

Affirmative Action

DAVID OPPENHEIMER¹:

Well, good afternoon. Thank you. We have a terrific panel here. We're going to start with Professor Onwuachi-Willig who's going to be talking about the extension of mismatch. We're going to try to keep it to about seven minutes each and thereby, leave time for discussion between ourselves and then discussion with the rest of you. Professor Onwuachi-Willig?

ANGELA ONWUACHI-WILLIG²:

So first, I want to start out by thanking the editors of the four journals. It's been an amazing day with really wonderful panels, I've learned a lot, so thank you very much.

There are consistent messages to people of color about their proper place in society, which has always been a really important tool for maintaining and advancing white supremacy. Referring back to what Professor Haney-Lopez asserted earlier today, in today's post-civil rights society, few people would argue in favor of segregation in racial terms explicitly so. And few people would assert that Blacks, for example, do not belong in certain places. However, opponents of affirmative action have begun to articulate a form of these arguments as an add-on to the mismatch theory. In the minds of these scholars, affirmative action should not be employed—or, rather, it should be utilized much less—because African American, Latinx, and American Indian students simply do not belong at elite institutions of higher education, pointing to what they refer to as a mismatch between elite schools and the standardized test scores of many underrepresented minority students. Scholars like Peter Arcidiacono and Richard Sander assert that affirmative action tends to harm underrepresented minority students more than it helps them because it places them at schools where they're simply “outmatched,” or where they cannot compete with their white peers. And

1. Professor David Oppenheimer is a clinical professor of law of Berkeley Law, and co-faculty director of the Student-Initiated Legal Services program, and a co-faculty director at the Henderson Center for Social Justice. He teaches civil procedure, leadership for student leaders, and comparative equality, and anti-discrimination law.

2. Angela Onwuachi-Willig is Dean and Professor of Law at Boston University School of Law. At the time of this panel, she was a Professor of Law at Berkeley Law. She has a bachelor's degree from Grinnell College, a JD from the University of Michigan, and multiple masters and a PhD from Yale. She teaches employment discrimination, and evidence, and family law, and critical race theory, and torts. She is a leading scholar on law and inequality and writes in a variety of areas. She is also the recipient of numerous awards for her teaching and her scholarship, including the Clyde Ferguson Award and of the Derrick Bell Award.

for this reason, they argue what should matter most is whether underrepresented minority students actually go to college or graduate school, not where they go to college or graduate school. They highlight that affirmative action determines *where*, not *whether*, individuals attend college.

For example, Arcidiacono once argued, “[t]he reason for this is that the vast majority of colleges and universities are not selective. Individuals who are admitted under affirmative action were not on the margin of attending college at all. Evidence from statewide bans on affirmative action show virtually no effects on minority college enrollment rates overall, following a ban, but do show evidence of bans reducing minority representation at flagship schools.” This emerging anti-affirmative action argument is dangerous for a number of reasons.

First, it fails to acknowledge inherent class and racial biases and how colleges and graduate schools determine merit for admissions. It presumes that schools’ current over-reliance on standardized test scores and grade point averages are neutral and fair. It ignores a presumption of incompetence that students of color face from their teachers and professors—the very people who grade their papers, their assignments, and their tests. It presumes an equal starting point for all students in terms of educational and other opportunities.

And, it disregards the huge wealth gap and class inequities in the type of education and quality of education that students of color, even middle-class students of color, tend to receive at primary and secondary school levels. It ignores the way in which wealth enables some students, primarily upper class and wealthy white students, to pay for private tutors or private test preparation courses. Finally, it presumes that all schools are equal in terms of the financial aid they offer to students and the support they offer to ensure that students graduate. The fact is that elite schools have much higher graduation rates and much better labor market participation rates than less wealthy schools. Why? They can offer students more aid. Students take out fewer loans, which is really important for students of color, who tend to come from more economically disadvantaged backgrounds. And many of these schools will even meet the full need of students. All of these factors are critical to one’s success in life. It plays a role in the types of burdens that students may leave their various schools with.

