CIVIL RIGHTS

THE FUTURE OF RACIAL PREFERENCES: IS THE ISSUE ON THE BRINK OF RESOLUTION AT LAST?

Professor James Coleman, *Duke Law School*
Professor Gail Heriot, *University of San Diego Law School*
Mr. Michael Rosman, *General Counsel, Center for Individual Rights*
Ken Lee, *Member, Executive Committee, Civil Rights Practice Group (introduction)*
Hon. J. Michael Wiggins, *Deputy Assistant Attorney General, U.S. Department of Justice, Civil Rights (moderator)*

MR. LEE: Again, welcome to the Civil Rights Practice Group Panel: The Future of Racial Preferences. My name is Ken Lee. I am one of the members for the Executive Committee for the Civil Rights Practice Group, and I want to introduce the moderator for this panel, J. Michael Wiggins.

Mike is the Deputy Assistant Attorney General at the Department of Justice, Civil Rights Division. Prior to joining the DOJ, Mike practiced in Atlanta, Georgia with Kilpatrick Stockton.

A 1993 graduate of the University of Georgia Law School, he served as a law clerk to the Honorable J.L. Edmonson of the 11th Circuit of the United States Appeals Court.

With that, Mike.

MR. WIGGINS: Thank you. It is a distinct privilege to try to moderate such a distinguished panel this afternoon, and I will do my best. But before I begin, I would like to ask you to join me in once again thanking the staff of the Federalist Society for again, year after year after year, putting on a fine program, one in which anyone who seriously has an intellectual curiosity in the law would have to admit they have put together consistently the finest legal panels that any group puts together at any time.

Please join me in thanking them.

We have three panelists. We will begin with Michael Rosman. He is the General Counsel for the Center for Individual which and has been involved, and Michael has personally been involved with many noteworthy cases having to do with racial preferences and civil rights. Among the most notable would be *Hopwood v. Texas*, with which we are all familiar.

Michael was also involved in *the United States v. Morrison*, which was the case involving Violence Against Women Act in which the Court held that Subtitle C of that act was beyond the scope of Congress' enumerated powers.

Michael graduated from the University of Rochester *summa cum laude* in 1981, Yale Law School in 1984, and he was named the American Lawyers Public Sector 45, which is the top 45 public sector lawyers under the age of 45 in 1997, and into the National Law Journal's 100 Most Influential Lawyers last year.

Also on our panel today is Professor Gail Heriot from the University of San Diego School of Law. Professor Heriot has been a frequent critic of racial and gender preferences. She has been published in numerous law reviews, the *National Review*, the *Wall Street Journal*, and the *Weekly Standard*.

In 1996, she was the co-chairman in California for the Proposition 209 campaign during the course of which she was a frequent commentator on television and radio in California. She received her bachelor's degree from Northwestern University and her law degree from the University of Chicago.

Our other panelist today is Professor James Coleman from Duke University. Before going to Duke, Professor Coleman practiced law here in D.C. as a partner with Wilmer, Cutler & Pickering. He began his law career as a clerk in the Eastern District of Michigan, and he served some time in the public sector. In 1976, he was the Assistant General Counsel in the Legal Services Corporation. He later served two years as Chief Counsel to the House Committee on Standards of Official Conduct, and in 1980, he was Deputy General Counsel in the Department of Education. He attended Harvard University, where he received his undergrad degree, and his law degree from Columbia University.

MR. ROSMAN: Thank you. Thank you, Michael. I want to thank the Federalist Society for inviting me here to speak at the National Convention. It was almost 20 years ago, in the fall of 1981, that, roaming the halls of Yale Law School, I first saw the sign on the wall that said, "Conservative? Libertarian? Hayekian? Come join a new student group next Tuesday at noon." I remember my reaction. I looked at the sign and said, wow, what the hell is a Hayekian?

So I went and I met such luminaries as Steven Calabresi, who it turns out was the nephew of my torts professor, and a group of others that turned out to be eventually the Federalist Society. And I also learned in very short time that it was the only organization at Yale Law School that would have someone like me as a member.

In the 20 years that has transpired since, that much really hasn't changed. It is still the organization that would have someone like me as a member, and I still don't know what the hell a Hayekian is.

I have done a lot of speaking over the years for the Federalist Society chapters, but this is the first time I've been asked to speak before the National Convention. Perhaps after what I have to say, it may be another 20 years. And before I say it, let me put down the usual litigator's caveats. I am speaking today solely for myself, not anyone else at CIR, some of whom might disagree with some of what I am going to say, and I am certainly not speaking for any of my clients.

Today's topic is "The Future of Racial Preferences: Is the Issue on the Brink of Resolution at Last?" I'm afraid I don't have much good news for you. The answer is no, the issue is not on the brink of resolution. The future of racial preferences — raceconscious decision-making is a less tendentious phrase I sometimes use — looks okay. This is a fairly remarkable thing, I think, because the one thing that has taken place over the course of the past ten years or so is a remarkable decrease in the general popularity of race-conscious decisionmaking.

Earlier this year, the *Washington Post*, along with the Kaiser Group and Harvard University, conducted a poll that asked the following question:

"In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted or admitted to college, or that hiring, promotions and college admissions should be based strictly on merit and qualifications other than race or ethnicity?"

In answering that question, 94 percent of the white people said that hiring, promotions and college admissions should be based strictly on merit and qualifications other than race or ethnicity. Remarkably enough, 86 percent of the African-Americans who answered the poll gave the same answer. Eighty-eight percent of the Hispanics and 84 percent of the Asians gave precisely the same answer.

Now, naturally, the *Washington Post* being the *Washington Post* ran the article under the headline "Misperceptions Cloud Whites' View of Blacks."

And the entire article went on for three pages, virtually ignoring these results. They were mentioned towards the very end of the article. The exact numbers were not given for African-Americans, and nothing at all was said about the response of Hispanics and Asians; you had to go to the *Post's* website and look them up.

The article said that the result of the question I gave was not particularly important because, quote, "Hard preference programs are vanishing fast from the scene, either ended by judges who ruled these programs constituted reverse discrimination or abandoned by their besieged sponsors." End quote. "Rather," according to the article, "corporations and colleges are just doing outreach." So, according to the *Post*, the answer to the question posed in today's panel is an easy one: racial preferences are, quote, "vanishing fast."

Well, I probably don't have to tell this audience, but just in case, don't believe everything you read in the *Washington Post*.

They are not vanishing fast. They are with us and likely to be with us for the foreseeable future. Their sponsors may be besieged in some instances, but trust me, they are tough and they're hanging tough.

