definition of merit and, in that respect, has done a service to everyone, not simply to its immediate beneficiaries.

While the proper administration of affirmative action is consistent with merit, improper administration depreciates merit and threatens to undermine other institutional goals. This applies to any kind of preference, whether it is a preference for musicians, athletes, or alumni. Rigid preferences operate to the exclusion of other institutional goals and therefore should be thrown overboard.

Finally, there is the balkanization argument. Critics of affirmative action frequently argue that paying attention to race perpetrates the racial balkanization of America. This is a very difficult proposition. One of the most pointed ways in which balkanization is argued, however, is quite troubling. Proponents of this argument say, “The more that minorities and women argue in favor of affirmative action, the more backlash and resentment is created. And we just cannot have that kind of division in America.” This is a classic “blame the victim” strategy and could be rephrased as, “If you will just be quiet, we will all be more comfortable.” Well, sorry. If I am on the outside, maybe you will be more comfortable, but I will not be more comfortable. Do not tell me to be quiet because it will make you more comfortable. You have got to break some eggs in order to have scrambled eggs. If folks inside are asleep, you have got to bang on the door in order to wake them up. Sometimes you have got to kick at the door.

Let me close by saying one last word. Is there a moral cost to making decisions about individuals on the basis of immutable characteristics like color? Some opponents of affirmative action, embracing color blindness, say “Yes, there is a moral cost and that cost is so great that we should never be willing to pay it.” Some proponents of affirmative action say the moral cost of making decisions about people on the basis of race is no different from that of making such decisions on the basis of geography, or height or income. So long as your purpose is beneficent, it is okay. Most people would believe that the answer is somewhere in-between. The
answer is that there is a moral cost. We would prefer a world in which no decisions had to be made on the basis of color or gender, but there are circumstances in which we should, circumstances in which we must be willing to pay that cost.

IV. SPEAKER DISCUSSION

D'SOUZA: I must say I feel like a mosquito at a nudist colony. I am not sure where to begin. I will start with your strongest and perhaps most powerful argument which is that discrimination continues, discrimination remains a significant factor in society, and that affirmative action is a good way to fight discrimination. Do you see a difference between what one can call anti-discrimination on the one hand and affirmative action on the other? Put it this way, you and Greg LaDuke, a white male, apply for a job. You are better qualified. Greg LaDuke gets the job. That is discrimination. EDLEY: It could be just a mistake.

D'SOUZA: It could be a mistake that leads to discrimination, but it is discrimination. By discrimination, I mean that despite your better qualifications, the job has gone to Greg LaDuke, the less qualified applicant in this case. Greg LaDuke and I apply for a job. He is better qualified. I get the job. That is affirmative action. Why is it the case that the second transaction remedies the first? How does discriminating in favor of less qualified applicants and turning away more qualified applicants correct the nepotism that you described earlier?

EDLEY: My disagreement with you is the premise. What do you mean by “qualified?”

D'SOUZA: That is a separate issue.

EDLEY: No, that is exactly the issue. If the question is who will be the better cop, my answer is that I cannot tell whether it would be you or Greg LaDuke because I do not know the other people on the police force or what the police department needs. Maybe the department needs someone who speaks Hindi because there is a large Indian-American community and the department needs more police officers who would be able to work with that community. If you speak Hindi, then it would make you more qualified. But if the department does not need Hindi-speaking officers, then perhaps the fact that Greg LaDuke can do more push-ups than you tips the balance because the department is concerned with merit. A good police department must be diverse and reflect the community it is trying to serve. If a law school is hiring a law professor, by the same
token, who the most qualified individual is depends on a lot of things about the individual and the school. So I am for hiring the most qualified given all of the employer's needs.

D'SOUZA: You have shifted ground because the very concept of discrimination implies some standard. In fact, you yourself presumed a standard when you said in your opening remarks that equally talented testers applied for a job. If you then say that there are no standards against which these people can be measured, how do you prove discrimination? There are cases which seem few and far between, where race is a legitimate job qualification. You gave one. If you have a riot-torn Chicago, you cannot have an all white police force in a city where there is a substantial black population.

Let me offer you a different scenario. I have a computer company in Silicon Valley and I want to hire some good programmers. I set up some requirements which I think are best suited to attracting a good programmer. What if I take the ten applicants with the highest test scores and all ten of them happen to be Korean, no blacks, no Hispanics, no whites? What advantage is there in a Hispanic perspective on computer programming? What particular diversity advantage would I get by suspending these hiring requirements which I, in my business judgment, determine are best for my company, to hire people to “look like America?”

EDLEY: I am not aware that there is a distinct Hispanic perspective on computer programming. But if someone thinks there is, I would listen to the argument. One could imagine that if a computer programmer spends a lot of time going to global conferences on software development, some facility for interacting with people in other markets in other countries might be useful. But let us put that to one side.

Let me address your question straight on. My closing comment was that in making decisions on the basis of color there is a moral cost which we should be willing to pay in some circumstances. The diversity justification for affirmative action does not have as much moral weight as the remedial justification. Nor does the diversity justification have the same weight in every context. The diversity justification is clearly a stronger argument in the Chicago Police Department than it may be in a computer firm in Pocatello, Idaho. Does it have some value? Probably. But I would want to make a context-specific choice in a way that is sensitive to the fact that there is a moral cost.

D'SOUZA: Are you saying that affirmative action is necessary to fight nepotism or are you defending affirmative action as a form of
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nepotism? Adarand Constructors, Inc. v. Pena\textsuperscript{28} involved a contractor who submitted the low bid on a government contract.\textsuperscript{29} The reason the government established the low bid system was to fight nepotism. In the construction industry, there were a lot of “old boy,” “Tammany Hall” arrangements, in which the favorite nephew got the contract. The low bid system operates to award the contract based on merit, in this case, efficiency. The contractor that can do the job cheapest, gets the contract. In this case, Adarand was competing against a minority firm, Gonzalez Construction Company.\textsuperscript{30} Gonzalez is a very good firm and very often Gonzalez submits the lowest bid and gets the contract. Adarand argued that even though it submitted the lowest bid, Gonzalez got the contract because Gonzalez had minority representation.\textsuperscript{31} Thus, the “race” card trumped the “low bid” contract. How was that fighting discrimination? What would you tell Adarand?