Second, this emerging argument ignores the importance of intangible qualities like prestige, school resources, and networks, all of which help to open doors in society, and ignores how people of color have not only historically been excluded from key networks, but also, largely remain excluded from these networks. And yet, the importance of prestige, networks, and other intangibles in schools are so critical that even the United States Supreme Court recognized that importance nearly 70 years ago in a case called *Sweatt v. Painter*. In *Sweatt v. Painter*, the Supreme Court responded to the legal challenge of Heman Marion Sweatt, a man whom the University of Texas School of Law refused to admit because he was African American. The court not only highlighted how the educational opportunities offered to black and white students of the university were unequal, but also detailed how the benefits of education always extend

beyond what professors lecture about in the classroom and into networks, school resources, and prestige. After talking about how unequal the schools were in terms of material resources, the court explained,

“What is more important? The University of Texas School of Law possesses to a far greater degree those qualities which are incapable of objective measurement, but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions, and prestige. It’s difficult to believe that one who had a free choice between these law schools would consider these questions close. Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with whom the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which law is concerned. The law school to which Texas is willing to admit— petitioner excludes from its student body members of the racial groups, which number 85% of the population of the state— include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing with when he becomes a member of the Texas Bar.”

Even in 1950 the court is acknowledging the importance of resources, the importance of prestige, the importance of networks. It’s also important to note that the rationale in *Sweatt* applies with similar force to white students, whom scholars like Richard Sander assume are “mismatched.” These scholars would assume that all of these benefits are worth it for those students. They never talk about those students. It’s also important to note that without affirmative action, white students would be attending colleges and universities in “a vacuum of sorts”, as the court said, largely removed from huge segments of the population, a rapidly growing and more diverse population within the United States.

Third, this affirmative action argument underestimates the value of the exposure that students of color gain in seeing the possibilities that many white students and elite institutions grow up knowing and may even take for granted. It ignores the fact that college and graduate schools are acculturation processes. There’s a way that people learn about how to speak, what fork to use, or how to interact in certain social circumstances.

Finally, this emerging anti-affirmative argument ignores the way that people tend to rise to the occasion when we are placed in places that arguably push us. It ignores the fact that parents want a mismatch for their children. As parents, we tell our children to seek mismatches all the time. When they want to become a stronger basketball player, for example, we don’t tell them, well, play with students who are right at your level, or lower than your level. Instead, we tell them to find the best players, because playing with them will improve their skills. *It’ll make you better. It’ll make you stronger. It’ll make you wiser.*

In all, we have to be careful to call out these segregationist-like arguments when they are wrapped up in pretty language. As Mr. Dorsey Nunn just said earlier, if where a person went to school did not matter, there would be no backlash against affirmative action. We should resist the emergence of statements that imply people of color need to simply stay in their place.

DAVID OPPENHEIMER:

Thank you. I channeling Professor Haney López a little bit when I say, so let me make sure I understand the argument that Sanders and others are making: that it's not fair to have black students, and other students of color attending schools where they're mismatched because mismatched doesn't matter. Except it matters for white students because we wouldn't want them mismatched and sent to a school that wasn't the best school that they could get into. Yeah? OK, that's clear. Good.

NANCY LEONG³:

All right. So now that we've cleared that up, I, too, just want to say that I really appreciate the opportunity to participate in this symposium. To all of you student organizers, you've done a really great job, and that does not go unnoticed.

I, also, like Professor Onwuachi-Willig, want to talk about one of the new battlegrounds in affirmative action and then to explain how this particular type of opposition to affirmative action actually plays into and reinforces white supremacy.

As many of you know, there is a lawsuit ongoing against Harvard by an Asian-American applicant who didn't get in, and who alleges that Harvard discriminated against him in admissions because of his race. This lawsuit is backed by a man named Edward Blum, who is white. He also backed Abigail Fisher's unsuccessful effort to discontinue affirmative action after being rejected from the University of Texas.

What I want to do is to talk about how Asian Americans fit into the recent conversation about affirmative action and to think a little bit about why opponents of affirmative action have recently taken such an interest in this alleged discrimination against Asian Americans, particularly when these opponents haven't really taken an interest in any other issues affecting the welfare of Asian Americans, ranging from things like voting redistricting, employment equality, fair housing, anti-poverty legislation. Basically, you name it. It's really just affirmative action.

3. Nancy Leong is a professor of law at Denver University. She's a graduate of Northwestern with a bachelor's degree in music and a JD from Stanford Law School. She clerked for Judge Kermit Lipez of the US Court of Appeals for the First Circuit. She's published over 30 Law Review articles. Her research interests include constitutional rights and remedies, criminal procedure, anti-discrimination, law and culture, and judicial decision-making. She is also the recipient of numerous awards and honors for her scholarship and her teaching.