This is a classic case where you have a committed minority -- I don't mean a racial minority, but rather a democratic minority -- who were able to achieve their political ends because the majority simply does not have the same intensity of preference. Also the minority, the democratic minority, has control of certain institutions like colleges and universities. As wildly unpopular as race-conscious decisionmaking may be outside the universities and colleges, if you believe the *Washington Post* poll, they are just as popular within those institutions.

I will tell you the same thing that I've told my employers. Lawsuits alone will not end race-conscious decisionmaking by public actors. Not by a long shot. There are too few lawsuits, and in cases like the ones that CIR litigates involving higher education, those attacking the racial preferences are wildly outmatched in terms of resources. The University of Michigan must spend ten times what we do on cases up there. For one thing, they pay their lawyers. The number of amici on their side is much larger. The number of law firms representing those amici are much larger. It swamps the number of amici law firms on the side against race-conscious decisionmaking. And in an area where the law is at least somewhat unclear in some instances, that is going to make some difference. In any event, there is only so much lawsuits can do in a democratic society.

I am going to digress for just a minute and provide a definition of race-conscious decisionmaking, race preferences, whatever you want to call them. Race-conscious decisionmaking is where race or ethnicity is used as a criteria in decisionmaking or where the criteria themselves are set and motivated by a desire to reach some racially or ethnically defined end.

Let me just explain that last point. If the University of Michigan Law School institutes the 100-meter dash as an admissions criteria for law school because it thinks that certain minorities will do better at the 100-meter dash, and it wants more minorities admitted to law school, that's race-conscious decisionmaking. If the State of Texas decides to automatically admit the top 10 percent of graduating high school seniors from each school because they want to increase the proportion of minorities at the University of Texas, that's also race-conscious decisionmaking, pure and simple.

Let me be clear on this point. I've never been one to suggest that admissions officers can consider only grades and test scores. I think standardized tests can and frequently are over-emphasized, and I have no objection to their deemphasis if they are deemphasized because their value as an admissions criteria has diminished in the eyes of university

officials or admissions officers. But if they are deemphasized in order to achieve a racial result, that's pretty much race-conscious decisionmaking.

So lawsuits without the political will to enforce the results will often end up only changing the form of race-conscious decisionmaking, making them less conspicuous, and you can go back to *Bakke* where Justice Brennan, I think quite accurately, accused Justice Powell of preferring Harvard's system over the evil quota system at the University of California at Davis simply because Harvard's system achieved the same goal in a way that was less visible to the public. I think Powell's opinion, frankly, is a bit worse than that, worse than simply elevating form over substance and preferring stealth over candor. That would be bad enough. Unlike Brennan, though, Powell didn't even bother to emphasize or retain the one really valuable element of the Davis system. The special admissions system at the University of California, Davis, medical school was limited to those who were economically disadvantaged. The racial preferences at Harvard that Justice Powell espoused had no such limit, and neither do most of the systems we have today. That, of course, at least explains part of why they have become less popular.

One of the primary functions of the lawsuits, in my opinion, is public education. It is an extremely important function, or at least it was. It is as CIR and other groups have publicized the admissions system, as people have become more familiar with how they operate, that they have become as unpopular as the poll that Kaiser, Harvard and the *Washington Post* published this summer suggests.

But if the figures in the *Post* article are to be believed, there is not a great deal of public education left to be done. To ultimately eliminate race-conscious decisionmaking, what we need are political leaders who are willing to harness the dissatisfaction over preferences in this country and turn it into action. It will take political courage to do so because the political minority, as I've said before, has strong and intensive preference on this issue.

I don't want to assail their motives. God knows they like to assail mine, but I do not return the favor. I think most of them really believe -- well, actually, I must say I don't think many of them really believe the diversity stuff that Justice Powell espoused in the *Bakke* case. But they do believe that there was a great historical wrong against certain groups in our country, and that historical wrong calls for strong societal remedies towards the groups that were injured, and they believe this very strongly.

So we will need strong political leadership and political courage to resolve the question of race-conscious decision-making. If you think we have that in America today, I'm afraid you're mistaken. And if you think we're going to get it from the Bush Administration, I suggest you ask Mr. Wiggins during the Q&A what their position is on the Michigan case or race-conscious decisionmaking in general.

It's not just them, though; it's us, too, if we readily accept racial preferences as the price we have to pay for tax cuts or vouchers or whatever other political goals we might ask of our political leaders. And if you quietly root for Mountain States or Pacific Legal Foundation or CIR in their battle against racial preferences or race-conscious decisionmaking, but make sure you don't get associated with it too closely because you might not get tenure, well, that's part of the problem, too.

The issue of racial preferences, race-conscious decisionmaking is not on the brink of resolution and it will not be if Mountain States and PLF and CIR and the Fifth Circuit are out there on their own, and it is not going to happen any more than the Supreme Court could on its own end segregation in the South. The forums will change, the lawsuits will pick off some bad systems here and there, and the law can and will move slowly towards the ideal of racial neutrality, but resolution will require political will, and as of yet, I don't see it.

Thank you very much.

MR. WIGGINS: Professor Coleman.

PROFESSOR COLEMAN: I also want to thank the Federalist Society for inviting me here to give me an opportunity to participate in your discussion of this important issue.

We were told that we were going to have about ten minutes, ten to twelve minutes for our remarks, and so, in light of that, I am also going to cut out the long discussion that I had planned about my involvement with the Federalist Society over the last 20 years and get right to the discussion. Although, I probably also should just sit down in light of Mike's remarks about the future of race-conscious decisionmaking. It looks like my side is ahead and I don't want to do anything to hurt that. But I've got the time, so I'm going to go on anyway.

I want to focus on racial and ethnic diversity in public higher education. There sometimes is a tendency to try to lump together all race-conscious public policies in a single discussion, and I think that is misguided.

The assumption of those who oppose race-conscious admissions to institutions of higher education is that the state ought to be indifferent to whom it admits to public schools, beyond admitting the most highly qualified. That assumption, however, ignores why the state supports public education in the first place.

A race-conscious admission policy must be judged against the purpose of public education. The threshold question, then, is what is the purpose of public education? And beyond that, is race-consciousness necessary to

achieve that purpose?

There is an important distinction to be made between affirmative action efforts involving public education and those involving employment and public works. The latter efforts are rooted in anti-discrimination concerns. As a consequence, past and present discrimination is a proper concern in examining the constitutionality of such remedial programs.

Anti-discrimination, however, is not the principal motivation of race-conscious higher education admission policies. Rather, the justification for such policies can be characterized as diffusion of knowledge so as to spread, in the words of the Massachusetts Constitution of 1780, "the opportunities and advantages of education in the various parts of the country and among the different orders of the people."

