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AFFIRMATIVE ACTION: BACK TO BAKKE?

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PANELISTS:

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MR. COHN: Thank you all for coming, and welcome to the panel on Affirmative Action. This past term, the Supreme Court decided two cases about affirmative action. In *Grutter v. Bollinger*, the court addressed the University of Michigan Law School's policy if considering racial diversity in the admissions process. Race was one of many factors that was considered as part of a "flexible assessment" designed to achieve, among other goals, a critical mass of under-represented minority students. In a 5-4 decision written by Justice O'Connor, the Court held that this policy did not violate the Equal Protection Clause of the U.S. Constitution.

By contrast, however, in Gratz v. Bollinger, the Court struck down the admissions policy of the University of Michigan's College of Literature, Science, and the Arts. Under this policy, every applicant from an under-represented minority group was automatically awarded 20 points out of the 100 points needed to guarantee admission. According to the Court, in a 5-4 decision written by Chief Justice Rehnquist, this approach did not provide the individualized consideration that was necessary to survive scrutiny under the Equal Protection Clause.

Today's panel will address these two decisions, attempt to reconcile them, and explain their ramifications. The panel originally was composed of four distinguished members. Now, by my count, we have three. Up first is Professor Gail Heriot, who is a professor at the University of San Diego School of Law. Professor Heriot has challenged affirmative action programs head-on, and in 1996, she was co-chair of the Proposition 209 Campaign, which succeeded in prohibiting state-sponsored racial and gender preferences in California.

Speaking second was supposed to be Professor Chris Schroeder. Hopefully, he will arrive pretty soon, and when he does, he will get his time. He's currently teaching at the Duke University School of Law. Previously, during the Clinton administration, he served as the acting assistant attorney general in the Office of Legal Counsel.

Speaking third is Ralph Boyd, who until recently was the Assistant Attorney General for Civil Rights. As such, he headed up the primary institution within the federal government responsible for enforcing federal laws prohibiting racial discrimination.

And finally, speaking fourth is Brian Jones, who is the General Counsel of the U.S. Department of Education. In that capacity, he serves as the principal advisor to the Secretary of Education on all legal matters affecting departmental programs and activities.

Let's start with Professor Heriot.

PROFESSOR HERIOT: Well, I think I understand why I was asked to be on this panel. On my left here is Brian Jones, General Counsel for the Department of Education, who, like any good government official, knows he's speaking for more than just himself, and therefore I suspect is going to be duly circumspect. Then, we have Ralph Boyd, a little more difficult to peg here because you've recently left your position as Assistant AG for Civil Rights. But maybe—just maybe—you haven't gotten used to the great luxury of being able to speak for yourself again. We'll have to see that in a couple of minutes. I'm a sure thing here in that, you know, I'm the insurance policy for the Federalist Society on this side of the issue. I have absolutely no reason not to speak my mind, so that's what I'm going to do. I don't have to pull any punches, so I won't.

Most of the time, it's really a pleasure to be able to speak your own mind. But honestly, I'm a little concerned in this case because I'm afraid you're going to think that I'm being hyperbolic. I have to say that this is a very, very bad set of opinions. And I want to say it just one more time, Ladies and Gentlemen, just to make sure you understand me. This is an extraordinarily bad set of opinions, not just for those who are opposed to race-based admissions at universities, which constitutes the overwhelming majority of Americans, by the way, at least according to voting patterns and polls. But also for anyone who simply desires the Supreme Court to develop a coherent equal protection jurisprudence, I hope that means all Americans, and I think that a careful, or even not so careful, read of these opinions is going to demonstrate to any fair-minded lawyer that these opinions just don't make a great deal of sense. They don't fit in well with Supreme Court precedent.

Let me talk first about the practical policy implications as they relate specifically to race-based admissions. Some of you probably have not had the opportunity to read the decisions and may have been left with the impression that the litigation was basically a draw since the plaintiffs won one and the defendants won one. But the *Grutter* case, in which the court approved the University of Michigan Law School's admissions process, is by far the more significant case. It is the first Supreme Court case to actually approve an explicitly race-based admissions program that's actually at issue.

Yes, the *Gratz* case, the companion case, came out the other way. The University of Michigan's College of Literature, Science, and the Arts, its admissions policy was invalidated, but it doesn't really matter. *Grutter* provides a road map that the college can simply follow in the future. Any university that currently employs a *Gratz*-like

mathematical formula can simply switch over to employ a *Grutter*-like program. It will be inconvenient for them; it will be more expensive for them. But I'm confident that colleges and universities will do so if they feel that they are being forced to.

The problem is that there's really no substantive distinction between these two procedures. In *Gratz*, the college used a very mechanical formula for admissions that awarded African Americans, Latinos, and American Indians a particular number of points based on their race. By the way, the numbers were quite large. We're not talking about subtle distinctions that are basically there to decide cases that otherwise would be ties. If you look at it in terms of high school grade point average, the number of points awarded is the equivalent of a full grade point in the high school record, so that a B average student with a 3.0 is treated the same, if he happens to be black or Latino or American Indian, as an Asian or white student is treated with a 4.0. If you look at it in terms of SAT score, again, the difference is huge. The number of points is enough to make the difference between SAT score at the very bottom to make an essentially perfect score. So, you needn't bother to take the SAT, if you happen to be in one of the racial groups that gets the 20 points.

But back to my main point here, and that is, the difference between that and the law school system that doesn't actually award a particular number of points is nothing, essentially, in substance. The level of preferential treatment, as measured by academic credentials, was at least as great for the law school as it was for the college; perhaps greater. Surely, in the end it should make no difference to the victims to know that they were not the victims of a specific mathematical formula, just generalized favoritism for other racial groups.

If this were an old-fashioned discrimination case where the victims were members of racial minorities, the defendants would be laughed out of court if they were to go in and claim, “Look, it's okay here; we can discriminate in favor of the white job applicant because after all, we're not doing it according to an explicit point system.” So, the decision, if you look at it, seems to be instructing our state colleges and universities, “Look, go ahead. You can discriminate on the basis of race as much as you want. You can go ahead and create very large gaps in academic credentials with your students, if that's what you want to do. But just don't use a numerical formula. It will only embarrass us if it leaks out. It makes for bad press.” That seems to be it.