In my view, this supposed concern for Asian Americans is really just a way of maintaining a racial hierarchy that primarily benefits not Asian Americans, but white people. And, it's a way of doing so that attempts to disguise that underlying motive.

Let me talk first about why this concern for Asian Americans in the higher education admissions process is misplaced. As a threshold issue, I do want to echo what Angela said about over-reliance on test scores like the LSAT and GPA, which only tell us so much when people come from so many different high schools. The LSAT only explains about 30% of the variation in first-year law school grades, and it goes down after that. That means 70% of the variation is explained by other things. So, the LSAT is just a proxy, and it's not a very good proxy at that.

As an Asian-American person myself, I also take issue with the claim that affirmative action injures Asian-American people. It's not at all clear to me that Asian Americans are, "injured" by affirmative action in the sense that we're harmed, or that we're worse off. There's all this research, like a pile of it, of social science research that shows diversity improves the educational experience both within and beyond the classroom for everybody. Asian-American people benefit from that just like everybody else.

I think it's also important to keep in mind that Asian Americans are already beneficiaries of affirmative action. In the 1960s and 1970s, Asian Americans had suffered from segregation in public education, just like a lot of other racial groups. Today, the reason why many Asian Americans are economically prosperous and can send their children to private schools or good public schools in relatively wealthy neighborhoods is because the previous generation benefited from affirmative action. I think it's very important to acknowledge that.

I also think it's wrong to say that Asian Americans are injured by affirmative action because there are a lot of underrepresented Asian subgroups that benefit directly from affirmative action. There's this tendency to talk about Asian Americans as kind of this giant monolith spanning a massive continent. But if we look at groups like Cambodians, Vietnamese, Thai, Lao, Burmese, Filipino, Native Hawaiian, and other Pacific Islander students, all of these groups are underrepresented at most schools. Affirmative action programs that actually look at Asian-American identity in a more nuanced way can use affirmative action to benefit these groups in question quite directly.

Finally, other non-white groups who also benefit directly from affirmative action are important allies of Asian-Americans on a whole spectrum of civil rights issues. Historically, Asian Americans and other people of color have been allies on all kinds of civil rights issues that impact all of us. And I'm skeptical that affirmative action "injures" Asian Americans.

If doing away with affirmative action comes at the cost of dismantling these alliances that on balance are really beneficial to the Asian-American community,

what's really going on? Why are opponents of affirmative action suddenly so very concerned about Asian Americans not getting into college?

Well, let me start by saying this. If the goal of affirmative action opponents was really to address the fact that Asian Americans with particular numerical indicators are statistically at some schools somewhat less likely to get into institutions of higher education, it's completely possible to address that without touching affirmative action programs. The way to go about doing that would be to admit fewer white people. As a starting point, we could stop giving legacies of preferences. Let me just throw a few numbers at you quickly here. One study found that at elite schools, legacy applicants have a 45% better chance of getting admitted than people who aren't legacies. The legacy admission rate at Harvard is 30%, which is five times the overall admission rate. Another study found that at elite schools, simply being a legacy is the equivalent of 160 points on the SAT, which gives the legacy a marginal benefit, equivalent to the benefit associated with being a top athlete, or a member of the most underrepresented minority group at that institution. And, research has shown that these legacy preferences are particularly disadvantageous to Asian applicants who are less likely to be legacies. Notice that opponents of affirmative action are not going after legacy admits, who are again, of course, predominantly white, given the history of our country and higher education in our country.

I think it's very telling also that legacies are not being in the same way that beneficiaries of affirmative action are being targeted. Picking up on Angela's presentation, I think it's very telling that opponents of affirmative action are so very concerned that beneficiaries of affirmative action are going to be mismatched—that they're not going to succeed at these schools that are too rigorous for them. But they don't have the same concerns about legacies being mismatched beyond their abilities at these elite schools, where the average SAT score is so much higher than the score of the legacy. So I think the fact that there's this focus on affirmative action beneficiaries on the one hand and this complete lack of focus on legacies on the other hand—I think that's very revealing about true motives. Implicit in these lawsuits featuring Asian plaintiffs is this unspoken assumption that if we think of university admissions as a pie, the slice that's for white people has to stay the same size. And if Asians are going to get a bigger piece, it automatically means that other people of color have to get a smaller piece. And that's not actually true. I think the unspoken assumption here is that white people who oppose affirmative action don't think that they should have to give up any pie. Instead, people of color should have to fight each other for the leftovers.