The diffusion of knowledge is the democratic and compelling purpose of public education at all levels, and by definition, in a multiracial democracy, it requires race consciousness or may require race consciousness to achieve.

Every state has a system of public education, and many of them explicitly state in their constitutions or in their statutes that the purpose of the system is the diffusion of knowledge. The Virginia Constitution, for example, declares that "government rests, as does all progress, upon the broadest possible diffusion of knowledge and that the Commonwealth should avail itself of those talents which nature has sewn so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."

The link between public education and American democracy was forged at the birth of the nation. As envisioned by Thomas Jefferson and others in the 18th Century, the goal of public education is inclusion, not exclusivity or concentration of learning.

Thus, Benjamin Rush of Pennsylvania observed that, "Where learning is confined to a few people, we always find monarchy, aristocracy and slavery. To achieve the purpose of public education in a democratic society, a primary function of the general plan of government must be removal of obstacles to the broad diffusion of knowledge."

In his time, Jefferson believed that the principal such obstacle was poverty. Consistent with that, he proposed a public education system for Virginia that had as its primary goal education of the poor at all levels. Jefferson argued that by eliminating poverty as an obstacle to the diffusion of knowledge, Virginia could claim those talents which nature has sewn as liberally among the poor as the rich, but which perish without use if not sought for and cultivated.

The broad diffusion of knowledge also serves to assimilate diverse groups of people into a functioning democracy. This essentially is the diversity rationale of affirmative action in higher education, as reflected in Justice Powell's opinion in *Bakke*.

In discussing his proposal for a national university, for example, George Washington argued that "the more homogenous our citizens can be made in these particulars, the greater will be our prospect of permanent union."

In this sense, diffusion of knowledge among citizens seeks to overcome those differences among them, such as religion, poverty, race and national origin, that may threaten democratic self-government.

The revolutionary leaders who believed public education was intrinsically linked to democratic government had in mind a society that was racially homogenous. As one scholar said, "it was a heady vision of the new world in which rich and poor, German and French, Protestant and Catholic, but not black and red, would take part in the great experiment." As a result, the founders had no occasion to consider the diffusion of knowledge in a multiracial democracy.

The exclusion of African-Americans from the heady vision of the new world was not inadvertent, but by design, and continued long after the former slaves were freed and became citizens.

One of the principal characteristics of American slavery was a systematic effort to keep slaves in a state of ignorance. As one defender of the system who was quoted as saying, "if you teach the black man how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable and of no value to his master. As to himself, it would do him no good but a great deal of harm. It would make him discontented and unhappy."

Following emancipation of the slaves, states continued the exclusion of African-Americans from its institutions of higher education in order to disenfranchise them and limit their ability to participate in self-government. This was done through policies that directly excluded them by race and policies having that effect.

It has been only in the last 25 years or so that state governments, through race-conscious measures, have made any systematic effort to educate African-Americans to the full extent of their talent and under the same circumstances that white students are educated. That is what diffusion of knowledge seeks to accomplish.

Diffusion of knowledge is not a remedial device, however; rather, it is the ultimate goal of public education. A concentration of education among non-minorities undermines that goal whether or not the concentration results from discrimination. It also subverts democracy, which was the very purpose of the discriminatory policies that were challenged in cases such as *Sweat v. Painter*.

By unlinking public education from its democratic purpose, the current debate about race-conscious admissions wrongly assumes that a public school's admission policy is a matter of individual rights. It is not. A race-blind policy would elevate individual interest over the fundamentally more important public interest in the diffusion of knowledge. In effect, the contention is that a multiracial democracy can survive with an education system that effectively concentrates

public education narrowly among non-minorities. Such a race-blind mission policy directly conflicts with core purpose of public education. And in a society that increasingly is composed of minority groups, such a policy in the long run undermines democracy itself.

To conclude, as Benjamin Rush said in 1786, "where learning is confined to a few people, we always find monarchy, aristocracy and slavery."

Thank you.

PROFESSOR HERIOT: When I was asked to speak on this panel, I was told that the topic was going to be "The future of racial preferences: Is the issue on the brink of resolution at last?" And I thought, do you really need me to get on the red eye and come out from California to answer that? The answer is no; I will send a postcard.

But I think as a Californian and in particular as a Californian who worked on Proposition 209 and is seeing what is happening out there on the West Coast, maybe I can make a valuable contribution to this panel.

Of course, two things can happen if the Michigan cases reach the Supreme Court or if, in fact, some other racial preference case reaches the Supreme Court in the next couple of years. The Court could determine that the University of Michigan's or whoever's practices are fully constitutional, in which case the spotlight is likely to go back to popular initiatives like Prop. 209 and Washington State's I-200. At the other extreme, of course, the Supreme Court could write an opinion that declares the Constitution requires no less than that which Californians and Washingtonians have already voluntarily adopted as to the initiative process. If that happens, then racial preference supporters will likely employ some of the same strategies that are being employed, legally or illegally depending upon your point of view, to soften the impact of Prop. 209 and I-200.

It is post-Proposition 209 California that I can tell you about. I do not know a great deal about what is happening in Washington State. But for every issue that Prop. 209 resolved, two more, perhaps smaller, but perhaps not, issues have sprung up in its place.

When Prop. 209 first went into effect in California during the Wilson Administration, there appeared to be a real effort on the part of the University of California to comply. Sure, there was some cheating, and maybe if we have time, you can ask me a question about some of the more interesting cheating that went on initially. There are some pretty funny cases.

But since then, California has become essentially a one-party state. All important offices are now being held by Democrats, the Democratic Party holds a lopsided majority in both houses of the California legislature, and the going for Prop. 209 has gotten particularly rough. Some politicians there have been anything but subtle about their insistence that the University of California do something in order to bring the number of blacks and Hispanics up to the pre-Proposition 209 levels.

As you probably know, if there is anything that strikes fear in the hearts of academic administrators, it is threats to cut the university budget. Since most academic administrators were not Prop. 209 supporters in the first place, it is not surprising that they would buckle to such pressure pretty quickly.

Two kinds of things are going right now. At some UC institutions, the pressure from Sacramento has meant ignoring 209 altogether. UC-San Diego recently started a multi-million dollar Millennium scholarship program. In a nutshell, minority students were given free tuition, guaranteed housing and course selection. These are minority students in the sense of underrepresented for the UC, and that would be African-Americans, Hispanics and American Indians. For White and Asian students with identical or better credentials, these scholarships were unavailable.

