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From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives

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FROM PROPOSITION 209 TO PROPOSAL 2: EXAMINING
THE EFFECTS OF ANTI-AFFIRMATIVE
ACTION VOTER INITIATIVES

UNIVERSITY OF MICHIGAN LAW SCHOOL
SATURDAY, FEBRUARY 9, 2008
ROOM 100, HUTCHINS HALL

PROCEEDINGS

WELCOME AND INTRODUCTORY REMARKS

PRIYA BASKARAN: Good morning. Thank you all for braving the winter weather to be with us here today. My name is Priya Baskaran, and I'm one of the symposium coordinators. I would like to welcome you on behalf of the entire *Journal of Race & Law* to our Symposium today. We have a lot of wonderful panels and speakers, so I won't keep you from them too long. My only request right now is, if you have any cell phones, BlackBerries, other high-tech gizmos that will ring, buzz or vibrate, please take this time to turn them off. Apparently all of you are very socially responsible and have already done that. I have the great pleasure now of introducing our opening keynote speaker, Dean Frank Wu from Wayne State University Law School. Dean Wu is the author of *Yellow: Race in America Beyond Black and White*, which entered an immediate second printing in its hardcover edition. He is also co-author of *Race, Rights and Reparation: Law and the Japanese American Internment*. In 2004 he returned to his hometown of Detroit to serve as the ninth Dean of Wayne State University Law School. From 1995 to 2004 he served on the law faculty of Howard University. He has been an adjunct professor at Columbia University, a visiting professor at the University of Michigan—Go Blue—and a teaching fellow at Stanford University. Dean Wu serves as a Trustee of Gallaudet University, the only university in the United States serving primarily the deaf and hard of hearing. He has taught over several short periods at Deep Springs College, a highly selective, full scholarship, all-male school, enrolling 26 students on a student-run cattle ranch near Death Valley. He served briefly by appointment of the D.C. Court of Appeals on its Board of Professional Responsibility, which adjudicates attorney discipline matters, as well as serving two terms on the Board Hearing Committees. Prior to his academic career, Dean Wu held a clerkship with the late U.S. District Judge Frank J. Battisti in Cleveland, and practiced law with the firm of Morrison & Foerster in San Francisco. He received a B.A. from Johns Hopkins University, a J.D. from the University of Michigan, and has completed the Management Development Program

of Harvard University Graduate School of Education. He is married to Caroline L. Izumi.

Please welcome Dean Wu. (Applause)

FRANK WU: Good Morning. It is an honor to open this Symposium here at the University of Michigan in Room 100, where twenty-years ago, it's hard to believe, I started law school.

I'd like to talk to you about affirmative action, civil rights, and the changing face of our nation. I'd like to begin by sharing a story, a personal story.

I'm asked from time to time to debate affirmative action and I've done so on college campuses, television shows, and radio programs. I've debated Ward Connerly, Dinesh DeSouza, Linda Chavez, and a few others. And I've realized that by debating affirmative action, those of us who are supportive of the constitutionally permissible efforts to increase inclusion in a meaningful way at these institutions of higher education, that we make a mistake—that we make two mistakes. And so, now when I get a call to debate affirmative action yet again, I try to say “no,” and I'd like to explain why.

Here are the two mistakes that I believe that we make: The first is to engage in a debate, and the second is to start with affirmative action.

The very first thing that we teach students in law school in the first year is how to frame the issues, how to present the appropriate question. Because, as any advocate of even modest skill knows, the person who has determined the agenda to be discussed has already determined the conclusions that will be come to. And what happens when we debate affirmative action is we make a mistake of framing. First, by debating, because a debate is, after all, what? It's a spectacle. It's entertainment. It's academic. It's the sort of thing that we go and watch, and we cheer on the side that we believe in. It frames the issues as simply pro and con. One must make a choice. There are only two choices, and they are mutually exclusive. We'd be disappointed in any debate if one side said to the other, “You know, you have a point there. Why don't we sit down, roll up our sleeves, and come to a consensus, and work out a policy that we can all agree to, and then move forward to actually implement it and bring about progressive social change?” That's not why we sponsor debates. It's not why we encourage them. It's not what the format is conducive to.

I propose that instead we engage in dialogue, dialogue among equals as individuals and within communities. Dialogue that asks a very different question, not whether we should abolish affirmative action or amend it, but instead what we will do. What we will do to make good on the ideals we claim to share. What we will do as a diverse democracy so that all of us are able to write the scripts of our own lives.

A debate, with its sound bites and slogans, we watch. A debate where we decide who has been wittier, who has the better haircut, who has told the anecdotes that are funnier. A debate does a disservice to all of us who

care about these issues, and it suggests for those of us who are in the audience that all we have to do is watch. That we are not participants. That we are not stakeholders. That we do not have responsibilities in determining the policies that will shape who is allowed to sit in rooms such as this.

So, allow me then to suggest that all of us, when offered that opportunity to debate, instead try to persuade others to engage in a symposium such as this, a thoughtful opportunity to express views, to engage meaningfully with the issues, not according to the debater's bullet points that are prepared in advance, where everyone knows, as if by rote, what will be said and cheers at the appropriate time. That what is needed is the sort of dialogue that can be accomplished only through the democratic process.

The other mistake we make, I'd like to offer, is this—starting with affirmative action. For what we do when we start with affirmative action is we start at the back end of these issues. It allows us to overlook the very reason we have the programs to begin with. Affirmative action, as controversial as that term may be, as that buzzword is, as a rubric that encompasses so much—whether it's recruitment and retention programs; whether it is outreach efforts; whether it is mentoring and support or financial resources; and yes, in appropriate instances, targeting of particular racial groups and ethnicities, genders, and addressing historic wrongs that have lingering contemporary consequences—is ensuring that the disparities that are measurable and concrete are overcome. Affirmative action programs do have in common that they rely on race or gender, or some other volatile classification that we all recognize it would be better if we could do without.

And yet, sometimes it turns out that that is the best, or perhaps only, means of addressing these problems that we all agree continue to exist and affect, in the most severe manner, the opportunities afforded to the least privileged among us. But when we start with affirmative action, what we do is we truncate that dialogue. We forget the impetus for these programs, that they were proposed by Lyndon Johnson in his historic commencement address at Howard University in 1965 with his metaphor of the shackled runner. You do not start a foot race in which one person has been hobbled by chains for the first hundred yards and set him free and expect then that the competition will be run fairly. Under Richard Nixon, affirmative action was adopted in the most broad scale. Not because it was regarded necessarily as a means of bringing about social change, but instead because of a political calculation, that it would be the more moderate compromise. It was indeed thought of, at that time, as almost conservative compared to direct aid to groups that were regarded as too radical to be entrusted with financial resources. It was thought then that these programs would divide traditional, liberal groups that had worked so hard to come together—of labor unions on the one hand, of Blacks on the other hand. And so we forget all this history that affirmative action was the product of a consensus. That affirmative action has been

proven time and again to work, to open the doors to offer individuals who otherwise would have been excluded, and historically always had been, solely on the basis of superficial characteristics that were not relevant to our notions of merit. What happens when we start with affirmative action is we forget this history. We overlook the contemporary disparities that you can measure: whether it is in infant mortality, whether it is in housing segregation, or the glass ceiling, and we instead focus obsessively on the different measures that we have adopted as remedial measures. And so it becomes easy to poke holes in these programs as anyone knows. You can always point out that there are costs to doing this or to doing that, and we then neglect to return effort to the original imperative of addressing racism and sexism as they continue to plague us.

I would suggest that we begin there. That we begin not with debate over affirmative action, but dialogue over racial discrimination, racial disparities in all of their forms. Not just the egregious, intentional cases, the clear ones that are so easy for us to condemn now because we have a consensus, fragile though it may be, forged through the struggle of the civil rights movement. But those that are ambiguous; those that are complex. Where there is no longer an intentional wrongdoer for us to blame, for us to point the finger at, for us to in some way hold responsible, as if holding that individual responsible will absolve all of us and take care of these issues. That is what this symposium, it seems to me, is all about. It isn't about just affirmative action. It's much broader; it's much deeper. It is about the harder issues that we face. What is it we will do? Never mind the name that we give the program, or who's sponsoring it. Never mind whether it is federal or state or local, private or voluntary, or imposed by court order. This is a challenge that we must set for ourselves, all of us who care, of devising the most appropriate means within the constraints that we face and using the rhetoric that has been deployed against us once again in our favor. For in the campaign here that we recently saw in 2006 when Proposal 2 passed, as in every other jurisdiction, California or Washington state or elsewhere, those who sought to abolish what they called "preferences," reassured the voters time and again as explicitly as possible that, like us, they too embraced diversity. They abhorred discrimination. All they wished to do, they said, was to eliminate a particular means of addressing these problems. And they said that they were ready, that they were willing. Indeed, they were eager to work with us after they had achieved victory at the ballot box to eliminate a particular means. But that the ends that we held dear, a vision of a society in which the University of Michigan Law School or the halls of Congress or corporate boardrooms would see in a meaningful manner a critical mass of people of all backgrounds, all ancestries, of both genders, that that was a vision that they, too, shared. That they saw that same future for us as we undergo a profound transformation that no other nation on the face of the globe in recorded history has ever made peacefully, much less successfully. As we,

within the lifetimes of those of us in this room, cease to have a single, identifiable racial majority. Around 2050 or so, it will happen if present trends continue, trends of migration, trends of marriage. It will happen not just as it has already in California and New York City and major urban areas. It will happen on our college campuses in the Midwest, in the Deep South. It will happen in places that you would never expect not far from here, where in the course of a single census-taking over a decade, you see populations that have changed, communities that have formed in what seems to those who have resided there for so long like the blink of an eye. Whatever their backgrounds are, we are surprised to hear the languages spoken, smell the foods that are being cooked, and interact with the people who, it turns out, have that same notion of the American Dream, though it may be manifested in a very different way.

So, as we do this, as we have a dialogue, not a debate, about race and diversity, not affirmative action, it seems to me that our jurisprudence has taken a turn toward abstraction, not toward the material differences of individuals and communities in the world. I would urge that we look to the reality of psychology and sociology. That we return to what made the Supreme Court's decision in 1954 in *Brown vs. Board of Education* so important. Not merely the decision alone, but that it was a decision recognizing that there was not equality. That "separate but equal" as a phrase did not, in any way, accurately describe the situation in the *de jure* Jim Crow South. That separate was inherently unequal. That separate had always been materially unequal—whether you looked at the financing of the schools, the physical condition, the textbooks that were used, the student/faculty ratio. In every respect it was apparent to all that some schools were superior and others were inferior, and that that hierarchy correlated to race. What has happened, as we all acknowledge this demographic change, is it seems we have become glib. It is too easy for all of us to say, "Well, we're all minorities now," or, "We will be minorities soon." And so everything is more or less the same. By abstracting these numbers and by looking just at the most general numbers, we leave out the meaningful consequences.

And as we learn that racial prejudice is deep-seated, that it can be subtle, that it's the images rattling around in the backs of our heads, we become glib in another way, too. We say that all of us are racist, after all. And so it evens itself out in the end, without seeing that, when you look at the world around us, that some of us have privileges that we take for granted that have long been denied to others. And that when we look at the opportunities that communities, not just individuals, but that communities have in the aggregate, that they are not distributed as we would imagine it abstractly.

So let me turn to another personal story before concluding. A few weeks ago I had the opportunity to speak for MLK Day at two different high schools. It was an honor to be asked to speak, at both of these

schools. One was a high school in the city of Detroit, a public high school—not that far from Wayne State University in the heart of the Motor City. The other was an elite, exclusive, distinguished prep school on the East Coast—well endowed, historic, an institution that has produced presidents and senators and corporate leaders. The contrast could not have been more striking.

When, on Tuesday of that week, I drove to the high school in Detroit and pulled up in front, the first thing that I saw was the police station. For in that high school, as in others in Detroit, there's a police station right there in the high school, and there are uniformed officers patrolling the halls, and if you walk in, there is a metal detector that wasn't working. And when I found my way to the room—as the administrators of that institution did their best to shepherd the students in; and as they straggled in and it turned out that some of them weren't in the right place or weren't there at the right time, that there was confusion about what they were supposed to be doing, and that some of them didn't want to go and listen to the speaker that they were assigned; and as the teacher spent the first five or ten minutes just bringing order to that room and telling some of the kids that they couldn't be there and had to go elsewhere, and trying to find where the other students who were supposed to be there were, where they had wandered off to—as I gave my speech, I wondered what it was like to be educated, or to try to be educated in that environment. Where the students, when they entered the school, had to pass through that metal detector that didn't work, and when they left for the day, as I did, went down the street to get a bite to eat. I stopped in at a local establishment that had a big banner outside that said it had just opened, and it was a mom-and-pop operation serving fried chicken.

So I wanted to patronize it, a small business. It was wonderful to see that these owners had decided to open up in the heart of the city. I walked in and immediately, as in virtually every retail establishment that's still operating in Detroit proper, you're confronted by a wall of one-inch thick clear Plexiglas so that the customers are one side and the proprietors on the other side. And it's bulletproof. You can't interact other than through the little grill that you can speak through. That is the context in which this high school operates. These students move through their lives, in a context that signals to them if they just want to order lunch at a fast-food joint that they're presumed to be thugs and felons, to be armed and dangerous. At this high school, with its dingy chairs and with its walls that look like they really hadn't been cleaned in some time, a vast cavernous space that was designed for a city twice as large when the school was bustling and flourishing, you couldn't help but wonder, without even knowing that there were other high schools elsewhere with conditions that were not the same at all. You could not help but wonder what went on day in and day out, and admire the teachers and the administrators who went to work and so valiantly did their best to uplift a city.

On Thursday of that week, I flew to the East Coast and was picked up in a limo and driven to this idyllic New England campus that, if you didn't know it was a prep school for teenagers 14 to 18, you would have thought it was an elite college, because it looked just as nice, just as big as any private college that you could find. Indeed, you could find many just down the road from where this was. And they didn't just have me as a speaker. They had a half-dozen speakers, all from out-of-town, all being paid handsome honoraria, all driven from the airport in limos. They had a printed program. They had a lavish dinner the night before. They gathered all the students, 1500 of them or so, and in the auditorium we spoke. And then we had an entire day of activities. It was wonderful to be there, to talk to the faculty who are dedicated, to the faculty who have PhDs. One of them remarked to me, "Well, you know, after Harvard, our endowment is the largest on a per-student basis." I didn't doubt that for a moment, as I learned that they had study abroad programs in China and France and Mexico for high school kids. Their tuition, I'm certain, is equivalent to what you would pay at a private college. That was an altogether different experience. I'm grateful to have been invited to have spoken there. When I was in high school, I didn't even know there were any such things as elite East Coast prep schools.

But one wonders about this disparity. Because, if you have the opportunity back-to-back to visit these two institutions that occupy the same place in our educational system, the same place in our society that have the same task before them, there can be no doubt of the difference in the material conditions. Yes, the day will come when we're all minorities, and yes, we all have racial prejudice, but there is a difference between that high school in Detroit and that prep school on the East Coast. And it is undeniable. So, we can choose, if we want, to ignore it or to say that the law has no responsibility. There has been no intent to do any wrong here. This disparity simply exists. We can accept it as a fact of life. Or we can ask ourselves whether as a society we envision and offer, as a model for the world over, a different future.

My conclusion is this. I would like to tell you a little bit about some of my friends, because you may have friends like this, too. You can envision someone. I'm sure you can picture him or her. Do you have any friends who say that they marched? You know, it's funny how many people marched, even people too young to have been alive then. We all have those friends, right? They marched. They take great pride in that fact. They're nostalgic. No one ever stands up and says, "Yes, I threw Molotov cocktails." No one ever says, "Yes, I beat the Freedom Riders, or sic'd the police dogs on them, or turned the fire hydrants on peaceful marchers." No one remembers anymore 1957 in Little Rock, Arkansas, when angry mobs gathered to prevent school children, who happened to be Black, from entering the building so they could sit and be educated next to school children who happened to be White. You just go back and look at

the news reels, the photos, or the Norman Rockwell paintings, if you like. The famous paintings that he did; the series about the Civil Rights Movement. There you see ordinary people. Men and women who were, to be sure, fathers and mothers and good decent people. You see teenagers. They're all White and with hatred on their face. It is apparent. You can even make out, if you look at these photos, that some of them are shouting obscenities. The National Guard had to be called out, and ultimately, the schools were shut down for an entire year there, as they were elsewhere in a campaign of massive resistance to the mandate of the Supreme Court, to the law of the land that ended racial segregation.

Well, be that as it may, let us take our friends at their word. That all of our friends marched. That they were on the side of justice. That they were with Martin Luther King in 1963 in Washington, D.C. under the hot sun, before he was a national hero who had a holiday named after him; when he was a radical, and when he was despised.

For I'd like to talk about some of these friends of ours. There are a good number of them, and you'll know who they are as I describe them. A good number of them who say, "But that was then, and this is now." And they say, "Well, didn't we pass all these laws? Don't we have commissions? Don't we have rules? Don't we have training? Don't we have sensitivity? Haven't we gone," they say, "a little too far with all this political correctness?" You know these friends of ours. They say, "Why must we still have affirmative action? Haven't we done enough?" And then they wind up saying they have "compassion fatigue." That they're sick and tired of hearing about other people's problems. I always wonder when they say that they're sick and tired of hearing about those problems, what they think it must be like to live with those problems. As Fannie Lou Hamer, one of those voices from that era, said, "I'm sick and tired of being sick and tired."

But these friends of ours, what they most want to know, and they say this with disillusionment if not bitterness, is, "When is it over? When does it end? Why aren't we finished yet?" That's their plea.

Do you have friends like this? They were once with us, but now they're chagrined that we still must have symposia and conferences, that they must go off to diversity training, that they must learn how to address these "-isms" and understand privilege. And when my friends ask this, I always say, "You know, I don't think it will ever be over. I don't think it should end."

And they shake their heads, and they say, "Oh, what a terrible cynic you are. What a pessimist. You think that our children and our children's children will still be at it? That they will have to confront these issues?" Why don't you have any hope? they want to know, they demand.

And I always reply that "No, to the contrary, I say what I say because I am an optimist." I do believe in the American Dream, that I don't think it will ever be over. I don't think it should end, because, what I'd like to

suggest, is that diversity, like democracy itself, is a process not an outcome. Allow me to offer that law professor's stock in trade, maybe we can draw an analogy.

Think for a moment about democracy, and it doesn't matter for my purposes what party you favor, what candidate you're supporting. Just think for a moment, when you go this November to cast your ballot, and to elect leaders not just nationally, but at the state and local level, to exercise your rights, to fulfill your responsibilities. If the man or woman in front of you at your polling place, perhaps it's on this campus or it's at a school nearby, if they turn to you and they say, "This voting stuff, didn't we just vote two years ago?" If they say, "When is it over? When does it end? Why isn't it finished yet?" You would realize this person doesn't get it. They somehow misunderstand democracy. It's a process, not an outcome. You participate in it, you engage with it. It may be frustrating from time to time when we do want to see reform. We want every vote to be counted, but we know that the goal is to always take part in public life, in the civic square, in the give and take. Not just for ourselves, but to invite others to do so, to expand our sense of community and membership and who may assert themselves, stand up, and speak out.