So how does this—in just a minute or so—how does this relate back to white supremacy? I think a key mechanism of white supremacy is creating divisions among different minority groups, different groups of people of color. One way that this happens is with respect to affirmative action by using these lawsuits to distract people. Directing attention to the way that affirmative action supposedly “injures” Asian Americans is an attempt by white opponents of

affirmative action to improve the optics of opposing affirmative action. It no longer looks as much like white supremacy if it's now not just about white people, but about white people and Asian people.

If white people can say that Asian Americans also oppose affirmative action, or are also harmed by affirmative action, it looks less like white people are actually just transparently trying to maintain their place at the top of the racial hierarchy.

I encourage people not to be fooled here. If affirmative action opponents can frame their concern about affirmative action as concerned for Asian Americans, then they've succeeded in distracting everyone from the idea that what they really want is for the status quo to stay the same for white people. So again, this tool of white supremacy is to create divisions among people of color. I think it's a really cynical move, and my hope is that people will see straight through it. Thank you.

DAVID OPPENHEIMER:

Thank you. So I'd like to say a few words about Dr. King's dream of affirmative action. Whenever affirmative action is debated, you can count on the opponents of affirmative action to refer to Dr. King's "I Have a Dream" speech. To claim that because Dr. King wanted his children to be judged on the basis of their character, that he was therefore a supporter of colorblindness, and would thus have been an opponent of affirmative action—it's simply not true. It's not true. Dr. King in the last six years of his life spent much of his time working to support race conscious quotas in employment and reparations for black Americans. He believed in broad-based, color conscious remedies for racism and to respond to white supremacy.

One of the interesting things about the great volumes of work about Dr. King's short life and his remarkable campaigns is that there are multiple books on every part of his life, except Operation Breadbasket, which he began in 1962 and continued until his murder in 1968, and was one of the most important things he did. But, virtually nothing is written about it. Breadbasket was an employment quotas program based on boycotts in order to ensure that in black communities across the country, black people were being hired proportionately to their percentage in the population.

Now, Dr. King also supported programs to lift all people out of poverty. And one of the things that is interesting about his work is that it can't be separated into colorblindness and color consciousness because he didn't see that division as a division.

In Breadbasket, Dr. King he had ministers and volunteers working with him, going into black communities and searching for employers who weren't hiring black employees. They would go to those employers and say, "you need to hire black employees throughout your company, top to bottom; not just in the low jobs, and in the same percentage of the black people in this community."

And when the employers didn't agree—they often didn't, particularly at first—his response was to organize a boycott of those companies. If a community was 20% black, Dr. King and the others who worked with him in Operation Breadbasket were demanding the 20% of the employees at every company in that community be black.

Today, we'd call that affirmative action. We didn't use the term then, but that's what we'd call it today. Dr. King called it simple justice. Now, sometimes they carried signs when they picketed and boycotted that said "Don't shop where you can't work." That was often the theme of the boycotts, and that goes back all the way to the 1920s. And a black social movement in this country that started in the '20s and was the subject of a great deal of litigation, a great deal of legal history, which has been forgotten and ignored, and came forward all the way to Dr. King's work in the 1960s. And parts of it are still being carried out today in a somewhat different form by the Reverend Jesse Jackson.

But on a broader scale, Dr. King called for and regularly called for reparations for slavery, based on a principle of equitable restitution for unpaid wages. He made a legal argument on behalf of a legal remedy, and he made it repeatedly in a number of different fora. He also called for massive programs to eliminate poverty in the United States for all poor people of all races and ethnicities. And he reached out to white Appalachians. He reached out to Mexican farm-workers. He had a continuing correspondence with Cesar Chavez. He reached out to black sharecroppers and wage earners. He organized black ministers throughout the country to lead a moral campaign to eliminate poverty. He worked with President Johnson on the War on Poverty. In these things, he said that we should try to lift all poor people out of poverty. But at the same time, he was saying, we need quotas in employment in order to create opportunity for black employees and we need reparations to restore the wages that black people were deprived of through slavery.