If a donor had come to the UC and said, I want to give scholarships to black and Hispanic students and not to White students, it would have presented some interesting legal questions that we could talk about here as lawyers. Can the UC accept such a gift? To what degree can the UC participate in the administration of such a scholarship? But that's not what happened. This program was financed mainly out of tax money, and with regard to the money that was raised from the outside, the program was proposed to the donors, the donors didn't come to UC and say, this is what we want to do. So it was a legal no-brainer.

That's why UC-San Diego did everything it could to keep the program below the radar screen. Unlike other scholarship programs, there was nothing on the University website about it, there were no receptions to honor the donors, recipients were not told that their scholarships were being awarded on the basis of race, and when pro-Proposition 209 faculty members inquired about rumors of the program, they were told that no such program existed.

When it was recently outed, the administration's response was to admit that yes, this is illegal, this is a violation of the California constitution, but to argue that they are now legally required to continue the program at least until the people who were awarded the initial scholarships have made it through their bachelor's degree.

But I don't want to spend time talking about -- or maybe I should just say whining about — the fact that, there are going to be people who were against Prop. 209 who are going to try to get around it in ways that are clearly illegal.

Sometimes they are going to be difficult to prove, but there are lawsuits to deal with that kind of problem.

The more interesting cases are those that do not involve a return to facial preferences based on race or

ethnicity, but rather take an indirect approach. These involve subtler questions of law and policy. There are two main such programs at the University of California today.

First, there is the already implemented 4 percent solution, as they call it, in which the UC commits to admit anyone who graduates in the top 4 percent of a California high school regardless of SAT score or other factors.

Second is UC President Richard Atkinson's proposal to phase out the SAT ultimately in favor of what he calls a more holistic admissions policy; and on Thursday, UC Regents voted 15 to 4 to authorize UC campuses to fashion such a policy if they so choose.

These plans raise real issues. Are they legal? Can opponents of the plans prevail in litigation? Should they try? Sometimes discretion really is the better part of valor. What effect will they have on the University of California? What effect will they have on education generally or on racial harmony generally?

Even if I could answer all of those questions, I suspect that Mr. Wiggins here would not allow me to because I don't have enough time allocated to me. So let me just go over some of this lightly.

What these programs have in common is a very significant de-emphasis of the SAT. What's driving them, however, is not a belief that the SAT is not a useful tool for determining which students will do well in college and which will not. No one denies that admitting a student regardless of his or her SATs will result, on average, in a class that performs less well while at the University of California.

Instead, what's driving this is a desire to admit more black, more Hispanic, and more American Indian students — to try to get the numbers a little closer to what they were prior to the passage of 209. Therein, of course, lies the problem. The evidence is overwhelming that the purpose of both of these programs is to produce an agreeable mix of students from the standpoint of race and ethnicity, and that they would not have been adopted but for that result.

You can see it also in other states that have been affected by the racial preference issue. In Florida, for example, when officials adopted a program somewhat similar to California's 4 percent solution, they considered 5 percent, 10 percent, 15 percent, before they finally settled on the 20 percent formula. They freely admit that for each variation, they ran the numbers through a computer model to see just how many minority students it would generate, and only the 20 percent figure gave them the figures that they felt necessary politically to go forward. California officials have been somewhat better advised by their attorneys on what they ought not to say and what they ought not say on this matter, but they've been only slightly less up front on this issue.

If it's wrong or illegal to grant preferential treatment to minorities directly, then it's also wrong to do so by indirection. Otherwise, all anti-discrimination laws from Prop. 209 to Title VII to the Equal Protection Clause of the United States Constitution would be essentially paper tigers, easily avoidable by hiding what is being done.

Sometimes it is easier to see that when the racial roles are reversed. For example, suppose the University of California had in some parallel universe been discriminating against African-American and Hispanic students by giving a 300-point preference on the SAT to whites and Asians. That is just the opposite of what they were actually doing prior to Prop. 209 where that 300 preference, of course, was for underrepresented minorities. And suppose, for example, the Federal authorities had come in and said, no, no, no, you can't do this, and then UC administrators had thought to themselves, well, we really have more African-American and more Hispanic students then we would like now, let's increase the weight that we give to the SAT beyond the level that it predicts student performance so that we can get more Asian and more white students. Few would doubt that that would amount to purposeful discrimination.

As many, many, many court decisions have recognized, intent is crucial when it comes to discrimination, whether one is making retail decisions about individual candidates or making wholesale decisions about criteria for selecting candidates. We can argue about the exact nature of the evidentiary standard that ought to be applied here, and by all means we should argue about it, but it seems very difficult to argue that changes in admissions policies that are mere pretext for racial discrimination can not be attacked in the law.

A good analogy would be to the political redistricting cases in which courts have been willing to intervene when they find that racial considerations were the predominant factor in selecting the political boundaries.

It is worth pointing out that UC administrators did not come up with these ideas all on their own. Shortly after Prop. 209 passed, a lawsuit had been filed against the UC demanding that the SAT be scaled back radically on the grounds that it was a civil rights violation.

The Clinton Administration, in the person of Assistant Secretary of Education for Civil Rights Norma Cantu, had attempted to strong-arm the UC, as well as other colleges and universities, into deemphasizing or eliminating the SAT on the grounds that, again, on average, African-American, Hispanic and American Indian students don't do as well on it as Whites and Asians. (Of course I am talking on average. This is subject to lots and lots of individual variation.)

The new plan for a holistic approach to college admissions has even deeper roots. Eighty years ago, Ivy League universities complained about being overrun with Jewish students. The problem, if one can call it that, was that Jewish students tended to do quite well on the college boards. It was difficult to turn them away without displaying obvious bigotry. A more subtle strategy had to be developed, and it was.

Harvard, Yale, other elite universities, announced that they were not interested in test-taking grinds, they wanted well-rounded students with good character instead. Some administrators were not the least bit shy about admitting that this change was the result of what they called the "Hebrew problem." To prevent a dangerous increase in the proportion of Jews, Harvard president A. Lawrence Lowell wrote that, "admissions decisions should be based on a personal estimate of the character on the part of the admissions authorities."

The jargon was a little different then. They used the word "well-rounded;" now they like new-age words now like "holistic," but the effect is basically the same. Somehow, the admissions officers in the 1930s found that WASPish preppies tended to be more well-rounded. The number of Jewish students at Harvard dropped dramatically starting in the late '20s and continuing into the early '30s.

Now history seems poised to repeat itself. This time, the complaint is there are too many Asian and white students, including white immigrant students, at the UC As before, nebulous standards will be arbitrarily administered and ultimately work to lower standards.

