1998 HUGO L. BLACK LECTURE: TEN ARGUMENTS AGAINST AFFIRMATIVE ACTION—HOW VALID?

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Thanks to the Alabama faculty and especially Dean Ken Randall for the invitation to speak here today. I am honored to give an address named after one of the greatest and most courageous Supreme Court justices. Hugo Black began his political life as an enthusiastic member of the Ku Klux Klan, but ended it as a supporter of African-American equality.[1] When he joined the majority in *Brown v. Board of Education*,[2] his friends in this state shunned him, and he was not invited to his class's fiftieth reunion.[3] For a "Clay County hillbilly,"[4] as he called himself, to come that far is certainly remarkable. He was not without his faults, later ruling against civil rights sit-ins[5] and in favor of Japanese internment.[6] A complex figure, it is interesting to speculate how he would have come out on issues of affirmative action and diversity raging today.

Not long ago, I stood in front of another university audience like this one, speaking on a similar, although not identical, subject—diversity. A certain irony attended the occasion, the graduation of the 1996 class at Boalt Hall, the law school where I myself graduated more than twenty years ago. As it turns out, my class at Boalt was the first to experience a fully diversified student body throughout all three years; the one I addressed is likely to be the last.

Let me paint the scene for you. Here was the Greek The-

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1 *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

2 347 U.S. 483 (1954).

3 NEWMAN, *supra* note 1, at 441.

4 *Id.* at 3.

5 Brown v. Louisiana, 383 U.S. 131, 152 (1966) (dissenting opinion); Hamm v. City of Rock Hill, 379 U.S. 306, 319 (1964) (dissenting opinion).

6 Korematsu v. United States, 323 U.S. 214 (1944).

ater, a giant outdoor bowl surrounded by eucalyptus trees and overflowing with the most diverse imaginable crowd of proud parents, brothers, sisters, and other relatives of the graduates sitting on stage, waiting for the speeches to end and the magic moment to arrive when they would collect that coveted diploma. Large Chicano families with young children mingled with equally large African American ones from all over the nation. And, of course, Asian and white families were liberally sprinkled among them. Earlier a steel marimba band had played salsa music under the sun, cutting to Pomp and Circumstance when it was time for the procession. I was struck by how perfectly inaptly certain critics and even defenders of diversity and affirmative action frame the debate about them. Diversity is not a heavy-handed obligation, risky social experiment, or vengeful righting of the scales, but a giant *celebration*. Like a party, a graduation, a meal at a good ethnic restaurant, or international travel, diversity should be a source of pleasure, wonderment, delight. Not at all a win-lose proposition, diversity can be a win for *everyone*, white, black, brown, Native American, or anything else, opening the door to new ideas, skills, and experiences.

But of course, not everyone sees it that way. Others see diversity in the same way some motorists cruising a large, crowded parking lot see the handful of parking spaces reserved for the disabled, certain that if it had not been for those reserved slots, they would be safely parked by now.

On day one, most law school deans greet the entering class with an inspiring speech in the course of which they tell them a little bit about each other. My entering class, if I recall, included a professional ballet dancer, several owners of small businesses, and a clown from the Barnum and Bailey Circus. It also contained a number of social workers, community activists, and organizers looking for new skills in the struggle against poverty and inequality.

That was how we entered. My class was about thirty percent minority, like the one I was to address. Curious where all that diversity *went*, I asked administrators at Boalt to do a bit of research and tell me where my fellow students of color, and women, too—for then law schools were also making special efforts to raise the numbers of women enrolled—all products of affirmative action, wound up. Did they all flunk out, fail the bar

exam, or assimilate silently into obscure, gray corners of the corporate kingdom?

Here is a small sample of what I learned. They all passed the bar exam, after which a certain Paul, who sat opposite me in class, became CEO of Broadway Federal Bank, the largest African American–owned financial institution in the United States. I wish I had gotten to know him better. Six classmates of color became California State Court judges, including Lance Ito, who even then seemed bound for distinction! Richard was recently nominated to the Ninth Circuit. Jose, the chief justice of the Supreme Court of the Northern Mariana Islands. Jennifer became a hearing judge for the Merit Systems Protection Board of California. Ted, executive corporate counsel for Wells Fargo--another person I wish I had gotten to know better. Ginger, deputy administrator of the U.S. Small Business Administration. Charles, a partner at Davis Wright Tremaine. Frank, U.S. Congressperson, Texas. Thomas, solicitor for the U.S. Department of Labor and deputy inspector general of the Energy Department. Ned, partner at Paul Hastings, in San Francisco. Richard, partner, Rivkin Radler. Susan, Kate, and Laura, professors of law at Washington University of St. Louis, Duke University, and Georgetown, respectively. Jessica, pioneering female managing partner of a major law firm (Heller Ehrman). Lois, executive director of Children Now. Claudia, U.S. District Court judge. Not to mention three more law firm partners, a New York State Supreme Court justice, a Goldman Fund executive, a director of Lawyers Committee on Civil Rights, another professor of law, a state bar presiding judge, and one state bar president. And, of course, Yours Truly, professional typist. As you know, the Cassandras and detractors of affirmative action warn that we are in danger of sacrificing quality. Well, you certainly could not tell it from that list. I have never felt so much like an underachiever.