Dr. King was a brilliant and complicated person. And he can't be reduced to a single phrase from a single speech. But ironically, if you want to study that speech as evidence of Dr. King's views, don't go to that great pull-quote about his children being judged by the content of their character. Go to the entire metaphor of the speech in which he said, "We've come here to cash a check". We've come to cash a check. That was a check for reparations. That was the basis of the "I Have a Dream" speech. Dr. King didn't say we have to have colorblind remedies *or* we have to have color conscious remedies. Because he understood that we could, can, and must do both. And it's true fifty years after his murder. We must do both. Thank you.

We're going to move to some discussion among the panelists and then open it up to the floor. Because so much of the discussion about affirmative action is about the critique of affirmative action, we agreed in advance that one of the things we wanted to be sure to address was what are the benefits? What are the benefits of affirmative action? Who would like to start? Professor Onquachi-Wilig? Sure.

ANGELA ONWUACHI-WILLIG:

I think the benefits are far-reaching. I mean, I think one of the benefits that we don't like to talk about—or that the court doesn't like to talk about—I think are the remedial benefits, or the correction that it's doing in terms of making up for past and current injustices and discrimination. I think another benefit, of course, is the benefit of interaction, and learning, and being prepared to live and work in a diverse and global society. Another huge benefit is, I think, the experience of not being a token in settings. And that is a burden that students of color still feel today, even with affirmative action. And also, it helps with the breaking down of stereotypes, right?

As educators, we play a really, really important role in our society. We're more segregated now than we were in the 1950s and at least our schools, for sure, are more segregated. And if you think about it, college and graduate school are some of the few places that people are interacting across racial lines. This is a really an incredibly important role that educators are playing in terms of teaching people how to interact with each other, how to work with each other, understand one another, understand different experiences, particularly for people like you, who will be policymakers and maybe elected officials. I'll stop there.

DAVID OPPENHEIMER:

Thank you. Professor Leong?

NANCY LEONG:

I agree 110% with everything that Angela has said. And I think maybe what would be most helpful for me to do rather than just reiterating some of those in different languages is to make it a little bit more concrete and more personal.

As an educator, I don't think I can even put into words what the difference is between teaching a classroom full of people with diverse life experiences—including on the metric of racial diversity—and teaching to a relatively homogeneous classroom.

As David said when he introduced me, I teach at the University of Denver, which is a pretty white upper-middle-class school. In theory, we're 20% non-white, but sort of visually, it's a lot less than that. I remember one year we literally had two black men in a class of 250 students, which is startling. I haven't been in a room that looks like this for quite a while.

For example, the first time I taught my critical race theory seminar, 19 of the 20 students in the room were white. Now, these were very interested, curious, eager to learn white people.

But the conversations that we had in that room would have been, I think, a lot richer if there was just a broader mix of experience to draw from. Now, of course, as an educator, there's ways to compensate for that. But I've taught now at five different law schools. I taught at American University in Washington, DC,

William & Mary, UCLA, Washington University, and University of Denver. These schools are in different places along the continuum of diversity, and I can say without exception that having diversity of all kinds of experience—but race is incredibly important as part of the mix—makes conversations in the classroom immeasurably better.

DAVID OPPENHEIMER:

Thank you.

NANCY LEONG:

And not even just conversations about race either, right? There are certain types of experiences that people of different races are more likely to have, even if those experiences aren't explicitly racial experiences, like experiences of racial profiling.

DAVID OPPENHEIMER:

There's a great article on why it's important to have diversity in a physics class. Let me take a minute to knock down another lie. And that's a lie about diversity and the origins of the diversity justification for affirmative action.

Most of you know that in Justice Powell's opinion in the *Bakke* case, the court embraced diversity as a legitimate justification for affirmative action. It did so with reference to Harvard College's admissions policies. After this case, you immediately started hearing blow-back from the opponents of affirmative action who said diversity was simply the excuse that Harvard used to exclude Jews, beginning in the 1920s with the Jewish quota. And by the way, that is half true.

And that's the worst thing—lies that are half true. Harvard did use the language of diversity to justify the ugly, vile Jewish quota of the 1920s. And in doing so, they did great damage to the idea of diversity, but we have survived it.

But that's not the origin of the diversity justification for affirmative action. If you go back to a speech made by Harvard president Charles Eliot in 1904, he said, "we are so proud of the diversity at Harvard College in terms of class, and race, and religion, and experience, because it makes it such a richer place".