Well, maybe, diversity is just the same. It's a process, not an outcome. It demands that we exercise our rights, fulfill our responsibilities time and time again; that we march. Yes, we rest our weary feet, and we march again and again and again. That we are inspired, and from time to time, we reflect upon and celebrate the accomplishments and remember those who gave so much. But that we always be prepared to return to the struggle. Because it doesn't matter what ballot measure passes; it doesn't matter who wins office. If we have this vision that we say we have, of a diverse democracy, of a place where we all belong, where any of us can aspire to sit in the White House or to hold the highest and most prestigious office, to reap the material rewards the New World offers, then we will always be prepared, understanding that there are legal constraints within which we must work, and political ones, too. But we will then renew the challenge for ourselves within institutions and of our leaders. As individuals we will always ask, What is it we will do? What will we do to make good on the promise of a diverse democracy? That is what I ask you, and I look forward to the answers that you have to offer as we engage in the dialogue that is at the heart of a diverse democracy.

Thank you. (Applause) It truly is an honor to be part of this gathering. It's terrific to see so many people come out on a Saturday morning to grapple with these challenging issues.

(Applause)

PRIYA BASKARAN: Thank you again, Dean Wu. There will be a brief ten-minute break. The panel will reconvene at 10:30. Thank you.

PANEL I

ENDING AFFIRMATIVE ACTION: THE CURRENT EFFECTS OF PROPOSITION 209
IN CALIFORNIA AND THE POTENTIAL EFFECTS OF PROPOSAL 2 ON
PUBLIC UNIVERSITY EDUCATION IN MICHIGAN

RACHEL JOHNSON: Because Proposal 2 passed so recently, we don't yet know the effects that it will have on public university education in Michigan. However, we can look at the effects of Proposition 209 and how it has affected diversity in public education in California. To do that, our esteemed panelists here will compare the two states in terms of economics, class, local and statewide politics, and racial and ethnic diversity. They will then use that information to help us understand the potential effects of Proposal 2 here in Michigan. Unfortunately, Professor Harris, who was in your programs, was unable to join us today, but we are grateful to have Professor Mark Rosenbaum who has graciously decided to take her place on the panel. The panel will be moderated by Hardy Vieux. He's very popular. He's one of our first *Journal* alums. He was actually the EIC of Volume Two. He graduated from Michigan Law School in 1997 with a dual degree in law and public policy from the Ford School. He's a senior associate at the D.C. office of Blank Rome, and he practices in the areas of White-collar defense and national security. Please welcome, Hardy Vieux.

(Applause)

HARDY VIEUX: Thank you, Rachel. Good morning, everyone. I will be serving as your cruise director for the day.

(Laughter)

First off, I want to thank the *Journal* and its symposium directors for pulling together this engaging day of dialogue, and all of you for braving this fine Ann Arbor weather. We have a wonderful panel here today with our four panelists, and I'll introduce each of them and then turn it over to Professor Rosenbaum. They will each have about 20 minutes to address the topic. Afterward we'll leave some time for some questions and answers. There will be *Michigan Journal of Race & Law* associate editors with microphones in their hands. Please wait until one of those AE's makes it to you with a microphone before you pose your question.

So starting off to my left, we have Professor Rosenbaum who is currently the Legal Director of the American Civil Liberties Union in Los Angeles. He has worked there since 1974. Additionally, Professor Rosenbaum has taught at Michigan since 1993. He received his B.A. from the University of Michigan and his J.D. from Harvard Law School, where he was Vice President of the Harvard Legal Aid Bureau. Professor Rosenbaum has also taught at UCLA's Law School, the University of Southern California Law Center, and Loyola Law School, and he has lectured at Harvard and at Duke. He has argued on three occasions before the Supreme Court of the United States and has frequently argued before

the Ninth Circuit Court of Appeals as well as the United States Court of Appeals for the Armed Forces. Just this past week, he argued here in Michigan.

His areas of expertise include race, gender, poverty and homelessness, education, voting rights, workers' rights, immigration rights, and the First Amendment and criminal procedure. He has received numerous awards and commendations and is regularly selected as one of the most influential lawyers in California, and was recently named California Attorney of the Year in the area of civil rights.

To his left, we have Ms. Martha Kim. Martha is currently the Director of Research and Workplace Programs at the Level Playing Field Institute, which is a San Francisco-based non-profit that studies and identifies barriers against people of color, women, and gays and lesbians in higher education and in the corporate workplace. The Level Playing Field Institute offers a three-year summer residential math and science academy for underrepresented high school students and a scholarship program for underrepresented students at the University of California at Berkeley.

Prior to joining the Level Playing Field Institute, Ms. Kim was at an international, New York-based law firm, where she worked primarily in matters of international anti-trust and securities regulation. She received her J.D. from the University of Michigan in 2003 and served as a research associate to the Assistant Dean of the School of Public Policy.

Before attending law school, Ms. Kim worked at McKinsey & Company and at PricewaterhouseCoopers in San Francisco and received a B.A. in Political Science in 1999 from the University of California, Berkeley. Her research as a Ronald McNair Scholar regarding racial discrimination in the National Football League and how it is a microcosm for discrimination in our society at large was published by the University of California.

To her left, we have my classmate, Professor Emily Houh. Emily is a graduate of Brown University. She earned her J.D. from the University of Michigan and was a founding member and articles editor of the *Michigan Journal of Race & Law*. After law school, Professor Houh served as a law clerk to the Honorable Anna Diggs Taylor, United States District Court Judge for the Eastern District of Michigan. She also practiced as a staff attorney with the Legal Assistance Foundation of Metropolitan Chicago and as a litigation associate at Miller, Canfield, Paddock and Stone in Detroit. Professor Houh teaches contract, commercial law, and critical race theory at the University of Cincinnati College of Law, and in 2006 she won the Goldman Prize for Teaching Excellence.

Her scholarship is focused on contract law and critical race theory, and she is a frequent speaker on these topics at symposia throughout the country. Her articles and essays have appeared in such journals as the *Cornell Law Review*, *University of Pittsburgh Law Review*, *Utah Law Review* and the *UC Davis Law Review*. Currently, Professor Houh serves as the

Chair of The Association of American Law Schools Section of Law and Humanities, and when she's not doing that, she's happy to show you adorable video clips of her two-year-old son Edward and her husband Andrew.

To her left is Professor Matthew Fletcher, another classmate of mine. Professor Matthew Fletcher is an assistant professor at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. He also sits as an appellate judge for the Pokagon Band of Potawatomi Indians, the Turtle Mountain Band of Chippewa Indians, and the Hoopa Valley Tribe. He is currently a consultant to the Seneca Nation of Indians Court of Appeals. Professor Fletcher is an enrolled member of the Grand Traverse Band of Ottawa and Chippewa Indians located in Peshawbestown, Michigan.

Professor Fletcher recently published articles with the *University of Miami Law Review*, the *Nebraska Law Review*, the *Harvard Journal on Legislation*, and the *Houston Law Review*. He has articles forthcoming in the *Hastings Law Journal*, *Tulane Law Review*, and *St. John's Law Review*. He graduated from the University of Michigan Law School in 1997 and the University of Michigan undergrad in 1994, "Go Blue" twice. He has worked as a staff attorney for four Indian tribes, and he has litigated over 20 tribal court cases. Most importantly, he is married to Wenona Singel, and they have a son Owen.

(Applause)

MARK ROSENBAUM: Thanks very much for having me here this morning. This is really a privilege. I know how much work goes into a program like this. In addition to helping talk about some of these questions in a serious and thoughtful way, bringing together the activists and the students and the scholars, the materials that are published really do have an impact on the political activism that results and a very large impact on the litigation and the scholarship that attaches to that litigation that can be influential. I also want to acknowledge, with respect to the case that was mentioned we argued this past Wednesday regarding the constitutionality of Proposal 2, and I want to point out that George Washington, who was one of the lawyers for BAMN, is here as is the lead plaintiff for the group I represent, Chase Cantrell. It's really lovely that you all are here.

I want to talk about California with you all. As Judge Lawson pointed out to me on Wednesday, I helped lose the case in California. And I want to talk to you some about the impact, but at the same time, looking at Proposition 209 in California as a marker, perhaps, of what is likely to occur in Michigan. Frankly, the news is bad in terms of what the impact will be. Proposition 209 is a dress rehearsal for what I think will actually be a worse outcome given some of the objective circumstances here in Michigan. But I also want to use it as an opportunity to explore with you some of the underlying issues and themes that attach to measures like Proposition 209 and

Proposal 2 and the spate of similar measures that are now being urged across the country.

As I think you know, Proposition 209 was very skillfully marketed as a civil rights amendment, appropriating the rhetoric of non-discrimination, the language of Dr. King. The discussion about equal opportunity and Proposition 209 was in many respects successfully sold as this generation's contribution to equal opportunity and to meritocracy. It was presented as what would be a true playing field leveler. Just this past Wednesday, in the argument that I'm describing to you, the attorney general, in defending Proposal 2, began his argument by quoting from Chief Justice Roberts and stating that the only way to stop discrimination on the basis of race is to stop discrimination on the basis of race. The argument that she presented, as you can see, was a notion that that's what measures like Proposal 2 and Proposition 209 were all about. They were this generation's civil rights measures. Ward Connerly, as I know most of you know, has authored and spoken frequently on the concept of colorblind justice, and he has presented Proposal 2 as a marker, as a measure of what colorblind justice is.

I want to think about that with you. I want to think about the way that, as George Washington said in court this past Wednesday, affirmative action, race-conscious admissions policies have been described as "preferences" in pejorative terms. In many respects, I think we have to admit that the proponents of such measures have effectively maneuvered the dialogue so that defenders of affirmative action are frequently on the defensive, that they are placed in positions of having to defend the unfairness that the other side says affirmative action works, and the undeserving. The argument is made, and it was made again this past Wednesday, that race-conscious admission policies are ways of getting the undeserving into universities where they don't belong, and as I'll come to very shortly, in fact this measure, this statement is trumpeted quite loudly. The other side has presented, as its principal defense of Proposal 2, the notion that people of color, in particular, African Americans and Latinos are mismatched when they attend universities like this university or Boalt or Berkeley or UCLA under such programs.

So it's important, I think, for us to rethink these matters and to see if we can talk about these matters even on their own terms. Is Proposal 2—is Proposition 209—are these truly colorblind measures? How do they operate? And one way of thinking about this—and I just want to start here, before I get to California is to look at the measure itself and to say, "What's going on here?" And to recognize that it's no coincidence, that the areas that were excised, that were repealed and then made extraordinarily difficult to re-attain: public education, public contracting, and public employment, are perhaps the three most noteworthy and maybe the only three areas where proponents of civil rights, where individuals of color, were

successful in a political process. These were precisely the measures that were excised.

Let's talk a little bit about California and about what happened there. It's worth comparing California to Michigan. Exactly what is at stake here? When people talk about the numbers, there's a lot of distortion. For example, in Michigan, before Proposal 2, in 2005, the public school enrollment of African Americans was 20%. The undergraduate student body at the University of Michigan pre-Proposal 2 was 7%. So that's what we're talking about here. Compare that, say, to the White population. In 2005, the public school enrollment was 72%, the undergraduate student body admits were 71%, and the undergraduate student body was 67%.

As we look at what happened in California, let me give you a little bit of background. The University of California consists of ten campuses, and the aim of the University of California is to admit the top 12.5%, the top one-eighth of all high school graduates within the public school system. Students become eligible for the UC system based on grade point and based on either SAT or ACT. And as you probably know, the most competitive campuses within the UC system are Berkeley, Los Angeles, and San Diego. Now prior to Proposition 209, as a result of a commitment to diversity, there were in fact major gains in the percentages of underrepresented minorities who were admitted to the UC freshman class. For example, in 1980, the percent of underrepresented minorities—I'm going to use that phrase because it's a term of art—was 9.9%. By 1995, just before the impact of Proposition 209, that number had more than doubled. It was up to 21%.

After the board of regents, even pre-Proposition 209, applied a rule that eliminated race-conscious admissions, those numbers began to drop precipitously. In 1995 21.5% of UC applicants were underrepresented minorities. By 1998 the number was down to 17.5%, and at the most selective campuses, the numbers were even more dramatic. At one year post-Proposition 209, at UCLA with an entering class of some 5000 students, there were 98 African American students that were admitted, 49 of whom were athletes. In the UC Berkeley class, between 1997 and 1998, the fraction of minorities dropped from 22% to 12%. At UCLA, the numbers of underrepresented minorities dropped, during the same time period, from 22% to 15%. At UC San Diego the numbers went from 13% to 10%.

Looking at it a different way, in 2002, underrepresented groups represented about 17% of UC freshmen. In 1995, 38.3% of California high school graduates were from underrepresented minorities, 21% of UC freshmen were from those groups. That's a difference of about 17%. After Proposition 209 and after it began to be implemented, that gap widened to 24%. So whereas 41.6% of California high school graduates were from underrepresented groups, freshmen dropped to about 17%. What hap-

pened when the state of California said it wanted to attempt to utilize so called “race neutral methods” to deal with these sorts of drops using, say, a 4% plan whereby the top 4% of every high school was guaranteed admission to at least one of the campuses, although, as you can tell, not necessarily UCLA or Berkeley? In the first year, notwithstanding this program, freshman enrollment of African Americans dropped to 3.9% from 7.8%. Latinos dropped to 10.8% from 14.6%.

Moreover, as I indicated to you, these numbers, the numbers about the UC system, disguise a couple things. One of the things they disguise is the fact that many of the students we’re talking about come from out of state, although, as I will come to in just a moment, that’s going to be far worse in Michigan than it was in California. Moreover, the reshuffling—that’s the phrase that the other side uses—means that, notwithstanding studies like the Bach and Bowen study that say these kids do just as well in these schools, just as well afterwards, and that there’s no difference in terms of performance, at the schools where African American and Latino kids attend, the SAT scores drop by over 100 points which is just another way of saying they’re not in Berkeley, they’re not in UCLA, they’re not in UC San Diego.

Now, however grim that news is, it’s nothing compared to what is going to happen at the University of Michigan, and that’s for two principle reasons. First of all, as I indicated to you earlier, the numbers of students that we’re talking about, African American and Latino students, is terribly small to begin with. But the percentages that I give you are misleading. And the reason that they’re misleading is because a large proportion of students, African American and Latino students, are from out of state. So the sorts of programs that might otherwise be addressed in state, will have no effect at best no matter how successful they might otherwise be.

In 2005, there were 275 African Americans who were admitted to the University of Michigan who were in state. The number of out-of-state was 292, 52%—51% of the total African American population. So that most of the students who are otherwise coming are going to be from out of state. These out-of-state kids don’t have the SAT scores and the grade points to otherwise get into the University of Michigan. Furthermore, within Michigan itself, the kids who are at the in-state schools are not at schools where they get the educational opportunities to otherwise compete. For example, the in-state underrepresented minority average is 571 and 574. The out-of-state average is 620, 628. The non-UM admits are somewhere in the neighborhood of 660 and 699. The short answer is that race admissions policies are not likely to have any impact in terms of reducing the sorts of gaps that were somewhat mitigated in California itself.

Let me say one more thing about so called “race neutral methods,” and that is, Michigan is among the most segregated states in the United

States. When it comes to, for example, Black students who are in predominately or intensely segregated schools, Michigan is ranked sixth in terms of predominately, that's 50% or more, non-White, or third highest state in the United States in schools that are 90% kids of color. What does that mean? It means that if the state of Michigan in fact adopted a so-called "percent plan" to let the top 4% or so of a high school in, it's going to have little or no impact because those kids are already in the most segregated schools, and the big winners of such a program are probably going to be White kids who are in less segregated schools.

So the outlook for Michigan is very, very bleak. As I said, the argument of the other side, the state of Michigan and the interveners who are seeking to support Proposal 2 who are represented by an individual who represented the Reagan White House, was part of the White House counsel and worked in terms of the Reagan policies in court as to voting rights and education, is that, to use their words, "This is all good news." That's the phrase they used, because they said there were too many kids who were "mismatched" in the schools they attended.

I want to say one final thing in terms of ways of thinking about this. As I indicated when I started my remarks this morning, it's always struck me that the other side has very successfully appropriated what everyone thinks about colorblindness and the notions of colorblindness and the term colorblindness. But even on the notion of that term itself, it's been a lie. It's been a serious lie in terms of how these matters work. That is, the notion has always been, and the lawyer for the interveners said this again on Wednesday, that what exists under race-conscious admissions programs are preferences that unfairly benefit kids of colors. With Proposal 2, that has never been the case and you know that is not the case. And you know that's exactly what was struck down in *Gratz*, and you know that in the *Grutter* case, those sorts of definitions don't operate.

But it's far worse than that. Let's talk about how Proposition 209 and Proposal 2 actually work. Is it true that a race-conscious admissions policy really is the opposite of colorblindness? Does Proposal 2 in fact produce a colorblind, race-neutral process? The reality is, it works just the opposite. That is, in a diversity-producing, individualized, flexible, and holistic program, kids of color who identify themselves by race are the ones who are most disadvantaged.

Let's think about that. Imagine you are an oboist. Imagine you come from the Upper Peninsula. Imagine you come from a military background. Imagine you're an athlete. Imagine you're the child of an alumni, and you're filling out, as part of the application process, your statement. And you're being asked, "How do you define yourself?" What do you say? What do you bring to a university that is committed to diversity? Why do you bring a set of values, a set of interests that are valuable here and that can make a serious contribution to what the Supreme Court said was a constitutionally grounded interest in producing a diverse student body? If

you're one of those groups, and indeed if you're virtually any group in society as to how you identify yourself—and after all, isn't that what we're all about? Isn't that precisely where the state should stay out? How we choose to define ourselves?—you can talk about yourself in the most direct way and say, "I have something to bring to this diverse community."

But under Proposal 2, the one group that is absolutely prohibited by law, in fact, it's prohibited by the state constitution, from talking about itself are people of color who choose to define themselves by race. If those individuals say, "Look, I can define myself in lots of ways, but my racialized experience, what it means to have grown up in this society as a member of a particular racial group, has formed who I am and who I want to become. And I can bring that to the community," the response of the state of Michigan, like the response of the state of California, is, "We can't listen to you." The response is, "Race doesn't matter." Race is not only is neutral, it's worse than neutral. It has become a negative. So an individual who is put in that position is essentially left with a circumstance where he or she is forced to deny those racialized experiences, making the individual essentially illegible, essentially incomprehensible within that process.

I'm not going to take time to read it because I don't want to take time from the other panelists, but it struck me in looking at the autobiography of Senator Obama and the autobiography of Justice Thomas, which those of you who are familiar with those books, those papers know, are in essence about coming to terms with a racial identity, what it meant. These individuals, if they applied to the University of Michigan, unlike any other group, in talking directly about the importance of race, are precluded from doing so. So what has happened in California and what will happen in Michigan is more than a reduction in the numbers themselves. That's serious business, but what has happened also is that race, race as a measure, racial identity as a description of the character of lives has been denied that integrity. Race is not a plus. Race is not a neutral, but under the regime of the 209's and the Proposal 2's, race has become a negative in this society. Thank you very much.

(Applause)

MARTHA KIM: Good morning. I'm sure that many of you have friends from California who believe the world revolves around California, but in this circumstance, actually, there are certain things that make California very unique, and in particular the UC system. So I'd like to start with a little bit of background information on what makes California such a unique place with regard to Proposition 209 and affirmative action, then discuss some of the measures that have been implemented since the passage of Proposition 209 to mitigate the effects thereof. I'd like to conclude with the programs that the Level Playing Field Institute has been charged with running to help mitigate the effects of Proposition 209.

Affirmative action, when it's discussed in this country, is largely a Black and White issue, and California is unique in that it has a very large Latino, Chicano population. California, as many of you know, is a minority-majority state where underrepresented minorities or minorities altogether constitute a larger proportion of residents than Whites do. But in particular, Hispanics and Chicanos constitute 32% of California's census population and 42% of the K-12 population, which is indicative of showing how young that group is and how much more impact propositions like 209 have on this population, especially with respect to public education.