At the law school where I now teach, in each of the last several years the minority students, many of whom were admitted under diversity programs with lower LSATs than the others, graduated at the same rate, found jobs more quickly, and earned a slightly higher entering salary than their classmates as a group. Not only that, they obtained prestigious positions, such as judicial clerk or university professorships, at a slightly higher

rate. Certainly, all our students are smart, capable, and go on to fine careers, but the diversity part of the party does as well as the rest. Moreover, my travels around the country convince me that what is true at our school is also true elsewhere: attend the tenth- or twentieth-year reunion of the black or minority students association, and you find yourself in a roomful of extremely distinguished people—commissioners, judges, partners, attorneys general, and so on. Do not mistake what I am saying: law schools, like other social institutions, should be trying constantly to improve the quality of all of the people they admit, train, and turn loose on the world. But higher education is one of the few things that America emphatically does right—our universities are the envy of the world, every year unfailingly attracting the best foreign students—and diversity is one of those programs we do right, as well.

I sometimes think that defending diversity is like having to justify a really good party or celebration. Why would anyone need to? Yet, as I mentioned, some people focus on the three reserved slots in the parking lot rather than the tiny displacement rate and great social utility of setting aside these spaces. The next part of my talk is aimed at them and the principal arguments they tend to assert.

I will *not* be discussing here reasons that argue in *favor* of affirmative action, just ones against it. I favor it, obviously, believing its benefits practically self-evident, but others and I have spelled out the case for it elsewhere, so that interested members of the audience can simply look it up, for example in my book *The Rodrigo Chronicles*.[7] If you are conservative, these are my answers to your arguments; if liberal, tools you can use to defend your position.

With those provisos, the first argument is the one from stigma. A paternalistic argument, it holds that we should reject affirmative action, even though most people of color support it, because it would only injure them. If they knew their own self-interest, they would oppose it. This argument tends to be made by liberals who genuinely like minorities but worry about their black friend with the IQ of 149, who may be unfairly labeled an

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7 RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

affirmative-action baby. It is also made by some principled conservatives who actually fear affirmative action will do more harm than good and do not want that harm to befall blacks. And it is also made disingenuously by people who do not much like blacks or Mexicans at all, much less care if they are stigmatized, but think it is a good argument against something they dislike and want to see ended.

The stigma argument holds, in brief, that affirmative action will hurt all blacks, Mexicans, Asians, and so forth, even those who got to the top by their own merits. In the absence of other information, observers will assume that they did so with the aid of the unseen hand. The argument is empirical. It holds that if you do *X*, something bad will happen. But stigmatization and negative stereotyping of people of color in the media and movies, and as reflected in public opinion polls, has either held constant or decreased in the roughly thirty-year period that affirmative action has been in place. Before this time, stereotyping of blacks and other minorities was rampant—groveling maids and Aunt Jemimas, shoot–you–in–the–back Mexicans, "ugh–want–um" Indians, and more. Many states had laws on the books forbidding interracial marriage until 1967, when *Loving v. Virginia*[8] declared them unconstitutional.[9] What more stigmatic message could exist than that—a law that says that if you are black or Asian, you are unfit to marry a white?

Stigma is in plentiful supply still, but it predates and operates independently of affirmative action. Almost all universities admit athletes, musicians for the school orchestra, holders of ROTC scholarships, and legacy candidates (sons or daughters of wealthy alums) with SATs and grades considerably lower than those of the students regularly admitted. *Does the star quarterback feel stigmatized?*

Most schools employ a geographical preference, favoring students from far away, even though they all study from the same textbooks and watch the same television programs. When Stanford admits a student from rural New Hampshire with numbers a little lower than those of the genius from Marin County, California, does the New Hampshire student feel stigmatized or re-

8 388 U.S. 1 (1967).