Eliot came into Harvard in 1867 as their transformative president. He served for 40 years and completely changed the place. And he was firmly committed to diversity, because he was a follower of the work of John Stuart Mill. Although we think of John Stuart Mill today as a traditional liberal, if you read the book of John Stuart Mill, his most important work "On Liberty". . . if Liberty were written today or named today, it would be called "On Liberty and Diversity". The diversity argument in our Western English language culture really begins with John Stuart Mill, embraced by Charles Eliot, who fought bitterly against the Jewish quota before he stepped down as president and was replaced by Lowell, who was a terrible bigot. One of the first things Lowell did

was kick the black students out of the dormitories and dining halls at Harvard, to which Harvard students resisted. But to take the ugliness of the Jewish quota and use it as a way of attacking diversity is an historic lie.

Second question— and then we're going to move on to the audience. Opponents to affirmative action say it's a barrier to meritocracy. Can you respond to or unpack this critique? Nancy, why don't you go first this time?

NANCY LEONG:

Yeah. So I think that Professor Onwuachi-Willig and I have both touched on this in our presentation. The reason that the argument that affirmative action is a barrier to meritocracy is problematic is that it relies on the idea that meritocracy is a thing that's possible or desirable in the first place.

I mentioned that the LSAT is one of the better predictors of law school performance that we have, and it still only explains about 30% of the variation in first-year grades on average, meaning 70% is other things. And, a lot of those things are not quantifiable. I think if you're a student here, you're probably pretty good at tests, and I was good at tests as well. And especially growing up in public schools that are kind of a test-rich environment, tests tell you that you're smart. And so you like that, right? But I think a lot of us need to let go of the idea that tests, or grades, or just these numerical indicators in general tell us something definitive about how smart we are, or how good we are, or how deserving we are. There are so many other qualities that affect whether somebody is going to be a good student, or whether they're going to contribute to an educational environment, or whether they're going to be a good citizen of the United States, or a citizen of the world, that we just can't rely on test scores.

Even if we wanted meritocracy, it wouldn't be possible. I think going along with that, the court's holistic approach to reviewing college applications makes a lot of sense.

And you can say, well, sure, but how much can you tell about a 17-year-old from their college application? How much can you tell about anybody from their college application, regardless of what their numerical indicators are? All of us are risks to some degree. And so I think it's important to acknowledge that and to acknowledge the fallacies that are built into the very idea of meritocracy. This is a myth, right? This is a thing that's not really possible.

ANGELA ONWUACHI-WILLIG:

One thing I always like to think of when people ask this question is something that Lani Guinier and Gerald Torres wrote in their book, "The Miner's Canary". They said there's three rules that you basically have to remember. One is that there are always winners and losers. And, the winners are the people who get to make up the rules and design the rules in a way that enables them to keep winning. The third thing is that the winners then concoct a story to tell the losers about why they lost. You didn't work hard enough.. You didn't pull yourself up

by the bootstraps. And I think that is absolutely true and in this case. People who are the winners have designed how we want to measure merit in the admissions process.; they have designed it in a way in which people who are most privileged are going to be able to benefit over and over again and have then tell a story to those who are the losers in the game why they have lost.

And I actually personally kind of went through this last year. My oldest son just started college this year. And you are absolutely privileged if you have a parent who understands the educational process who can help you with your application, who can spend all those hours looking at your essay and proofreading it. There's no way that it's purely based on merit.

I also want to note that there are a couple of schools that have started to admit people without scores. You have an option: you can either submit your scores or not submit them. I think Bates is one of the colleges. They did a study and they looked at students who didn't submit their scores and students who did. They found that they performed at exactly the same level, whether they submitted their scores or whether they didn't.

I think Lani Guinier makes one of the best arguments about how we should measure merit. If people go back and look at the mission of their school, what are the things that are in the school's mission? Diversity is usually one of them. Preparation for society. Doing good for society. I think there's got to be a way in which merit is measured by the things that you say your institution's going to do and your institution is going to do for society. I really would like the conversation to turn back to that.

DAVID OPPENHEIMER:

We're right on schedule to open this up to the audience. Do we have any questions?

AUDIENCE:

Hi, I really love the discussion on the limitations of standardized tests as an indicator of merit, but I was also wondering if a lot of the decision-making is open to discretion, are we opening doors for more implicit bias? In China during a cultural revolution, we got rid of all the scores and we tried to admit students from working class. If you're children of a very poor farming family, then we are going to get you into college. This plan sounded good, but it didn't work because it ended with a lot of corruption. Basically, if you are children of leaders, then you end up being in good colleges. So I'm just wondering in this process, how are we're going to protect certain ethnic student groups from being harmed in this process? It's almost a black box when you're making these decisions. Because in the legal system, too, when the judges have discretionary power, we tend to think there might be a worry of implicit bias. I wonder, what do you think are some of the ways to deal with that?