Opponents of racial admissions standards, what should they be doing at this point? Unfortunately, *Grutter* and *Gratz* are likely to be the last word on the subject for a very long time out of the Supreme Court. And I'm afraid that for the foreseeable future, federal litigation in this area has been largely foreclosed. It's not that every college and university is going to comply perfectly with the *Grutter*-*Gratz* distinction.

Some are probably going to continue to use *Gratz*-like formulas if they can get away with it. But the amount of money that would be necessary to spend on litigation in order to force them to comply with *Gratz*—I'm not sure that it would be worth it to the people and organizations that might otherwise be inclined to be interested in that kind of litigation. From their standpoint, it's not going to be that much of a gain to force a university to go from a *Gratz*-like numerical formula to a *Grutter*-like, “Gee, we do it by eyeballing it and considering everything, but in the end we consider race a lot,” sort of solution.

So, I think more likely, conservative public interest firms that have been doing this sort of work in the past, notably of course the Center for Individual Rights, is going to be more inclined to look at state constitutions as the basis for litigation, rather than the federal Constitution. Popular initiatives are perhaps the most viable political tool at this point, and one is currently being discussed for the State of Michigan.

That leads me to what, in the long run, may be the more serious aspect of *Grutter-Gratz*, and that is its effect upon equal protection jurisdiction generally. Given cases like Crosin and VMI, the Court was going to have to perform a few judicial gymnastics in order to get to the result they did, and that's just what happened. They turned some real somersaults. They couldn't hold that strict scrutiny doesn't apply to discrimination against whites or Asians. That would be politically unpalatable, and they'd already, in many cases, taken a different route on that. So they had to purpose to apply strict scrutiny and then find that the policy survives that scrutiny. Well, how can they do that?

The scariest sentence written in any of the Court's most recent terms, that I'm aware of, or perhaps for many years, is the sentences in which Justice O'Connor states that the Court should give deference to the University of Michigan in determining what is a compelling purpose. Well, you don't have to be an opponent of race-based admissions to wonder what's going on here. The whole purpose of the strict scrutiny standard is to refuse to defer to legislative or other state judgments about the necessity for race discrimination, to insist upon strict proof of necessity.

If deference could be accorded to the University of Michigan, then why wasn't it accorded to the Board of Education of Topeka, Kansas back 50 years ago? Its representatives were fully prepared to give an opinion that race discrimination of the rankest sort in the Topeka public schools promotes better learning. But mercifully, the Supreme Court knew that deference to state authorities is inappropriate. They insisted on strict proof, and when they didn't get it they decided the case the way they did.

Now, some would say that the whole strict scrutiny-rational basis framework with which all lawyers are so familiar is all smoke and mirrors anyway. The Court simply upholds the policies it agrees with and invalidates the policies it disagrees with. I guess in a sense I'm a cynic, but I'm a cynic in the other way. I'm cynical about cynicism. I have a very difficult time believing that everything really is all politics, that there is nothing that is law at all. But the cynics are starting to look pretty smart, at least when it comes to equal protection jurisprudence these days.

One more point I want to make before you throw me away, and that is in our history, the American people have sometimes made the mistake of believing that a particular instance of racial discrimination might really be a good thing; we ought to give it a try here. Almost always in retrospect, we have regretted it. That's why we have strict scrutiny. The historic role of the Court has been to pull us back from the brink of folly at the moment when we're tempted by that path of race discrimination. That's what's so remarkable about the University of Michigan cases.

In them, it's the Court that's dragging the American people kicking and screaming, as it were, into race discrimination. If you look at how the American people have voted on this issue in California and Washington State, they have voted strongly against racial and gender preferences. If you look at polling data, they're massively against racial and gender preferences of this kind. The polling data is actually extraordinary.

Thomas Piazza and Paul Schneiderman, experts on public opinion in this area, have said that what is controversial about racial preferences is that they're not controversial, and yet they keep going. These cases now, of course, make it likely that there will be further continuation. But there also is invitation. If, in fact, I'm correct that overwhelmingly the American people oppose racial and also gender discrimination of this type, then they ought to flex some political muscle, maybe through legislation. But given that the status of racial and gender preferences is classic in the area of special interests, a small group benefits a lot; a large group may not consider it at the top of their agenda, but perhaps through direct democracy. So, I would expect to see further popular initiatives. And you definitely want to get rid of me at this point, so I will step down.

MR. COHN: Thank you very much, Professor Heriot. That was fantastic. My only concern is that yesterday, you must have emailed a copy of your speech to Professor Schroeder. He was supposed to take the pro-affirmative action standpoint today, and I think you scared him off.

Now, Dean Reuter did a fantastic job in putting together this panel. And understandably, he was concerned when Professor Schroeder did not make it. So, before the panel began, he said to me, “John, is it possible for you to say a few words about the pro-affirmative action standpoint.” And my answer, without thinking really too much, was “No.” And then, he said to me, “Well, John, do you think there's anyone else in this room who would be able to stand up impromptu and say a few words about affirmative action, in favor of affirmative action.” And so, we stood up and took a look around the room and decided that there's probably no one in the building who's willing to take the pro-affirmative action standpoint at this point in time.

So, with that in mind, let's go on to Ralph Boyd.

MR. BOYD: What a shock if I did, huh? More shock outside this room than in.

Gail, let me tell you something about me. My problem has typically not been that I failed to speak my mind. Usually, my problem is that I speak it too much, too often, and too loudly.

PROFESSOR HERIOT: You're a good man, Ralph.

MR. BOYD: But anyway, I'm delighted to be here with you all today—pleased to be with you. Now that I've left the Department of Justice, I have come to miss the podium and the pulpit. I think it's fair and accurate to say that there are many who don't miss me having it. But I hope that that isn't the chorus or the current in this room. It's a good place from which to speak the truth as one understands it, and to speak the truth regardless of how hard or how difficult that may be, generally or in specific circumstances. But I'm delighted to have the chance to do it today, hopefully in a very thoughtful way.

Time is short and we have an excellent panel, even without Professor Schroeder, although I wish he were here. I think it would add immeasurably to the discourse, the thoughtful discourse. But we have, I think as Gail's remarks, a superb opportunity here for some robust discussion about something that goes to the core of fairness and the rule of law in our society, so let me get right to it, what I want to talk about.