Admission to the UC system is guaranteed, or as some would say restricted, to the top one-eighth population of high school students in California. And although the UC system employs a minimum academic standard to be considered for the UC system, because admission to the UC system is so popular, the UC system throughout history has employed stricter criteria to be admitted into certain schools. So to give you an idea, in the '70s and '80s, the UC system employed a 50-50 two-tier system where 50% of its students were admitted purely based upon scholastic criteria and 50% were admitted in consideration of the scholastic criteria, but also in consideration of non-scholastic selection criteria which included hardship, potential, as well as other experiences.

In 1988, this two-tier system changed to a 40-60% system whereby 40% of the students were admitted purely based upon scholastic aptitude and 60% were admitted based upon non-scholastic criteria. And this change was made really with the hope of increasing the diversity of the student population, but also in recognition that the scholastic criteria, SAT and GPA, were in and of themselves not race-blind. There were a lot of studies that were produced that said SAT and LSAT scores were more indicative of family income than they were of scholastic aptitude. So in recognition of these types of studies, the UC system employed this change.

After Proposition 209, this changed across UC campuses, and UC schools started admitting student solely based upon academic criteria, anywhere from 50% to 75% of students. Although Proposition 209 did not take effect until 1998—it was passed in 1996, but did not take effect until 1998—the UC system saw a sharp decline in the number of Black and Latino applicants immediately. There have been many reasons stated for this, some of which include financial aid. Many people forget that Proposition 209 also precluded universities from extending financial aid based upon race, so the reality was, a lot of Black and Latino students were disproportionately affected if they could not receive financial aid to attend these schools. Other reasons that have been given for the sharp decline immediately after the passage of Proposition 209 include the loss of community that students felt would occur at the UC system as well as what Professor Claude Steele at Stanford refers to as a stereotype threat,

basically stating that if there is this perception that Black and Latino students are not qualified to be at these schools, they internalize this perception and have already precluded themselves before they have even applied. So there was an impact of Proposition 209 way beyond its actual numbers.

But the percentages are very striking. There are many out there, but perhaps one of the most striking is the effect upon admit rate after passage of Proposition 209. And two of the UC schools that had been most affected were Berkeley and UCLA, by far the schools that received the largest number of applicants. So pre-Proposition 209, the admit rate for underrepresented minorities was 54%. Post-Proposition 209, it dropped to 20%. That is more than half. UCLA saw a similar decline. Pre-Proposition 209, the admit rate of underrepresented students was 52%, and post-Proposition 209, it dropped to 24%.

So these are some of the effects of Proposition 209. And then the UC system, after the passage of Proposition 209, adopted certain measures to try to mitigate these effects, many of which included outreach and expansion efforts, partnerships, designs to increase preparation of underrepresented students for UC education, expansion of the academic criteria considered for admitting students, a program called the Eligibility and Local Contacts—whereby the 4% of students in all high schools, including students in urban and rural high schools, were guaranteed admission to the UC system—as well as expansion efforts, enrollment efforts of community and transfer colleges.

This is the climate into which the Level Playing Field Institute was born. At that time, our founder served on the executive board of the University of California Berkeley and the chancellor at that time charged members of the executive board with developing ways in which they could combat the effects of Proposition 209. And so at that time, the Initiative for Diversity in Education and Leadership, IDEAL, was born. And what IDEAL strove to create was a sense of community that was lacking after the passage of Proposition 209 for underrepresented students of color, specifically at the University of California Berkeley. It's a four-year program for students who have been admitted to the University of California Berkeley race blind. It replaces all of their work study, all of their scholarship money with our scholarship money thereby making these students eligible to pursue unpaid internships and study abroad programs. It provides tutoring and academic support for all four years in which they are in school.

One of the things that we realized, though, in carrying out this program, is a lot of students came to Berkeley without the same preparation as perhaps their Caucasian counterparts. This is when we realized that preparation really was lacking and that this was indicative of a lack of resources in the high schools that they attended. And so that's when we began the summer math and science high school academy, which is a

three-year high school academy for underrepresented students, and it's a residential program that's run at the UC Berkeley campus each summer for their first three years. It's really targeted at mitigating the effects of lack of resources in these schools and trying to level that playing field between these students.

So, I really come from the perspective of the practitioner. We are on the field working with these students and learning from these students as well as the research that has been done from an academic perspective. So I welcome any questions, after the other two panelists have spoken, about what it's been like working in the field post-Proposition 209.

(Applause)

EMILY HOUH: Hello. Good morning, everybody. I'd like to thank the student editors of the *Michigan Journal of Race & Law* for organizing what I think is a very important conference and for inviting me to participate today on this panel. Although it pains me very much to be here under these circumstances—that is post-Proposal 2—I have a very close personal connection to the *Journal*, so I'm also paradoxically very happy to be here. Having said that, I also have to say, and here I mean no disrespect to the student editors, I think what we're here doing is great, but I'm a little bit perplexed as to why I'm here today since my scholarly work actually doesn't focus on affirmative action. But the panel description also says that testimonial experience of those teaching and working under Proposition 209 and Proposal 2 is to be presented. Since I've only ever taught in Ohio and Kentucky, I also don't quite fit the bill in that regard.

I am, an alum of the *Michigan Journal of Race & Law* and one of its founding alums, as Hardy told you. And I'm here speaking today along with Guy Charles, the *Michigan Journal of Race & Law's* first EIC, and Luis Fuentes-Rohwer, its first executive editor, and Matt Fletcher, my co-panelist, is another alum. He was a year behind me here, so we've worked with each other and have known each other a long time. Of course Hardy Vieux was Editor-in-Chief of Volume 2 and the first symposium editor. I don't want to speak for these guys in particular, but given my lack of scholarly expertise in the area of affirmative action, I guess I'm here as a legacy invite and if that's the case, that's fine with me.

(Laughter)

So what can I offer you this morning on the effects of Proposition 209 and the potential effects of Proposal 2? What I can offer, of course, is my testimonial experience about the law school before it got embroiled in the *Grutter* litigation, and then in the fight against Proposal 2. And I'm here, I suppose, to tell you all how great it was to be here in the heyday of affirmative action before *Grutter* and certainly to warn against how bad it's going to be in its aftermath and all the difficult work that lies ahead. I've done a lot of reading in preparation for today, and I think my co-panelists can do a much better job of that, so I'm going to proceed with my narrative and go from there.

So the real story, or at least my story of what it was like to be here in the heyday of affirmative action, or, really more accurately, the declining heyday of affirmative action, is of course very complicated. It was a great experience, of course, but it was very, very complicated. And to make this experience relevant to the circumstances we're in today, I want to frame my narrative around a very important distinction that Sumi Cho, whom you'll hear from later, has made between affirmative action as a policy and affirmative action as a movement in the Gramscian war of position against White supremacy. In fact, she made this distinction here in this room in 1998 during a panel co-organized by the *Journal* and Michigan's chapter of APALSA, which was subsequently published in the journal. (I encourage you all to take a look at that.)¹

Sumi called for, in her remarks, a blurring of this distinction between affirmative action as a policy and affirmative action as a movement, in part to illumine the ways in which Asian Pacific Americans (or APAs) benefit from affirmative action as a movement against White supremacy. So I offer my narrative about the *Journal* to demonstrate one way in which affirmative action may function as such a movement within elite institutions that are ostensibly committed in some ways to diversity. I also will discuss why, in the absence of affirmative action policy, this movement may become significantly impoverished and how this may contribute to the growing inequality in the legal profession and the academy.

In the fall of 1993—that's a long time ago—here at the law school, Heather Martinez, Eddy Meng, Leslie Newman, and Dan Varner—they were a rainbow coalition of some really progressive third years here—reconstituted the then-defunct critical race theory reading group. The reading group met monthly. It provided a home for many of us who were then first years. There we could examine issues of racial and social inequality, issues that were of central importance to us but seemed to be largely absent in the classroom. Several of us had also already become friends through our participation in the law school's minority assistance program, or MAP, which I've been told ceased to exist in that form shortly after we graduated under the threat of litigation.

The reading group further nurtured a growing sense of community and kinship that had begun to develop in MAP. By early fall of our second year in 1994, several of us, including Guy and Luis, myself, and our

1. Symposium: *Rethinking Racial Divides—Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 233 (1998) (Cho states: "I want to try to blur two things. One is affirmative action *as a policy* in which groups receive a plus factor, let's say, in admissions. The other is affirmative action *as a movement* overall in the war of position with white supremacy.") (emphasis in original). See also Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1049–50 n.54 (1997) (discussing Antonio Gramsci's concepts of "war of maneuver" and "war of position" in struggles against group subordination).

classmates Emmeline Kim, Christina Chung, Hardy, and Pam Shifman, to name just a few, decided that a reading group just wasn't enough. This early group, again, was like a rainbow coalition. We were led largely by Guy and Luis who at the time were also beginning their first year in the PhD program in political science here. We decided to start a journal that would dedicate itself exclusively to issues of race. We started meeting on Saturday mornings up at the Espresso Royale Café on State Street, which is still there.

At the beginning, we had a pretty good time. But as we grew and started to make our ideas concrete, we also started to argue about a lot of things. Part of this was due to the fact that each of us came to the table with a different level of and approach to this kind of organizing. Part of this was the nature of simply working in coalition, which is how I now have come to understand and interpret what it was that we were doing. But we had one particular goal that kept us on the right path. And looking back on it, I think this goal reflected and continues to reflect a very important aspect of affirmative action as a movement against, specifically, what we saw pretty clearly as intuitional problems here at the law school around race. This goal really addressed a material inequality. In plain terms, we were moved to act because of the dearth of people of color on our own faculty, and at the time, having done some research, the apparent dearth of people of color on law faculties across the country.

Of course we greatly respected and appreciated Sallyanne Payton who had been tenured at Michigan well before we had arrived, but in the fall of 1994, I think she was the only person of color on the doctrinal tenure track, tenured faculty. And, I'm sorry, Jose Alvarez was also here, tenured; he left not long after we got here. Moreover, as members of various basement groups, that's what we were called; (such as BLSA, APALSA, LLSA, and WLSA) it's because they're located in the basement. But it has other meaning, too, I suppose!—

(Laughter)

As members of various basement groups, many of us had been carrying on what had become a tradition of advocating for more hiring and recruiting of faculty of color. This continues today, I think. We came to understand that one reason for this severe under-representation of people of color had to do with the pipeline from law schools to the academy, which was largely closed to people of color. So we thought it necessary as students at an elite feeder institution such as Michigan, to work to open up the pipeline in whatever way we could. We decided that the best way to do this was to establish a race-centered journal as an alternative to the *Law Review* and several other already existing topical law reviews.

We thought this necessary because we were dissatisfied with the ways in which these journals consistently—we felt—failed to consider for publication scholarship that explicitly and deeply addressed racial or inter-sectional inequality. This often meant, in turn, that these journals

consistently failed to publish articles written by scholars of color, particularly young, promising, untenured, and in some cases, institutionally marginalized and vulnerable faculty of color. We felt that given what we then knew about the very hierarchical publication requirements of tenure, it was important to provide a publication venue at an elite institution like the University of Michigan Law School for those scholars.

Now lest you think that we acted purely out of altruism and concern for others, let me assure you that we did not. We also felt it necessary to establish the *Journal* for ourselves. We knew that journal experience was a requisite for entry to the more prestigious echelons of the legal profession. At the time, several of us knew that we wanted to enter the legal academy, or at least have that open to us as an option. And by the fall of '94, we also knew that unless we did something, the writing was on the wall. We weren't, by and large, the top ten percenters that would be subsequently groomed by the institution for the academy. We weren't those traditional law students who after only one year of law school—one alienating year of law school—"loved the law," *loved* law school. Most of us were not on *Law Review*, either by choice and on principle, or because we didn't get on. Additionally, with respect to the vaunted *Law Review*, it was hard not to notice the racial homogeneity of the *Law Review's* membership and the other journals' memberships, so we started to look into some of those journals' selection processes and policies and found that at the time, they were organizationally quite hostile to using affirmative action to select new editors who were also racially diverse. Now I say "organizationally" because several individual leaders and members of those journals were very supportive of our efforts and offered us a tremendous amount of assistance and support as we started this *Journal* from the ground up.

So, perhaps, because we had been denied access to some of these institutional goodies, we had different sets of commitments and priorities. As I stated earlier, some of us were in PhD programs. Some of us, including myself, were teaching in other departments at the University to pay our way through law school (and of course, for the love of teaching). Luis had an infant son to take care of at the time! We knew that without each other and without some institutional support, even if self-created, we would be shut out of clerkships, out of other types of prestigious legal jobs, and certainly out of the academy.

Now let me pause here to say that I'm fully aware that what I'm talking about are extremely elite types of positions and professions, and certainly there are more pressing issues that should be addressed when it comes to educational equality that both Mark and Martha have talked about, and that we'll hear about today. But the continuing integration and diversification of the legal academy and the legal profession at all levels still matters, not only for those of us that are in or aspire to the professoriate,

but more importantly for our students and our clients, and particularly for our students and clients of color.

So in terms of the *Michigan Journal of Race & Law's* success in addressing the pipeline issue, I think we were pretty successful. The annual symposia continues to be comprised mostly of people of color who come to speak, scholars of color. *Michigan Journal of Race & Law* alum who are now law professors include in alphabetical order: Jeannine Bell at Indiana-Bloomington; Guy Charles at Minnesota, who is now also finishing his second year as the Co-Dean of the University of Minnesota Law School; Matthew Fletcher at Michigan State, where he also directs the Indigenous Law and Policy Center; Luis Fuentes-Rohwer, also at Indiana-Bloomington; myself at Cincinnati; Angela Onwuachi-Willig at Iowa; and Tom Romero at Hamline. And I'm sure I'm missing several others.

Now there was a trickle-down effect when the *Journal* addressed a cultural inequality, or what I'll call the diversity issue, here at the Law School. We understood, of course, that if our efforts proved successful, the work of the *Journal* would serve an educative and expressive function that would benefit the majority students and the institution as a whole. We could bust stereotypes and raise consciousness with the best of them, I think. But diversity benefits also inured to ourselves and to other students of color. With respect to ourselves, these benefits came to us, I think, through hard arguments, conversations and politicking around things like what the *Journal* should be called, whom to invite and not invite to symposia, how the editorial board would be structured, if at all, and who would serve in what positions.

All that work in diverse coalition just about killed us a few times, to paraphrase the great Bernice Johnson Reagon.² It required us to problematize among and within ourselves what race means. It forced us to look at how racism and White supremacy were operationalized structurally and discursively, not only at the law school and as an external matter, but also within our own communities and as a matter internal to the *Journal* itself. We fought about race and gender and sexuality and position. We confronted each other about the ways in which we exercised our own privileges, and how we internalized and then turned outward our own specific subordinations. We challenged each other to look at our own social practices and actions. We came to understand, quite profoundly, the complicated nature of race and the intersectional projects of race, gender, and sexual subordination.

To the extent that we were able to translate our insights and struggles into how we selected scholarly articles and organized symposia, I

2. Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in *FEMINISM AND POLITICS* 242, 242 (Anne Phillips ed., 1998) (on the difficult work of coalition-building, Reagon has written, "You don't go into coalition because you just like it. The only reason you would consider trying to team up with somebody who could possibly kill you, is because that's the only way you can figure you can stay alive.").

think that the *Journal* played a really important part and continues to do so in problematizing and enriching the legal discourse on race. And I think this is what the *Journal* still does best. In doing this kind of work, it again benefits not only its members, but the institution as a whole.

Now I want to make clear that for purposes of this presentation, I'm not interested in institutional benefits as they've been articulated by the Supreme Court. That is, I'm not that interested that diversity exposes people to different perspectives and cultures and thus has inherent value, or that it better equips its student to practice in a diverse world and in global markets.³ That's all fine and good, but that's not what I'm concerned about here. The institutional benefit I'm most interested in is the way in which diversity, which results from the use of affirmative action as a policy, can bring about one of the most important goals of affirmative action as a movement. That is it facilitates the implosion of the construct of merit as a neutral principle by exposing how merit is raced and gendered. The *Journal* by its very existence and its success has contributed to the deconstruction of this myth of merit and, in so doing, we can see how the enactment of affirmative action as a movement may transform institutions from within. In Frank's words from this morning, we can see how diversity is a process and not just an outcome.

How then might the dismantling of affirmative action as a policy vis-à-vis Proposal 2 impact the movement type of work that the *Michigan Journal of Race & Law* has done historically? Well, first of all, it may mean in the most basic sense that fewer students of color will be around to do the work. I was able to get a hold of some numbers on my entering class here in '93 and the class that just started here in 2007.⁴ So, in the fall of '93, there were 381 students in the class that matriculated. Of the 381 there were four Native Americans, that's about 1%, 34 African Americans, about 8.9%, 18 Latinos, 4.7%, and 23 APAs, 6%. That's 20.7% people of color, 14.6% underrepresented minorities (APAs, Michigan has always said, were and are not included in its affirmative action policy.)

Three hundred fifty-five students matriculated this past fall. Half of the admissions season was pre-Proposal 2. Of the 355, there were six Native Americans, 1.7%, 22 African Americans, 6.2%, 18 Latinos/Latinas, 5.1%, and 44 APAs, so that's 12.4%. So that makes for a class of 25.1% people of color or 13% underrepresented people of color. So that's 14.6% as opposed to 13%. Now I'm not an expert on numbers, nor do I want to be. But to me, they don't really look all that good, especially in light of

3. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (describing the educational benefits of affirmative action, which include "cross-racial understanding," and "break[ing] down racial stereotypes," and other benefits as articulated by American businesses and the military).

4. E-mail from Sarah C. Zearfoss, Assistant Dean and Director of Admissions, The University of Michigan Law School, to Emily Houh, Professor of Law, University of Cincinnati College of Law (Feb. 1, 2008, 2:58PM EST) (on file with author).

what Mark and Martha have told us today. Now some of you or other people might say, "Hey, the percentage of students of color is higher now than in '93, just look at all those APA admits. Wow, affirmative action must really have hurt APAs, all that stuff is true." There's a new report that was just released this week again talking about how affirmative action hurts Asian Americans.

Well, the assertion that these numbers mean that affirmative action must be hurting APAs is just wrong. First, because APA applications to law school have gone way up over the years for reasons I'm not prepared to fully explain today for this particular talk, the number of admits and matriculating students simply reflects that. Second, there's the phenomenon of what Jerry Kang has called "negative action" whereby APA applicants who have similar LSAT and UGPA scores as White applicants receive a downward point assignment as against those White applicants. The idea is that it's this negative action that hurts APA students, not affirmative action aimed at underrepresented minorities. I'm oversimplifying; you should read Jerry Kang's article.⁵

So to me, the comparative numbers don't bode well, not because I think you can't have an entering class that's comprised this way and that isn't interested in race, but because part of the work of affirmative action, and I'll speak specifically to this elite institution, is to put students of color into the pipeline for the academy and other elite legal positions and professions. It's not just about a bunch of people who want to work on the *Journal* because they're interested in race, it's about the people themselves and how they materially benefit from their work on the *Journal* and how that work materially benefits others.

Additionally, these numbers potentially mean that students of color who are around to engage in the work of the *Journal* will likely do so in a very different way because they will have so much other work to do as they struggle against external forces and within an institution that's no longer permitted to use affirmative action. In fact, I think this is what's been going on for a long time. It was going on with *Grutter* and the appeals. It was going on in trying to fight off Proposal 2, and it will continue to go on in trying to mitigate the effects of Proposal 2.