There is a real irony here. Self-appointed civil rights experts attempt to portray the SAT as the invention of malevolent forces out to harm minorities. Using neo-Marxist jargon, one such expert has described the SAT as a "highly effective means of social control serving the interests of the Nation's elite," and as a "tool for elites to perpetuate their class privilege with rules of their own making."

The truth is a whole lot closer to the opposite. The SAT was developed as a reaction against the WASPish elite and their corrupt admissions practices in the late '30s. Unlike earlier standardized tests, which tested for mastery of Latin, ancient Greek, and other subjects taught at exclusive boarding schools, the SAT was considered a breath of fresh air, emphasizing basic math and language skills. Its developers aimed to make higher education available to talented young people regardless of their background, and they were successful in part. More than one Idaho farm girl and more than one Postal worker's son from Newark has beaten out a scion of wealth and privilege for a seat at Harvard, Yale or some other elite university precisely because of the SAT.

Some have asserted that the SAT is full of sound and fury, but in the end, it signifies nothing about the likelihood of success in college. This, I'm afraid, is wishful thinking. Indeed, the arguments that are used to support it would make a statistician cringe.

Research has repeatedly found not an overwhelming correlation -- the SAT is not perfect -- but a moderate correlation that is valuable. It is not perfect; nothing is, certainly not high school grades which, after all, are just the subjective judgments of a group of high school teachers. But neither is the holistic approach that Atkinson is advocating.

The bottom line is that the SAT, when used in conjunction with other factors, provides useful information. It is a common yardstick, unlike the other things that are taken into consideration, with which students from very, very different high schools and backgrounds can be compared. Atkinson has proposed developing a California test that would be used just for the University of California. The problem with that is you tell me what result you want, and I can design you a test that will give it to you. I am afraid that's what Atkinson is thinking, too.

So far, there has been a real reticence on the part of Prop. 209 supporters and on others around the country to weigh in on this issue, in part because it appears to be a train coming downgrade, and getting in the way of such a train can be hazardous to your health. But I think it's a mistake.

This is the future of racial preferences. Perhaps the general lowering of academic standards that comes with the percent solutions and comes with the de-emphasis of standardized tests will turn out to be the price that was paid for *Hopwood*, for Prop. 209, for I-200, and for more cases in the future, but perhaps it shouldn't be.

Thank you.

MR. WIGGINS: Let me sum up while you are walking to the microphone. We have two panelists who have told us conclusively that racial preferences are not on the brink of resolution, and Professor Coleman seems glad about that and not wishing to rock the boat.

PROFESSOR COLEMAN: So we all agree.

MR. WIGGINS: I take it you concur with their judgment.

Let's go to the first question.

AUDIENCE PARTICIPANT: This is probably directed mostly to Professor Coleman. I am Joe McCue from Pittsburgh.

Assuming that there is an issue in terms of diffusion of access to higher education, and I think that's debateable, my question is why is race the right factor to take into account to address that problem? It sounded to me like what you were talking about was economic factors, not somebody's racial background.

As a hypothetical, why would a black woman from Scarsdale, upper middle class, receive a preference in admission to a college over the upper middle class white guy from White Plains? Why is race the right factor rather than

economic status?

PROFESSOR COLEMAN: Well, race is the right factor because diversity ought to reflect the racial diversity of our society.

Race is the correct factor because we are a racially diverse society, and the diffusion of knowledge among the different insular groups that make up the society is what the original idea was.

In Pennsylvania, for example, Benjamin Rush talked about the Germans and the French and the other people of that state who previously were loyal to different European governments. Today, many of the divisive distinctions among us are based on race. That is, we are different racially, and the purpose of diffusion of knowledge is to make sure that those who are educated by the state include people from the different racial groups that make up the society. Whether you take into consideration the race of a person from Scarsdale as opposed to someone from Iowa is a matter of admissions policy for the university, how they make up their class. I don't think that's a constitutional issue. I'm going to be the red meat here, I see.

AUDIENCE PARTICIPANT: Professor Coleman, I was going to say they have these sort of panels every couple of years and the pro-race preference person always gets the questions.

PROFESSOR COLEMAN: That's okay.

AUDIENCE PARTICIPANT: I would like to break that trend, and I will actually throw this out to the whole audience. By the way, my name is Alan Forst. I am from Florida.

You focused a lot in talking of diversity in terms of black and white, but a lot of the preferential treatment programs are not just black and white.

PROFESSOR COLEMAN: Right.

AUDIENCE PARTICIPANT: In fact, there are very few that are.

PROFESSOR COLEMAN: Right.

AUDIENCE PARTICIPANT: And one of the things that has really changed in the last 30, 40 years is the intermarriage and the determination of who's black, who's white, who's Hispanic? For example, I am married to a Hispanic woman and my kids look more like their mother. But she herself is a descendant of Spanish and French, so she's very Caucasian-looking as well.

Our household is very middle-class, White-American, to the extent there is such a thing as White America. How is diversity furthered by giving preferences to my kids? If this was my second marriage, and I was raising my children from the first marriage, they would be exactly the same as the other kids, and yet they wouldn't be entitled to such preference. How is diversity furthered in that instance?

A follow-up to that, when you start breaking things up into slices, how deep do you go? Do you have descendants from Spain given a preference rather than descendants from Brazil? What happens when the minority starts doing pretty well, such as Asian Americans in various things and African-Americans in other things? Where do you stop? How much do you slice the pie?

Again, getting back to the first part of the question, how is diversity furthered by extending it when you have so much intermarriage?

PROFESSOR COLEMAN: Well, certainly there is some intermarriage in this country, and the effect that will have in 20 years, I don't know. But I think we would be fooling ourselves if we fail to recognize that we are racially different, that we are a society of different racial groups and each state has a different makeup. Those racial groups that the University of Washington is concerned about in terms of making sure that they are part of education that the state provides may be different than Georgia or Alabama where it may be simply black and white, or Texas, which would include Hispanics, or California, which includes just about everybody.

AUDIENCE PARTICIPANT: Are we racially different? Are my kids racially different?

PROFESSOR COLEMAN: Well, I don't mean racially different in the sense that -- you and I probably have more in common than I may with some other people in the room who are also African-American. That is not what we are talking about. What we are talking about is that in a multiracial society, that in order for the democracy to work, we want to make sure that all of the people are included in the self-government. We have decided that public education is an important function of a democratic society for exactly that reason.

It would make no sense, then, to have a public education system that leaves out some group, some insular group that's identifiable, and not educate that group. I think that would undermine the democratic nature of our society.

I think the reason my two co-panelists are correct in their judgment about what will happen politically is because that is consistent with our democratic instinct, that we should be inclusive, not exclusive.