Here's the proposition that I want to suggest for your consideration. I only have about ten minutes, so I'm going to run through it very quickly. I apologize; I can't talk about it in greater detail at this juncture, but I certainly hope we can during the interactive portion of this panel. My thesis is this: it involves what I'll call the politicization of constitutional advocacy. You know, routinely before cases reach the Supreme Court, savvy advocates have always, with varying degrees of success, framed or at least tried to frame their positions for public consumption in ways that are most favorable to their causes, of course in order to enhance the prospects for prevailing inside the courtroom, or perhaps more accurately in the chambers and the conference room of the Supreme Court of the United States. But I think the *Grutter* decision and the lead-up to that decision reflects the fact that increasingly in our constitutional advocacy, especially in high-profile, controversial cases, it seems now, to be an effective advocate, one has to not just effectively frame the issues and briefs in the oral argument in the Court itself, but one must also conduct a well-orchestrated, concerted campaign that looks and sounds and feels and tastes a great deal like a traditional political campaign for elective office. To the credit of the pro-race based affirmative action forces supporting the Michigan admissions program, they understood this and they did it somewhat expertly. And I think that it had a meaningful impact on the Court's deliberations, if not on the outright decision itself and the reason underlying that decision.

There were, for example, in the time leading up to the Court's consideration in *Grutter* and *Gratz*, in the *New York Times* and the *Washington Post*, almost weekly profiles of the pro-race based affirmative action advocates—Elaine Jones and Ted Shaw, two very decent and well-meaning people with LDF, to name just a few, and certainly others. Those profiles were not just favorable, but if you'll recall them with me, they almost always included despairing laments about the course of Supreme Court race jurisprudence since *Bakke*, and equally despairing predictions of the state of we people of color, in the event that the Michigan programs were struck down by the Court. And I dare say that I saw no such admiring profiles of any people advocating a different position or offering a different but equally heart-felt principled view of the outcome of what *Grutter* and *Gratz* ought to be.

The Court also was, as many of you know who saw and read the opinion, was bombarded by amicus briefs from big business and other established elites. In fact, the majority opinion penned by Justice O'Connor cites specifically the General Motors brief and certain retired members of the military establishment, each opining on the value of diversity. Diversity, good or bad, was the focus of those briefs.

Well, of course when the issue is framed that way and the public reporting of that case and the public debate focuses almost exclusively on the value of diversity, who can disagree with that? Who's against diversity? No one, and certainly no one in the popular media that I saw, was framing the issue in constitutional terms, that is, as a searching judicial inquiry into whether the means Michigan was using to achieve racial diversity in Grutter were functionally acting as a quota system, and whether the means unlawfully or unfairly discriminated or treated some of our citizens unequally by conferring benefits on some and assigning unavoidable corresponding burdens on others because of their race.

I don't think I'm being reductionist here in suggesting that what I've described goes a long way in explaining what happened here, what happened in *Grutter*, which I think is an opinion that is virtually, as Gail suggested in her comments, impossible to

square with longstanding Supreme Court jurisprudence regarding government's use of racial classifications. And I think in some important respects, the majority opinion, the logic of that opinion—and I mean no disrespect here, but I think the logic of that opinion is implosive. And perhaps, we can talk in greater detail about why during the discussion portion of the panel.

But let me just take a few remaining minutes to try, anyway, to succinctly summarize a few of the reasons I think that the logic of that opinion is implosive. First, in previous Supreme Court cases involving race, as many of you know, Justice O'Connor had often described the government's interest in promoting racial diversity through the use of racial classifications as trivial—the dissent in *Metro Broadcasting*—unless it was strictly reserved for remedial settings; that is, as a remedy for actual specific, provable discrimination. And of course, in *Grutter*, in great contrast, that interest in racial diversity was transformed into something that was compelling as a matter of constitutional principle.

Likewise, in *Crosin*, Justice O'Connor took great pains to say that where government uses racial classifications in conferring benefits on some and assigning correlative burdens to others, racial classifications are considered to be highly suspect tools, and that government assurances of good faith just simply can't suffice to justify the use of racial classifications. But then, of course, pretty stunningly, in *Grutter* Justice O'Connor again transformed, it would seem, understands strict scrutiny, understands that searching judicial inquiry regarding racial classifications, to permit the Court to quote, as Gail said, "presume good faith" and to "defer" to the law school's judgment regarding the essential nature of racial diversity to its mission.

Now, I don't know about any of you, but any Supreme Court—or frankly, any federal court—decisions that I ever recall reading that were strict scrutiny decisions when they had the words "defer" or "deference" or "presume" or "presumptive" always had the word "not" as a prefix or suffix.

The point is that this conception of the deference to government that the majority in *Grutter* seems to think strict scrutiny permits is even harder, again, as Gail suggested, to understand. In fact, it's hair-hurting when one considers the application of the intermediate scrutiny standard in which the court engaged in the VMI case, where, of course, the Court emphatically declined to defer to the judgments of that particular academic institution in that particular instance.

What's really going on here—but the court just won't say it—is a sub-silentio resurrection of that old benign, invidious distinction that until now the Court, including, by the way, Justice Powell and his *Bakke* concurrences, had outright rejected.

Let me see. Three quick end points, and then I will sit down. And hopefully, these will light us up for later. Let me say something quickly about the Court's attempt to distinguish the concept of critical mass and quota. As many of you read the opinion see, the majority invests some energy, Justice O'Connor invests considerable energy, in distinguishing between the critical mass that the law school at Michigan sought, and a quota. And the principal point of distinction for the minority is that unlike the University of California School at Davis Medical School in *Bakke*, which set aside 16 seats for minority applicants in a class of 100, Michigan doesn't do that. Instead, they have a critical mass, which is a flexible range.

But of course, anybody who looks at the evidentiary record knows that that range is anywhere from 13.5 percent of the class to 20-something percent of the class, never going below 13.5 percent of the class. But the fact that the fixed number is a floor and not a floor and a ceiling, I don't think changes the nature or the character or the impact of what you call it. The way I've described it is, you can put lipstick and a dress on a duck, but it's still a duck; it has the same effect. And I don't think the outcome in *Bakke* would have changed if, instead of saying 16 seats out of a hundred, they had said a range from 16 to 20 or 25 seats and the 16 was a floor below which the school never went despite fluctuations in the quantity and quality of the applicant pool in the yield. So, I just couldn't find a meaningful distinction between the concept of critical mass with a floor and a fixed number that everyone would concede would constitute a quota.