9 *Loving*, 388 U.S. at 11.

gard himself or herself as a case of affirmative action? Do veterans, who receive special consideration in federal job programs, feel stigmatized because of the way they got their jobs? Does a disabled person feel stigmatized when he or she goes up a ramp to a restaurant or public building that was installed pursuant to federal law? No, it is only people of color who are said to be. An odd selectivity, in my opinion.

The second argument is that affirmative action helps those blacks and other minorities who need it least: the proverbial son or daughter of the black neurosurgeon who got into Stanford or Harvard under an affirmative action program. This, too, is an empirical claim, and unlike the first one has a small grain of truth to it. The students of color who get into Stanford, Berkeley or Alabama are apt not to be the ones whose parents were dope fiends and dropped out of inner–city schools at age eight, but a little higher up the socioeconomic ladder. But the social status of whites at top schools is even higher. A straight–line correlation links standardized test scores and family income; zip codes predict LSAT scores better than those scores predict law school grades. At one law school at which I once taught, the average family income, in today's terms, was over $100,000. *Are we not also helping those whites who need it least*?

The black middle class, a few of whose sons and daughters do get into colleges through affirmative action, is indeed growing; but as writer Andrew Hacker points out, it stands on quite a different footing from that of the white middle class.[10] A black family with a yearly income of $75,000 is apt to consist of a bus driver making $45,000 and a nurse earning $30,000, while the white family is apt to consist of a male engineer making that amount and a mother who stays home or works part–time.[11] Just as black poverty is different from the white kind—it tends to last forever—black membership in the middle class is more insecure than that of whites. Blacks fall from the middle class more often and suddenly. Their children are more likely to be downwardly mobile. Even those who reach comfortable professional status, making $250,000 a year or more, according to Ellis

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10 ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 93-106 (1992).

11 *Id.* at 94-99.

Cose, endure racial insults and lockouts on account of their color.[12] I personally have had conservatives virtually cross–examine me, certain that I must be the son of Eva Peron, a Venezuelan oil magnate, or a brown neurosurgeon. When they learn I am instead the son of a Mexican orphan who immigrated illegally to the United States at the age of fifteen without a cent to his name and a woman from the tenement district of Chicago, they act puzzled and disappointed. They *know* there has to be a brown neurosurgeon in there somewhere.

Consider how we also apply this argument unevenly. The unstated assumption is that we should put all our resources where they are most needed, namely into dirt-poor blacks and Mexicans. But we do not apply the same standard to professors who ask for no morning classes or want all their classes in a three-day block. We do not tell them, "Shame on you. You have no business worrying about that when the real problem is cancer, AIDS, children in Appalachia, or secretaries who are going blind from staring at computer display terminals all day long." We simply accommodate them because they are our friends, and we want to please them. But with middle class blacks it seems unnatural to us that they should have advanced so far and shameful that they would want even more.

The fact is that race is probably the best measure of social disadvantage that we have, even better than poverty. If you compare the prospects of a group of middle-income blacks from families earning, say, $50,000 to those of relatively poor whites making $20,000, you will find that the white kids, on the average, have better life prospects than the blacks. In many parts of the country, a black with a college degree earns as much as a white high school drop–out.

A third argument is that affirmative action operates like an unfortunate stairstep, admitting to top schools students of color who otherwise would go to middle-tier ones, and so on down the line. The result, according to writers such as Lino Graglia and Abigail Thernstrom, is that minority students always end up over their heads.[13] One who would have done well at Fordham

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12 ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993).

13 Lino Graglia, *"Affirmative Action," Past, Present, and Future*, 22 OHIO N.U. L. REV. 1207, 1216 (1996); Abigail Thernstrom, *The Real Problem*, 19 HARVARD J.L.

instead gets into Harvard, where he or she is supposedly miserable, scores in the bottom of his or her class, considers suicide, and possibly drops out, when the same individual would have been happier and better adjusted had he or she studied in the less heady atmosphere of a second–tier school. Like the two previous arguments, this one is paternalistic, pretending concern for minorities and using that as a basis for phasing out a program that helps them. It, too, relies on an empirical premise: namely, that affirmative action harms its beneficiaries. This premise is difficult to maintain in the face of the generally high morale, camaraderie, and success record of minorities at my university and elsewhere. A recent book by two university presidents shows that at elite colleges, where affirmative action is deployed aggressively, blacks, at least, earn degrees at a rate within a few percentage points of whites and go on to careers of great success.[14]

It also presupposes that exposure to first-rate education is not good for you but *bad*. Going to a school with a favorable student-faculty ratio and studying under nationally acclaimed professors is good for whites, but not for blacks. This is truly paradoxical, and I am surprised bright people assert it. Rich people of all eras have been sending their sons and daughters not to the worst, but the best schools they could get them into, sometimes bending the rules to do so. There is little reason to believe that what is true for whites is not true for blacks, Mexicans, and other minorities.