MR. WIGGINS: Another panelist?

PROFESSOR HERIOT: Well, I can say something here. One statistic I have is on African-American marriages. One in seven is now interracial among African-American marriages. Also just a personal note. Doing some genealogy on myself over the summer, playing around on the Internet, I found some evidence that I am Hispanic.

MR. WIGGINS: Eric.

AUDIENCE PARTICIPANT: Well, Professor Heriot, (speaking in Spanish). Actually, I was going to thank -- before you said that, I was going to thank Professor Heriot for finding the statistic that according to the University of California, Hispanic students should be given 300 extra points on the SAT. I am very excited to call my mother shortly after this and tell her I actually got 1800 on that.

I will ask a question for the panel, which is that despite the general or generic title of the panel, you seem to have focused on education and public education specifically. But I've gone to these dinners where the law firm pays $10,000 to sit at a table and go to a function where they give out awards for minority hiring in general counsel's offices in major corporations. I think that the things that Mr. Rosman said initially, which is that there is sort of a very focused and vocal democratic minority that wants to impose racial preferences on a system, is true of the private sector as well, but you don't have the same constitutional issues.

I wondered what your thoughts are on the racial preferences practices of private industry, which are in many cases more so than in public education, overt.

PANELIST: As a legal matter, there is not a tremendous amount of difference involved. I would say the law provides for some greater latitude for private parties to engage in racial preferences than the strict scrutiny standard for Federal and state actors, but not a tremendous amount.

We have imposed the constitutional standards on virtually every actor in America, at least insofar as this particular constitutional norm is concerned.

AUDIENCE PARTICIPANT: Thanks.

MR. WIGGINS: Anyone else?

PROFESSOR COLEMAN: I think there is a difference between race-conscious decisions in education and those in private employment and those that involve public works programs.

With respect to private employment decisions, I think that private companies are making the same judgment that was made about education in the 18th Century, which is that the quality of their services are improved or may be improved if their work force is diverse.

Not every company has made that judgment. I don't think, for example, that our profession has made that judgment, notwithstanding the $10,000-a-table luncheons that you described. I mean, more of them are paying $10,000 a table here than at some of those luncheons.

PROFESSOR HERIOT: I have one little comment, though, and that is I wonder how much of the gender and racial preference practices in private industry would disappear if there were not pressure from the Federal Government to ensure racial and gender diversity. If they think there is only legal danger from one direction, then the obvious thing for them to do is to protect themselves from that direction.

AUDIENCE PARTICIPANT: David Hill from Chicago.

I have two questions. To those on the panel who don't think racial preferences are going anywhere soon: Why do you think the Bush campaign paid such a heavy price insisting that they were strict constructionists when they were always being asked about the question of affirmative action, if you feel that they've backed down from that to the point that affirmative action is here to stay, at least with the Bush Administration?

And with respect to Professor Coleman, while it's a very noble thing to want to have diffusion of knowledge and diversity in the classroom, my concern isn't just with the admissions; it's with what happens after the admissions.

I just got out of the University of Illinois and I can tell you that from orientation where they have a special minority-only orientation through your career at U of I, which can apparently take up to seven years for an undergrad degree, they have special majors set aside to get the "special students," quote/unquote, through the school; all the way up to graduation where they have special minority-only dinners. They have special robes for the minority students to set them apart even at graduation from their class. It seems to me that you're defeating the whole point of affirmative action, which is supposed to increase the exchange of ideas and the quality of education if, for the entire time that minority students are at the institutions of higher education, they are being separated, though some would argue to protect them from the rest of us.

PROFESSOR COLEMAN: Well, I actually agree with your last point, and I oppose in-school segregation voluntarily or otherwise. I think the whole point of higher education is for students to learn together and to get to know each other and learn from each other. I think that's defeated when groups of students segregate themselves. So I am opposed to that and, it's fairly well known at Duke, that I am. So I don't disagree with you.

PANELIST: Well, I will go to the first question, and I am not sure I understood it. Are you suggesting that the Bush campaign during the campaign was a forceful advocate of race neutrality? I must have missed something.

AUDIENCE PARTICIPANT: Not by any means.

PANELIST: I must have missed something.

AUDIENCE PARTICIPANT: No, not by any means. But it seems to me that at just about every speaking event where there were public questions, there was always an African-American in the audience who got up to the microphone and said, are you going to take away my affirmative action? And George Bush's answer always was, well, I am a strict constructionist

PANELIST: Well, there's a clear response.

AUDIENCE PARTICIPANT: Well, for a politician, it was --

PANELIST: It was clear.

AUDIENCE PARTICIPANT: Well, as clear as I think you're ever going to get from a politician.

PANELIST: Well, there you have it. I don't think he's paying a price because I don't think he made his position as clear as you think. Listen, you know, we all hear what we want to hear and, you know, I could have sworn he said something about Scalia and Thomas being his favorite Justices during the course of the campaign, but I'm not sure I should believe that, either. I don't know how else to answer your question other than to say I don't think he has really moved much.

AUDIENCE PARTICIPANT: My name is Jeff Grabill, I'm from Sacramento, and I wanted to follow up on Mr. Rosman's invitation to ask Mr. Wiggins the position of the U.S. Government on his case.

MR. WIGGINS: I have no comment.

PANELIST: He's a strict constructionist.

MR. WIGGINS: I will say this, however. Justice Scalia and Justice Thomas are certainly my favorite Justices.

AUDIENCE PARTICIPANT: Hi. Yamm Burlach.

I had a quick question. You talked about doing away with the SATs and playing other games to get racial preferences or to do something to admit particular groups. To what extent does that affect academic standing, and assuming that it does affect academic standing, is the problem at least limited from going too extreme or to some extent a self-correcting problem?

PROFESSOR HERIOT: What do you mean by academic standing?

AUDIENCE PARTICIPANT: Well, if you look at U.S. News & World Report, they rank all the schools --

PROFESSOR HERIOT: So university rankings.

AUDIENCE PARTICIPANT: Exactly. So that if a school sees that they're going down in the rankings because they are doing these things, I would assume that most professors -- you know, more importantly than anything else is their intellectual position in colleges.

PROFESSOR HERIOT: I think there are some odd politics going on here. In the old days of affirmative action, universities thought that they essentially had a two-track system. They were going to get the best students in each racial or ethnic group. But the new form of racial preferences gives you less talented students all the way across the board. Of course, the very best students are going to get in anyway because they will have both a high GPA and high SATs, but quite a few talented students of all races will be excluded simply because they attended a very competitive high school were they did not rank at the top of the class and their SAT scores were not considered. There are a lot of people who were quite willing to sit still for the old two-track system who are getting up on their hind legs now to fight this de-emphasis of the SAT. We're starting to hear from faculty members in the Physics Department and the Chemistry Department and such.

