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PANEL DISCUSSION

The discussion period opened with consideration of one of the central questions raised by Professor Scalia: the appropriateness of placing the burden of the "principle of restorative justice" not on society as a whole through taxation, but primarily on "innocent whites" adversely affected by race preference policies such as hiring quotas. Professor Merton Bernstein¹ observed: "Title VII's burdens have been permitted to fall primarily on those least able to bear them, and have been shunted aside by most of us whose burden it equitably is."

In response Professor Edwards pointed to extremely high black teenage unemployment figures, and observed that while racial classifications may be "distasteful" and may "hurt," it can not be said in view of the history of blacks in America that racial classifications are wholly contrary to the "American tradition." In his view, the use of quotas and ratios has had at least some "minor successes" in getting blacks into the mainstream of American society. They are part of a "burden to be shared" until the overall racial pattern has changed.

Professor Scalia agreed that the discrimination against white immigrant groups in this country had been minimal compared to the discrimination against blacks, but believed that the primary governmental response should be "anti-discrimination laws—not pro-discrimination laws" such as affirmative action. As evidence that old patterns can be changed without affirmative action laws, he pointed to the success of the Oriental-Americans, one of the minority groups included in the ethnic preference portion of the admission system for the University of California Medical School at Davis. He stated that Orientals had been previously discriminated against in this country as much as blacks, especially on the west coast, but "now have a higher proportion of their number in the scientific professions than any other other single ethnic group." He asserted that a substantial solution to the problem of black youth unemployment lies not in affirmative action, but in "the racially nondiscriminatory step of eliminating its principal cause: the requirement that employers pay teenagers the same minimum wage applicable to mature and experienced workers." Largely through union opposition, he noted, a special youth rate has been repeatedly rejected.

1. Walter D. Coles Professor of Law, Washington University. A.B., 1943, Oberlin College; LL.B., Columbia University.

Professor Edwards responded to a question whether job testing is practical and whether test results are reliable indicators of job qualifications. He suggested that in the employment context these questions are easier to deal with than in education. In employment there seldom have been any "valid objective criteria" for entry; rather, persons have been hired without great selectivity, trained for a time, and fired "if they fail in the opportunity." In higher education, however, more objective data on cutoff lines exist to predict likelihood of satisfactory performance and to permit selection decisions to be made "within ranges."