NANCY LEONG:

I think that's a great question and I like the other context that you've tied it to. I can certainly see the appeal of these pseudo-objective metrics like standardized tests because it at least gives the impression that this really is based on something aside from who your family is, or who your family knows, or something like that.

However, the problem is that they don't actually even measure the thing that they're supposed to measure very well—or at least one thing that they're supposed to measure—which is how well you do once you get to law school. I think a better solution is to move away from the quantitative metrics, maybe even eliminate them altogether, the way Bates College has, but, at the same time, couple that with training for admissions committees about implicit bias. There actually is research out there that shows debiasing training can be very successful if people take it seriously. Even just having people read an article about implicit bias in experimental settings will cause them to be less biased in subsequent decision-making. Well, if you can do that in an experiment that lasts 45 minutes, imagine what you can do in a training that lasts a few weeks, or a few months, or something like that.

And so I do think that this is a long-term project, but I think that we can get to a point where admissions committees are aware of potential biases and considering these more qualitative factors, but also, have ways of managing their own biases. The other thing I would say is that I think one of the very best ways of managing potential bias on admissions committees is making sure that admissions committees themselves are diverse. That is something that we think about at my school, for example, and I know a lot of other schools as well. Making sure that the members of the admissions committee are diverse, I think, serves as a built-in check. I don't know if that's entirely responsive to your question, but a few ideas at least.

ANGELA ONWUACHI-WILLIG:

Yeah, I agree with everything that Nancy said. It's actually an argument that Justice Thomas has made—that what actually protects students of color are these “objective” measures. I think one of the things I would say about that—and add to what Nancy is saying, too—is that the current system privileges the privileged already, right?

If you look at what correlates with test scores— if you look up each particular range, it goes up with the income, or the wealth of the parents, right? So the current system already privileges the very people whom you say would benefit under a system with more discretion.

I agree with Nancy absolutely. There's lots of research that shows you can begin to undo implicit bias. I also think there's a huge benefit to having a discussion openly about why any particular admissions team is abandoning standardized test scores. Again, the benefit of making implicit bias salient for

admission teams so they're thinking about those things that they may not be thinking about when they're reading applications already. There are lots of articles people have written about the sort of the ways in which students who get to do internships—particularly unpaid internships—or do a variety of things that tend to correlate with wealth that look better on applications that people may not be able to do because they're working or taking care of a younger sibling. Those are already biases built in. A lot of people have written about that. Those are already the effects of implicit bias. So I think that having an open and honest discussion about the inequality in terms of the access—the opportunity that people have to do particular things—would actually make the process more honest and more fairer to people

DAVID OPPENHEIMER:

To restate in slightly different words something about the SAT, I thought the most insightful thing I've read on the SAT is that it's a fabulous predictor, a really accurate predictor of parental income. Other questions? Comments? Yes, over here.

AUDIENCE:

So we've framed this discussion a lot about diversity. I have kind of a two-part question. One is how else can we frame it? Because I think diversity doesn't really get at—I mean, we're here talking about white supremacy. And secondly, people are beginning to frame affirmative action as a better tool if we did it based on class instead of race, because then we would be actually getting people who are not from more privileged backgrounds. I'm wondering if you can just comment on that.

DAVID OPPENHEIMER:

Well, let me if I may as the moderator. On the second point, this is why I was talking about Dr. King's views on affirmative action. Because it's a false choice, I think, to say, well, we should do it this way instead of that way. We ought to be doing both. We absolutely ought to be regarding economic disadvantage, all kinds of disadvantage, and students overcoming disadvantage as a very important factor in terms of appreciating how good a student is as a student and their potential as a college student, or certainly as a law student.

When we talk about diversity, we ought to be considering class, background, and experience. And we don't have to say, well, either we're going to use race, or ethnicity, or gender, or alternatively, we're going to use class, or experience, or wealth. They are not mutually exclusive.