EDLEY: That is easy. Here is the conception of the argument. Based on social science evidence and formulated anecdotes there continues to be substantial discrimination against minority and women entrepreneurs in the contracting arena, and specifically in the highway construction contract arena which is involved in Adarand.\textsuperscript{32} It is discrimination to some extent, although decreasingly, from governments awarding contracts. More importantly, it is discrimination in the private market itself. Examples include prime contractors who simply never hire minority and women businesses as subcontractors unless there is a government program pushing them to do it; banks that do not give loans to minority businesses or require much more capitalization for the same loan; and minority entrepreneurs who have difficulty in obtaining surety bonds. These examples occur over and over again and are documented in well over a hundred studies that have been done post-Croson.\textsuperscript{33}

Given that there is discrimination faced by minority and women entrepreneurs in the market place, what should the government do about it? Some people say that government should simply enforce the anti-discrimination laws. Other people say that anti-

\textsuperscript{28} 115 S. Ct. 2097 (1995).
\textsuperscript{29} See id. at 2102.
\textsuperscript{30} See id.
\textsuperscript{31} See id.
\textsuperscript{32} See id.
discrimination is a start, but that such enforcement is imperfect because discrimination is so difficult to detect. There is never a "smoking gun." One cannot find the evidence.

The idea is to create a program that creates some opportunities for minority and women entrepreneurs and offsets the fact that they are shut out of so many opportunities in the normal operation of the still somewhat discriminatory private sector. Then, over time, they will develop a business acumen, the network, and so forth to compete effectively in the private sector.

Now having said all of that, let me also say that you could make a decision. You could say,

Look, I understand the facts about discrimination against minority and women entrepreneurs, but frankly I think that is of a much lower priority for public policy attention than a whole host of other issues, even regarding affirmative action. So I do not want to have any minority business set-aside programs. Instead, I want programs focused on education, unemployment, training or skills training.

But that is a kind of category decision. All I am trying to do is to explain the rationale for the kind of program that was at issue in Adarand. It is very much an effort by the government to compensate these minority and women entrepreneurs and to remedy the fact that they face discrimination in the private sector. The society wants to tilt the playing field to give them a better shot.

D'SOUZA: I fear that you are endorsing a very faulty legal principle. As a principle of fair compensation, if there is an injustice done, the perpetrator and the victim have to be identified and then the benefit imposed on the victim and the cost on the perpetrator. Under what moral or legal principal is it fair to tell Adarand, "Listen, social science studies have shown that there is a lot of discrimination, and therefore we are willing to sacrifice you at the altar for our sociological justice?"

EDLEY: You are trapped in a common law fault causation framework, as if the only basis available to society for redistributing opportunity, and for assigning benefits and burdens, is a tort suit. That is not the case. Public policy is about identifying groups and reallocating opportunities and so forth. The moral premise does not

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34 *See Adarand*, 115 S. Ct. at 2102 (involving contract terms providing that the prime contractor would receive additional compensation from the government for hiring small businesses controlled by "socially and economically disadvantaged individuals").
have to be the individualized identification of a wrongdoer or a causal chain.

The appropriate moral question, since we are not talking about a litigation of A v. B, is to ask, "On what basis can society fairly ask of one group of citizens to contribute to something that another group of citizens needs?" It is the same question that arises when we are designing an income tax, deciding where to build a highway, or deciding whether or not to have a Head Start program. It is a familiar question and it does not come from sixteenth century common law principles. How would you define racial justice?

D'SOUZA: By and large, we live in a liberal society in which racial justice is "fair rules." By "fair rules," I mean a set of neutral principles applied equally to all groups.

You are quite right that in individual cases these tests or principles will vary. It is very different from an academic test, which is typically a paper and pencil test, to go to an academic institution. For example, a fire fighter's test does not ask one to do algebra equations, but to take a hose and run for a hundred yards, or to find a location on a map. If one wants to be a fire fighter, it helps to find the fire. The tests here are designed to measure something that is relevant to what fire fighters do.

It seems that you are making an implausible assumption. I can understand that this test or that test is discriminatory or biased, but is it conceivable that every test and every age and every sector of society is conspiring and, as such, in a conspiracy to give whites historical privilege?

How is it that Asians, who have very little political power in this society, manage to score so well on these tests? Why are they not affected by this fabled discrimination? It seems that you are neglecting important external causes as to why groups perform differently.

EDLEY: Other causes should not be excluded. There are lots of things wrong with society. Affirmative action is not designed to solve all of them. Imagine a society in which one observes a certain income distribution without any particular correlation between race and income, but sub-group distributions look basically the same. Compare it with a second society with the same income distribution, but low and behold, most of the people on the bottom in the second society have dark skin. Is there a problem of racial justice in the second society?

D'SOUZA: As a scholar and an observer of society, I would be troubled by something like that because I would see the way in
which such a distribution would create what some scholars have called "rumors of inferiority." If one group is not succeeding all the time, then some people are going to conclude that this group's lack of success is because the group is incapable of succeeding. I would be troubled from a moral point of view, but I would have to ask, "Is the reason that some people are on the bottom the result of a rigged race, or is it the case, as in the Olympics, that some white guys are not running very fast?"

The fact that whites are coming out last is interesting. Some people would conclude that white guys cannot run, however, this does not mean that the race is rigged. One can see clearly that everyone is starting on the same line, a gun goes off, and there is a timer that does not appear to be racially biased. Therefore, it is a fair race. I am sociologically interested in the outcome. I would ask, "Why is it the case that some groups are falling to the bottom? Is it discrimination? Is it the fact that they have not had access to good training? Maybe they do not have good coaches? Maybe they have small apartments without a Nordic Trac in the basement?" These are the kinds of questions that I am asking. In other words, I would like to support social policies that encourage us to reach our competitive strengths.