The staircase argument also presupposes the argument from *merit*, namely that blacks and others of color on the average have less going for them and that facilitating their entry into law schools, jobs, and other charmed circles violates that sacred principle. This is argument number four. How would you like to be operated on by a surgeon who got into medical school not because of his or her scientific ability but skin color, the argument goes. In many ways this is a central criticism of affirmative action, but it, too, begs the question. Now, I am not one to

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& PUB. POL'Y 767, 770 (1996).

14 *See* WILLIAM G. BOWEN & DEREK CURTIS BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

maintain that every person of color is hardworking, trusty, thrifty, smart, and loyal. There is a range, just as with white people. But the merit argument holds that affirmative action generally, or always, places underqualified workers and students into jobs or slots over more highly qualified ones, presumably white or Asian. Once again, I am not saying that there is no such thing as an incompetent black or Mexican, any more than anyone could sensibly maintain that no whites squander inheritances, make poor use of their opportunities, or are just plain underpowered. But I defy anyone to produce evidence that the average level of services has gone down in the United States over the thirty years or so of affirmative action. The United States economy has taken nose dives from time to time, but these have been more the product of short–sighted behavior in executive suites, here and abroad, than on the part of hardworking immigrants and minorities working in restaurants, cutting grass, burning the midnight oil in the library, and doing a thousand other things, usually efficiently and for low wages.

It ends up, then, that the meritocrat is stuck with SAT scores and the like, where minorities do indeed, on the average, score lower. Does that mean they lack merit? Of course not, unless by merit you mean scoring high on a three-hour, multiple choice test taken on a Saturday in October. The SAT, until recently, included items about polo mallets, lacrosse, and regattas. How likely is a poor kid from the inner city to spend his or her weekend playing lacrosse or attending regattas? The SAT's originator, Carl Campbell Brigham, was an unabashed white supremacist who wrote a book in 1923 entitled *A Study of American Intelligence*,[15] in which he warned that Southern European immigrants and minorities were swamping the country with their inferior genes, at the expense of those of superior European stock.[16] He also warned against interbreeding and urged that we close our borders.[17] Two years later, he became director of the College Board's testing program, in which capacity he based the first test on Madison Grant's *The Passing of the Great Race*,[18] a white supremacist tract. The test's purpose was to

15 CARL C. BRIGHAM, A STUDY OF AMERICAN INTELLIGENCE (1923).

16 *Id.* at 197.

17 *Id.* at 205-10.

18 MADISON GRANT & HENRY FAIRFIELD OSBORN, THE PASSING OF THE GREAT

confirm the superiority of white test takers, pure and simple. You might think today's testing organizations would have repudiated his teaching, but the Educational Testing Service library today bears his name.

Furthermore, the SAT is eminently coachable. The director of one of the prominent test-coaching companies, which charges nearly $1000 for its services, boasted that his organization was able to boost the score of the average test taker by 185 points. Thirty percent improved by 250 or more. Because of the high price charged, the children of the wealthy naturally are more likely to be able to take the course.

A further problem for merit advocates in educational settings like this one is what I call the paradox of distributed merit. The paradox lies in the moral irrationality of using merit criteria to distribute regimens or programs that can give the recipient a boost in an attribute that forms a part of, or is a preexisting element of, the very same set of merit criteria used for distributive purposes. It would be like a paint store that only sold yellow paint for houses that were already yellow. If law school can boost anyone's LSAT--and we say that the purpose of law classes is to get you to think like a lawyer--it becomes irrational to insist on an absurdly high test score as a condition of entrance.

Consider, also, how contingent ideas of merit are. LSAT scores do predict law school first-year grades. But they also reflect the backgrounds and training and advantages of those who thrive under them, as well as correspond to the law firm jobs and prestigious clerkships some of the students will hold after they graduate. Identifying the LSAT as a predictor of grades, or even of later job performance, tells us only that this narrow test picks people who thrive in particular types of environment—the ones that rely on the test to do their selection for them. Yet those situations are contingent, not necessary. Change the rules, and any test becomes more, or less, valid. Raise or lower the hoop in a basketball game six inches, and you radically change the definition of who has merit.