It may well turn out that there will be more resistance to the regents' decision when it gets down to the individual schools deciding what they're going to do. They may not take it all the way. I think a lot of people in the Prop. 209 campaign thought, "Well, there are a lot of people in the public who are very strongly for Prop. 209 who don't seem to care about the SAT issue," the sort of Joe Six-pack who thinks, fine, character ought to be taken into consideration. And so they think that they're not as strong on this issue. But instead they're picking up support from the physics professors, from the chemistry professors. And so who knows what will happen.

Another point to make, though, is that when it comes to academic rankings of that sort, they are always 20 years behind. There is a really strong time lag in terms of the prestige of any university. U.S. News will try to come up with some objective ranking that seems to be more up to date, but it nevertheless weighs people's subjective valuations of that school very strongly, so it probably won't have strong immediate effects. But it's an interesting issue and we will have to see how it shakes down in the future.

MR. WIGGINS: Thank you.

PANELIST: Let me just comment on that last point because it's not exactly true. I mean, it's certainly true that it will take decades to change the reputation of a school like Yale or Harvard or Stanford. But in terms of the U.S. News & World Report, those things can change on an annual basis and schools rise and fall based on changes in the median LSAT score, which is a very big factor.

The fact that schools aren't moving in and out of, let's say, the bottom ten -- that is, five through ten and then below that -- the fact that there's not a lot of movement in there is an indication that these policies are not having a significant impact on those kinds of factors that influence rankings.

PROFESSOR HERIOT: Actually, one more point, and that is that there will be political pressure on U.S. News to deemphasize the SAT as well.

PANELIST: But they haven't done that. That's probably true, but that's irrelevant.

AUDIENCE PARTICIPANT: Hi. I'm Daniel Woodrin.

I have two questions for the panel.

My first question is, much of the discussion and focus today has been on preferences in higher education. Most of the states have a guarantee of a free public education for all K through 12 students, but they don't have that kind of a guarantee when you get into higher education.

Is higher education really where the focus should be on trying to disperse the knowledge base and increase the learning, or should the focus be on K through 12?

As a follow-up to that, isn't it true whenever we're talking about being inclusive, that if we're talking a zero sum gain, which is the only time it becomes an issue if you use race as a preference, you're talking about being not inclusive, but exclusive, because every time you include, you're excluding.

PROFESSOR COLEMAN: Well, yes, that's correct, and that's an issue because it's a zero sum gain. The question is how you have a diverse student body. And the way you have a diverse student body is to take a look at the race of the people who are being admitted.

You know, we're not talking here about qualification. For example, some of our top students coming in, in terms of LSAT scores and GPAs, don't finish that way. There are other factors that influence how well a student does. The LSAT certainly is a predictor of first-year grades, at least, but it doesn't predict how well a student will do throughout three

years of law school. Nor does it indicate how well a person will do once he or she leaves law school. That is what we ought to be concerned about. Whether we are educating people who are going to go out and make a contribution to our society. That's certainly what we try to do at Duke. Whether they're doing that in San Diego or some other place, I don't know. I can't speak for them.

AUDIENCE PARTICIPANT: If I could follow-up briefly on that. In Florida, there has been a debate going on about raising the bar passage rate. Most of the debate has not been over whether the bar passage rate should be raised, but over the impact it is going to have. It is going to use some language from this area: a disparate impact on minority students as far as first-time passage, significantly disparate impact.

At what point, if we are giving a preference in undergrad and if we're giving a preference in law school, at what point do you stop giving a preference or do you stop considering that as a factor?

PROFESSOR COLEMAN: I'm actually -- I'm bothered a little bit by our use of "preference" because I think we use it in a pejorative sense and we use it too broadly.

There are also white students who are admitted to law school and to college, for example at the University of Texas, who had lower grades and lower LSAT scores than the plaintiffs did in those cases, and they were admitted to serve some other goal that the University of Texas had, including keeping their alumni happy. So it's much more complicated. The assumption is that for all white students, the first 100, top 100, are the only ones admitted, and then for everybody else, it's pick and choose taking race into consideration. In fact, there is a lot of picking and choosing that goes on among all students, including students who are not members of any minority group.

Now, what is the effect of raising the bar passage? I don't know. And to the extent that your point is that somehow raising the standard of the bar passage rate will improve the quality of the practice of law, if that's true, then we ought to do it and then deal with the consequences. I'm not sure, though, that those two things follow, but that's a different issue.

PROFESSOR HERIOT: I wanted to make one comment there, and that is I agree with Professor Coleman about legacy preferences. A state university has absolutely no business giving preferences to students because their parents happen to have gone to that institution. I find that an outrageous practice, and I would like to point out that Prop. 209 supporters tried to get rid of legacy preferences. Ward Connelly did as a regent for the University of California. And you would be surprised at where the opposition to removing legacy preferences comes from -- it comes from the same people that didn't want to remove racial preferences.

AUDIENCE PARTICIPANT: My name is Bill Worthen. I am not quite sure how to introduce myself, but I work for you, Michael, in the Civil Rights Division.

MR. WIGGINS: It's good to meet you.

AUDIENCE PARTICIPANT: My pleasure. I wasn't quite figuring on this method of doing it. I was actually going to shake your hand first.

PROFESSOR COLEMAN: You two should get together and decide what your policy is.

AUDIENCE PARTICIPANT: And therefore we will say this is not the Department of Justice's position.

I want to address this to Mr. Coleman. With all due respect, it really doesn't matter, anything that you said. Why? It's very important to consider you have something called the Fourteenth Amendment. The Fourteenth Amendment makes the varied considerations on public education or employment or any of these considerations -- eliminates the prospect for using race as the determining division. That's why it's there. It's not there for all the other purposes that you're suggesting, and you've all kind of ignored it or pushed it away.

It doesn't matter that you feel better about it or that we have had 1,000 flowers bloom for the last 200 years and so great many problems in having people accept blacks as human beings and individuals. We passws this constitutional amendment to protect ourselves from considering all these other factors.

Gail, in response to your point, it may be incredibly stupid to have preferences for other things, like whether you gave money or not, or it may be incredibly wise, but what it incredibly is not is unconstitutional. That's the point I'm suggesting that we want to consider, and you, of course, get to respond to that.

PROFESSOR COLEMAN: Well, implicit in my remarks was that I think diffusion of knowledge is a compelling government interest, and if I am right about that, then it's consistent with the Fourteenth Amendment.