So this kind of struggle, I think, is very different from the kind we were engaged in back in 1993 pre-*Grutter*. It's no surprise, then, that the *Michigan Journal of Race & Law* is not producing academics at the pace that it did, I think, in its first few years when the struggles like the ones you face today were not yet part of the picture. So understand, this isn't a comment about the *Journal's* success or failure as a scholarly project. It is today, I believe, one of the most well-respected specialty journals in the country, and I think it will continue to be that. It's simply an observation

5. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996).

about the kind of work that we have to do and how we must direct our energies against this ever-shifting war of position against White supremacy.

In conclusion, I just want to say that Proposal 2 has and will significantly, obviously, alter the terrain. The fight for racial equality here at the law school is a very different one than it was when I was here as a student, and to the extent that the *Journal* has always been a project that enacts the politics of affirmative action as a movement, I hope that it continues as such. But it will have to do so in different ways now, and the hardest work really lies ahead. I trust that this symposium will provide some sustenance in that regard, but it's a different fight now.

(Applause)

MATTHEW FLETCHER: Thank you, Emily. Boozhoo. My name is Matthew, as Hardy said. I am a member of the Grand Traverse Band of Ottawa and Chippewa Indians. I graduated from this law school just over ten years ago and I have to say that it's a wonderful opportunity to come back and be part of this *Journal* symposium. I can say without hesitation that being on this *Journal*, being part of it, certainly changed my life in many, many ways, and made me who I am in large part. So it's a wonderful chance to be back here and I welcome the honor.

Today I'm going to talk about Proposal 2. I certainly have to talk about how it's going to affect American Indian students in the state of Michigan, and how I hope it will not affect American Indian students in the state of Michigan. But mostly, I want to talk about the notion of critical mass, which is a term of art I learned while observing from a distance, the *Grutter* and *Gratz v. Bollinger* cases as they went on their way through the courts and into the Supreme Court. So let me start by talking about critical mass and then later on I'll talk a little bit about Indians. But I always talk about Indians, so it is going to be about Indians anyway.

(Laughter)

Critical mass to me is a very interesting notion. And when I see statistics out of California where there are very limited numbers of people of color in a given class—and I think it's important to know those numbers as a quantitative matter certainly—but as a qualitative matter, I wonder how people will react to what that means to be in a room very different from this one, a room that consists almost entirely of people who are not people of color as a student, or as a professor. I think of a class that I took in law school, which had people of color in it. It was Federal Courts, and Guy was in that class. He sat on the other side of the room, and he sparred frequently and in an extremely intelligent way with our professor. And he was a godlike figure.

(Laughter)

He has since declined in stature to just a mere professor/dean. But from my point of view, he was an amazing creature to behold. And it was

fun to see. I had no idea, frankly, what he was talking about most of the time. Federal Courts was a class I never should have taken.

(Laughter)

I could probably understand it now, but they say education is wasted on the young.

(Laughter)

But the thing about Guy's presence—and there were other people in the class too and a big *Journal* presence in that classroom if I recall—was that our professor, I believe, testified against the University of Michigan's affirmative action policy during the trial. One of things he said, and he had said this in writing, I believe, was that he didn't agree with an article about critical mass that argued that people of color are going to say something that other people who are not of color are not going to say. He'd been teaching for a long time. He said he didn't think that was a very impressive argument. And he thought that, while it was nice to have people of color in the classroom, that their experiences and their observations in class and participation in class wasn't really that much different than what White people were bringing to the classroom.

I have to admit that I didn't spend a lot of time reading his view. I didn't read every single expert report on this. I had a job, so I had to do other stuff, but it just shocked me. Because I remember Guy bringing up things that were just amazing that I think a lot of other people, White students in the class, as we talked about the class, said, "That Guy keeps saying this stuff and I had no idea that this was true about Black people. I had no idea that this was true about minorities or people who were poor." And they learned a great deal more. Apparently far more than this professor did.

And so this is, to me, the beginning of a story. There is an impact of critical mass of minority people in law schools and in colleges and universities. I'm going to go into my next point, which is what it's like to be isolated, or just to be part of one or two, or a small group in a larger group. I think of mostly how there really isn't a critical mass of American Indians, just because there are so few of them, relatively speaking—about 1% of the population we'll say as a rule of thumb, 1.7% of the incoming class as Emily said, which is actually pretty good. It's 0.7% more than you would expect I'd guess. And you can see it, not only in schools and universities and law schools, but you can also see it just in relatively intelligent television shows, for example.

I'm going to tell you a story about a show that I watched with my wife Wenona a couple of years ago called *History Detectives*. We like to watch important shows like *History Detectives* every now and then, just to try to leaven ourselves. On *History Detectives* that night was an episode called *The Cherokee Bible*. *History Detectives*, if you don't know what it's about, is about somebody who has something from the past, and they go on this television show and people investigate it for them. This

woman who looked White and acted White had a Bible that was written in the Cherokee language, and it said that it was published sometime in the 1860s. She handed this over to the history detectives. Her speculation was that somebody in her past, one of her ancestors, was probably Cherokee. That's why she had this Bible in her possession. And for 99% of the show, I was fairly impressed. They talked to people who are historians, who are Cherokees who work for the Cherokee Nation of Oklahoma; they talked to people at Eastern Band Cherokee in North Carolina. One of the woman's suppositions was that this Bible had traveled with her ancestor on the Trail of Tears. The first thing that the history detectives informed her of, was that the Trail of Tears took place in the 1830s and that the Bible was obviously not published in the 1830s, it was published in the 1860s. So, that got rid of number one.

But the main element that she really wanted to show was that she was somehow an American Indian. And they did go into great detail about where these kinds of Bibles came from, the purposes of these kinds of Bibles, and they also talked a lot about the Cherokee Trail of Tears, which did take place in the 1830s. And it was determined that one of her ancestors indeed was on the Trail of Tears, but this ancestor was not a Cherokee Indian. This ancestor, if I recall correctly, had married a Cherokee Indian, and under Cherokee law back then—and there are dozens of Supreme Court cases about this that I hope none of you ever have to read—if you were a male and you married into the tribe, you acquired possession of the female's property. So it was a very popular thing for non-Indian men to try to do, to marry into the Cherokee nation and acquire property that way.

So that's what this guy did, and probably in North Carolina or Georgia, something like that, just prior to the Trail of Tears. He accompanied the family, I suppose, from the east to the west into Oklahoma, on the Trail of Tears. There are records of this individual, this woman's ancestor, being sort of a manager on the route. In essence, as we're watching this, Wenona and I are experiencing an expectation. It is clear this guy was one of the people who held the whip. And so we get to the end, and the history detectives have a pretty rough story to tell this woman. And they say, "Look, this guy, your ancestor was on the Trail of Tears. He wasn't an Indian, but he was one of those people who drove a wagon and pushed the people along." And they did it in a very, relatively speaking, kind and non-judgmental and neutral manner.

And this woman broke down. And at this moment, this is the very end of the show, me and Wenona are expecting her to say, "Wow, I'm crying because it turns out my ancestor is not only not Indian, but was one of the people who held the whip on the Trail of Tears." And her response, ultimately, when she stopped crying at the end of the show, without discussion at this point, was, "I just want to know how many lives he saved."

Can you imagine a show about a woman who has a Bible from the Deep South that was perhaps owned by an African American person who was a slave, finding out in fact that her ancestors were not slaves or African American, but that they were part of the family, the White family, the plantation, and saying, "I just want to know how many African American slaves my family saved?" Or can you imagine a woman who finds a Bible that came from the railroads where a lot of Asian Americans were exploited for cheap labor? Again, same statement is, "I just want to know how many people my ancestors and the railroad saved." Finally, could you imagine a television show where the subject matter is people of color who were working in the fields in California prior to and with César Chávez? "How many people did my farm owning ancestors save?"

My point in all of this is to raise an issue, which is what it is like, in some part, to be part of an incredibly small minority, that there is no critical mass, where you are just an extremely isolated individual. An individual student, perhaps, confronted with this expectation that perhaps you or your ancestors were helped in some ways, but being extreme minorities in this instance. So my point is that the critical mass has a certain amount of value to it.

I point out to you a friend of mine who has kids in the Ann Arbor school district. Her children are routinely confronted by other students about Indians because they know that my friend works for a law firm that represents Indians in a lot of different cases. These are some rough stories; the things that my friend's children have to confront on a relatively periodic basis are very troubling. And this is, I think again, what it's like to be a part of a minority that's below, in terms of numbers, the critical mass—there're not enough of you to be able to stand up and say, "What you said is incorrect. It's either a stereotype or historically inaccurate."

I move on to my next point which is about American Indians at the University of Michigan and a little bit at Michigan State University. I have an ancestor, a great, great something uncle named George Mamagona who went to law school here. He's an American from Antrim County, which is part of the Grand Traverse Bay reservation. He went to law school here in 1905. I don't know if he graduated or how long he was here. He had brothers who were also at the University of Michigan around that same time. There were all these Mamagonas running around Ann Arbor. And in fact, since then there have been over 30 and perhaps as many as 40 Mamagona descendents who have attended and graduated at the University of Michigan including myself, my brother, uncles, cousins, dozens of people, literally; Indians who have gone to the University of Michigan throughout the years.

So my connection to the U of M is important, I think. That doesn't mean we're legacy admits. I didn't know this until just a couple of years ago. I just dug up a chart that was produced during the *Grutter* and *Gratz* litigation. It was a chart listing all of the graduates in terms of numbers

from 1950 to 1999. It included how many of them were Caucasian, how many African American, how many Hispanic, how many Asian, how many American Indian, and then there were others. From 1950 to 1975 the part under American Indian was zero every single year. There were very few, obviously, from that period of time of the other categories of minority students as well, but this is a really striking thing, zero. There were none. In fact, there have never been more than eight graduates in any given year from the University of Michigan Law School who claimed to be American Indian.

And I'll point out another statistic. As of about 1966 or '67, the United States conducted a study—one of the agencies back then conducted a study to find out how many American Indians who were lawyers in the United States—and they concluded that there were fewer than 25. Since then there have been several thousand, a couple thousand law students who have gone through school from that period of time onward. There may be as many as 4000 American Indian people who are lawyers at this time. So, there has been a striking turnaround, obviously. And there can't be any other explanation but affirmative action. Michigan has, although its numbers are small relatively speaking, been a part of that, including more specifically myself, obviously.

I will point out that there is a second aspect to affirmative action and American Indian lawyers being trained in the state of Michigan, and that is something known as the Michigan Indian tuition waiver. It's not about lawyers, specifically; it's more about undergraduate students. The Michigan Indian tuition waiver is a state law that waives tuition for, or at least the legislature will pay for, the tuition of American Indians who attend a public school in the state of Michigan. This was instituted, I believe, in the late '70s, and there has been a whole generation of people, American Indian people, from the state of Michigan who have gone through college simply because of the tuition waiver. Yes, they got in because of, perhaps, affirmative action. But getting in means nothing if you can't pay for college. The tuition waiver, while its efficacy and continuing viability in a conservative political atmosphere may be questionable, has been one of the most important things ever to happen to American Indian people, probably in any state.

There has been massive litigation of treaty rights within Michigan since that time. There has been litigation over gambling and Indian casinos, and that's changed a lot. That's changed Indian people and their situation in the state of Michigan dramatically. But, I argue, that the very promise of the tuition waiver has convinced Indian students who never would have even left their communities, such as Peshawbestown, to go to a school perhaps 300 miles away. And the fact that so many, a whole generation of Indian students, have gone through public schools in the state of Michigan, public universities and colleges, and community colleges because of the tuition waiver is an unbelievably dramatic situation. I think

that that is part of Proposal 2. Preserving not only affirmative action, but also this tuition waiver. At this point, my expectation is this will be the case for the foreseeable future. The tuition waiver is relatively safe at this point, largely, I think, because of the litigation Mr. Rosenbaum is involved in that sort of distracted the state attorney general from pursuing tuition waiver litigation.

I will conclude by noting a couple of different points. First of all, as Hardy mentioned, the Grand Traverse Band is centered, really, in a little town called Peshawbestown which is named after a guy named Ben Peshawbe. But it really could have been named after Aishquagonabe, which is a much harder word to say. And much, much harder for Hardy to say.

(Laughter)

He's the guy who founded the place, we call them ogemuk, who signed the treaty in 1855. He also signed one in 1836 that my tribe to this day views as a founding and organic document. He once wrote a letter to the secretary of interior saying, "Please don't make us leave as, for example, the United States made the Cherokees leave their homeland to go to Georgia." And he wrote, and I think in probably one of the most poetic things I've ever heard, "To go from this place, Peshawbestown," it wasn't called that back then, "To go from this place would seem like death." Michigan Indian people need to be in schools and universities to not only learn and to acquire that which is important to live in this kind of society—the kind of knowledge you need, the kind of experiences you need, and certainly those pieces of paper with the president's seal and signature on them—but they also need to be in the classroom with other students who are not Indians so that they can help and instruct each other with experience.

Before the end, I will point out a couple of pieces of, I think, relatively understudied pieces of scholarship from former colleagues of mine at the University of North Dakota. If you want to know what it is like to teach without a critical mass, I urge you to read an article by Kathryn Rand and Steven Light. Kathryn is a professor at University of North Dakota Law School and Steve teaches in the political science department at University of North Dakota. They put together an article—it's really empirical research—in the *Journal of Legal Education*, I believe. It's about what it is like to teach affirmative action, equal protection, and *Brown v. Board* to a predominately non-minority student class, in this instance, people who have not had very much experience in general, in life with people of color: North Dakota students, western Minnesota students, and South Dakota students. It is an extraordinarily enlightening document. For those of us who will be teaching in the states of Michigan, California, Texas, Wisconsin, Florida, where all of these purported bans on affirmative action are, I think, it's important to be able to read and to understand that this is something that is a significant example.

The other article I would mention is in the *North Dakota Law Review* from another University of North Dakota professor, Jim Grijalva, who has been barraged by emails over the years from former students of his saying, "Why didn't you convince me to take Indian Law when I was in law school, because now that I am confronted with an Indian Law question, I don't know what to do." And that's another example of being in a situation where there aren't enough people of color to remind the people in the dominant society of the importance of the laws of Indian Tribes or the laws of affirmative action and civil rights.

I will conclude by saying thank you very much. I noticed that there has been a lot of commentary about the rhetoric of colorblindness in American society, particularly in the context of things like Proposal 2. I will say, it's really not colorblindness, it's snow blindness. It's going to be a situation where we're all snow blind, and the only thing we can see in the end is White. Thank you.

(Laughter)

HARDY VIEUX: We still have about ten minutes for questions, so please, if you just raise your hands one of the editors will hand you a microphone.

AUDIENCE MEMBER 1: My name is George Washington. I am an attorney for BAMN in the Proposal 2 lawsuit. I think Mark has accurately described the effects that Proposal 2 will have in Michigan if it is sustained. They will be devastating. There's good reason to think they will be worse than they are in California. It seems to me the critical question is what can we do and how can we keep Proposal 2 from being sustained. I don't think that there's much that we can learn from Ward Connerly, but I think there is one thing. Four and a half years ago, he suffered a devastating defeat in the *Grutter* case, and what he did two weeks later, is begin the initiative which eventually became Proposal 2. To be blunt, I feel like there's an awful lot of assumptions in this conference so far that Proposal 2 is going to be sustained, and how do we deal with the fact that there will be no Black or Latino students in this school. I think we ought to take a lesson from our opponents and get up and start fighting to stop this. Because if it goes through, it will set us back for a long, long time.

And in a way, there's not really time now to talk about all of the ways that we've got to fight it, but I do want to say I think the question of preference is really a crucial discussion. It's a term which has been used in the affirmative action debate, and as long as we don't combat that term every step of the way, we're going to lose. Because neither judges nor the general population are going to say you should have a right to fight for preferences. Nobody believes in "preferences," nor should they. But the fact is that affirmative action was not and never has been a preference. If you listen to Dean Wu's statement about that prep school in Massachusetts and the high school in Detroit, it's obvious that students who graduate from that high school in Detroit are going to have lower test scores and

less advanced placement courses and everything else, than the students from the prep school in New England. And those students should be admitted with lower scores and lower advanced placement courses. That's not a preference, that's simply a recognition of discrimination in our educational system. It's a leveling of the playing field. It is moving towards equality, which is what affirmative action was all about to begin with.

Now I want to say two other things. First of all, I think one difference that we've had with Mark and with the NAACP and ACLU on this case is whether we want to go to trial on this case. We believe very much we have to go to trial, because we have to build a political movement, and we have to do that by showing that these are not preferences, by showing the reality. On that point, I personally feel very confident from the argument the other day that we are going to win this case in District Court. I don't think that is a question. The real question is, are we going to win it in the Sixth Circuit and the Supreme Court. The one thing I would say on that is, especially in the area of race, every great decision, from *Dred Scott* to *Plessey* to *Brown* and *Grutter* is, above all else, a tremendously political decision. They reflect a political decision made at the time. And for us, as people who are involved in this, the issue has been joined around preference.

We don't have a choice about what the issue is. We've got to fight on that issue and make clear all of these things. We've got to build a political movement so when that case goes to trial or hearings, we have hundreds and hundreds of people there. We've got to make clear that this will not be accepted. If we don't do that, we're going to go back decades. And if we do do that, we can go forward. I think it's really the question of whether we're going to do that. I'd be happy to talk to anybody about our thoughts. I wish we had more time to discuss those issues, because I think they are the crucial issues. In any event, that is what I think we need to do.

Thanks so much.

(Applause)

AUDIENCE MEMBER 2: My question is for Professor Fletcher. I know that often American Indians don't have a political classification that is protected as well as a race classification. Is this not the case in Michigan and that's why the tuition waiver is at risk?

MATTHEW FLETCHER: No, it is the case. The argument that tribal interests are going to make in the state of Michigan, in the event the tuition waiver comes up for some sort of political or legal dispute, is that affirmative action is applied to American Indians. It certainly is going to be our argument that Proposal 2 doesn't apply to American Indians because of this political relationship. The difference really is that Indian tribes and people through Aishquagonabe, signed a treaty, and the treaty under Article IV or V of the Constitution is the supreme law of the land until it, for whatever reason, is abrogated by Congress. But that hasn't

happened, so there is certainly going to be this political status question. That doesn't mean American Indians are going to drop out of the fight when it comes to affirmative action in general.

I will add, given Mr. Washington's comments, there are some unusual things that can happen in American politics, and in particular, state politics. I'm consistently flabbergasted by what goes on in the state of California when it comes to Indian gaming. All of these non-Indians—believe me, there are some Indians in California, but not very many really like to gamble. It's sort of a strange version of interest convergence where non-Indians vote for gambling, which is very beneficial to Indians, a very small population relatively speaking, and have done so overwhelmingly three times. And if it could be done in the same state that strikes down affirmative action and Proposition 209, then referendum politics is something that I don't think very many people understand. I think that there is a lot that can be done to undermine Proposal 2 through a simple referendum.

MARK ROSENBAUM: It's not directly responsive to what you asked, Priya, but Matt, your comments reminded me of something that I thought might be helpful when you talked about critical mass. For many years, I would teach in the winter here at Michigan, and I would teach in the fall at UCLA. I would teach essentially the same courses. Those of you who've had me or those of you that know, one of the courses I would teach in both places is Fourteenth Amendment. After Proposition 209, I had no African American, one Latino, and no Indian students in my classes. Emily touched on this too. The nature of the course changed dramatically. Those of you who've had me know that when I start talking about race, one of the questions I ask the students is, "Have you ever experienced discrimination?" And the pedagogical reason I do that is because I want students to think about the way Fourteenth Amendment doctrine identifies and deals with discrimination, and then compare it with their real life experiences as a way of looking at the integrity of the doctrine.