Change the legal curriculum, or the way law is practiced, so that it becomes more cooperative or empathic, and half the cur-

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RACE (4th ed. Charles Scribner's Sons 1932) (1916).

rent first–year class might not get in. The current arrangement rewards people like us and so seems natural and right; the idea that a school might let in a few students with lower scores seems radical and dangerous, like going to an unqualified brain surgeon.

The fifth argument is that affirmative action establishes group rights, something the Constitution has never recognized and that is especially dangerous in a democracy. But consider: The Constitutional Convention was attended only by white men, who provided for political representation only for people like themselves. The document they drew up provided for the institution of slavery in no fewer than six clauses, which are still there—you can look them up—as group-based a set of rights as you are likely to find. One group was entitled to own another. A century later, the Thirteenth and Fourteenth Amendments abolished that, but Jim Crow and separate-but-equal laws maintained a system of group rights for nearly 100 more years.[19] To say that a paltry program of affirmative action that benefits a few blacks and Mexicans a year violates a long-standing principle is an odd way to read history. We give rights to groups all the time, for example, through favorable tax treatment, veterans' preferences, senior citizen discounts, a hundred ways. Like others, the argument turns out to be quite selective: groups turn out to be troublesome only if they look different from ourselves.

The sixth argument against affirmative action is that affirmative action injures relations between the races, producing resentment among whites, and maybe Asians, who blame blacks for their every defeat and trouble in life. *Unlike* most of the other arguments, this one may well contain a grain of truth. But the solution is not to abolish affirmative action; rather, it is to explain to whites how very little actual displacement is occurring. Admissions directors around the country will tell you that every year the most indignant protests they receive are from white applicants who would not have gotten into the institution anyway, even if affirmative action did not exist. The ones who *are* displaced, right at the margin, right at the very bottom, and so who have to go to the immediately next–best school—Yale,

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19 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 390-94 (1978).

say, instead of Harvard, or Seattle University rather than Washington—are just not that hugely disadvantaged, at least compared to the hungry and determined black kid who struggled up from a broken home and substandard schools but nevertheless has real intellectual ability. A lot of things cause working-class Caucasians to suffer real hardship these days, including profit-driven corporations that send jobs to Third World countries, close factories at the drop of a hat, and spend their time and energy gobbling up each other instead of carrying out research and development, all in hopes of making a quick buck. These short-sighted, profit-driven actions cause a substantial loss of jobs, certainly many times more than that caused by a few blacks moving up.

If one continued looking for actions that limit the hopes of white individuals interested in getting into undergraduate and professional schools, one would find dozens of policies traceable right to elite sources and government, such as a Congress that is cutting student loans and a medical profession that maintains an artificially low supply of doctors and medical schools. All of us have cause to be upset over the increasing gap between the poor and the rich in this country and diminishing upward mobility. But to blame the one and one half percent impact on professional and graduate school enrollment traceable to affirmative action is to miss much of what is really going on.

The next argument is not empirical but theoretical. It holds that affirmative action is reverse discrimination. But huge differences separate "No blacks need apply" from a program that gives blacks a moderate boost vis–à–vis whites. For one, the purpose of affirmative action is remedial. Whites–only drinking fountains and workplaces were not aimed at remedying anything: not historical injustice against whites, nor anything else. The purpose of affirmative action is radically different from that of the old-fashioned, black– and Mexican-hating kind, namely to help a historically marginalized group acquire the tools to enter society on an equal basis. Relatively little displacement occurs, as I mentioned earlier—about one and one half percent, as in the parking lot example—while the earlier regime of "Whites only need apply" excluded blacks one hundred percent. In dozens of situations, the purpose and setting in which something is done makes a large difference; otherwise, capital punishment

would be the same as murder.

The eighth argument, that affirmative action violates the principle of color blindness, is related to the previous one and also is an armchair argument that simply does not hold true. Our legal system, from the beginning, has been intensely color conscious, as well as conscious of sex or gender. And this was so not just in the early years of slavery and Indian conquest, but continued on a formal level until very recently, and does on an informal one today. Every single large-scale test of social prejudice reveals that Americans are highly color conscious. In a typical example, testers from a university or governmental agency, one white, one black, go to check out apartments, apply for jobs, buy things in stores, or apply for a loan.[20] The two testers are as alike as possible in income, education, age, personality, etc., yet they report radically different experiences. For society, then, to say, "We cannot take account of race" simply ratifies and allows the unchecked accumulation of private prejudice.