Secondly, and very quickly, let me ask you this question. If the Court is serious about racial diversity being compelling as a matter of constitutional principle, then analytically, why isn't a quota the most narrowly tailored means to achieve it? What I mean here is, why isn't it the most intellectually honest and analytically correct thing to figure out what your critical mass number is, your 13.5 percent to 21 percent or whatever it is; use your normal admissions criteria; see what yield you get in terms of minority students; and then take the delta, the difference between the floor of that critical mass and the number you actually get, and use a quota to bridge the difference. Why isn't that the least intrusive means, the means that impairs least those non-preferred candidates? Why, analytically, is that not right? Well, I would suggest to you it is correct but the reason that no one will say that is because, of course, it is politically unacceptable and unpalatable.

Final thing. What is it the law school's really doing here with respect to the program? What they are doing is, I would suggest to you, the flip side of what happens in racial profiling. In racial profiling, we all concede that's wrong because what law enforcement is alleged to be doing in that context is using race as a proxy for something, using race as a proxy for enhanced criminality. We've decided that's wrong. Well, what the law school is doing here is the same thing; they are using race as a proxy for something else—as a proxy for diversity, as a proxy for different experience, viewpoint, and perspective. It's the same thing.

If that's what they want, then design criteria that will really get at it. Don't use racial stereotypes and assumptions as a basis for achieving a laudable objective. I'll sit down with that.

MR. COHN: Thank you very much, Mr. Boyd. Brian Jones, it's all yours.

MR. JONES: Thank you very much. Good afternoon. You know, as I listen to these two very powerful presentations about the logic of these *Grutter* and *Gratz* cases and the analytical persuasiveness of them, I have to say, as Gail very astutely noted at the beginning, I'm here as an administration official. I feel a little bit like the kid with the flu on Saturday afternoon who's standing at the screen door watching his friends Gail and Ralph playing outside.

Having said that, though, these two have talked a good deal about the analytic coherence of the case, and I think have pointed out very ably important questions that I think need to be asked about what the Court has done in these cases.

I sit in the chair of the General Counsel at the Department of Education, and the Department of Education actually does play a very important role in making sense of what the Court has done and trying to lend some practical utility to what comes out of the Court's reasoning and the Court's opinion in these cases. And I have to say, I'm somebody who, before I came into government, spent a lot of time thinking about these issues and arguing a particular side of these issues. And to be honest, these cases, I think, ultimately where we've come down here, don't exactly square with where I have always been on these important issues.

Maybe I'm the eternal optimist here because I do think that in these cases, there really are some important factors that come out of these cases, and I do think some areas where we will see some real change in how an organization like the Department of Education, an institution like the Department of Justice, goes about examining instances of racial discrimination as it may be manifested in these kinds of preferential policies.

Gail talked a lot about the two parts of this test that the Court has articulated for us, first obviously on the interest side, and the Court having found a compelling interest in the diversity idea. That's a part of this test that we in the United States did not speak to in the position that we took in our amicus brief in the case. And I'll remind Ralph, he had a lot of fun up here, but his name is on that brief just like mine is.

But again, the United States, in our brief in that case, in the amicus brief, did not take a position on the interest question. And again, as I go through and I look at what the Court had to say on the compelling state interest side, I think Gail raises a very good point. When you have the language talking about the deference that's owed to the academic judgment of institutions and that sort of thing, I do think that on that side of the equation, I'm not so sure that there's going to be a much greater role for an enforcement agency like the Department's Office for Civil Rights or the Department of Justice to be able to come in and fundamentally change the way institutions go about it.

Obviously as we do go through and we look, we undertake compliance reviews, we respond to complaints and that sort of thing, obviously the Court has said that there has to be some sort of articulation of what the interest is, and that there's got to be some sort of evidentiary basis that's put forward to show how the policy in question furthers that interest. But again, I think that the emphasis on the deference and the academic judgment on the institutions really will, frankly, minimize the impact that we can have there.

As I look at these opinions, I do think that on the narrow tailoring side of the question, we do have a good deal more clarity than we had before, and I think that the Court did articulate that side of the test, in part, in a way that will allow us as an enforcement agency to give some real teeth to what the Court has articulated here.

First of all, it's important to note that, our hook in all this is our Title VI regulation. I mean, the Title VI regulation that we enforce has generally tracked the constitutional standard that's set forth. But I think one of the things that's important to note—and I think a lot of people don't often realize this—the Title VI regulation today says virtually nothing at all about the narrow tailoring side of the test. There's nothing at all about what an institution needs to do to demonstrate that its policies are narrowly tailored.

I do think that we have at this point an invitation, number one, to go back and perhaps take a look at the Title VI regulation and to see if, now that we've got a little bit

more definition as to what it means to have a narrowly tailored policy, whether that kind of thing oughtn't be included in our regulation. And that gives us a bit more of a hook when we go in and we do our compliance reviews and when we respond to complaints.

I'm going to be very brief here. I just want to talk very quickly about four of the factors that the Court talked about in determining the finding of narrow tailoring. And the first, of course, is this principle that comes out of the *Gratz* decision, this idea that any use of these sorts of racial classifications have to, at bottom, be individually focused. There's got to be an individualized assessment of applicants and individuals who fall under these kinds of programs, however they're manifested.

Again, I think the way that the Court articulated the test, I'm not sure that what I read in the test necessarily appears to have all that much teeth. But I do think that we, as an enforcement agency, do have a responsibility to take a good hard look at how institutions are administering their programs and forcing institutions to justify that they are, in fact, not basing their policy on stereotype, that they're not treating individuals, fundamentally, principally, as members of a particular classification. And so, I do think that that provides us an area—not so much as we go about our enforcement efforts, but again, as we think about what our regulation might look like, that gives color to the enforcement efforts. I think that we do have some room for improvement of the regulation there.

There is also this idea of not imposing an undue burden of members of the non-preferred classifications. This idea that the Court did articulate, that diversity factors other than race should certainly be coming into play in how institutions actually manifest these kinds of things. And there are institutions out there like the Center for Equal Opportunity and the Center for Individual Rights—I see Roger Clegg from CEO here—who have brought a lot of pressure to bear on institutions. And they are actually bringing some sophisticated analytical tools to the table, as well, taking a look at regression analyses and the like, trying to figure out whether there are really, in fact, factors other than race that come into play here.