I'll never forget the year after 209 was implemented. When I asked that question in class, nobody raised their hand. No one had experienced discrimination, to answer the question. And finally, a young woman raised her hand and said that she was one of three girls in her family and her dad had not treated her well. That was the only response that I got. And so it will be material.

Your other point, Matt, about initiatives is terribly important. Before I argued the 209 case, I argued the Proposition 187 case. The proponents of 209 learned a lot about the defeat politically and the defeat legally of 187. And they learned, as George was stating earlier, the power of language and the power of images and the power of putting together a movement, no matter how false those images were. And I see it with Indian gaming. I see it with initiatives.

I often say in California, the only initiative I would support is the initiative to end initiatives, but we really haven't aggressively explored the use of initiatives, both to counter the direct measures like Proposal 2 and Proposal 209, and also to test many of the underlying premises. If people were really committed to a level playing field and not a level playing field for one group and another playing field with high hurdles for the other group, then they ought to be responsive to measures that would deal with the K through 12 public education issues, with measures in California like Proposition 13 which knocked out the infrastructure. I think you're right on the button, Matt. I think it's really important for groups to seriously consider taking back the political process on themes that are both honest and would resonate.

AUDIENCE MEMBER 3: I am Roland Hwang, adjunct professor in the American Culture Program teaching Asian American history and the law. Hearing Professor Houh talk about the movement and having heard Dean Wu and Ward Connerly debate Proposition 2 at Lawrence Tech, I wonder, is anybody looking at the movement aspect? Having heard Ward Connerly talk about looking at five or six other states after Proposal 2 and identifying those candidate states, has anybody in the One United movement or proponents of affirmative action been bird-dogging the process? Because if the civil rights initiative is a movement, then there should be movement in opposition. I'm just wondering if anyone on the panel can comment about the push and shove of that political movement, so to speak.

MARK ROSENBAUM: There were meetings in Los Angeles and Washington D.C. within the last couple months of a number of civil rights groups to talk about precisely what you're talking about. It is stunning, isn't it, how late it is, but if it doesn't start now, it's not going to happen. And apropos what George was saying, we know that many opponents of Proposal 2 feel that they sat on their hands too long in terms of dealing with it. In talking to people around the country, in some of the states where Connerly has targeted, there are a lot of individual efforts that are going forward, but they're not what you describe, professor. They are not unified. They are not really borrowing from the lessons, and they are not really taking the offensive on it. So there are some efforts in the very early stages, but not of the power to overcome it.

Connerly's effort—this is me talking—I think it's kind of stunning. They did not put that much money into the program in terms of relative matters. They did not have the official endorsement of political leaders, with the exception of Attorney General Cox. That's very sobering in terms of how to deal with it. On the other hand, our side did not do—the proponents would tell you—the serious organizing effort that was required to overcome it. And so the answer is a little bit, but not nearly enough.

HARDY VIEUX: We have time for one last question.

AUDIENCE MEMBER 4: Hi, my name is Monica Smith and I'm a second-year law student at Wayne State University, and I'm a legal intern with BAMN and UUA, who fought the lawsuit the day after Proposal 2 passed. I'm not going to repeat what George said, but I do want to just address two things that were brought up: First, having another referendum to overturn Proposal 2. I don't think that is a good idea, because that's playing into their game. I think if it were to lose, it would strengthen Proposal 2, not weaken it. Seeing how Michigan is 83% White, I don't think it would be a good idea to give a majority White state another opportunity to vote on the rights of Black, Latino, and Native American students—our rights to go to college or not.

The other thing that I wanted to hit on, is just how disgusting Proposal 2 is. One hundred percent, its aim is to drive out Black, Latino, and Native American students from Michigan colleges and universities. We did a deposition of Ward Connerly. We were the first people ever in the country to depose him on his efforts to get rid of affirmative action. He said that he knows that standardized tests are completely biased against minority students, yet he still wants to take away the one way that is going to integrate our schools. And when asked why he did that, he said, "Oh, well it's tough love." He literally said that. Because he does think that integration is good, we asked, "When do you think that integration will come about?" He said, "Maybe ten years from now," yet he knows ten years after Proposition 209 in California, it didn't go up. And the only place it did go up a little bit was at UCLA through affirmative action and through money given to Black students to try to push them to come and through real affirmative action. So for him to know what happened in California and come here to do it, that is 100% their aim.

I think that similar to how *Brown v. Board* was won, that's how this is going to be won. Similar to how *Grutter* was won. We mobilized people, we had hundreds of people at every single day of the trial. The reason that it's so important to mobilize and to build the movement around this is because as Black students, as women, as Native Americans, as Latinos, and as supporters of equality, all White people who support equality, we need to be asserting our equality. It's not simply legal arguments. It is more of a request that the court grants your desire. But if we just rely on that, that's totally playing into Ward Connerly's game. Playing into Proposal 2, as if it's something civil. It's not civil. It's just like Jim Crow. That's what they're doing. They're trying to say, Black students in Detroit, you cannot come here. We're not going to look at the fact that everything in the admission process is completely biased; we're just going to turn a blind eye to that. So now the whole admissions system is fraught with White privilege, and just like George said, affirmative action is not a preference, White privilege is a preference.

What affirmative action does is work to mitigate that preference and make us equal. Black students, through the Black Action Movement,

fought to be equal and it was an integrated movement, and I'm calling on everyone in this room to stand with me and fight with me because I'm fighting for my equality. I'm fighting for my brothers and my sisters. I'm fighting for integration for this school. We'll be showing the deposition here at the University of Michigan, Thursday, February 21st, so mark your calendars. That will be at 7:00 p.m. at Angel Hall, Auditorium D. There'll be a presentation by our lawyers.

When they said "separate but equal," that was totally a lie. Proposal 2 is completely a lie. This is the last thing I want to say. I'm from Detroit, born and raised. I went to Cass Tech High School, and I went to the University of Michigan. I wouldn't have gotten there without affirmative action. I wouldn't have gotten to be a law student without affirmative action. Not because I'm not extremely smart, extremely qualified—I've fought very hard and I am extremely intelligent—but I know that I needed affirmative action because of racism. And I'm fighting. I'm fighting to assert my equality, and I'm encouraging every single person in this room, every high school student, every college student, every law student, every professor to join us, join BAMN. Join our movement, because we're fighting to win. We will win, and we need your help!

HARDY VIEUX: Thank you very much, I appreciate that.

(Applause)

RACHEL JOHNSON: Thank you very much ladies and gentlemen. We are going to break for lunch. Panel Two, POTENTIAL LEGAL ALTERNATIVES TO AFFIRMATIVE ACTION, will start promptly at 1:30.

HARDY VIEUX: Thank you to the panelists.

RACHEL JOHNSON: Yes, thank you.

(Applause)

PANEL II

POTENTIAL LEGAL ALTERNATIVES TO AFFIRMATIVE ACTION

CHRISTINA WHITMAN: Our first speaker is Ken Forde-Mazrui, Professor of Law at the University of Virginia Law School and also the Director of their Center for the Study of Race and Law. He is an Ann Arbor kid and a Michigan grad. I am particularly happy to see him back.

KIM FORDE-MAZRUI: Hello. It was mentioned during the morning panel about the importance of taking a course such as Indian Law, and for any students in the room who have not taken Professor Whitman, that is another must. I had her for both Constitutional Litigation and Torts, and she is someone that I have tried to aspire towards in my teaching ability.

I want to stand because I want to talk about what is on the board. In case it is difficult to read, I have "Alternative Action" as opposed to "Affirmative Action." What I mean by that is pursuing affirmative action goals through race-neutral means, and then this (pointing at the board) is an outline of my talk. I am going to talk first about "because of race," and these are going to be programs that are adopted with race as a motivating factor, such as responding to the racial disparities that we have been talking about today, but then the policy as designed and implemented uses only race-neutral means. So when I say, "because of race," I mean there is in fact a racial motivation behind the adoption of the policy even though it is race-neutral in its operation. I want to point out several arguments that could be applied to these programs. The first approach will declare them "valid easily." Under the second, they will be "presumptively invalid"; they might fail SS, that is "strict scrutiny" or they may survive strict scrutiny. I will lay out the different arguments. Then, the third approach will hold the race-neutral programs "invalid *per se*." Those are the three different approaches to programs adopted "because of race," what I'm calling "alternative action" or race-neutral affirmative action. Then the final category, I call "despite race" and that is where programs are race-neutral in all respects, including motivating purpose, yet can still pursue affirmative action goals.

I will explain this chart that I have over here. What I have here is "RN Means," for Race-Neutral Means heading the left column. In that column, I have "SES," Socioeconomic Status: "Essays," for example in the application process, and "Top Ten Percent." We talked about Top Four Percent as well earlier today. Atop the middle column is "Race Means," and under that I have "Racial Minorities." Then over here in, the right column, I have "AA Goals," for Affirmative Action Goals. I have two items under that heading: "Remedying Discrimination" and "Diversity," including "Cultural Diversity," and then in parenthesis I have "Discrimination Victims" and "Diverse People." Those are the sort of people that serve the two AA goals. Okay, so this is the question: what is the legality, both under

Michigan's Proposal 2 law and the U.S. Constitution's Equal Protection Clause, regarding race-neutral means adopted because of a racial motive, such as responding to the dearth of minorities qualifying for education, employment, etc.?

The first approach would find such policies *per se* valid. And that is to say that if it does not use race in its operation, in its administration, then there is no problem with it at all. So it is *per se* valid. As a matter of federal constitutional law, there is actually an argument to be made that that could be how the court will respond. It is not an argument so much as things justices have said that indicate that they seem to have no problem with this even though, as I will argue under "presumptively invalid," there is an argument to be made that this is problematic. Actually, dating back to the eighteenth, nineteenth and well into the twentieth centuries, the court approached laws by looking at their terms on their face. But we know that that changed in the mid-twentieth century with *Washington v. Davis*. We now look at motive. But all those cases, at least the affirmative action cases, dealt with racial preferences in operation. In *Richmond v. Croson* Justice Scalia, as well as Justice O'Connor, both thought race-neutral means would have been totally fine, and by totally I mean not even subject to strict scrutiny as a way to improve minority representation among contracting firms in the City of Richmond. Even in *Grutter*, the Court talked about the top ten percent plan in Texas—granted it is *dicta*—as completely unproblematic. Although it had problems as a policy matter, the Court did not view it as constitutionally suspect. Most recently, in the *Parents Involved* case last summer, Justice Kennedy, who is now the swing vote, said in his concurrence in striking down policies that took race into account when assigning school children, that you could try to place schools into areas that would create racial diversity in the schools. That action would not even be subject to strict scrutiny, never mind that it would satisfy strict scrutiny. It would not even trigger a heightened justification. Under Proposal 2, you also could get a similar result as Dean Wu talked about this morning. The campaign was all about racial preferences in operation. Do not worry, Proposal 2 advocates said, we will still respond to K-12, we will still use SES (Socioeconomic Status)—suggesting that the use of race-neutral means would be fine.

According to the "presumptively invalid" approach, all these programs would be subject to strict scrutiny. Just like a literacy test designed to exclude Blacks should trigger strict scrutiny if that is its intent, a race-neutral program designed to benefit Blacks should trigger strict scrutiny, because it is still a racial purpose. Under strict scrutiny, one possible conclusion would be that race-neutral affirmative action should fail strict scrutiny, because it is not narrowly tailored to ensure that only those who are benefited by it were victims of discrimination. It might satisfy diversity under *Grutter*, but of course, the Roberts' Court may be more strict on that. An argument could be made that it will fail strict scrutiny.

Under Proposal 2, similarly, they may say: We wanted to go stricter than *Grutter*. *Grutter* allows affirmative action for diversity purposes so a court interpreting Proposal 2 might decide that if we have a strict scrutiny approach under Proposal 2, it is going to be extremely difficult to satisfy and these programs should fail.

Another possible conclusion under strict scrutiny is that race-neutral affirmative action should survive. In the interest of time, please read these. I put several on the table out there. It is based on an article that I call "The Constitutional Implications of Race Neutral Affirmative Action." The argument here goes that race-neutral means allows purposes that would fail strict scrutiny, if pursued through racial preferences. In brief the argument goes, there is nothing wrong in pursuing or remedying societal discrimination or pursuing diversity. The problem that arises under strict scrutiny is when *racial preferences* are used in too untailed a way. If they are used too bluntly. In *Croson* and in *Bakke*, I go through all these different opinions. The Court emphasizes remedying societal discrimination. That is not a bad thing to do, but you cannot do it through quotas and you cannot do it through preferences. I argue that if you use race-neutral means, many of the objections for using race—the ways in which it inflicts harms, the way in which it expresses a racial message—go away. So the court may well say that if you use those less restrictive means—in fact, they are completely race-neutral—then remedying societal discrimination or pursuing diversity could satisfy strict scrutiny, even if they would not satisfy strict scrutiny when pursued through racial preferences.

Under Proposal 2, you could have a similar result. Even the language of Proposal 2, talks about affirmative action programs that grant preferential treatment. So they seem to suggest that there may be affirmative action programs that do not grant preferential treatment. Well, affirmative action has a very specific connotation in our culture. It means race-related, remedial or diversity programs. So the language that people were voting for or seemed to be is "We want affirmative action," just not through preferential treatment. So if you use race-neutral treatment, you could still pursue affirmative action goals.

Then, invalid *per se* would be the argument, and Professor Barnes may touch on this in his remarks. Just briefly this is the argument: No, Proposal 2 says that you cannot use race treatment as even a purpose, and it is *per se* invalid if that is the purpose behind it. Under federal law, we know we can survive it sometimes *a la Grutter*, but of course the Roberts' Court may say, no strict scrutiny would result in *per se* invalidity because we are going to be so strict in requiring colorblindness that nothing will ever satisfy strict scrutiny in practice. So that is an outline of the various arguments, if there is a racial purpose.

Finally, there is the "despite race" version of race-neutral affirmative action. What I mean by that is that you could adopt race-neutral programs that pursue affirmative action goals, such as remedying discrimination or

pursuing diversity including cultural diversity, but not use race at all, either in purpose or means. The idea here is that the problem with these first approaches I have been talking about is that race-neutral means are being used as a proxy for race. When people say, "Oh, post-Proposal 2, we will use SES (socioeconomic status) or essays or top ten percent in order to get racial minorities, because by getting racial minorities, we will remedy societal discrimination or we will achieve a diverse student body." The problem is that while you are using race-neutral means, race is still playing a part in the motivational process. Race-neutral means are being used as a proxy for race, which is still in turn being used as a proxy for achieving affirmative action goals. That is why all these arguments potentially have a "because of race" aspect.

This final argument is: rather than using race-neutral means as a proxy for race as a proxy for these goals, use race-neutral means instead of pursuing race at all. So rather than trying to evade the colorblind mandate, comply with it. We have been using race, because we presume race correlates to victims of discrimination and we know that it is imperfect. Many people, probably including myself, benefited from affirmative action even though we are not a victim of American societal discrimination. Diversity, too, imperfectly correlates with race. We can debate the point, but there are some people of color who are not necessarily adding significantly more diversity to a student group than many White people do.

But, instead of being arguably lazy and using race as a presumed proxy, this race-neutral approach would say, let us go more directly at what we want to do. Let us not use race at all and let us pursue victims of discrimination. They are more likely to have suffered socioeconomic disadvantage. They can express their experience of discrimination through essays. They are more likely to live in segregated communities. It may correlate to something you can express in your essays, something that is reflected in where you live or in your economic disadvantage, which affects your diversity—but not because of your race but because of your experience. Then you are not using race at all. So you should not trigger strict scrutiny under the federal constitution or Proposal 2.

Now you may be thinking that is "clever by half." But wait a minute—victims of discrimination, societal discrimination—you are talking about Black people and other minorities to a significant degree. And when you talk about diversity—wink, wink—we know you mean racial diversity. Well, that may be true in some cases where they have been using race-neutral means as a proxy for race, but the doctrine supports that these goals—remediating discrimination and achieving diversity—do not require you to define people along racial terms. In a case called *Hernandez v. New York*, the Supreme Court explained that a trait that correlates with race does not count as race if there are members of the race outside of the classification and if there are members of other races within the classification. In *Hernandez*, the prosecutors struck Spanish speakers and the

defendant complained that the prosecutor was striking jurors because they were Hispanic or Latino. The Court said, no, there are Latinos who do not speak Spanish and there are Spanish speakers who are not Latino so the trait Spanish-speaking is not coextensive with race. There is an overlap in both directions. Well, similarly victims of discrimination, though historically are dramatically correlated with race, are not necessarily tied to race. There are Black people who have not suffered discrimination—and in fact, affirmative action opponents emphasize that—and there are White people who have suffered discrimination. Opponents of affirmative action complain about that too. And there are White people who live in segregated neighborhoods that suffered the experiences of our history of segregation even though they are White. So you can have people who have experienced the effects of discrimination who are White and people who have not who are Black.

Similarly, with diversity, including cultural diversity, obviously with perspective on political background or economics, people know that you can be White or Black and be viewed within and without various perspectives. So the key point I will emphasize then is cultural diversity including African American culture, including Native American culture, including any other culture, is not a racial classification. You can be Black and not identify with African American culture to the extent that African American culture is a cognizable concept, and you can be White and identify with Black American culture. In fact there are theorists who have argued that very point. So if essays ask not what is your race, but what is your culture? What is your experience with discrimination?, we do not need to know your race. We want to know about your experience; what is your cultural identification? Those are not racial concepts. So if you pursue them directly without using race as a proxy, then you should be constitutional both under federal law and under Proposal 2.

I know that I am probably out of time so I will just leave it with this. If the courts do not find a way to uphold race-neutral programs, then the effect is that in the name of colorblindness we are going to lock in racial disparities that result from historical violations of colorblindness against Black and other minority people. Why are we locking in if we just ignore race? Will the gap not close? The gap will not close, I submit, because I think White people are as biologically intelligent as Black people. What I mean by that is if White people are on average born into families with greater economic and educational support than Blacks and other more disadvantaged minority groups, then why would we think that they will end up without having better training and qualifications by the time they get to college? That is stigmatizing and insulting to White people and I refuse to engage in that.

Thank you very much.

CHRISTINA WHITMAN: Our next speaker is Professor Mario Barnes from the University of Miami Law School. He was the co-editor

in chief and published the first issue of the *Berkeley Journal of African American Law and Policy*. It had a different name when you started [*the African American Law and Policy Report*]. In January, he received the Derrick Bell award presented by the Minority Group Section of the Association of American Law Schools for his outstanding contributions.

MARIO BARNES: You make me sound so impressive. Thank you. First, I do not know if I deserve that because I probably lack some credibility as somebody who left Miami to come here and speak, given our weather. Second, I want to say it is probably appropriate for me to be speaking on the proxy panel, because in a way, I am somewhat of a proxy for someone else today and that is Professor Onwuachi-Willig, your esteemed alumnus and fellow traveler on the *Journal*, whom I have been working with on a series of articles looking at proxy. She wanted to be here, but she is “very” expecting. So I guess you can be very pregnant, because she is nearly due.