The color-blind view is like a track meet. One of the athletes systematically has been deprived of food all his life. People laugh at him and throw garbage in his path. He lacks adequate training facilities and cannot afford decent track shoes. You bring him to the starting line with all the other, well–fed runners, and say, "Okay, it's a fair race. No bumping or shoving. Let the best man win." Given a fair chance and a helping hand, the starved runner actually may turn out to be the best one, but not by being thrust to the starting line and laughed at by the crowd throughout the race. Color blindness makes us pretend these things are not true.

The ninth argument holds that affirmative action balkanizes, encouraging people to regard themselves as members of small groups, jealously guarding their positions vis–à–vis each other, rather than being simply Americans. It promotes antagonism, ethnic strife, and a racial spoils system in which the momentary victor, today's majority, gets to take advantage of all the others or get even for imagined past sins.

But balkanization, properly understood, means small groups or nations feuding, endlessly and senselessly reliving old griev-

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20 *E.g.*, Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

ances and settling old scores. It does not mean small groups who have been deprived of their birthright and share of America's bounty making demands on the larger society for redress. That is not balkanization, but something quite different and, in many cases, wholly legitimate.

The last few years have, indeed, seen an increase in tensions among outgroups, such as Koreans versus blacks, blacks versus Jews, blacks versus Hispanics, and so on. But this is not so much because of affirmative action as it is because America has been slow to extend its bounty to all. Raising the income level of groups of color to a decent minimum would greatly ameliorate inter–group tension. Changing our racist immigration and licensing rules also would help. Many Korean merchants who run grocery stores in the inner city, for example, have professional degrees, are pharmacists and teachers back in their home countries, but cannot practice their professions here. That is why they open small stores in Brooklyn or south–central Los Angeles, where, unsurprisingly, they sometimes come into conflict with the people who live there.

The final argument is that we do not need affirmative action—all we have to do is to enforce anti–discrimination laws currently on the books. Ending all discrimination would, of course, help a great deal, although it would do little for those who lead blighted lives now from the legacy of slavery, Jim Crow laws, and a century of neglect. Recall the runner on the starting line for a race whose officials scrupulously monitor for cheating, bumping, and other unfair tactics. Their scruples do little good because the race itself is unfair.

But a second reason counsels that we should not rest content with existing laws against discrimination. The civil rights laws, even more than others, are radically flouted and underenforced. A 1987 survey by the University of Chicago showed that seventy percent of employers in that city acknowledged making distinctions in employment decisions based on race and ethnicity.[21] Yet only a small proportion of those mak-

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21 William Julius Wilson et al., *Urban Poverty and Family Life Survey of Chicago 1987*, (last modified May 1997) <http://www.icpsr.umich.edu/cgi/archive.prl?path=ICPSR&format=tb&num=6258>; *see also* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996) (reviewing the data).

ing such decisions have a complaint filed against them; estimates are on the order of one or two percent. Litigation is expensive; many valid complaints are not brought because of difficulties of proof or because the victim decides "what's the use?" A survey in another area, housing, conducted by a federal agency, estimated between two and four million cases of housing discrimination in this country per year.[22] Affirmative action must remain as a supplement for imperfect enforcement of the law.

A variant of this argument charges that affirmative action penalizes persons who did not own slaves or run plantations. This innocence argument is a corollary of one we considered earlier, namely that affirmative action benefits those who need it least. Is it true that affirmative action punishes innocent whites for the sins of their fathers? No. When a university sets up a program to allow in a slightly larger number of blacks, its purpose is far from punishing whites. If anything it wants to broaden their education by exposing them to a new range of experiences and ideas. When a university decides to let in Naval ROTC scholarship holders, tuba players for the band, quarterbacks who can throw a football seventy yards, veterans, or the sons and daughters of wealthy alums, is it trying to *punish* physics majors, the nonmusical, or pacifists? If it sets up a geographical quota for students from far away, is it unfair to the locals, punishing them because their fathers and mothers committed the sin of having them be born in the state where Stanford, say, is located? No. It is only with blacks and Latinos that we find unfairness in a modest mechanism that lets a few of them get ahead.