EDLEY: Do you believe that, in general, the quality of schools attended by ten-year-old black children and ten-year-old Hispanic children is equal to the quality of the schools attended by ten-year-old white children?

D’SOUZA: On average, no. Yet, it is predominately a class problem rather than a race problem, which means that there are white kids and black kids going to under-funded schools. But you also have white kids and middle to upper middle-class black kids going to suburban schools and prep schools that have much better facilities. The fallacy is to assume that the funding is the decisive factor.

EDLEY: I asked you about quality, not funding.

D’SOUZA: I am agreeing with you in principle while emphasizing the point that discipline, cultural values and other factors deserve consideration. I was struck in reading Jonathan Kozol’s book, *Savage Inequalities*, where he begins by looking at the schools in East St. Louis. There is graffiti on the walls, urine in the hallways,

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and the seats and toilets are all broken. The important questions he does not ask are: Who is bashing the toilets? Who is bashing the seats? Who is urinating in the halls? Who is putting graffiti on the walls? Are the schools built this way?

One cannot discuss the problems of opportunity without reference to the complex interaction between culture and structure. The liberal emphasis on structure has ignored an emphasis on behavior and culture which contributes to the problems we are talking about. EDLEY: How would you respond to the observation that most social and economic conservatives oppose public sector programs that are commonly discussed as alternatives to affirmative action for the creation of economic opportunity?

D’SOUZA: First of all, I would distinguish between libertarians, who tend to have an anti-government mentality, and conservatives, who tend to take a more limited approach and believe that government has not worked very well. There is a difference. Let me clarify what I mean. In San Francisco, a sociologist named Dornbush was very puzzled about why the Asian students were doing better than the other students. Dornbush wanted to see whether it is true, as Charles Murray and others say, that Asians are genetically superior. So Dornbush performed a study comparing ethnic groups in San Francisco and found large differences in study habits among different ethnic groups. Asians studied the most, at about ten to twelve hours a week, as compared to white students at seven to eight hours a week, Hispanic students at four to five hours a week, and black students at two to three hours a week. Assume that this is true and the data valid. The study shows important differences in study habits that have an obvious effect on how people do in schools. My problem, as a conservative, is that it is very difficult for the government to regulate this. This is a problem rooted in broken families. It seems obvious that if you have a single-parent family, it is more difficult to maintain discipline at home, let alone regulate study habits.

For example, what is the difference in the illegitimacy rates between Asians and blacks? Three to four percent for Asians, sixty-

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37 See id. at 7-39 (describing the state of schools in East St. Louis).
38 See id. at 38-39.
39 See HERRNSTEIN & MURRAY, supra note 18, at 272-76 (stating that East-Asians score higher in IQ tests and IQ is substantially inherited).
eight percent for blacks. These results reflect crucial cultural and social variables. How does one solve that? The government in a free society cannot tell its citizens who to marry, how to stay married, how to raise their children, or how many hours to make their children study. What is really needed are initiatives in the private sector that win the goodwill and support of society at large. People help those who are helping themselves. Trying to marshal these funds of goodwill is really the most effective cultural strategy to change things, rather than asking for another governmental remedial program.

EDLEY: What is the evidence that the strategies that you are talking about work? In particular, why do you take so little stock in the possibility that good teachers, inspired teachers, and good principals can bring order even to the most desperate urban schools?

D'SOUZA: I agree with that principle, but I am much more skeptical as to how the government brings such teachers to these schools.

EDLEY: Affirmative action would help.

D'SOUZA: Not necessarily.

EDLEY: The question is why not improve the education and the staffing in the education, and then hold the schools accountable for the results. My basic proposition is that the conservative alternative to affirmative action turns out to be no program at all. It turns out to be sermonettes and nothing concrete that one could say, "Yes, there is something that holds a reasonable promise of being effective."

D'SOUZA: Part of the problem is that you are trying to undo vast social changes.

EDLEY: Correct. So we need every available tool.

D'SOUZA: Look at what those changes are. In this case, the public schools enjoyed enormous subsidies in past decades. Educated women, who were not in other parts of the work force, essentially donated their time, or at least did it for less money. Clearly, the public schools benefited from that. These women today are lawyers and stock brokers and so on. Those are the social roots of some of these problems. The question is what to do about it.

The problem with government is that there is no easy accountability. One of the things about a corporation, however self-interested, is that profit motive focuses the mind. How do you introduce the accountability you mentioned? Catholic schools in

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40 See D'SOUZA, supra note 9, at 514-15.
Washington, D.C. are spending $2500 per student and getting better results—grades, and test scores, minority students included—than public schools spending $6000 to $8000 per student. I would take the cost of a Catholic school, $2500, and give every poor parent, regardless of race, a $2000 voucher. I would then say, "Listen, you can pocket this money and send your kid to a public school. It is a windfall. Or, you can add $500 of your own money and send your kid to a Catholic school."

This is the kind of incentive that is going to cause the public school system to get a wake-up call. These schools have a built-in benefit, but nothing is motivating them to change. In a sense, they are living in sociological prisons or dominated unions. The mildest forms of merit standards are vehemently opposed because of their racially disparate impact. It therefore, becomes virtually impossible in this convoluted system to bring about the kind of imaginative change you talk about.

V. AUDIENCE QUESTIONS

QUESTION #1: If diversity is considered a worthy goal by either an employer or a university, why is that affirmative action? Why is that not simply a bona fide occupational qualification or a bona fide academic qualification?

EDLEY: I agree, in part, for two reasons. One is historical. At this moment, if you were to poll the leaders of higher education on the proposition that diversity is valuable to the quality of your institution, you would get overwhelming support for that proposition, probably around ninety-five percent support. But, if that same question had been asked twenty years ago, certainly thirty years ago, the support for that proposition would have been much lower.