And I think the Department of Education is now empowered in a way that perhaps it wasn't before to really be able to pay attention to these sophisticated models and make sure that institutions, if diversity really is the articulated interest, let's make sure that what they really are seeking is genuine diversity and that this really isn't a ruse just for benefiting people on the basis of their membership in particular racial groups.

The third factor, and this is one that's interesting and we'll see how it plays out and manifests itself in the enforcement context, is this idea that racial classification systems like these should be limited in their duration, that there should be a consistent and constant reassessment, reevaluation of these programs, to make sure that they continue to be useful and that they continue to serve the interest that's been articulated.

I do think that was a flaw in what flowed from *Bakke*. Institutions would put these systems in place, and then it was just assumed that we would always continue to have these kinds of things. I think now the Department of Education really is empowered to say, “What kind of showing can you make that you really are going in and undertaking a good-faith evaluation, and perhaps we have a systems have got to justify to us on a periodic basis that they have undertaken the appropriate kind of evaluation. And if they can't make that kind of showing, are they really in compliance with what the Court has articulated and hopefully what our regulation ultimately ends up reflecting?

And then, of course, the fourth and the final narrow tailoring requirement is the emphasis on race-neutral alternatives. As many of you may know, after the administration filed its brief back in January of this year, one of the things that Secretary of Education, my boss, Rod Paige, directed our Office for Civil Rights to do was to develop something of a guidance document, basically to go out around the country and take a look at race-neutral alternatives that were being used in both K through 12 and in higher education institutions to see what's really working and to see if there really are race-neutral alternatives that can bring about this kind of diversity that institutions often talk about; that is, making sure that institutions are as broadly inclusive as possible and making sure that people with different perspectives are brought to table, setting aside, that people may have different perspectives other than their racial affiliation.

So, we did that and it's actually a very good document. I had intended to bring a copy of it with me today and walked out of the office yesterday and forgot. It's a document you can access on the Department's website, www.ed.gov. It is race neutral alternatives to racially preferential public policy.

There were two approaches that we were able to identify that are being used around the country. There were what we referred to as these developmental race-neutral alternatives. You've got many institutions out there, but what they're trying to do is think of ways to expand the pool of qualified people who are coming from a variety of disadvantaged backgrounds and making sure that you've got kids who are prepared to meet the competition in terms of admission.

I think that is, in some sense, the dirty little secret that nobody ever wants to talk about, and that is that you have such a small pool of really qualified students who come from very disadvantaged backgrounds, often minority backgrounds, who are really prepared to meet the competition at the most rigorously competitive institutions.

And so, what we've seen is that there are a lot of institutions, particularly in places like Texas and Florida and California, which were precluded by law from using race in admissions systems, that really had to get creative. And what we saw were things like an emphasis on partnerships between institutions of higher education and K through 12 systems, where colleges and universities were actually going into the most disadvantaged school systems and providing supplemental assistance to kids to make sure that kids have the knowledge they needed. There were efforts to improve access to AP courses and to better prepare kids to take AP tests and the like. So, on the developmental side, you've got those things.

And then of course, where you often hear the talk in a race-neutral alternative context is in the admissions side. What sort of race-neutral alternative approaches are institutions using to broaden their admissions procedures? Again, what we saw were a lot of very interesting things. You hear a lot about these so-called percentage plans in places like Texas and California and Florida, but that was just one example of the kinds of things that we were talking about.

You also had interesting things going on at places in California. The University of California at Los Angeles, the law school there, for a long time had tried a very comprehensive sort of race-neutral alternative approach that really did try to examine, in a holistic way, disadvantages that kids had overcome and that sort of thing. They tried to broaden their pool of admittees that way.

And now, again, none of these things are necessarily a panacea, and all of them, I think, in some sense have their flaws. There's no question about that. I do think that none of these things are perfect. But again, I think we operate in a political context in some ways, and so what I think many of these institutions are trying to do is to find ways of broadening their pools without necessarily violating the Constitution while doing it, and I think that's something worth looking at.

So, the Court says, "Look, you've got to undertake a serious, good-faith consideration of race-neutral alternatives before you resort to the use of race in an admissions system." I think that that is a significant statement, frankly, or could be, if you've got an enforcement agency that's really prepared to take it seriously, and I think we are.

I don't have an answer for you for how it ultimately will play out, but one of the questions that I think has been presented in the press and elsewhere is, "What about, in a place like Texas, for example, where you've got institutions that have used pretty sophisticated race-neutral alternatives? They're now free of the Fifth Circuit opinion in Lockwood that precluded the use of race. Now what happens if the University of Texas decides that we want to go back and use race in our admissions system? Having tried their race-neutral approach and had some reasonable success with it, can we now say that they're in compliance with what the Supreme Court said? If they did, at one time, seriously and in good faith undertake a race-neutral alternative that was effective, can they now go back to the use of race? I think that's a legitimate question to ask. It hasn't really been formally presented to us in any sort of enforcement way, but once that question has been presented, I think it's going to be a difficult one to wrestle with, and one that we'll just have to see how it plays out.

So, I do think that there is a principle in this opinion or factors in this opinion that I think can be useful to us as an enforcement agency, and so the analytical flaws in the decision notwithstanding, I think that we have to take the decision as the law of the land these days and try to make the most of it. And I do think that there is some reason for folks in this room to take heart.

With that, I look forward to our conversation. I thank you all for having me here.

MR. COHN: Brian, thank you very much.

We're going to take questions from the audience, but first to get the ball rolling a little bit, Professor Heriot has volunteered to say a few words on behalf of affirmative action, and hopefully that can give rise to more questions.

PROFESSOR HERIOT: I've been sitting there feeling guilty. I'm a law professor; I tell my students every day in class, "Come on, now make the other side of that argument." So, I figure I ought to do that here. I don't know what Professor Schrader would have said, so I'm going to talk about what I think Justice O'Connor might say if we got her in a really unguarded moment. And I think if we pressed her hard enough, she might even admit that you really can't justify this case doctrinally, but there's a lot more going on here than just doctrine.