ANGELA ONWUACHI-WILLIG:

I completely agree with what Professor Oppenheimer said. The other thing I want to say is that there have been a number of studies that looked at what would be the outcome. There have been some schools that had played around with the question of would be the outcome if you go only based on class. And I agree that you should do both class and race. And what happens is that white poor people, white working class, and poor people outnumber people of color by so much. The overwhelming number of people who would benefit under that system would be white. And so you would honestly lose racial diversity. And that's just—I am actually kind of critical of the diversity rationale. I'll accept it as the rationale that we have now. I think that it ignores, I think, the very purpose of affirmative action, which is that it's meant to remedy past and current discrimination. I think that it actually puts sort of a bow on it and keeps us from having the discussion that is really quite important about correcting past injustices. And so I'm actually kind of critical for it. Look at Justice O'Connor's opinion and *Grutter*. Derrick Bell and a number of people have criticized it. If you read it, it's written from the perspective of a white person who's talking about why diversity is beneficial for white students. It's written as though students of color are simply there for the benefit of white students. I think there are all kinds of things that are problematic about the rationale.

DAVID OPPENHEIMER:

I'm going to push back a little on that Professor Onwuachi Willig and what I'm going to say is, again, you can do both, which is to say you can have affirmative action based on a history of racial injustice that has disadvantaged black people and ought to be corrected. Affirmative action is an appropriate remedy. And you can also have diversity-based affirmative action because of the benefits it provides to the entire institution. And the notion that we should have to choose is wrong. We shouldn't.

ANGELA ONWUACHI-WILLIG:

And I agree with that. I agree with that. And that's actually part of the problem in *Fisher*. University of Texas had the 10% plan; if you were in the top 10% of your high school class, then you were automatically admitted to the school of your choice in Texas.

And what happened is that it ended up making the school racially diverse in some ways, because Texas is incredibly segregated, and high schools are incredibly segregated. And so you ended up having actually some kind of class transformation. There were schools—including poor, rural white schools—that had never ever sent a student to the University of Texas that were now all of a sudden setting them. So you actually have this weird coalition in Texas, my home state, of sort of rural, poor, white communities, and people of color, and more urban communities.

But part of the problem is that University of Texas said, well, we weren't diverse enough. There were classes where students weren't benefiting from diversity because there were no students of color in those classrooms. And in particular, they were concerned about not having students of color from more upper-class backgrounds. And that's really important to have diversity within groups at the school in terms of breaking down stereotypes and having a range of different people within groups. I absolutely agree with that.

NANCY LEONG:

Yeah. I'm also a bit of a critic of the diversity rationale on some grounds, if only because I think that it gives opponents of affirmative action the opportunity to say things like, well, why isn't being from North Dakota a form of diversity? Right? Because of course, being from North Dakota is— I mean, it is, right?

ANGELA ONWUACHI-WILLIG:

It's already considered.

NANCY LEONG:

It is. I would say that it's somewhat different from the type of diversity that comes from a lifetime of being Asian, or being black, or what have you. I also think that the diversity rationale has given rise to this new ideological diversity movement. There's nothing wrong with ideological diversity. I mean, I think in practice there's people out there who are like, this panel is terrible. There's not even a white supremacist on it for perspective, right? And so there have got to be logical limits on everything.

But kind of the more serious thing that I wanted to say in response to the first part of your question, which I thought was really interesting— what else is there? I wonder if I can kind of put a gloss on the back and forth that Angela and David were having a minute ago and saying, well, not only are different kinds of diversity important, but I wonder if the diversity rationale—which is the one the Supreme Court chose in 1978—can include a remedial rationale. Right? So for example, overcoming obstacles in your life is a form of diversity, including overcoming the obstacle of being racially profiled, or being discriminated against on the basis of your race. And so maybe that can be framed as diversity, but it's actually functioning in a remedial manner.

DAVID OPPENHEIMER:

Thank you. I want to add— not Montana, but Idaho. And here's why. Because in the *Bakke* opinion, Justice Powell says that diversity means sometimes making room for a black kid from the ghetto. And sometimes it means making room for a farm boy from Idaho. Now, that farm boy from Idaho is in

there because the dean of admissions who then was subsequently the dean of Harvard College, was a farm boy from Idaho who participated in designing their affirmative action diversity program. He was talking about himself, and it went into a brief that Harvard filed that in turn ended up in Justice Powell's opinion. So there really was a farm boy from Idaho who went to Harvard because of diversity, and then believed in expanding the diversity rationale for admissions at Harvard, not Montana.

And we are out of time. So thank you for the panel. Thank you both very much.