When Derek Bok, at Harvard, made a big splash about diversity in 1971 or so, the fact that he had really rocked the boat in higher education is simply an indication of the fact that it had taken a while for these institutions, first to experience the effects of diversity and then to acknowledge that diversity was really valuable. Academia was dragged into the belief that diversity is a valuable commodity. Now that we have done it, we see that, in fact, it is part of what makes a quality education. Originally, there were only a few institutions that believed it, but now virtually every institution believes it. What started out in some ways with almost a remedial motive of overcoming our own past exclusionary practices, has now become one in which we have been forced to rethink what we mean
D'SOUZA: Derek Bok did make a famous statement to which Professor Edley alludes. He said that a kid who comes from the cornfields of Nebraska brings something to Harvard that a kid from Boston does not. This statement was true in 1920, when American society was very stratified and segmented. There were regional accents and styles. Arguably, there would be a great cultural gap between a kid from Boston and a kid from Nebraska.

Our society has since become far more homogenous. Filtering mechanisms, such as standardized tests, have guaranteed that not much today separates us in culture, style, speech, lingo and so on. I was in Derek Bok’s class about a year ago and posed this question to him: “Tell me what does this kid from Nebraska with 1200 on the SATs bring to Harvard that a kid from Boston with 1400 does not bring—is it corn sticking out of his shirt?” Mr. Bok was a bit dumbfounded. He could not say.

The problem is that when you use race as a proxy for diversity you have to ask all kinds of interesting questions that are ignored by that equation. It is true that if you find someone from the inner city underclass and bring them to this law school, they would contribute a unique perspective. But would Christopher Edley’s son or mine, because of the color of their skin, contribute an equally unique perspective? These are kids raised in upper middle-class families who go to good schools and probably go to the same prep schools that a lot of white students attend.

Let me also say a word about the work force. There is an equally dubious principle at work in that area. Yes, there are unusual cases. If I am Avon Cosmetics and want to open up a new market in San Antonio, I might decide to hire a Hispanic advertising firm because they are going to do a better job of communicating with the Hispanic community. Fine. That choice would make sense in that case, but now there is an interesting body of literature that actually talks about the economic benefits of homogeneity in a work force.

Why are Japanese companies so successful? Because when people come from similar backgrounds they save transaction costs by recognizing cues from each other. They can work more efficiently. Think of it this way. If I am in a room with ten Indians, I can tell who is being ironic in about thirty seconds, who is being sly, who is trying to pull a fast one over me and so on. If, on the other hand, I am in a room with ten Koreans, it is much more difficult for me to make those kinds of intuitive judgments. The argument here, and
there is an interesting literature behind it, is that homogeneity can, in many cases, be an important business asset and that fact has not been taken into account in the debate.

QUESTION #2: My question concerns the language that has been used. In listening to you, whether you meant it or not, most of the references that you made to Latinos, African-Americans and other groups were negative. Do not get me wrong. The statistics came out negatively. That is not your fault, but we are talking about affirmative action and what I am listening to is the language of racial preferences. Are we talking about racial preferences and gender preferences, or are we talking about affirmative action, because those are two distinct entities?

D'SOUZA: I am very glad you asked, because we are talking about racial preferences. Remember that in his opening statement Professor Edley refuted things that I never said. An example is the distinction between goals and quotas. I agree with him. Those issues are total distractions.

The real issue is racial preferences. Affirmative action was not supposed to be preferences. It was supposed to be a mechanism for widening the pool of applicants so that the best applicant for college would get the position. The problem is that the meaning of affirmative action has in practice changed, so that now we are dealing with racial preferences.

I will give you one example for why this issue of merit is critical. Never have I said that test scores are the only measure of merit. There should be other factors. A couple of years ago a law student at Georgetown Law School, Timothy Maguire, who happened to work in the admissions office, publicized data showing essentially a huge racial gap. Hispanics and blacks were being admitted to Georgetown Law School with vastly lower test scores and grades than white students and this created a scandal. The dean jumped up and said, "But we are not engaging in preferences. We are not departing from merit. We are looking at other factors." In debate with her I said, "Dean Judith Arene, I would love to have a list of these other factors because whatever these factors are, it is quite clear to me, no whites possess them." Why? Because white applicants never get into Georgetown with those scores.

The argument about other factors has been used as a camouflage for race. What is going on is that racial preferences are, in fact, the essence of affirmative action, and if they were not, then the simple solution would be to outlaw racial preferences just as we outlawed
quotas. Affirmative action that does not involve racial preferences could then continue undisturbed.

EDLEY: I do not understand the distinction between affirmative action and preferences. Maybe I do not know what the word "preferences" means. I understand the political distinction. The political distinction is that the Republican pollsters discovered sixteen to eighteen months ago that when polling is done on the term preferences, all kinds of alarms are set off. But, if you do polling on affirmative action, particularly if you have explained what affirmative action really is, then it turns out to have majority support. All of the talking points distributed by the GOP tell people to use the terms "preference" and "racial preference" all the time.

I do not know the facts of the Georgetown case. I do know the facts on Hopwood, the Texas case decided in the Fifth Circuit in mid-March.41 One of the interesting things about Hopwood, in this regard, is that the plaintiffs, including the lead plaintiff Cheryl Hopwood, were denied admission to the University of Texas School of Law.42 Texas, in 1992, had a very awkward, and what I would label as indefensible, admissions program that the circuit court correctly held was unconstitutional.43 Texas has since reformed the program to a form, one that is constitutional, but the Fifth Circuit painted it with a very broad brush. The fact of the matter is that the cut-off score for minority applicants presumptively allowed those applicants admission.44 Cheryl Hopwood's score was above the cut-off score for minorities and she did not get admitted.45 She was upset that there was a bunch of minorities who got admitted and she did not.46 There were actually many white applicants who fell below that score, but who were admitted.47 The notion that race is the exclusive reason why somebody gained admission simply does not cut it, at least not in an affirmative action program implemented in the right way.