This is an extremely important issue, and from her point of view, you know, maybe what she would say is, "Look, from where I'm sitting, here at the Supreme Court, every college and university in the country that employs admissions standards that are

high is employing racial preferences at this time. Hundreds and hundreds of these schools have submitted a brief here. It's quite clear that if I write a strong opinion getting rid of racial preferences, all hell's going to break loose. And who am I, up here, to make that decision? It does appear that there's a very strong consensus in favor of racial preferences, and a court should not use up all its political capital on a decision like this. The better thing for us to do is defer. Despite what all the doctrine says, I'm going to defer."

"Now some woman named Gail Heriot has said that, in fact, the population of the United States is very much against racial preferences. Well, fine. Glory be. If that's the truth—and I'm not saying whether it is the truth—why don't you just get that political consensus together and get rid of racial preferences, if you think that you can. But I don't want to stake the Court's political capital on a decision that clearly is going to send the country into turmoil. If there were really consensus, that I can see, but what I see is a consensus going in favor of racial preferences."

Okay, back to being Gail Heriot. I think that is her argument, and I think it's important that we recognize that arguments that are based on conserving judicial political capital are not specious. That is something that courts really ought to keep in mind.

MR. COHN: Thank you very much. Okay. We'll now take questions going from left to right.

AUDIENCE PARTICIPANT: I think that was a brave effort. And I think O'Connor's position should be considered. She was facing, essentially, the military-industrial complex. There was a consensus, but that's a consensus of the elite. And what they lacked was the consensus of *Brown v. Board of Education.* But anyway, good job. Good job, Brian Jones, for putting the best possible face on it. And I appreciate the material you had to work with.

But I have to say, it's hard to have confidence in race-neutral alternatives when they are still obsessively reaching racially conscious results. It's hard to have confidence in the limited duration if the level of scrutiny is so low.

In fact, here's my question. Mightn't things not actually be even worse than Gail presented them? I hate to present an even more pessimistic view. But if diversity is a compelling interest, and if strict scrutiny is applied with such deference as to trump the Equal Protection Clause, might not also trump any other clause in the Constitution? Might not it even trump the First Amendment if we end up with speech codes that suggest that there's a hostile environment in certain forms of speech on campus?

PROFESSOR HERIOT: How about the 13th Amendment? If it's really necessary to have minority lawyers and nobody wanted to apply, wouldn't we be able to draft them?

AUDIENCE PARTICIPANT: Okay. You've outdone me.

MR. COHN: Who would like to tackle that questions first?

MR. BOYD: I share the sentiment of the question and the comment that preceded it. One, I do think Brian did an excellent job of trying to suggest some role that his agency

may play in applying the rule of law in a way that makes sense and tries to be consistent with the reasoning of *Grutter*.

The problem that I have when I look at *Grutter* is the four factors that Brian pointed to that are referred to in both *Gratz* and *Grutter* seem to have played virtually no role in the outcome. And that, I think, is my problem. Let me give you an example. Consider the factor having to do with the use of race should not be an undue burden, and the review ought to be individualized. And then, folks will look at *Gratz* and *Grutter* and say, "Well, see where they mechanically just gave every minority 20 points, regardless of anything else in *Gratz*? See, they struck that down, so that's really meaningful."

The problem is that the law school program worked the same way. It just did, kind of quietly through the side door, what *Gratz* very openly did through the front door. Let me say what I mean by that. Look at the district court opinion in the law school case, where it actually talks about the evidentiary record. I'm a trial lawyer, so that matters to me, the evidence. What I recall from that opinion were a couple things that were very stark, and that was references to the evidentiary record that reflected a couple things. One, there was a footnote in that opinion that said that the relative odds for admission, to the preferred minority were several hundred to one. In addition, if you went through different zones on the admissions, the vertical and horizontal axes—one, relative GPA score, and the other, the LSAT score—when you looked at numerous places on that admissions grid, similarly situated non-preferred candidates and preferred candidates, they were treated dramatically differently.

There was one reference to one category, and don't hold me exactly to the number, but there were 15 preferred candidates who applied in that particular zone, and either all 15 or 14 were admitted. And there were 60 or 61 non-preferred candidates that applied, and either one or none were admitted. That's what I meant when I said you can dress up a duck with a dress and put lipstick on it, but if it's causing the same outcome, there's really no difference.

The other point I'll make with respect to that, as to why I think these factors, although perhaps meaningful for Brian and hopefully meaningful for the executive branch, were not meaningful for the Court. One is the requirement that the use of race be limited in time, and the 25-year reference that the majority opinion makes. I read that, and it looked like an afterthought to me. It looked to me like an afterthought. You got to the opinion and said, "Oops, man, strict scrutiny; there's got to be some temporal limitation here."

But the temporal limitation that I always understood derived from the concept upon which you constructed the use of a racial classification. It has no analytical connection to anything here. It's simply articulated as an aspiration. "I would expect"—"we would hope" —that in 25 years, this would not be necessary. Quite frankly, I think that not only is not any kind of controlling legal principal, I think the reality is that 25-year marker will be used for the next two and a half decades as a shield, and then at the end of 25 years, you can hear the brief on the other side. "We understand that in *Grutter*, the court expressed the hopeful aspiration that in 25 years, such use of race would be unnecessary, that things would be worked out by then. However, the Court could not have envisioned at that time how consistently intractable this problem would be."

And so, please don't misunderstand me. I think that the fact that there is not a greater representation of my people and other people of color in all mainstream walks of

American life is a terrible problem. But this is not a principled fix, and it is not an effective fix. As I somewhat crudely describe to some of my friends, I said, “Look, my brothers and sisters down on the block weren't celebrating when this decision came out saying, oh great, now we can go to the University of Michigan.” I raise the point humorously, but it's not funny. The point is that there are so few of us; we that are helped by this opinion are an infinitesimally small fraction of the population. And the truth is that most of us are middle-class or better, so that for the overwhelming preponderance of brothers and sisters who have been left behind economically and socially, this is completely irrelevant to them.

MR. COHN: Of the people who are lined up for questions, does anyone have a pro-affirmative action question.

AUDIENCE PARTICIPANT: I have one.

MR. COHN: You do? Great. We're actually going to go back this way.

AUDIENCE PARTICIPANT: Good afternoon. My name is Ronald McNeill. I'm an attorney from Philadelphia, and I believe that I'm a beneficiary of affirmative action. I also believe that Justice Thomas, Justice Ginsberg, and Justice O'Connor are beneficiaries of affirmative action.