The working title of my paper, which supports the talk that I am going to give today, is called, “A One Drop Rule for the Twenty First Century.” The title’s meaning will become evident based on my theories about the use of race-neutral proxies, which have some propensity to correlate with race, post the passing of Proposal 2. I was a person who was at the University of California as an undergraduate, there during the height of the Prop 209 debate, and was leaving as it was coming in the door. So this might be new here, but I feel like I have been living with the weight of the removal of the discussion of race in higher education admissions for a decade now. Unfortunately, I find my presence here a kind of reliving of some very emotional and tumultuous times, but I would like to say in my few minutes today that I think that there is some hope for speaking about race-neutral proxies as potentially a way to achieve some of what we hope to achieve when we consider race in higher education admissions. Hopefully, the fate of Michigan will not be the fate of California, which we heard about this morning—of its flagship schools at Berkeley and at UCLA having still not recovered from the damage done by Prop 209. I suggest that as challenging as it has been, we must use education as the place where we engage in questions about undoing the horrible affects of what has been a racialized existence in this country, where those of us of minority races have greatly suffered in our ability to acquire material assets that translate into opportunities for more education and employment. We might be at a place now where, given that we are not able to have an explicit conversation about what race means anymore given the political environment, that we may be able to have a conversation about race-neutral alternatives, what some people would term to be proxies for race.

I want to speak specifically about this idea post-Proposal 2, then to talk more generally about how we might consider the effect of using race-neutral proxies, and finally, to take on one specific scholarly argu-

ment about why actually using race-neutral proxies might be unlawful after the passing of Proposal 2.

First, I would like to suggest to you that this notion of proxy is not all bad, or to be more precise, this emphasis on looking at race-neutral proxies is not all bad. For one, one basis for the most vehement attacks on race-based affirmative action has been that race is actually a poor proxy for diversity because it is not clear that a member of a minority racial group necessarily is endowed with a representative racialized perspective, whatever that means. To suggest that we use race for the purposes of ensuring a kind of perspectival diversity, opponents would claim is a weak argument. It also is a problem that bumps up against the anti-essentialists' perspectives that many of us within the critical race tradition have advanced, which is to say that we actually believe there is not any one monolithic experience of being Black. And so to the extent you use being a member of the socialized group, African Americans, as your basis to create a link to what you believe will be some perspective without considering other background factors, creates a problem. In some ways Prop 209 and Proposal 2 have done us this favor of suggesting that we at least move away from this direct proxy of race as diversity and start asking about other types or criteria or factors in admissions. That might give us a wide range of perspectives that we really, really want when we talk about diversity on college campuses.

Another advantage of moving away from race toward more race-neutral means is the way that race no longer will simply be marked as a proxy for disadvantage. Jennifer Gratz, the main plaintiff in the undergraduate University of Michigan case in 2006, made a statement to the *New York Times* which suggested she understood the horrible history of racism in this country, but that the history did not justify giving a preference to a Black doctor's son over a poor person. I guess she meant ostensibly a poor White person, but that is not clear. Again, the claim becomes that race is just a stand-in for disadvantage. If we were concerned about tipping the scales for folks in poverty or who are otherwise disadvantaged, or I should say providing greater advantages to those who are otherwise financially disadvantaged, could we do that across race to achieve our goal of real diversity?

I want to suggest that even though we have at least two benefits of disturbing race as a proxy for diversity, that there also can be some problems related to suggesting that we move to a system of race-neutral factors. One of the problems, I think Professor Forde-Mazrui points out quite clearly, is the fact that although there are factors that are race-neutral, some of those factors—namely class or socio-economic status and geography—can largely be explained in a racial manner or in a way in which these non-race factors seem to correlate very significantly with race. There is an issue about talking about race-neutral factors when in

fact some people would claim that there are ways in which even when we talk about race-neutral terms or factors, that we are still talking about race.

There are sort of two prospective problems. One is that for those who support race consciousness—and I will identify myself as a person who does believe that—we have to consider race because it is really with us as a system that divides us in very unfair ways. For those of us who subscribe to it [race consciousness], using proxies actually gets us away from discussing, or obscures the importance of race and race discrimination to our narrative. It [neutrality] actually suggests in some ways that racial disadvantage is not actually achieved through racial discrimination but allows a conversation about how we all just end up in some sort of societal condition and essentially opens up the door to talk about how you end up in that condition, based on personal behavior and not based on any institutional or structural problems. So there is that issue.

And then of course for the colorblind, I mean for those who subscribe to colorblindness—I did not mean to say anything negative about truly physically handicapped people with regard to their colorblindness—with regard to those who subscribe to an ethic of colorblindness as a political perspective, there is the notion that all you have done with some race-neutral proxies is achieved through an indirect means that which you could not achieve directly through race.

I want to pick up here a particular form of that argument, and it was made in the pages of the fall 2007 issue of the *Michigan Journal of Race & Law* in an article entitled, “Can Michigan Universities Use Proxies for Race after the Ban on Racial Preferences?” In that article Brian Fitzpatrick essentially asks the question, what does Proposal 2 mean in its language that one cannot discriminate “on the basis of race?” Those of us who look at this question in the employment area are often asking what Title VII means in the words “because of race?” He imports this question [about meaning] to the language of the Michigan Civil Rights Initiative. He suggests that one reading of the language is that it will prevent even race-neutral proxies for race, where you undertake the proxies with the purpose of improving racial diversity or even where that is only partially why you have done it. That creates a problem—and he makes this claim largely on the fact that Michigan essentially used Prop 209 as its model—in that Proposal 2 was actually intended to pretty much mirror the language and the effect of Prop 209. Then he presents evidence from one employment case in California, which in its holding suggested that, at least within employment, even using race-neutral means was problematic, where your goal was actually to preserve or increase diversity. And the name of the case for those of you who care is *Connerly v. State Personnel Board*. Fitzpatrick, I think, gives a fair assessment of this case. In the case the state of California does something striking in that it says, “Well, fine. It is true that perhaps if we were using an analysis under the federal constitution or a straight Fourteenth Amendment analysis, we could talk about

the question of whether your use of race-neutral standards, which we believe to be a proxy for race, would survive strict scrutiny." But the court in California claimed the whole notion of a strict scrutiny exception present in the federal jurisprudence of Fourteenth Amendment equal protection for this question, was not available here. They claimed that California, in drafting this statute and using the language "on the basis of race," never intended a compelling interest exception. So there was no need to ask a question about whether in using race-neutral means that were proxies for race, whether in fact you would survive the compelling interest/narrowly tailored question standard.

Fitzpatrick takes this one employment case and poses the question of whether it forecloses the use of race-neutral means in the area of education. In other words, is it foreclosed because there is going to be no room to argue about diversity as a compelling interest because if Michigan follows California, that analysis is not relevant in the Proposal 2 context, as it was not relevant in the Prop 209 context. He is correct when he assesses this as the condition in that one case. Then he cites to comments by prominent legal scholars, Eugene Volokh and Erwin Chemerinsky, so we have both spectrums in a kind of conservative and liberal split suggesting that is what the *Connerly* case means. And also we have a comment, not on this case in particular, but on the question of race-neutral means to achieve diversity from our keynote speaker, Frank Wu. When asked the question about whether we could use race-neutral means post-Proposal 2, he said, this becomes the critical question and I quote, "people are going to be asking whether you are somehow trying to get around the ban and find proxies or pretexts for race which they believe to be impermissible."

Fitzpatrick's analysis suggests then that racially neutral means are going to be problematic post-Proposal 2 if one or any portion of the reason you use them is because you also want to improve racial diversity. I have a problem with that claim, and I want to suggest at least three reasons why Fitzpatrick may be incorrect. Actually I should not call him incorrect because he does pose it as a question: Are we going to end up in a world where race-neutral means cannot be considered because of the fact they are partially used for the purpose of securing diversity? He actually does take the position that he believes that an anti-discrimination bill with teeth should limit race-neutral alternatives, but my reply to the question—and I suggest the right answer—should be that race-neutral means should be preserved.

Why preserve race-neutral means? On the one hand, there is the matter that race-neutral means, even those that are proxies or that correlate with race, actually cover separate and expansive interest groups and populations. Take a few well-known proxies. Professor Forde-Mazrui mentioned a number of them: socioeconomic status or class, geographical indicators, first generation attendance at college. Most would agree that

these categories in and of their own merits are legitimate bases to consider students upon and actually are legitimate proxies for what we care more about—diversity. Right? And they are proxies for diversity irrespective of race. Fitzpatrick suggests, however, that of course many of these populations that are race-neutral, disproportionately match up to racial minorities. He would conclude that if you were using the race-neutral factors for their diversity-enhancing values but also wanting to improve racial diversity, there is a problem. Notwithstanding the fact that they have a legitimate basis for consideration, match them up with race or a desire for racial minorities, and it is problematic.

I think it can be problematic, but in an intuitive way, it does not make sense to suggest that you could consider a group of standards in an objective fashion on their own merits and that just because of the fact that you also consider them beneficial within the context of the race question, that somehow these formerly legitimate race factors become illegitimate. And that is where I get the title from the piece, because race becomes, essentially in this dynamic, tainting or the one-drop rule. Mix anything legitimate with race and it becomes illegitimate.

What I think Fitzpatrick suggests does not really make intuitive sense, which is that you could have schools that wanted to have students who were from poor or lesser socioeconomic backgrounds, who came from rural communities or the inner city, and that you could want them just as long as you also were not happy about the fact that they were Black. I think that once you take that in, you see the notion of why race in this context becomes so delegitimizing. You can also see how then race, this notion of race correlating with other factors, becomes an absolute conflation where based on this system, class becomes race; geography becomes race; whether or not you are the first generation to attend college becomes race; because anything that correlates with race has to go away, if in fact, you also care about racial diversity.

I guess that someone could say that the answer is simple. Put out a statement that says we care about all these factors, but we sure do not like Black people. But of course, it suggests an irreconcilable position in terms of having to like portions of an identity—and this was Professor Rosenbaum's point this morning—but having to completely disaggregate or disintegrate the value of race to that identity. So you could consider everything about students except the meaning of race to their experiences and to their narrative. That creates an untenable situation with regard to racial minority students applying to college, because they have to now write their applications so that the only thing they do not mention is race.

I make a number of suggestions. One is, and I am not sure this could ever happen, that perhaps you could actually structure a type of complaint or a type of cause of action which suggests that rejecting race-neutral proxies may result in a world where minority students may claim that schools operate a racial classification system, because they fail to consider

useful indicators simply because their indications map over race. I am not sure that is possible. It certainly would be somewhat controversial, but that is where we end up if we suggest that the mere fact that you have a correlation creates a strong enough indication that you want those students for maintaining some system or claimed system of racial advantage. I know my time is wrapping up, so I will mention briefly my two other points.

To the extent that Fitzpatrick's concerns go to the motivation of schools, meaning he would be okay with race-neutral means as long as your motivation was not partially premised upon race, I suggest that since it was [derived from] a California employment case, maybe we can use some theory or import some theory from employment law. For instance, my own thinking on this has to do with the mixed motive employment discrimination claims dealing with the *Price Waterhouse/Desert Palace* line of cases, which say, where race has been a motivating factor in a decision of an employer, the employer faces no liability exposure as long as he would have made the same decision absent the racial motivation. This way, in a situation where we have these legitimate race-neutral factors somehow aligned with race, we can ask the question, "Will the University of Michigan want this inner city, poor student even if the student was not black?" If the answer is yes, then perhaps we should not care so much about the motivation because it is not doing that much work. The race-neutral factors are doing quite a bit.

Finally, I wanted to suggest that maybe, perhaps tongue-in-cheek and a little ironically, we do not need to do anything, because, as many of us "race crits" and race-conscious people have known for years, Justice Powell in the *McCleskey v. Kemp* decision told us that mere correlations between race and other factors are not proof of purpose. It could just be that where you have these correlations between race-neutral factors and race, as long as Michigan does not say anything explicitly about why it is using certain criteria, the folks who are those who support colorblindness would be stuck in the form/substance hell the "race crits" have been in for years. Which is to say, a court would simply say, "We are not just about eradicating substantive discrimination. We just care about the form of it, and in the form of it, this looks okay. Sorry."

I will wrap up by suggesting that, clearly, there has got to be something wrong with a system that so totally and completely eradicates or disintegrates or disaggregates race. Perhaps at least around that subject, we can find some traction. But with regard to the twin poles of race consciousness and colorblindness, I suggest that maybe the race-neutral proxies will become a means, if we give them some time, to an unhappy middle ground between both poles; race-conscious scholars are not going to get the attention to racial disadvantage that they want and those subscribing to colorblindness are not going to get an absolutely race-free system. Maybe this approach of using race-neutral proxies becomes a way

for both unhappy groups to see that the glass is somewhat half full. Thank you.

CHRISTINA WHITMAN: Our third speaker is Daria Roithmayr, a terrific teacher. She is on the University of Southern California faculty, and I know she is a terrific teacher because she was at Michigan for a bit. She writes about critical race theory and comparative law, with a special emphasis on structural inequality in the United States and in South Africa, where she has also taught at the University of Pretoria.

DARIA ROITHMAYR: I wanted to follow up on the first two speakers and as you will see, a lot of what I have to say builds directly from the analysis that both Kim Forde-Mazrui and Mario Barnes have articulated. The central argument that this paper that I wrote a long time ago—and I will explain a little about that in a second—makes is to propose an alternative form of affirmative action that directly measures those things for which we typically have used race as a proxy. If you look at Kim's chart, it is basically that last category that he was talking about where you use means that are theoretically race-neutral to accomplish the goals that affirmative action was originally designed to accomplish. There are three criteria that I propose in this alternative form of affirmative action that would be operated in many of the same ways that conventional race-conscious affirmative action has operated.

There would be preferences for three types of students (1) students who could demonstrate that they were victims of racial discrimination, either societal discrimination, institutional discrimination, intentional discrimination, or historical discrimination to the extent that the student could demonstrate either their direct connection or a familiar or a community connection with discrimination—that obviously connects up to the goal of affirmative action programs to remedy past discrimination; (2) students who could demonstrate that they were likely to want to, after graduation, serve underserved communities and in law schools, which is the context in which I wrote this paper—that would be communities that were underserved in the sense that they did not have access to legal services—and (3) students who could demonstrate that their experiences and viewpoints could help the school to diversify the viewpoints and experiences of their existing law school populations. Whatever the current law school population had a mix of, this student could exhibit that she could diversify with a specific emphasis on viewpoints with regard to racial justice, so not just ordinary garden variety diversity on all viewpoints, but viewpoints with regard to racial justice in particular.

Now, I want you to notice that there is not anything in here that is race conscious in the traditional sense. That is, race in this program is not to be used as a proxy for these qualities, and in fact, theoretically, Whites could qualify under each of these three criteria. Barbara Hopwood, to the extent that the law school was willing to accept this argument, could qualify if she wanted to argue that she had been the victim of racial dis-

crimination. That would be up to the law school to decide. Morris Dees could qualify under criterion number two, demonstrating the commitment perhaps in past experiences to serve underserved communities. Matthew Hale, the founder of the World Church of the Creator, a very conservative, and some would say racist institution, could theoretically qualify under criterion number three, diversifying the law school populations' existing viewpoints about racial justice. And again, that would be up to the law school as to whether or not they would want to admit those candidates. Race could be used as a factor, permissible under *Grutter*, of course, putting in context the student's application, but race would not be used as a proxy for these directly measured experiences, traits, and qualities.

Let me say a little about the genesis for this proposal, and then I am going to go into a bit more detail with regard to the proposal. This project came about when Cheryl Harris and I sat down after Proposition 209 to say, all right, what can we do to navigate the room the court has left us after *Hopwood*, and the legislature has left us after Proposition 209, before *Grutter* was even a twinkle in anyone's eye—though we could see the handwriting on the wall. Of course, now that Proposal 2 has passed here in Michigan, it sort of re-energizes and re-invigorates the need for such discussion. The substantive genesis for this paper came when I read Justice Scalia's opinion in *Crosby*. I want to read to you the portion that made my eyes light up. This is the language: "Nothing prevents Richmond from according a contracting preference to identified victims of discrimination while most of the beneficiaries might be Black, neither the beneficiaries nor those disadvantaged would be identified on the basis of their race." So this notion that Scalia articulates in *Crosby*, and the Court in many of the other redistricting cases, as well as the affirmative action cases is that their problem, as Kim points out, is with using race as a proxy to generalize that all people of color have been victims of discrimination. That all people of color would actually diversify the law school population. And this is a problem for reasons that I will talk about in a second.

Let me talk to you about the three criteria in a little bit more detail. First, with regard to students who are able to demonstrate that they are victims of either past historical or present racial discrimination. Of course, there would be a limitation here which is that a law school could not use this criteria in such a way that they would presume that all people of color automatically, without showing more, would qualify under this prong of the proposal. That is, a student would actually have to articulate in an essay or in some other form in their application what their connection to or experience of or suffering the affects of racial discrimination would be. How might a student demonstrate that? In many of the same ways that both Mario and Kim have talked about. So demonstrating that one has grown up in a segregated neighborhood, a racially segregated neighborhood, attended under-funded schools, had been the first person

in their family to attend college, have come from a family where they would potentially be first-time homeowners. Wealth is obviously a very important structural part of racial discrimination. The student could demonstrate that they or a family member had been excluded in an industry in which people of color historically had been discriminated. For example, the construction industry, the very type of societal discrimination that the Supreme Court said that you could not address through race-specific means, using race as a proxy. And again, I want to emphasize this notion above and beyond what Kim already talked about. The idea is that you are bypassing race as a proxy for these traits, experiences, and qualities, and looking directly to them and using race as a factor to put those in context. It is important to note that because the program would not use race as a proxy for these qualities, the courts, I imagine would at least, if they are going to be consistent with their previous jurisprudence, need to defer to the law school's definition of what constitutes discrimination insofar as the law school can demonstrate that it does not presume that all people of color are all members of underrepresented minorities that have suffered from racial discrimination.

The second criterion is this notion that a student could demonstrate that they are committed to serving underserved communities. That would not just not be an articulated commitment; one would hope that the student could demonstrate through past experiences things on their resume that would show that they had a commitment to serving underserved communities, and, of course, there is social science data to document which communities are underserved and that certainly is not race exclusive. The advantage of both this and the previous criterion is that students and institutions generally would be forced to articulate those facets of race discrimination that relate to serving the underserved that we typically do not articulate anymore, in part because we are so used to using race as a proxy—so to focus on structural inequality, to focus on the way in which particular communities are underserved with regard to legal justice.

The final criterion is basically the current criterion of diversity. One can imagine the way in which you would simply adopt a sort of *Grutter*-approved use of race as a factor in assessing a person's ability to diversify the law school population, but again with a specific focus about viewpoints with regards to racial justice. But I think that it would be even better if the student were not to rely on their racial identity but to simply, directly express what viewpoints, commitments, and experiences would help contribute to the law school's existing mix of students. This notion of being forced to articulate in a way that we do not currently articulate, I think is an advantage.

Let me just say a couple of words about the constitutionality of such a proposal. I think Kim and Mario have both done an excellent job in discussing this, but I want to focus you for a moment on those parts of

the Supreme Court's decisions that articulate why race as a proxy is problematic, because this is the focus of a lot of discussion in the redistricting cases and in the affirmative action cases. The Court articulates three reasons why using race as a proxy is problematic. First, it stigmatizes people of color because they assume if people are admitted on the basis of criteria other than the traditional scholastic numbers that people are inferior. Second, it impedes our movement towards colorblindness as a goal and we want to get to a point where race does not matter. It is just an irrational, irrelevant characteristic and race-conscious affirmative action prevents us from getting there. Third, and perhaps most importantly, it is unfair to Whites. Whites who are innocent, who were not responsible for historical discrimination, are being asked to bear the burdens of race-conscious affirmative action. So say the courts.