It is certainly the case that if you have multiple factors, including a diversity concern with respect to race, class, or geography, then those factors are going to be at work in your program. There is no question about it. I doubt that Derek Bok was actually confused by

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42 See id. at 938.
43 See id. at 962.
44 See id. at 936.
45 See id. at 937 n.8.
46 See id. at 936-38.
47 See id.
your question, but instead found your question unanswerable. It is more likely the case that he thought the answer was so obvious he did not know how to respond. Even today, in 1996, the difference between somebody who grows up in a rural community versus somebody who grows up in an urban community, happens to be very substantial. I have been involved in presidential politics, campaigning around the country, and I can tell you that sitting in a living room with a bunch of dairy farmers in rural Wisconsin or a bunch of hog farmers in western Iowa is an eye-opening experience to a governor from Massachusetts. That is because America is a very diverse, heterogeneous place. If you put kids from those different environments together in a dorm room, they are going to learn a lot about a lot of things. The same is true with respect to persons of different race, even if they have happened to have gone to the same prep school.

QUESTION #3: I have a question for Professor Edley. Earlier, you asked Mr. D'Souza about his definition of merit and I would like you to give me your definition of a merit-based system.

EDLEY: The notion of merit has to be defined in the particular organization and context. It will differ, but by and large merit should have to do with making a judgment or prediction. If we are talking about merit related to hiring, admitting or promoting somebody, then a merit determination involves making a prediction about how someone is going to do in the job, contribute to the strength of the overall organization or enhance the mission of that organization. If you tell me that does not translate into admission qualifications or an employment test, you have to tell me something about the organization and its goals.

There are two points that I want to make. First, if we are talking about auditions for the symphony and there are two people and one of whom, a man, is a slightly better musician than a woman, who should you hire? You do not know. You do not know because one may play the viola and the other the piccolo. There must be an understanding of the needs of the overall enterprise. It is not enough to simply know the facts about each individual, but rather, it must be ascertained how each one may contribute to the overall enterprise. In most situations, whether one is talking about a law firm, a law school class or the board of a corporation, one is essentially talking about creating a pallet of talents and perspectives, not just focusing on individuals.

Second, it must be kept in mind that there are very few contexts in American society in which decisions are made strictly on the basis
of anything like merit. For the most part, people try to get a sense of who is adequately qualified and then a host of intangibles and subjective factors fit in. How do they dress? How do they look? Did we hit it off in the conversation? How do I think we will fit in with the mix? These factors have nothing to do with any kind of a rigorous prediction about job performance or organizational mission.

Life is not like getting into law school, you will be pleased to know. You have gotten through, in some respects, the worst part. In other respects, however, life after law school holds a potential for all kinds of prejudices and preferences of a malign sort to be present. That is why affirmative action continues to be needed. Let us not pretend that we have a meritocracy that does not exist.

D’SOUZA: I am the first one to agree that academic success is not an automatic measure of human success or work. President Clinton is a Rhodes scholar, need I say more? No one is denying that we live in a society where all kinds of factors that are non-meritocratic matter. Studies have shown, for example, that an important factor in determining success is how a person looks. Studies have shown that in criminal trials, if defendants look sweet and kind, as the Menendez brothers did, they are less likely to be convicted. If they look scary, they are more likely to be thought of as criminal. So we agree that we live in such a society.

Given that, do we throw up our hands and say, “Listen, the issue of guilt and innocence is not always decisive and other factors come into play, so we should use race and all our other preferred social variables to compound the existing nepotism?” How did we get to things like standardized test scores? Because you had old-boy networks in which colleges like Princeton would call up the head of Choate and say, “Whom do you have for me this year?” You had these nepotistic arrangements causing poor Irish, Catholic, Jewish and Italian kids in New York to say, “Listen, we did not go to the prep schools, but give us the test. Give us a math test. We will prove that we can do just as well as kids who went to Deerfield.” Merit, in a society that is riddled with nepotism, becomes a higher principle that allows us to set a social aspiration.

I doubt when Christopher Edley talks to his kids he tells them, “Listen, do not study for your math test. Those tests are only one measure” and so on. Affirmative action is a popular term because it relies on a squid-like cloud of camouflage. The term relies on deceiving people about what it means. Look at the back of the catalogue for the University of California at Berkeley. What does it say in big letters? The University of California at Berkeley does not
discriminate based upon race, gender or national origin. This statement is a clinical falsehood by the most elementary definition of language. The University of California does discriminate on precisely those criteria. There is an incredible bamboozling process that is going on when people are told "We are trying to include, not exclude."

The problem is that all these programs involve high costs. How do you include group A without excluding group B? Is there such a thing as benign discrimination? In other words, all discrimination seems benign to the beneficiary and invidious to the victim. There is no such thing as benign discrimination and in a fair society, the fair rules I am talking about remove those adjectives.

EDLEY: You opined that all discrimination is benign to the beneficiary, but the same is true when you say fair. What is fair is going to be fair to the person who is comfortable and unfair to the person who remains excluded. When you say Berkeley discriminates, that begs the question of what discrimination? Are we going to have a serious discussion about the issues or just throw words around?

If there is a disagreement over what constitutes merit, part of that disagreement involves a question of the historical context. When the progressives and the government reform movement of the 1920s decided to try to combat cronyism, nepotism and corruption by adopting civil service exams, that movement was an appropriate response to the social trauma and challenge of that day. Right now, the Chicago Police Department faces a different problem and that is how to police the streets in an effective way. It may be that the 1921 solution does not fit the 1996 problem.