SPEAKER: Sorry. Can I just briefly comment on the last point? Which is I hope -- in my view, what Professor Coleman has been speaking on today is somewhat different than what Justice Powell spoke about in the *Bakke* decision.

I don't want to go into the details of that, but you should all, I hope, be thinking about what is a different rationale than the one that has been generally used to that decision.

AUDIENCE PARTICIPANT: Tony Conte from Boston. I would like to direct this question to Professor Heriot.

I appreciate Professor Coleman's statement of the goals of public education to spread knowledge and I certainly agree with that. But I've read, and I wonder if Professor Heriot could comment on the fact that post-209, the percentage of minorities admitted to the more elite schools in the California system declined, but the total number of minority students, when you count all of the different elements of the vast California higher education system, did not decline.

In fact, what has happened in the elite schools, while the admissions levels initially may have been higher pre-209, the graduation rates, because of the multiple failings of the lower public education system disproportionately affecting minorities, were that minority students were much less likely to graduate from those elite schools, whereas they were more likely to graduate from the less elite schools in the California public education system.

So Professor Coleman's goal of the diffusion of knowledge would, in fact, be more likely to be carried to fruition by having students attend schools where their prior preparation better prepared them for actual graduation rather than just admission.

PROFESSOR HERIOT: What a great question.

I just happen to have with me some numbers on this. When Prop. 209 went into effect at U.C. Berkeley, the percentage of the (for Blacks, American Indians and Hispanics) went from 23.1 percent down to 10.4 percent.

What you often didn't hear is that the number of black and Hispanic students at some of the other UC campuses actually went up, and sometimes quite dramatically, at UC Riverside and UC Santa Cruz in particular. At Riverside, black and Latino student admissions shot up by 42 percent and 31 percent. Santa Cruz' figures were somewhat less dazzling but nevertheless quite noteable. At schools like UC San Diego, the number of black students went down, but the number of Latino students went up.

Then something quite remarkable happened. I've got the numbers for UC- San Diego. Prior to Prop. 209, UC San Diego had exactly one African-American student doing honors work out of a total class of 3,268 while 20 percent of white students and around that for Asian students would have a GPA of 3.5 or better. It just was not true for the black students. After Prop. 209 went into effect, the performance of black students at UC-San Diego went up dramatically. No longer were black honor students a rarity there; instead, a full 20 percent of the black freshmen at UC-San Diego in that first year could boast a GPA of 3.5 or better, and that's higher than the rate for Asians, which was 16 percent that year (that's in part an artifact of the fact that Asians were more likely to major in subjects that give low grades, like physics) and pretty much the same as the rate for whites that year, which was 22 percent.

At the other end of the spectrum, which I think is actually more important, the bottom of the class also changed dramatically. Prior to Prop. 209, 15 percent of black students, 17 percent of American Indian students were in academic jeopardy while only 4 percent of white students were. Of those, of course, you don't know which students are in UC-San Diego on account of a preference and which ones were gotten in even without a preference. But either way, the numbers of students in academic jeopardy who were from underrepresented minorities was quite high. That collapsed after 209 went into effect. The failure rates just came right together. Black and American Indian rates stood at 6 percent after that. So it was really quite a success story, and it's something that makes me very happy to be a Californian.

I don't know if it's going to last. In fact, I don't think it will. But at least the numbers came in there for a while suggesting that students were learning better. It's not surprising. Some people out-perform their entering statistics; some people, of course, under-perform their entering statistics; but most students are going to perform in the range their entering statistics suggest, and anybody who thinks otherwise is engaging in wishful thinking.

What happens is minority students tend to be grouped toward the bottom of the class when they're given preferences. But lo and behold, when they are competing with everybody else, everybody is at the school that their entering credentials suggest that they are likely to perform well at, they do better.

AUDIENCE PARTICIPANT: Professor, if I could follow up on one point very quickly.

PROFESSOR HERIOT: You bet. You're my favorite questioner.

AUDIENCE PARTICIPANT: The issue of graduation rates, though --

PROFESSOR HERIOT: I don't have the numbers on that, but you can expect that if the academic jeopardy rates are the way

they are, that the graduation numbers are going to be the same. I've seen numbers like that in the past and it looks like there is an improvement.

MR. WIGGINS: One last question.

AUDIENCE PARTICIPANT: First, Professor Coleman, I just wanted to thank you for raising the issue of diversity in that I attended a civil rights luncheon here earlier this week, and as the sole participant, the sole attendee who has been pulled over for driving while black, I think that my perspective perhaps might have been different than other participants. So I appreciate that fact.

Also, I agree with a couple of the other people, the questioners that have come on about the importance and perhaps, I guess, with Abigail Thurnstrom earlier this week, who mentioned literacy and education K through 12 and the need, perhaps, to strengthen it for all students, actually.

Now, Professor Heriot, as an affirmative action student from the University of California, Boalt Hall, and also at Harvard Law School, who also managed to do quite well, in fact perhaps even better than many of the non-preference admissions, I wonder whether we should redefine what merit is. I didn't take the SAT because the white students that were in my class were told to go while I was told to go to the library, and I am sure that my LSAT and my grades were probably not sufficient to get me into Boalt Hall. But once I got there and also while I was at Harvard, I did quite well.

How would you redefine merit?

PROFESSOR HERIOT: Several questions here. One, sure, it's true, some people go into a school where their credentials are not quite what the other students are and they rise to the occasion and they do well; but for every such student, there are more students who don't, who don't manage to do better than their entering credentials would suggest. Sometimes they do worse.

So I do not think that the fact that somebody might perform better than their entering credentials would say, how do we know which students those are that are going to perform better than their credentials say? No way of knowing.

I think the only way to have a system that will work at a large public university like the University of California is to try to determine what factors really do influence performance in school. It is the only way to avoid the corruption of everybody thinking that merit means whatever makes them happy.

We can track the SAT. We do have some sense in the aggregate of how much that bears on GPA. There are some quite sophisticated studies on whether or not the SAT does, in fact, predict college performance. Anything else you want to give me that you think might predict college performance, I am willing to study it, but if it doesn't predict college performance, I don't think it ought to be used.

PROFESSOR COLEMAN: Could I just comment briefly on that, because I don't think that the end of public education is how well a student is going to perform in college. I think what we're really trying to determine is how well the person is going to perform in life, and if that requires that we take into consideration factors other than GPA and LSAT and SAT, I think we ought to do that and not rely on these administratively convenient shortcuts.

MR. WIGGINS: With that, we will conclude the panel discussion this afternoon. I thank you for coming.