But this proposal bypasses the use of race as a proxy to directly measure those traits, experiences, qualities, skills, and abilities without using race as a proxy. I want to read just a little bit more from Justice Scalia's decision. I really love that I am quoting Justice Scalia to explain why this would be, by most accounts in terms of the constitutional law scholars that I have consulted, quite constitutional.

This is what Scalia has to say: "A state can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses or even for new businesses which would make it easier for those previously excluded by discrimination to enter the field." So he is actually sanctioning at some level race-neutral proxies. "Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a state may undo the effects of past discrimination in the sense of giving the identified victim of state discrimination that which it wrongfully denied him. For example, giving to a previously rejected Black applicant, the job that by reason of discrimination had been awarded to a White applicant, even if this means terminating the latter's employment. In such a context, the White jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here in which those to be disadvantaged are identified solely by race. In my view the reason that would make a difference is not as the Court states, that it would justify race-conscious action, but rather, that it would enable race-neutral remediation." And then the language that I just quoted to you, "Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be Black because of the historical correlation, neither the beneficiaries nor those disadvantaged by the preferences would be identified on the basis of their race. Since Blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remediation program

aimed at the disadvantaged as such will have a disproportionately beneficial impact on Blacks.” This language seems to very clearly sanction the targeting of victims of discrimination. I would suggest not just in the conventional intentional discrimination sense, but also on the basis of societal discrimination with regard to saying that so long as you do not use as a race as a proxy for these, then the program would be constitutional.

One more point to make and that is to elaborate a little bit on this notion that Kim spoke of with regard to the way that the Court currently defines race. Many of you, I am sure, have read the excellent article by Neil Gotanda, “Our Constitution Is Color-Blind,” in which he identifies different ways of using race in constitutional jurisprudence. In particular, he contrasts formal race, which is what the court currently uses, in which race is just a relevant characteristic of being a particular color versus a much more nuanced deeper and more robust conception of race which he calls historical race. That is the notion that race is not just this irrelevant category of skin color, but is the convergence of a set of historical experiences as a member of a particular community, a particular set of cultural practices that are not necessarily common to everyone but certainly can be talked about with regard to particular individuals. And this deeper conception of race is what I am drawing on with regard to directly measuring for those historical experiences, traits, qualities, and abilities.

The court, of course, adopts the very shallow, formal view of race and it does so most explicitly as Kim mentioned in the *Hernandez* case, in which the Court says that the fact that you speak Spanish is not intrinsically a part of race. The fact that you suffer from historical discrimination is not intrinsically a part of this irrational or irrelevant characteristic of skin color. Historically it is true; it is historically contingent, says the court in the *Hernandez* case. I think that we should take advantage, I would say rightful advantage, of the Court’s very narrow view of race in this regard, because if race is not about historical experiences, then it has to be legitimate to adopt preferences for people who speak Spanish; for people who suffer the effects of historical discrimination; for people who are committed to serving underserved communities; disproportionately those people who have experienced and connected with those subordinated communities; and finally, for people, because of their experiences and communities have a particular viewpoint when it comes to racial justice, that would diversify what would otherwise be a relatively homogeneous law school population.

One final note in closing which is that I recognize that there is, of course, a danger in trying to hijack the Court’s use of this very narrow conception of race. And I want to state at the outset that I view *Grutter* and *Parents Involved* as a loss. There is no question; there is no way of thinking about this as a silver lining or my alternative proposal as a way of in some sense reaping the benefits of the Court’s decision in *Grutter* or

Parents Involved. So let me acknowledge straight out that this is instead an effort to hijack the Court's jurisprudence with regard to race because the Court cannot have it both ways, right? The Court cannot prohibit discrimination on the basis of race in the narrowly-defined sense and exclude discrimination on the basis of things like speaking Spanish, and then at the same time, find that programs that rely on those contingently connected experiences that just so happen to be connected to racial identity cannot be outlawed as an affirmative action proposal based on those particular experiences, traits, and qualities.

For those of you who are interested, the *Michigan Journal of Race & Law* published this article.⁶ I do not remember what year off the top of my head, but I am sure that someone can provide that either to you or to me if people are interested. I highly commend my own article, here is a plug, but only insofar as I am also plugging the *Journal* at the same time.

CHRISTINA WHITMAN: I feel a little sorry for some of the Supreme Court justices given how carefully our panelists have read their language. I am not sure that it was written as carefully. Our final speaker is Luis Fuentes-Rohwer, who is also a Michigan graduate. In fact, he has three degrees from Michigan, a BA, a JD, and a PhD. He teaches and writes in the fields of voting rights, legal ethics, and the legal profession.

LUIS FUENTES-ROHWER: There is a trick going last. The trick is, I think we call it, pre-emption. There are two things you can do. One, you could hopefully get lucky and they do not say the things that you have written down, or two, you can just make your own topic. Mine is a mixture of the two.

Thank you for coming, all of you. This room is kind of strange and big and scary. Why? Because it is big. When we first did this in 1994, we worried—big room, fifty people. It looks bad and, of course, when I was planning my talk, I thought fifty people in this room would probably not be looking all that good. Of course, you show up and I thank you for it. Of course, I thank Maureen, the *Journal*, everybody. We are so proud, although I will speak for myself. It was about ten to fifteen years ago when we first started doing this. One of us said, that "I want to come back in ten years and see the *Journal* sitting there strong and tall." It has been thirteen and it is incredible. It is a pretty amazing thing.

Now for my topic, "Alternatives to Race in the Wake of Proposal 2." Let me begin with the language of the amendment, which was adopted over a year ago. It reads as follows, "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate or grant preferential treatment to any individual or group on the basis of

6. Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001).

race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

This language brings to mind two of my favorite quotes from the law reviews. Here is one, “Redistricting like reproduction combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology and often a need to pull and haul rather indelicately at the very end, and of course it often involves somebody getting ‘screwed.’” For my purposes, replace redistricting with college admissions and see what you get. As for the second quote, and here I quote again, “The kernel of my positive suggestion is so obvious that I would be embarrassed to offer it if it did not seem necessary that someone should.” Here is my kernel. The amendment does not allow discrimination or preferential treatment on the basis of race, sex, color, ethnicity, or nation origin. This language implicitly elevates merit and just desserts to a preferred position, and then the next move, which is crucial to my mind, is usually lacking. We proffer definitions of metrics for merit and desert that make me wonder whether I am from a different planet.

And here are a few. You know what they are. For college admissions, here is what we say, SAT or ACT scores and high school grades, that is merit. For law school admissions, we say LSAT scores and college grades. There might be some other things sprinkled here and there, but that is not really what we are usually talking about. Admissions become door prizes, rewards for past achievement. This is what you get. Here is what you did; hence here is what you get. For a helpful analogy, think of it this way. We see these applicants as competitors in a race and only those who finish among the top are deemed deserving of admission. In fact this analogy is not new, it has an esteemed history. Just this morning Dean Wu told us about the LBJ analogy to the shackled runner, running with a shackle and everybody else running without one. And, of course, then we say go ahead and compete, see if you can beat these other guys. Surely, college admissions must be about more than that. So when we ask for alternatives for affirmative action, in essence we concede this point much too easily at least to my mind. We are asked in essence to move on.

Well, I am not quite ready yet, so in my remaining time, I am going to make three points. First, I will frame the issue with two examples that ought to resonate with this campus, actually one of them should. The other one, we will see how that goes, hopefully not. The first example is from NCAA data on student athletes and college coaches. The second example is from voting registration data pre-1965 in various states throughout the south. These examples show clear racial disparities. They might even show what might be termed a problem and so the question to me is how to solve it. My second point tries to handle that question. One way to solve the problem is to do what the Voting Rights Act tries to do. In fact it is what it does. If in light of the numbers as we see them, we cannot trust the relevant jurisdiction, we will shift the burden on them to

justify the decisions they make. Based on history and the numbers, we cannot trust you. Why are you doing this? A second way we could do it is take a holistic circumstances approach. This is an approach, at least to my mind, granted with reason—and in fact it has been reflected in much that has been said today and deference to those whom we entrust with decision-making authority. And then with my third point, I am going to close with an example from the oldest story ever told. For all the time we spend debating this question, questions of merit and dessert, it bears repeating. This is not a new question, in fact far from it.

I will begin with an example that ought to be familiar since this past semester on campus. Here are some figures worth pondering. For the year 2001–2002, 57% of those students playing Division I and Division I AA basketball were Black—57%. Thirty-two percent were White. And of course there is another 15% that were other. They do not really tell you what the other may be and yet I suspect Latino, Asian, American Indian, and what not. Yet 83% of college coaches are White or were. This is 2001–2002, 83% and 16% were Black. If you look at college football, the numbers are pretty similar. In 2001–2002, and the numbers are not getting better by the way, but I am giving you these for the sake of simplicity, 50% of the players in 2001–2002 were White and 90% of head coaches. Fifty percent translates to 90%. Conversely, 43% of the players were Black, yet only 8% of head coaches. The numbers standing alone, at least to me, are quite intriguing. As I said before, they are not improving on their own. How do you explain them? Surely to me that is an interesting and important question. This is to ask, and I want you to think about this, what makes a good coach? And how should we go about selecting the right one? That is what I meant about this campus having experience with this. Apparently this is a big deal in Ann Arbor, they tell me. What is it? Is it wins and losses? Is it strong recruiting? Is it, I do not know, a good communicator? A strong tactician? X's and O's? Well, I have one, a good and hopefully sneaky video department? What is it? Do we know? This is, I think, a difficult question. We assume that it is not. It is far more difficult than we often assume.

Now, let me give you a second example; these are registration figures in select southern states pre-1965. In Alabama, just to take one of the many states I have here, the gap between White and Black registration in 1965 was 50%. This is from 69.2% for Whites registered to 19.3% for Blacks. In Mississippi, the gap was 63.2%. There were 69.9% Whites registered as opposed to 6.7% Blacks registered. Take Virginia, which is not quite as bad, 61.1% for Whites, 38.3% for Blacks, for a gap of 22.8%. This racial gap in registration and the average gap in states mostly from the south, is 44%: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia—44% gap in registration. This is 1965. This is staggering.

It also leads to the next part of my talk today—what to make of these figures? Or put differently, how do we solve this problem, assuming as I do, that it is a problem? One way is to ignore the problem exists. We can simply trumpet merit as many do and look the other way. Things will just figure themselves out; it will happen. And then we say most coaches of color, for example, are not hired because they do not deserve to be hired. In the registration example, of course, this was said many times in 1965, we can chuck it up to apathy, for example. They just do not want to vote. It is disengagement from the process. Or perhaps they do not merit the right to register or to vote. Why? Because they cannot pass a very simple literacy test or a good character requirement.

One problem with this position is that our confidence in our accepted definition of merit is simply unwarranted. So let me offer you a more promising tack. Under Section 4 of the Voting Rights Act, jurisdiction that meets certain statutory benchmarks come under the purview of the act. Then once jurisdictions come under the Act, Section 5 demanded that they preclear any changes in voting within the given jurisdiction. In other words, if you fit under the act, we do not trust you. And the states that I just read to you, those are the ones that in fact came in under coverage of the act in 1965 under Section 4. Notice, their past history leads to mistrust. That is basically the Voting Rights Act or the big important provisions of the act. Once you do that, these jurisdictions have the burden of showing that their changes in elections do not have the purpose and will not have the affect of denying or abridging the right to vote on account of race or color. Based on what we know, these jurisdictions cannot be trusted and must justify their every move.

One way to think about the debate today is to say, maybe we could demand similar justifications from universities across the spectrum of hiring practices including coaching ranks, including faculty hiring, including college admissions. Low numbers, for example, could lead to a demand for justification. What are you doing and why? I recognize this analogy does not carry through. It fails at some crucial junctions, perhaps in your estimation. I just give it you as a thought experiment, and for this moment, nothing more.

Let me give you another one, one that you have seen before. We have seen it this morning. This approach is far more promising, but perhaps, will not be as helpful as I wish it were. It is a holistic, total approach where decisionmakers can look to a range of factors, of course including race, for deciding among applicants. This approach is reflective of the world as we know it. And if you want any proof, all it took for me was to be in one of those committees at the law school: the admissions committee, the faculty hiring committee. That is what people do. But somehow when we come to admissions in college, those who argue that race should not be taken into account seem to forget and we make the process differ-

ent. I am suggesting that we ought to just open it up. Let decisionmakers decide.

As I said before, much has been said about this point today. So let me just note that, assuming the question of merit resides at the heart of the debate over hiring and admissions, assuming that you agree with me on that point, it seems to me the critics bear the burden of showing that race should play no role in this process. The mere assertion that race should play no role is not really an argument. And make no mistake, this is not as easy a question as we make it sound.

So to illustrate that point, let me bring the debate of my talk full circle by telling you an old story. It has two acts. The first act features a strong soldier. I did not make it up, believe it or not. A military leader of men fighting for his king and his people. Let us call him, for the sake of simplicity, oh I do not know, Guy. You with me? Upon sacking and looting a city, the king and his men divide the spoils of victory accordingly. That is what we always do; yet the king loses his spoils through no fault of his own. The gods demanded, what are you going to do? The king knew what to do. He did what any self-respecting king would do. He took Guy's spoils. The king after all could not be the one to be suffering the consequences of the gods' will. As expected, Guy flew into a rage. This was not fair. This was unjust. This was undeserving, unjustified.

Turn now to my second act, which moves this story a number of days ahead. We meet Guy again, but this time he is in charge of organizing a number of events for soldiers—the first event, a race among five competitors. Guy has five prizes to distribute to these five competitors. Think here back to President Johnson's analogy of the shackled runner. Guy knows each runner individually and he knows they have differing abilities in running and so forth. Again, for the sake of simplicity, think of these runners as 1, 2, 3, 4, and 5. The race begins and many things happen, broken legs, mishaps, elbows to the face, maybe a little cheating. All kinds of bad stuff is going on and in the end, number 2 crosses the finish line first, followed by 3, 4, 5, and then number 1. The question for Guy, how should the prizes be distributed at this moment in time? Well, should 2 get top prize? Would not fairness and justice dictate as much—2, then 3, then 4, then 5, and then 1? Number 2 does get the first prize because he is, and I quote, "the best runner." Yet he grants the second prize to number 5 because he knows, this is Guy now, that number 5 is the most deserving candidate. He knows him. He then allots the rest of the prizes accordingly. You might know this story. My story is based on the story of the great warrior, Achilles, as told in Homer's *Iliad*. Of course, I just equated Guy with Achilles, but that is my problem.

So if you take anything away from my talk, please take this. The debate over the use of race in the making of public policy is really not a new debate. It is really a debate, about old terms. When we talk about merit and just desserts, we are really talking about contested issues. Yet we

behave as if these terms have set and universally agreed upon meanings, a belief that, as Dean Wu reminded us this morning, is a real shame in this debate and a fight worth having.

Let me tie this all to the topic of this panel. If you were to ask me to move away from considering race as a characteristic to move on, I would spend twenty minutes, maybe eighteen telling you what I just told you. I suppose then that I would offer you a second choice. I would say, how about class? That is usually a sexy choice. Or, how about geography? Or, any other proxy you can think of? Hey, even random selection? Or, how about just picking them out from a minimum pool of candidates? GPA of 2.5? You pick it, 3 or 3.1? It is really irrelevant for my purposes. We could do many things. We could get really creative, but I note in saying this that those moves are not more indicative of a just and fair processes than any other move we make today. Without more, those moves are no more fair and just than the use of race. It seems to me that we need to be clear about that. Thank you.

CHRISTINA WHITMAN: Thank you. You are making me miss the time you and Guy were around here. Guy, do you want rebuttal time or something like that? We have about fifteen minutes for questions of the panelists. I open this up to you—if you want to direct your question to a particular panelist, please do. Or you could direct it to all of them. At any rate, open the floor. Lauren.

LAUREN: My questions are for Professors Barnes and Roithmayr. You said that relying on Supreme Court cases like *Price Waterhouse* to defend alternatives to affirmative action might be effective in court challenges, but I was wondering if you thought that relying on those rationales could also be damaging to the social movement for racial justice?

MARIO BARNES: I was the one who mentioned *Price Waterhouse*, but it really was as a frame for trying to talk about motivation and motivating factors because scholars, who want to talk about why race-neutral means are a problem, say it is because you still are animated and motivated by racial diversity. I wanted to talk about a way in which we sometimes will minimize the effects of motivation, because, in the end, they do not matter as much given all the other things we consider. Yes, of course, some people would suggest, if race is at all a motivating factor for employers, they do not like the sort of forgiveness we give employers who also had other means for their decisions. I did not mean to suggest it as a direct analogue, but I wanted us to at least have a conversation about understanding that when you have a number of motivations and when one of them is race, it does not always have to be detrimental and damning. Certainly the problem is politics. We are much more interested in giving discriminating employers a break than we are in assisting those who are students who are applying to universities with minority racial backgrounds. Maybe it is just a choice of political perspective in the end. But

yes, your point is well taken in that. It could be destructive, too; it could be problematic for the social movement aspect of this.

DARIA ROITHMAYR: I think that is absolutely the exact right question to ask and I think that it is important to recognize that in any movement to hijack existing Supreme Court jurisprudence, you are already limiting yourself. I think of arguments on the basis of existing Supreme Court jurisprudence as a sort of a rear guard action—something that you devote resources to, but, certainly as a movement, recognize as one tool among many and should not be the focus of the movement's energy and organizing. I think there is a way, though, to take some of the arguments that I made and create centerpieces of organization around them. This notion that what is important about race is this historical set of experiences. This set of cultural practices as opposed to just some sort of irrelevant aspect to most people's existence. So I think that you are absolutely right to ask that question with regard to the costs and benefits of any sort of litigation strategy, but you do have to do the cost-benefit analysis.

AUDIENCE MEMBER 1: This is to the panel in general, for whoever wants to respond. Last year I had an offline conversation with Sarah Zearfoss, who is the Dean of Admissions here and is wonderful. I think her job gets more difficult every year and certainly Proposal 2 has complicated an already difficult challenge. As you all are talking about frameworks for these proxies and alternative means, I think that it is great to help us think about what we would choose, what makes sense, what the challenges are. Have any of you gone back and considered the empirical elements of this? Because in speaking to her very casually last year—not putting words in her mouth—the impression that I got was at a school like Michigan—I am sure Boalt and others have found this—there are thousands upon thousands of applicants. What ends up happening is when things like socioeconomic class, status, class, first to go to college are numbered in, the disparity between majority and minority populations is so great that it kind of drowns out the ability to select for diversity. She viewed it as initially, I think, as being just a numbers game. As the numbers get bigger, you lose the very population that you are trying to get because there is such a volume of applicants and everybody has the ability to speak to something like that. Have any of you considered it? Obviously it is not the first thing that we go to if it is a rear guard action, but do you think it is important to get those folks who are out on the frontlines involved, does this pass the smell test for you to actually implement?

DARIA ROITHMAYR: I had conversations with Sarah as well as a number of other people who are running admissions offices and who are chairing admissions committees. Sarah will tell you that in processing the applicants here at the University of Michigan, the hallmark of their admissions process is that they review every file. The decision-making process obviously becomes more difficult, but it is in some sense no different from

the decision making process that they are already engaging in. You just have to decide among the people who submit applications who is more deserving than someone else, but practically speaking, that is not any different than making distinctions that Sarah and others are already making when they have decided to move away from the numbers and look at the whole applicant. But I totally agree that administratively it is a lot more expensive, time-consuming, and costly for the institution to engage in, and it really depends on how much in the way of resources the law school wants to devote to creating a viable affirmative action program.