D'SOUZA: There are two issues being muddled here that need to be disentangled. Consider the analogy of a race. A race can be rigged if the referee is cheating and not letting the participants start on the same line. In a liberal society, a race is fair if the government says in effect, everyone starts on the same line, the gun goes off, and the participant who reaches the finishing tape first wins the gold medal. This definition of fairness is open to an objection that not all the participants in the race are equally endowed. One participant may not have had a good coach, while another may have had inadequate nutrition and can not run very fast and so on. While this analogy raises various public policy questions that seek to identify the cause of these inequities, it still cannot be said this is not a fair race. Likewise, the solution should not take into account these sociological variables by having "Sam" start five yards ahead of the line and "John" start four yards behind the line. Such a formula would only
serve to convince everyone that the race is rigged, because it would be.

EDLEY: Your analogy has not advanced the ball at all. The next question, the deeper question, examines the purpose of the race. What are we trying to accomplish?

D'SOUZA: We are talking about success in America as it is defined by the distribution of social rewards, nothing more. The government is intervening on the behalf of groups and redistributing those rewards. Mr. Edley stated earlier that redistribution in politics or in other areas is no different than redistribution in a race. However, it is different.

EDLEY: I agree that it is different, but there are contexts in which redistribution is necessary. There is a moral cost, one that society should be willing to pay in some circumstances.

QUESTION #4: Mr. D'Souza, you based your argument largely on the existence of certain cultural traits among African-Americans. I am very curious as to how you arrived at the existence of these traits, a couple of traits in particular. First, you talk about a higher crime rate among African-Americans. I am a criminologist and I have seen nothing to suggest that African-Americans commit more crimes than whites. Of course, the system is controlled by whites, so whites might arrest more African-Americans. You might call it something else. The other trait is high government dependency. Again, that is a matter of definition. Instead of government dependency, this trait might be defined as tax breaks and corporate welfare. What is the difference?

D'SOUZA: The first point addresses why I raise the cultural debate at all. I approach the debate empirically or indirectly by asking several questions. About a year ago, the New York Times reported on an interesting study which said that in Queens, New York, West Indian immigrants currently have a higher per capita income than whites. There have been other studies conducted by Philip Kosinitz and others comparing West Indians to other groups. In terms of color, West Indians in this country, are as dark if not darker than African-Americans. West Indians are presumably subject to color-based discrimination to the same extent as African-Americans, yet West Indians have a vastly higher rate of savings, a vastly higher rate of business formation, a vastly greater presence in the professions, a lower rate of illegitimacy, a stronger family structure, and so forth. In other words, the profile of West Indians resembles that of other successful immigrant groups.
The interesting question is why? How are West Indians managing to elude the slings and arrows of racism? Clearly, something else must be going on. People continuously refer to immigrants as a "self-selective group." That is precisely my point. West Indians are coming to this country with an ensemble of skills, values, cultural capital and an orientation toward education. That is their human capital and that is the relative asset enabling them to succeed.

Next, you asked about crime rates. There has been considerable skepticism cast upon arrest figures and conviction figures due to the possibility of judicial bias. To dismiss that notion completely, simply look at serious crimes such as assault and rape and look at the victim studies conducted by the federal government.48 Basically, these studies ask victims to describe the race of their assailant. Now, victims are not likely to lie because they want the assailant to be caught. The fact is, if you look at victim studies you observe the same discrepancies that appeared in arrest and conviction studies.49 In other words, I am fairly familiar with the literature cited tonight and strongly disagree with your conclusion.

AUDIENCE: You are only talking about certain kinds of crime. You are not talking about all kinds of crime.

D'SOUZA: I am talking about violent crimes. I said African-Americans have a higher crime rate with respect to violent crime, meaning crime which takes a high toll on other members of the inner city. Obviously, I was talking about the kind of crime that makes inner city communal living very dangerous and difficult.

EDLEY: Look, I think that there are some things that Mr. D'Souza has said that are relatively noncontroversial. The controversy is revealed by asking, "What accounts for these differences in cultural capital or human capital, and to what extent are the differences that we observe the effects of either of present discrimination or the lingering effects of past discrimination?" In addition, we must ask to what extent have these communities been subject to the traumas created by urbanization, segregation and hyper-economic segregation, all of which is compounded by discrimination? To what extent is there a strong correlation between race and all the economic phenomena just mentioned?

If you look at the current census data relating to income, and look just at families with one full-time wage earner, the median income of African-Americans is about sixty percent of the median income of

48 See D'SOUZA, supra note 9, at 283.
49 See id.
Sixty percent. If you look at wealth, not income, the median wealth of African-Americans is eight percent of whites. Now, one way to think about that contrast is to view the sixty percent parity as, in some sense, reaching towards one hundred percent, but still held back to some extent by discrimination and to a far greater extent by the differences in education and geography. While sixty percent marks some progress, the eight percent, however, suggests the question of where does wealth come from? Wealth comes from having a house, from having a car, stocks, and a pension plan. These are indicia of having either inherited wealth or having accumulated substantial wealth over a period of time. This black middle class is, by-and-large, holding onto their middle-class status by the tips of their fingers, two paychecks away from falling into poverty. This dramatic difference in wealth mirrors all kinds of problems and represents dramatic evidence of the inherited disability of inequality in America.

D'SOUZA: I will say briefly that I agree with you about the existence of this wealth problem, but what we are debating, however, is the cause of this problem. You are implying that the cause of this problem is predominantly, if not solely, the inherited legacy of oppression.

EDLEY: That is in contrast with West Indians.

D'SOUZA: Well, the thing about West Indians is that they understand that the way to get wealth in this country is to start businesses.

EDLEY: It helps to have some savings, though. It certainly helps to have some savings.

D'SOUZA: It helps to have some savings, that is right. If you compare savings rates of Koreans and African-Americans, for example, you are looking at fifteen to twenty percent saving rates among Koreans versus one to two percent saving rates for African-Americans. Therefore, we are looking at a twelve to fifteen times difference in saving rate percentages, even when you control for income. What I am saying is that these cultural variables are implicated in these differences.