I have a part-commentary, part question. I had this debate with my nephew last night because the question that is always posed to me is, “Why aren't there more blacks Republicans in the United States?” And my general response is, we're too mean. And I think this panel is an exact example of that because, unlike in most Federalist Society forums, we usually have a pro and a con, at least two sides to every issue. And I was somewhat disappointed that we didn't have someone on the panel who's not pro-affirmative action.

I say that because to the average person, it's just like where Mr. Boyd was going there. To the average black American, this opinion doesn't mean anything because we won't deal with the real problem, which is what affirmative action needs to address in this country, and that's the public school systems in the United States. And the problem is, when you come to my city of Philadelphia, where 70 percent of the kids cannot read at the basic level, you can't convince Republicans, you can't convince Federalist Society members to talk about education. And that's what we need to be dealing with. We don't need these grand statements about some Supreme Court decision that—as usually, the Supreme Court analysis, you wonder how they made it to the Supreme Court, and you wonder if the Senate is really right, they should filibuster all these candidates.

But my question is, what role do you think both the state and federal government should play in terms of cleaning up the public schools in the urban areas in the United States? Thank you.

MR. COHN: Thank you very much.

HON. BOYD: let me say something very quickly, and then turn it over to Brian since he's the expert. My brother, I have talked about this issue coast to coast to coast. So, it is

literally not true that Republicans or Federalist Society folk aren't dealing with this issue in a real way. In fact, I think we're the most real in our conversations about it because we understand. And I cast dispersions about no one, but the reality is that this system has been broken, and that's not a news bulletin from last night. It's been broken for three and a half decades. So, unless you fix that problem, you can do affirmative action at Harvard and Yale and the University of Michigan for four more decades, and we're going to be having the same discussion and same debate at the mid-point of this century. So, priming the pump below is really the answer.

One of the things that I have said time and time again is, this racial preference at the university level is like putting a Band-Aid on a compound fracture. As long as you do that and allow people to think they're doing something when they're really not doing something, I think is the bigger outrage than being honest about what the real problem and trying to come up with a real fix. The real fix is Mr. Jones.

MR. JONES: There's not much more to add to what Ralph said. He points up the fundamental flaw, though, in focusing that debate, your concern, on the affirmative action question. I think one of the points that's noted—this is something that I've long argued—is that by using race as a proxy for the kind of diversity that institutions seek, race is really what they care about. The "critical mass" relates to race.

As Ralph said earlier, what you do is you create a competition between racial minority haves versus racial minority have-nots. The fact of the matter is an African-American kid who comes from a place where I grew up or my kids or Ralph's kids, they are going to win that competition against the kid in most of our urban school districts every time because they've got plenty of advantages. So, are we really helping to close the achievement gap, or are we really helping these people that we profess to help through racial preferences. I would submit that the answer is no.

But the question that you ask about what is the role of the federal and state governments in dealing with the problem of public education I could tell you that I, in my role, spend just about every day of my life working on now at the Department of Education. Secretary of Education Rob Page was the superintendent of the Houston Independent School District for seven years. He is a guy who is committed to this idea of closing the achievement gap.

Consider a few numbers we just released numbers this week from the nation's report card. The National Assessment on Educational Progress shows fewer than one in six African-American 12th graders actually graduate from school reading at a proficient 12th grade level. That's stunning. African-American 4th graders—fewer than 12 percent. About 12 percent of African-American 4th graders in this country read at a proficient 4th grade level. That's compared to about 40 percent of white 4th graders that can read at a 4th proficient level. That's a significant gap, and racial preference policies are not going to close that gap. What we need to be talking about is bringing greater accountability to the table, bringing choice to the table.

MR. BOYD: Vouchers, charter schools.

MR. JONES: That's right—he's right. He's right because what that does is it empowers the parents to be actual, real participants with power in the system. The fact of the matter

is that we've got a system today that for years and years and years has basically said to poor parents, “You're stuck. You don't have any leverage at the table. You've got nothing to say to your local school system in Philadelphia or wherever it is when your school system isn't improving, isn't performing for your kids.” And I think that's what we've tried to do in our short time at the Department of Education with the No Child Left Behind Act and other things that we've been encouraging, is trying to empower parents.

In fact, I heard the Secretary say it the day before yesterday. We were in a meeting and he said, “Look, people talk about all we care about is vouchers and that what this whole exercise in the No Child Left Behind Act is about, is about just imposing vouchers. Vouchers are not the panacea, but choice is a necessary condition to change. Without choice, parents have no power. They've got no leverage at the table. And so, those are the kinds of things we need to be talking about.” This idea that unless we're pro-affirmative action we're shutting the door on the poor, in my view, completely misses the point because they've got nothing to do with that system, quite frankly.

MR. BOYD: The real question is—and I throw this back and say it somewhat rhetorically; I'd love to hear an answer. I've never heard it. Why do people who purport to care so obsessively about education, which we all should, why are they so invested in essentially the status quo, when it has failed us in such an obvious way? Why are they opposing change in difference, whether it's charter schools, whether it's vouchers, whether it's something else?

I would direct that question to Mayor Street and want to know what is going to be different in the next two or three or four years of his administration. What's going to happen in that administration in the next four years that hasn't happened in the first four? Why do you want to keep investing in a system that is proving to you every day it is not working? Well, I think we know the answer to that and that is because those folks also have to answer to some people. And that's all I'll say.

MR. JONES: Teachers unions do a very good job of delivering voter patterns.

PROFESSOR HERIOT: I just have one sentence to add on this one. That is, I recommend Abigail and Steven Thernstrum's new book, No Excuses. I think the subtitle is something like, Closing the Gap Between Majority and Minority Students, or something. But the title is definitely No Excuses, and it's available on Amazon.com. I got mine there.

MR. BOYD: It speaks a lot of the hard truth I was talking about, the truth that may be difficult to say but needs speaking if anything's going to change.

AUDIENCE PARTICIPANT: I'm David Forte. I teach law at Cleveland State University. Following the years of *Plessey v. Ferguson*, the NAACP was successful in bringing a number of suits to break down segregation by saying, “Well, if he wants separate but equal, make sure it's really equal.”