White people, even ones who had no part in the plantation economy, still benefit from that economy and the development it brought the South, just as all of us benefit from the railroads the Chinese built, the farm labor of Mexicans, and the ruthless development of Indian lands. Our friends and children benefit from the informal set of privileges, favors, and courtesies we extend each other and from which blacks and Mexicans are

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22 *See* RONALD E. WIENK ET AL., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS (1979); George C. Galster, *More Than Skin Deep: The Effect of Housing on the Extent and Pattern of Racial Residential Segregation in the United States*, *in* HOUSING DESEGREGATION AND FEDERAL POLICY 119 (John M. Goering ed., 1986).

almost entirely excluded. Such practices include the artfully crafted letter of recommendation that gets an erratic student into a fine college, the summer job one of Dad's or Mom's friends offers at the last minute, the teacher who discusses the extra credit assignment with a favorite student that enables him or her to raise a B–plus in an Honors course to an A–minus. These are all examples of white privilege, an invisible system of courtesies and favors that has been going on for centuries and that constitutes, in one way of looking at it, history's largest affirmative action program: benefits, jobs, and other forms of help awarded not on the basis of merit but acquaintance, friendship, or other morally irrelevant, nonmeritocratic criteria.

As I have been speaking, you might have noticed that I focused on majoritarian practices and justifications, drawing attention to the inconsistent or self-serving nature of many of them. Why? Because it is essential, I think, to focus on the way we can easily define "the problem" as what those other people are getting away with. A perfect example of this occurred recently. A department store chain withdrew a T–shirt saying that it is time for a woman president.[23] Family values advocates saw it and raised a storm. I maintain that they actually saw the T–shirt as a slighting of their favorite principle. What they neglected, of course, was that a woman president can have a family, too. For example, if Hillary Clinton or Elizabeth Dole were president, the very same family we know would be sitting in the White House (assuming the marriages remain intact). A sound principle—that families are good—was used repressively, on the assumption that the wage–earner in a family always has to be the man. Nothing is wrong with color blindness, neutral principles, merit, family values, or anything else the conservatives hold dear. It is the one–sided, anti–woman and anti–minority application of some of them that we should oppose.

Now comes the part that you have been waiting for, namely when the speaker puts forward his or her suggestions on where we should go from here. Let me preface this part by saying that

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23 John Pacenti, *Wal-Mart Pulls 'Someday a Woman Will Be President' T-Shirts*, AP, Sept. 22, 1995, *available in* 1995 WL 4407370. Under the threat of boycotts by women's groups, Wal-Mart restocked its shelves with the shirts in time for Christmas. *Shirt Shrift*, PITTSBURGH POST-GAZETTE, Dec. 19, 1995, at B12.

ideally, no change would be in order. In the thirty years of its formal existence, affirmative action in education and jobs has been yielding a small, but reliable stream of professionals of color and abating black and brown poverty and misery, while causing little displacement and no discernible deterioration in the quality of goods and services. Public attitudes toward race require mending, but in my opinion, affirmative action itself does not.

Still, a restless public, not to mention a right–wing juggernaut, wants to see changes, so I offer two for purposes of discussion.

The first would have affirmative action's supporters go back to the situation that prevailed before *Bakke*[24] and reintroduce the restitutive or reparational rationale. The current one for higher education, diversity, was held to be a compelling state interest in the *Bakke* decision a quarter century ago,[25] yet recent decisions such as *Podberesky*[26] and *Hopwood*[27] have cast doubt on it. Also, a host of commentators is beginning to question whether *Bakke* even stood for that proposition at all, while others have pointed out, perhaps correctly, that an interest stops being compelling if not applied consistently, so that institutions that base admissions on the need for diversity may not limit it to race, but would need to give bonus points to other types of it, such as intellectual or ideological diversity.[28] These other forms would end up swamping racial diversity numerically and greatly limiting what colleges can do in bringing historically excluded groups into the fold. And, of course, as everyone knows, California has abolished racial preferences outright by popular referendum.[29]

Nevertheless, the Fourteenth Amendment presumably will always tolerate, or require, affirmative action by an institution

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24 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

25 *Id.* at 315.

26 Kirwan v. Podberesky, 38 F.3d 147 (4th Cir. 1994) (en banc).

27 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

28 *E.g.*, Alan J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2D 381, 387-90 (1998).