Look at government dependency. I suppose one can always point to governmental farm subsidies and so on. However, the practical point that I am making is that requesting governmental assistance in an era of downsizing is a very precarious position to be in. Your

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50 See EDLEY, supra note 23, at 43.
51 See id. at 45.
job is likely to be cut, you are likely to be out on the street, and you have essentially no marketable skills. I worked in government for a couple of years. There were all kinds of people making sixty and seventy thousand dollars a year sending out resumes to the private sector, but they never could get a job. People ask, “What is it you do?” The government worker answers, “Well, I write memos.” People say, “Well interesting, but that is not what we do.” Government and this dependency does not necessarily prepare one for success in the private sector. We agree on these wealth disparities, however, I think we have to ask, “How can these disparities be addressed and how can they be changed?”

VI. CLOSING STATEMENTS

EDLEY: There are many problems with the effort to reach common ground on issues like affirmative action. One problem is that not only our political leaders, but also people who hold themselves out as intellectuals, have a habit of debating the issue in sound bites and slogans that beg questions. Frankly, much of the written scholarship is not an improvement in that respect.

People should ask themselves why is that the case? Why is it that we seem so stuck and unable, in any real way, to reach some consensus on affirmative action and other matters of racial and gender justice? There are several explanations for that, and one is the rhetoric of legal rights. The “I have a right to this, you have a right to that” rhetoric has probably run its course as a tool of persuading people. For example, when one makes arguments about what kind of rights poor people have, conservatives are well trained to assert that they have a right not to have their pockets picked by the government. This ability in our liberal political culture to counterpose competing claims of rights really stalls the debate. We have seen some of that playing itself out here.

What is at stake is an argument about the values and vision of what constitutes a fair community and the ethical treatment of one another. What we do not have, therefore, is a sensible way of trying to talk to each other in ways that change values and transform our sense of what kind of communities in which we want to live. Neither rights nor social science arguments are going to persuade many people on these fundamental questions of values and vision. Nor do is there much hope that our political leaders are going to be able to do it. In large measure, this is because it is controversial. It turns out there is predictably thirty or forty percent of an audience that is
going to disagree with any particular position and most politicians try to avoid topics on which thirty to forty percent of the audience are going to disagree with what they say. Politicians would rather address other issues. Once in a while, politicians will think about history and they will address the subject because they have an eye towards history, but we should not count on it.

The kind of discussion that will make a difference concerning affirmative action is not going to be led by national leaders. It is the responsibility of each of us and frankly we do not do enough. I gave a speech some months ago to a group of senior black officers at the Central Intelligence Agency at a covert military facility in Virginia. I could tell you where it was but I would have to kill you all. After an hour of socratic-style questions and answers that pressed them on their views of affirmative action, I finally stopped. I said, “You are not very good at this. I would not want any of you to represent my side of this debate at a cocktail party.”

The reason that we cannot clearly express our views on affirmative action seems to be that we do not work at it. Taking a stand against someone with a different view on affirmative action is very difficult. Whichever side of the debate an individual is on, he or she spends most of the time talking about the issue, if at all, with people who are like-minded and trying to avoid serious engagement with people who may disagree. But until we go through the practice of having these kinds of conversations and arguments in our classrooms, around our dining room tables, and at the tavern, we are not going to be able to effectively engage each other on these deeper questions of values and vision. That is point number one. We have got to stop spending all of our time, whichever side of this debate we are on, in choir practice and spend more of our time on missionary work.

The second point is that the test of ethical behavior as a participant in this conversation is, “Will you take responsibility for searching for the kernel of truth in the position taken by somebody on the other side?” If one cannot make that ethical commitment, then he or she certainly cannot demand it of the other person and cannot expect that at the end of the day they will find common ground.

The last point is that words alone are not going to resolve the controversy surrounding affirmative action. There is an analogy with religious conversion. People do not find religious faith or have a transformation of values and vision because they hear a good lecture or a good sermon. More often than not, such a change is born out of some kind of an transformative experience. Thus, the third
thing that we need to do is try to think very carefully about what types of transformative secular experiences hold out some possibility of changing people's values and sense of community. This is a back door argument for diversity, but in a way this notion of a transformative experience to shape values is familiar from the old school integration ethic. The school integration ethic entailed putting the black, brown, white and yellow kids together in school, allowing them to grow up to appreciate each other and creating a more tolerant, inclusive society. In theory, everything would be wonderful. However, it does not seem to have quite worked out.

While something may have been wrong in the implementation of the school integration ethic, there was nothing wrong in the conception. While applying this theory is harder in practice than was romantically thought in 1954, parents frequently engage in self-conscious efforts to design experiences that will develop the values of their children. Parents try to give their children experiences that will shape the children's values. That is what all of us have to search for in our lives and the organizations we lead on the issue of racial justice. We have to search for not only the rhetoric, the legal briefs, and the debating points, but also the experiences that hold the possibility of changing our values and changing our sense of what is fair, what is just and what is community. Thank you.

D'SOUZA: This has been a very interesting debate. Not a typical one, I should say, for me, as my typical experience is ducking projectiles. Yet, I am good at that and usually come back with bazookas. But in this case, Professor Edley is a difficult opponent. He is exquisitely moderate in his views and a man of exasperating charm, making him a difficult opponent. He has made as good a case as can be made for a moderate form of affirmative action.

I would agree with Professor Edley that this is fundamentally a debate about values. However, it is also true that we live in a society where it is very difficult to establish a consensus of values when you have sharp, competing interests at stake. Our society is comprised of people of different backgrounds and ancestral histories such that it becomes very difficult to say, "Listen, you owe me something because of what your ancestor did to mine." This notion of inherited debt is in essence a feudal notion that did not survive the medieval era. The idea that we inherit the sins of our grandfathers is contrary to our ideals. America, of all nations, is thought to be a nation that is forward looking, in which today is the first day of the rest of our lives. America is also a nation grounded in the principle of individualism. Individualism is not an enemy of
minority rights. It is the recognition that in a society we are all, ultimately, a minority of one. That is how we come into the world, that is how we leave the world.