So, Mr. Jones, why don't we take Michigan at its word and say it wants diversity, and say, “Well, if you really want diversity, why statistically disadvantaging so many Asians? They are clearly statistically the losers. If you want diversity, why, state

university, do you allow voluntarily segregated dormitories? If you really want the diversity to accomplish the goals that you wish, why are black students always at the bottom of the class because they're ratcheted up because of the demand of them? And that being the case, why are you teaching white students to be disdainful to their peers because they're black, at worst, and patronizing at best?"

The gentleman who was just up said, I'm a product of affirmative action, and in my mind I said, "So what else is new?" Why the moral perversity of having the Supreme Court tell us that that's all right to think about a black person, and that's all right to teach our students that that's all right to think about a black person?

MR. JONES: I think those are all very fair questions. In terms of your questions about what's going on in institutions today, I think you do pose good questions. And again, this is part of the good work that institutions like the Center for Equal Opportunity do when they really pay attention to what's going on at institutions. They're not taking institutions at their word, but as I said, they're using sophisticated statistical analyses to actually see what's going on, and I think that's the kind of thing that assists an institution like the Department of Education with its enforcement work. I can say that this Department of Education with this secretary, and certainly with the assistant secretary that we had in our office until very recently, Jerry Reynolds, has been prepared to take those kinds of questions seriously.

On the issue about segregated dorms and that sort of thing, that, too, is a question that we're going to have to wrestle with over the next year or two, if we have it. And that is this question about race-exclusive activities on campus. That includes things like scholarships. Race-exclusive scholarships is the big question that's been presented to us. I do think there's a very important question that needs to be asked, whether, when you've got something that's a race-exclusive program, you can really say that that constitutes an individualized assessment, where race is a factor and where you haven't unduly burdened non-preferred individuals. I think there's a very serious question to be asked, so we're going to have to pay very close attention to it, and we will.

Now on the larger principled issue of the stereotype thinking that this kind of public policy can lead us to, Ralph probably is freer to speak on that than I am. But the fact of the matter is that I've talked a lot about it. I'm on the public record on a lot of this stuff. That's been my view. When you allow race to be a proxy for certain things -- for example, just the idea of race as a proxy for disadvantage, I think in the world in which we live today, it does lead to a certain stereotype that can lead to all sorts of unintended consequences; maybe intended consequences. I don't know. And that's the frustrating thing for me.

I'm somebody who quite honestly can't lay claim to having suffered a great deal of social disadvantage in my life, and certainly my kids will face even less than I did. And so, I am, like you, very troubled by what this does to our civic fabric, as a matter of public policy, to allow this kind of stereotypic thing.

MR. BOYD: Let me say something as quickly as I can. Maybe I heard you incorrectly. Please forgive me if I did, but I think it's important since we are part of the argument that we're making, that stereotypes and proxies are not particularly useful in this context, as a matter of law or as a matter of policy or as a matter of fairness and decency. I thought I

heard you say that students of color or black students are at the bottom of their class, they all are. Certainly, that isn't true. It is certainly true that disproportionately we are, but certainly it would be doing an injustice to them as individuals and an injustice to the truth to suggest that all, or perhaps even most, are.

Let me say this about how important diversity is or isn't really. I pose it as a question and I'll leave it for people to mull over. I think Justice Scalia has alluded to this on occasion. If diversity really is so compelling and so important—I think everybody thinks, or most folks think more or less it is important—but if it's really so compelling, then, as I suggested in my opening remarks, why not develop a system of admission criteria that actually focuses seriously on it, on real diversity, and elevate those diversity factors to the level that you do factors of grades and LSAT scores?

I'll suggest to you why that doesn't happen at the University of Michigan or other places. It's because law schools, I think, in their heart of hearts, don't really believe that it's that important, and they also believe that law students don't believe that it's that important. That is to say that the marketplace that is law students would select a grade in a LSAT-selective law school before they would select a diversity-selective law school. Don't trust the marketplace to say what they say they mean. I think that really is the measure.

If diversity is really that important, Michigan and Harvard and every other place darn-well know how to get it for real. You develop criteria that get at the experience question, get at the socioeconomic circumstances, get at the viewpoint question. All of those things that they say racial diversity advances have a real system that really does that. Is it labor-intensive? Absolutely. Equal Protection Clause requires you to roll up your sleeves and invest some energy and time and labor if you're going to use race.

MR. COHN: Does anyone else have a pro-affirmative action question? Okay.

AUDIENCE PARTICIPANT: I don't agree with this, but I wanted to play the devil's advocate for a second and present an argument. That is that race neutrality—and I think it underlies a lot of what proponents of affirmative action say—is like a speed limit: everyone knows you should go 55, but if you're in a hurry to do something, then you go 65, but you won't go 110 miles an hour. That's what proponents would say, I think, is that that's analogous to what they're doing with race-based admissions criteria.

You know, Harvard is still going to be Harvard. They're not going to allow the quest for diversity to become so overwhelming that it will damage their academic reputation. But why, panelists, should we be worried if they're willing to fudge it around the edges and go 65 for a while so that they can try to bump up their minority admissions for a short period of time?

MR. BOYD: Because it's unconstitutional. No—I'm being cute. Actually, where Harvard's concerned, it would be a Title 6 problem, not a constitutional problem, obviously.

MR. COHN: Professor Heriot, do you want to take a stab at that one?

PROFESSOR HERIOT: I just want to add—I think that Ralph has answered it fundamentally, but factually it's premised on the wrong assumption, and that is that they are going 115. These are not subtle preferences. These are not cases where, "Gee, we've got a close case and, you know, arguably this student is a little bit better than this student, but let's go for the minority student anyway."

The truth is, I wouldn't be interested in this issue if it were just one of these, tie-breakers in close cases. But the fact is, the University of Michigan was giving very, very, very high preferences, as I said during my remarks. The number of points that were awarded to minority students at the College of Literature, Science, and the Arts, 20 points, is equivalent to an entire grade point, so it's the difference between a B-average, a 3.0 and a 4.0. Or if you put it in terms of SAT score, the number of points that were awarded to minority students was the equivalent to the number of points that one gets for perfect SATs—perfect SATs. So, you might as well not go through and check every question wrong and you're going to get the number of points you need. That's a lot of points.

There's a big difference between somebody who has earned 400 on a combined SAT and somebody who's earned 1,600 on it. There's a very big difference. They're worlds apart. These are not subtle. Don't let anybody tell you these are just tie-breakers; they're not.

MR. COHN: If you have questions, maybe you could approach the panelists and ask them personally.

Thank you very much.