29 Proposal 209 was passed Nov. 5, 1996 and held constitutional in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). The constitutional provision is now codified at CAL. CONST. art. I, § 31 (amended 1996).

that has discriminated against a minority group so as to restore it to the status quo ante. Graduate students, academics, and even undergraduate researchers could investigate, publicize, and make available to lawyers, courts, and governing boards the checkered histories of racial exclusion, Jewish quotas, and all-white fraternities that mar their own schools. If university policymakers cooperated with local government to arrange exclusionary zoning or to keep local housing costs high and thus protect university investments, that should be brought out as well. If academics played a role in promulgating racist genetic theories of innate inferiority or routinely served as expert witnesses in defending school districts charged with segregated pupil assignment plans, that would be highly relevant, as well. Researchers at Colorado are carrying out such a study, and a number of historians and law professors I know around the country are following suit.[30]

The second avenue would entail rolling with the punches and taking seriously recent proposals to abandon race–based affirmative action, now highly unpopular, in favor of a version based on socioeconomic status or underprivilege, but with a twist I will explain. First, notice that programs of this sort, which give bonus points for childhood poverty, broken homes, frequent moves, and so on, present three problems for those who take racial justice seriously. First, the number of poor whites greatly exceeds that of poor blacks and browns, so that these programs would do relatively little to help those who are disadvantaged on both scores. Deeming race one disadvantaging factor among many would help, but only so much. Second, one confronts what Deborah Malamud calls the "top of the bottom" problem,[31] but in a new form. Current race-based affirmative action plans attract criticism because they are said to favor middle-class blacks, Mexicans, and other minorities over the very poor. Colleges who draw from the pool of all minority applicants naturally look with greatest favor on those who require the least adjustment and are most likely to succeed, namely those who

30 Kevin Johnson at the University of California-Davis and Thomas D. Russell at the University of Texas, for example.

31 Deborah Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 458 (1997).

are most like their usual pool of middle-class whites. With a shift to socioeconomic status (SES), colleges will examine the pool of disadvantaged applicants and choose those at the top of that pool, with high grades and test scores, most of whom will be white.

A third problem is that black or brown poverty is qualitatively different from the white kind. It tends to last forever, as I mentioned, while poor whites remain that way for just a generation or two, after which the kids move up. For all these reasons, substituting socioeconomic status for race is apt to do little to advance racial integration.

One change would help a great deal, and I will close by proposing it. We might take the idea of social class seriously and devise a program based on SES that not only gives a helping hand to those on the bottom of the scale, but corrects, or discounts, for some of those at the top. Imagine a youth from a socially prominent and well-heeled family who earns 1200 on the SAT and has a grade point average of 3.1 from a famous prep school. This student has enjoyed tutors, summer camps, and European travel while growing up. Indulgent teachers, aware of his famous family name, gave him extra-credit assignments and other help to shore up a sagging grade and make sure that he earned at least a B. As the time for taking the SAT rolled around, the youth took a prep course costing over $1000. All of us in education know students like this—socially advantaged, rich, and often fairly dull. Their college application essays describe how hard they worked to make the cross-country team and how it fortified their character. Sometimes you read about them in the news, years later, when they flunk the bar exam for the third time.

Contrast this applicant with a Chicano youth sporting an SAT of 1160 and a GPA of 3.4 from an inner-city school, who stepped in when dad went to jail, took care of his or her younger brothers and sisters, delivered a paper route, and wrote an essay explaining how to apply Cesar Chavez's ideas of religiously based, collectivist social organization to the *urban* working poor. I would pick the Mexican kid, and I bet most of you would, too. I would also be inclined to apply a system of discounting or penalty points to the very large number of bland, paradise–lost kids, like the ones I described, who made little use of their opportuni-

ties, have little idea what they want to do in life, and who our experience as educators tells us are likely to disappoint but who clutter up the field for the rest who really deserve and will benefit from a college education. Just as conservatives point out, correctly, that diversity cannot be a constitutionally valid reason for admission purposes if we apply it selectively, we should tailor programs based on socioeconomic advantage and disadvantage in the manner I have suggested--that is, across the board.

Privilege, as Peggy McIntosh,[32] and now, John Hope Franklin's commission,[33] have pointed out, is the other half of the dyad of distributional justice. If we limit ourselves to enforcing civil rights laws against outright old-fashioned discrimination, but do nothing about the system of old–boy networks, favors, and family cronyism, the current social structure will remain roughly intact, with white dynasties at the top, and blacks, browns, and other outsider groups at the bottom. My two suggestions may not conquer all unfairness in the way health, education, and other social goods are allocated, but could be a start in the right direction. They might *even* have appealed to a certain Supreme Court justice, long dead, with Alabama roots, a checkered record on racial justice but an undying commitment to workers, the poor, and the common person.

Thank you.

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32 Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in* RACE, CLASS AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 1992).

33 Advisory Board to the President's Initiative on Race, *One America in the 21st Century: Forging a New Future* (Sept. 18, 1998) <http://www.whitehouse.gov/Initiatives/OneAmerica/cevent.html>.