This irreducible individuality imposes upon us certain rights and certain obligations. The underlying concept of a liberal, democratic society is that citizens have a right to be treated equally as individuals under the law. If that principle is taken seriously, one cannot lightly accept arguments that say, "Listen, there is a social good to be done here and though it is true that you are an individual who is not an offending party in this instance, we find it rather convenient to impose upon you the cost to achieve this greater good." That utilitarian ethic in which individual rights are sacrificed at the altar of public good should be problematic, particularly for people who consider themselves to be liberals.

Professor Edley has repeatedly used the example that President Clinton said he wanted a cabinet, presumably a government, that looks like America. My profound objection to that statement has to do with the word "looks." What President Clinton has been seeking is an artificial and cosmetic diversity that does not translate into true intellectual or cultural diversity. Someone did a study that looked at the Clinton Cabinet. Apparently seventy to eighty percent of its members are lawyers. They belong to the American Bar Association. Apparently a good half of them eat at the Jockey Club in Washington, D.C.. Probably by the end of the day, a third of them will be convicted felons—I exaggerate.

This cabinet is culturally, economically and politically an extremely homogenous group. They have shared values, backgrounds, jokes, and political convictions. This is not diversity. This is cosmetic diversity in which President Clinton is saying, "Look, are Hispanics feeling isolated? There is a Hispanic in the Cabinet. Do women feel disenfranchised? I have a woman on my staff." This is not true diversity.

I support intellectual diversity in academic communities. Although colleges are doing forward and backward somersaults to get racial and regional diversity, they are paying very little attention to intellectual diversity or other forms of diversity that are also important. I once had a debate with Randall Kennedy and I asked him, "Can you tell me how many committed Evangelical Christians you have on the Harvard faculty?" He could not name one. I ventured to say that Evangelical Christians are as underrepresented on the Ivy League faculty as Hispanics and blacks put together. In
other words, this is a group that is excluded. No one pays any attention, because these groups do not have the same political power.

While I was talking to a Thai parent at Berkeley I asked, "Why is it the case that Asians are excluded?" Asians are a minority in this country. They have suffered discrimination. They have played no part in the historical crimes for which affirmative action is thought to be a needed solution. She made an interesting point without intending to be profound. She said, "In this country in order to be a minority you have got to have real power." That is kind of a paradoxical statement that reflects that racial justice and affirmative action are strongly tied to power relations. There is a better case for affirmative action for African-Americans than for any other group. No other group has been subjected to systematic oppression to the same degree. No other group has been enslaved. No other group has been subjected to such segregation.

A problem developed in the 1960s when Hispanics, women, homosexuals and other minority groups basically said, "We are the new blacks. We demand affirmative action." At first the black leaders disagreed. They later realized that while inclusion of these groups might undermine the moral case for affirmative action, it would increase the political constituency for it. Now there is the ridiculous situation in which the son or daughter of an immigrant from Barbados or Bombay, an immigrant who has played no part in American history, receives preference to go to a university or get a government contract over the son of a white postman. What rule of social justice can possibly justify these race-based preferences? There seems to be, really, none at all.

Let me say a final thing because someone touched me by saying in effect that my comments about groups like blacks and Hispanics appear negative. Early in the century there was a debate between Booker T. Washington and W.E.B. Du Bois, two great black statesmen, over the future of black America. Du Bois said, "Blacks face one big problem in the United States, white racism, and we have got to fight back." Du Bois was one of the founders of the National Association for the Advancement of Colored People (NAACP) and so on. Booker T. Washington said, "No, blacks face two big problems in the United States, one is white racism on which I agree with you. The other is African-American cultural disad-

52 See D'SOUZA, supra note 9, at 184.
53 See id. at 186.
54 See id. at 189.
Washington noted that this cultural disadvantage was not natural or biological, but was rather the product of oppression and slavery. He went on to explain that blacks' savings rates were too low, crime rates were too high, and so on. He said that this cultural disadvantage was disastrous because even if blacks were given equal rights, they would not be able to compete effectively with other groups. Moreover, this cultural disadvantage would strengthen racism by giving it an empirical foundation.

For a generation, led by Du Bois and the NAACP, our society has had a project to restore legal equality and equal rights under the law to blacks and other minority groups. Groups like my own have benefitted from this, and I admit that. However, we are at a point where that project has been largely completed. Certainly, there remains unfinished work to be done, but the other side of that coin which is improving cultural skills, academic skills, entrepreneurial skills and job skills has been completely neglected. Many of our garnered social problems are the fruit of that neglect. I am not saying we should blame the victim. Victims are not to be blamed for being victims. But as a result of being victimized, a group may develop a pattern of poverty and of dependency. Then, even if that group is not to be blamed for being a victim, its members may be partly responsible for addressing their victim status. In other words, one is not responsible for being knocked down, but may be responsible for getting up.

Ultimately, this is a tremendous message of hope for the following reason. If our problems are in our genes, there is nothing we can do about them. If our problems are due to white racism, there are no new methods to fight white racism that will automatically improve black academic test scores, increase black savings rates, unite and strengthen black families or reduce black-on-black crime. These problems have taken on a life of their own and they need to be confronted on their own terms. Nobody likes to hear that their culture is less than perfect and in that sense my message is tough to swallow. However, the positive side of the message is that if we acknowledge that in a multiracial society we can learn from each other, then individuals and groups can learn from the experience of others and learn what skills do work. For example, the Koreans have rotating credit associations in the inner city. Even when the

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55 See id. at 186.
56 See id. at 187.
57 See id.
banks do not make loans to them, they can generate capital by pooling resources, starting new businesses and having that capital circulated within their own communities. These are practical skills that bring enormous gains.

Edmund Burke said a long time ago, "The only thing necessary for evil to triumph is for good people to do nothing." The great benefit of debates like this is not that we achieve agreement, but that we are reflecting complementary social realities and competing claims about values. I hope that by getting to the bottom of these claims we can come up with a better moral framework so that the competing claims of minorities and majorities, blacks and whites, and so on, can be amicably resolved. Thank you very much.