CHRISTINA WHITMAN: I would just like to add that, of course, it gets even more difficult when you are talking about undergraduate admissions because it is so hard to take a holistic approach to each individual file when you have so many. Professor Deborah Malamud, who used to be on the Michigan faculty and is now at New York University, has actually written about this in several different articles.

AUDIENCE MEMBER 2: Why have the debates between the Democratic Presidential candidates not spent much time on affirmative action?

KIM FORDE-MAZRUI: I will take a jab. I have not seen all of them so I cannot know for sure whether it has come up at all. I am not sure why it has not been asked, but I can understand why the candidates would not want it to be asked. I feel very torn about this, too, because for someone, like—"Go Bama," by the way—[Obama] in this kind of tension between being true to racial issues and what he knows about the experience of racial minorities, he at the same time, knows that if that is emphasized that may undermine his ability to actually get the brass ring and have power. So there is pragmatic versus principled. I feel the same way about gay rights. Those are divisive issues, and the Republicans are more unified on affirmative action, gay rights and anything to divide the Democrats and send Independents over. So I can understand why they would avoid the topic and I am just hoping that pragmatism will mean that once we get power, then those issues can be addressed.

MARIO BARNES: Just two small points. One, I think there is a way in which the framing question from this morning is back on the table, because, unfortunately, I do not think this issue gets framed in terms of opportunity and access, especially not when we talk about the level of graduate and professional school. It gets framed as a problem of deserts, which is one problem, and elitism on the other. You do not have the right to go to an elite school. That is what you want to talk about, right? That was part of the conversation in *Grutter*, right? This was not about law school; this is about the University of Michigan, an elite law school. That is one of the issues. The other thing I think, on the other side, goes a bit to Kim's point about the Democrats. They do not have a unified narrative that both works for the party and for the people, because they actually

want to talk about complicated, messy things that do not go away with sound bites.

AUDIENCE MEMBER 3: I will direct the question first to Professor Roithmayr and thank you all. The third criterion that you illuminated included viewpoints and experiences for diversity like maybe race or sociological, primarily race, I think. If someone from an under resourced community was trying to convey these experiences to an admissions committee, aside from small multiple choice bubbles, for example like, I will be the first to attend college or professional school or maybe the first to own this or that, how would you get someone to convey information closer to the lines? I know that in my community there are these norms but I would not know to put them on an application. If someone suffered from racial intolerance, they might not know that their community had far more than other communities or if someone went to a school with no pens and pencils. Or where they did not have a computer, they might not know that other schools were far more advantaged. So what sorts of ways could you check for that third criterion?

DARIA ROTHMAYR: I think that is an excellent question. I guess that I would say a couple of things. One, I absolutely acknowledge that this puts an even greater burden on applicants to articulate the source of disadvantage in the first instance, commitment to underserved communities in the second instance and different view points in the third instance. I am hopeful that people who are in a position to assist applicants, guidance counselors etc. would step up to the plate. I am also somewhat convinced that as this process becomes even more competitive for law school admissions, people will figure out how to compete in the application process and that this articulation of disadvantage, commitment and viewpoint will become part of that process. With regard to the third criterion, I think of that less as a question of how your experiences contribute to the conversation and more talking about the way in which, for example, Matthew Hale growing up in Illinois with the experiences that he had which then produced his viewpoints on racial justice or Morris Dees talking about his experiences in the way in which they created his viewpoints on racial justice and I deliberately used White applicants to re-emphasize the point that race is not necessarily a proxy here, but to tie one's viewpoints to one's experiences. What I would be looking for as a member of an admissions committee would be to look at the way in which the person's viewpoints drawing from their experiences might not be represented in the existing mix of students in the law school population. So, for example, Clarence Thomas. If Clarence Thomas applied to law school again and talked about his experience growing up Black in Pinpoint, Georgia and finding the affirmative action that he benefited from at Holy Cross to be a source of stigma, I would count that. I would think that he could potentially get in under criterion number three because that is certainly an unusual viewpoint that might not be routinely

expressed in the law school population, people who benefit from affirmative action then turning on affirmative action so to speak. I should speak with a bit more respect about that. But the important thing for me, at least with regard to that third criterion, is to think about the way experiences relate to viewpoints and the way the viewpoint relates to the existing mix of law school students or undergraduate students specifically on the issue of racial justice.

CHRISTINA WHITMAN: I think our time is up and I would not only like to thank the panel for their really interesting presentations, but thank you for your really thoughtful questions. Thanks.

PANEL III
EXISTING AND EMERGING EFFORTS TO REMEDY
K-12 EDUCATIONAL DISPARITIES

RACHEL JOHNSON: A couple of our speakers, starting with Dean Wu, have mentioned President Johnson's analogy of the shackled runner, and in this final panel, we're turning from higher education to a discussion of K-12 public education. Affirmative action programs at the university level are inadequate because they don't address the root of the problem: that if our children are not receiving equal opportunities and equal educations at the K-12 level, they're never going to be able to compete equally at the higher education level.

So this panel examines some difficult questions: what duty do we have to refocus our efforts on children at the K-12 level, especially after the passage of ballot initiatives like Prop 2? Which disparities should be targeted first and how? And what role can the law and lawyers play in addressing these issues?

Panel Three is moderated by Professor Ellen D. Katz of the University of Michigan Law School. Please welcome her.

(Applause)

ELLEN KATZ: Let me just very briefly tell you the names of your panelists and then cede the floor to them. Michael Kaufman is the Professor and Associate Dean for Academic Affairs at Loyola University in Chicago. Margaret Montoya is a Professor of Law at the University of New Mexico School of Law. Susan Benton is a partner at Winston & Strawn in Chicago, and Sumi Cho is a Professor of Law at DePaul University College of Law.

Margaret will get us started.

MARGARET MONTOYA: Let's begin by taking note of place and space as we look around and notice the old portraits of these men who are presumably judges, lawyers or law professors on the walls of this classroom. What work do these portraits do? Specifically, what identity work or race work do these portraits do? What narratives are embedded in these images? What is the subtext of these pictures?

Ask yourself how many generations of taxpayers of color have paid to support the University of Michigan. Are their histories, interests or narratives reflected or represented in these images? And if not, isn't part of the story told by these pictures that there has been a transfer of various sources of wealth from taxpayers of color to those who have walked for generations through these halls and shared the space on the walls? That transfer of wealth is not race-neutral. These portraits bear witness to this history. We can't talk about educational disparities in the K-12 system without understanding the historical disparities that are reflected in the portraits on these walls.

I want to say that I'm more grateful than I can say to the *Journal* for inviting me to be part of this symposium. The *Journal* published my article *Silence and Silencing*⁷ in the late 1990's and in that article, I argue that legal actors, that is, law students, lawyers, judges, are taught *not* to talk about race. We're taught that there is a professional protocol that should not be broken in the classroom by introducing such ideas as race, and that this silence and silencing is an important way that racial hierarchies are maintained. So I just want to make the point that Proposition 209 in California and Proposal 2 in Michigan are structural policies about silence and silencing. As we re-segregate systems of higher education, viewpoints are excluded and voices are quieted.

The image that has been used historically to talk about applicants to college and universities is that of a pool of people. We say "applicant pools" or "There aren't enough folks in the pool." But in the late 1990's, Bok and Bowen refocused the discussion in "The Shape of the River" by taking issue with this metaphor and proposing a different image. "It is more helpful to think of the nurturing of talent as a process akin to moving down a winding river with rock strewn rapids and slow channels. Muddy at times and clear at others."⁸ This river metaphor now vies with that of pools, moving water versus stationary bodies of water.

Many of those who are working on educational access to the University of New Mexico and other academic institutions in the state have rejected pool and river images in favor of a pipeline. Why a pipeline? Pools and rivers are natural occurrences while pipelines are a human endeavor and a human construction. Pipelines require human effort and ingenuity to design the system, put the segments in place, and couple them together. So let's talk a little bit about educational pipelines, but I'd like for you to keep these images in mind because the images have proven important as we analyze this task of expanding educational opportunity.

I won't take time to do much with the jurisprudence of inclusion, but I do want to ring the bell about *Brown*,⁹ *Rodriguez*,¹⁰ and *Grutter*.¹¹ *Brown* resoundingly rejected the *de jure* segregation of public education; *Rodriguez* stands for the reprehensible idea that there is no constitutional right to education; and then we have *Bakke* and *Grutter*, about which others have talked.

On June of 2003 when the Court handed down its decision, we in New Mexico were delighted. Students in my class had filed an amicus

7. See Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. OF RACE & LAW 847 (2000) and 33 U. MICH. J. OF LAW REFORM 263 (2000).

8. See William G. Bowen and Derek Bok, *THE SHAPE OF THE RIVER* (Princeton U. Press 1998) at xxi.

9. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

10. *San Antonio Indep. Sch. Dist., v. Rodriguez*, 411 U.S. 1, 93 (1973).

11. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

brief on behalf of the Hispanic Bar Association, the Black Lawyers, and the Indian Bar, that is, the minority lawyers' groups argued that the interests of New Mexico were implicated in this national debate. We argued that because of New Mexico's high rates of poverty and its racial/ ethnic demographics and the existence of 22 tribal sovereigns, the state has pressing legal and medical needs that can best be addressed by maintaining a high level of Hispanic and Native American lawyers and doctors.

Our brief identified the many justice and health deficits, and this idea of comparing legal needs with medical needs was key to what we were arguing. These deficits are disproportionately borne by the Hispanic, Native, and African American communities because of the extreme poverty, the rural character of the state, and its complex political jurisdictions. On a cold April 1st morning in 2003, my students, my husband, my daughters, and I marched in front of the Supreme Court. (Yes, since the presidential campaign of Governor Mitt Romney has raised questions about people who falsely claimed to have marched with Dr. Martin Luther King, Jr., I brought a picture to document our claim.) (Laughter)

There were tens of thousands of mostly young people, mostly Black and Brown faces, that marched from the Supreme Court to the Lincoln Memorial in Washington, D.C. on that memorable day. The hip-hop generation was there, chanting and dancing and petitioning the Court in rap and rhyme, asking to keep open the doors of higher education. I am so glad that I lived to experience those hours in Washington, D.C. I am committed to the idea that law students learn how to become activists for social change, learn how to use the law to transform legal and social institutions by using their voices in classrooms, courtrooms and the streets.

Unlike California or now Michigan, New Mexico has never chosen to outlaw affirmative action. Its colleges and universities have been free to consider race and ethnicity, as long as the federal law has allowed. Nevertheless, most of the concern in New Mexico has been about diversity in the graduate and professional schools and it has taken community organizing, lawsuits and internal and external pressure to create educational opportunity at the University of New Mexico and its medical and law schools.

Today most of the debate is not focused on the doctoral end of the pipeline. If we are to do anything about keeping the doors wide open, we need to have a better understanding of the entire spectrum of the educational system and we need new strategies, resources and initiatives in the Pre-K through undergraduate segments of the system if we are to have meaningful educational reform. So let me begin with a little bit of information about Latinos and Latinas nationwide and then specifically about New Mexico.

The Chicano-Mexicano-Latino-Hispano community, and we go by various designations, is part of a national crisis in education. Latina/Latino students face overwhelming odds when it comes to schooling. The Pew

Hispanic Center tells us that Hispanics have some of the highest dropout rates—We have low college completion rates. We are among the most segregated, in fact, some say we may be the most segregated population in the K–12 system. And then there are Latinas, one of the most vulnerable segments because they have few role models, curricular materials ignore their lives and their experiences, and there is widespread inattention to them and to their needs.

Martha Kim gave you some of the statistics for Latinos and Latinas in California. In New Mexico, 53% of the public school students are Latinos. Another 12% are Native. Over two-thirds, that is, over 67%, of the students in New Mexico are students of color. When we couple race with gender, the face of public education in New Mexico is that of a Brown girl; however, educational reform has not caught up with this reality.

I also handed out some pieces of paper and I would direct your attention to something that looks like this that has bean jars, (an idea about how to represent racial inequalities that I borrowed from my friend, Prof. Sumi Cho). So what this handout basically shows is that in 7th grade, Hispanic Latino 7th graders comprise more than half of three jars, some 13,000 students. And if you see over time, the last one is the doctoral jar, and the doctoral jar is almost empty, of course, but only 10% of those are now Latinos and we recognize that 10% is very high for any state, but not when you're thinking about the percentage of students that begin in the pipeline.

And so today what I want to ask is: What would it take to increase the number of Hispanic Latino and other underrepresented students reaching the highest levels of education? The central proposition of the pipeline project is this: addressing the health and justice disparities and inequalities that burden New Mexico and stifle economic development, especially for those who live in rural areas, small towns, pueblos, and tribal lands, requires increasing the number of lawyers and health providers who are culturally responsive to New Mexico's Hispanic and Native peoples. This proposal contains three ideas. The law school's pipeline projects involve improving educational attainment rates from pre-kindergarten through the doctoral programs by creating partnerships with the medical school and other parts of the educational system as well as changing curriculum and pedagogy so that students emerge with the multi-cultural knowledge and skills necessary to work with underserved communities.

So the next few PowerPoint slides are actually going to show you what the law school is doing along this continuum, but I'm not really going to provide any detail about this just because we don't have time. So under the pipeline project, what we are trying to do is develop better statistical and informational analyses. And so, for example, one of the things that we have done is a school by school demographic analysis of the Hispanic/Latino/a faculty who are on the tenure track over the past 14 years in order to see whether certain patterns emerge. I offer this as an

example of the types of data compilations that can be done to identify the lack of faculty of color within academic units as well as those departments that are doing well with diversity hiring and promotion. Dr. Valerie Romero Leggett, who is now the Vice President for Diversity in the Medical School, Bill Kidder who was very active in the *Grutter* litigation and I have written an analysis of admissions in the law school and the medical school. I offer this as another example of the type of analyses that need to be done in order to understand the historical processes of student admissions and financial assistance. Such analyses can point the way to future improvements.

In one of my service learning seminars, students wrote a guidebook for parents of high school students called "*A Pathway to Higher Education.*" This a training manual to teach parents, many of them low income and immigrant parents, what it takes to apply to colleges.

I have been arguing that one of the steps toward addressing Pre-K-12 barriers is developing data and analyses. We also need to create partnerships between law schools and public schools, and so I'd like to show you a videotape of a mock trial that I did at Taft Middle School. What we did was we basically took the classroom and turned it into a little courtroom. The case involved a larceny fact pattern so over six days, we talked about the five elements of larceny and we prepared witnesses and then their direct and cross-examinations. The students wrote opening arguments and closing statements, both oral and written. Finally, the case went to the jury. After deliberating, the jury decided that the defendant was not guilty. There was a tremendous feeling of accomplishment in that classroom, on the part of the students and for me as a teacher.

Almost any of us has the training to go in and do these kinds of programs. The purpose of the program is not to recruit 7th graders or 6th graders into law school, but to begin to capture for them the reality that those of us who have gotten in and gotten out of law school have life stories very similar to theirs. My purpose was to have them imagine that they too could go to the university. Even if no one in their families had finished high school or gone to college, they could begin to visualize such a future for themselves.

Pipeline projects need data and good practices, they need partnerships but more than anything these educational reform projects rely on local solutions and community participation. Such programs also require attitudinal changes; we must abandon the language of educational deficits. These students who are now largely forgotten are not just a bundle of risks and challenges. They come with abilities and competencies, and school systems have to be more holistic in responding to them and their families. I could talk more about the kinds of information that we need to give to low income and immigrant students and their parents. For instance, that they will need to be out of the full time workforce until they are in their late 20's comes as a shock to many families. To be inclusive, we

need to make structural changes to the curriculum, to the school day, and to institutional alignments. We need to rethink antiquated ideas about cultural assimilation as we educate a workforce and a citizenry for a multicultural world. Our schools must become more adept at teaching a broad range of skills and knowledge bases that promote racial and cultural literacies.

We at the law school have found inspiration for our pipeline project in what is being done in medical schools, and I have included in your package information about the medical school pipeline and about the joint program in which high school students are accepted into their undergraduate program with a seat guaranteed in the medical school. We have found that law schools need to seek out collaborators from within their home institutions; law schools must break out of their institutional isolation in order to create the connections that pipeline projects require.

The first take-away message that I want to leave you with is one about the profession. As I have mentioned, pipeline projects are about coalitions and synergy. The professions, that is law and medicine, must bring their clout and voices to issues of educational reform. Diversifying the professions will depend on improving the public schools.

My second take-away message is about a personal challenge to all of us. Those of us who have benefited from affirmative action, who stand on the shoulders of those who worked to open doors for us must pay back our good fortune by remaking the public schools. We must link legal education to public service. Doing this means rejecting the idea that a law degree is about a job and our business is about making money and gaining power. Educating lawyers to reduce justice deficits and inequalities means radically changing the curriculum, the classroom and winning back the respect of the society for lawyers and judges. I began this talk by talking about imagery and metaphors, about pools and rivers and pipelines. Let me suggest another metaphor for the challenge that faces us. I come from the part of the United States, the Southwest, that was conquered and colonized, or better said, it was colonized by the Spanish and then conquered and then re-colonized by the Americans. And as a result of this dual colonization, we are very sensitive to notions of hybridity and cultural mixtures.

The lifeline of New Mexico has been the Rio Grande. We claim a body of local knowledge about using water, about sustainability and resource management that goes back hundreds of years. The Spanish colonizers carried their ideas to the pueblos. Both the Españoles and the pueblos created irrigation systems. Water has been diverted from the Rio Grande into the acequias (the ditches) for centuries.

Some of you know that the main canal in an acequia system is called *la acequia madre* (the Mother ditch). The smaller ditches are called *sangrias* (blood lines) and the water gates that control the flow of the water are called *compuertas* (gates), but this is also a pretty accurate picture of

the educational system ending at the doctoral level. We begin with a robust river of students in the elementary grades and by the time we get them in the University, our sangria or our small ditch has delivered only a trickle of students.

Many in the University cherish their role as gatekeepers. They carefully tend their compuertas, zealously opening and closing the gates, relying on the pressure of water, the resilience and the persistence of students to work their way down. Pipelines enclose and hide the precious water while acequias are open. Water in acequias is carefully tended. We are slowly comprehending that the educational system will work better, if like water that can be made to flow more easily, we all work on the acequia madre on the main river.

In a desert environment, water is sacred. It is literally the lifeblood of the earth. We must think of students in that way, of the large number of students in the public schools. Students like water are also the lifeblood of the community. Each one must be seen as a scarce resource, a scarce resource to be sent down the river to irrigate the crops of knowledge, innovation, invention, and progress.

Spanish phrase: "With heart, soul, and desire, si se puede."

(Applause)

ELLEN KATZ: Our next speaker is Michael Kaufman.

MICHAEL KAUFMAN: I graduated from this law school in 1983, and I will celebrate my 25th reunion this coming May. And I will echo what's been said already: I am so proud of this law school and of their *Journal* and I am just thrilled and honored to be asked to join this panel today. It's been a wonderful day so far.

I want to talk to you all about what makes a good school. Justice O'Connor, moments after she authored and published her opinion in *Grutter* and *Gratz* was actually interviewed. You may recall this. She sat down for the *New York Times* and in a very candid interview, she said that in her *Grutter* Opinion, she wrote that "In 25 years, we're not going to need these affirmative action programs anymore." And she was asked by a reporter, "Why 25 years? What's 25 years?" And she said in a very candid way, "When we no longer have disparities in K-12 educational opportunities, then we'll no longer need preferences at the higher education level."

Well, in the wake of Proposition 209 and Proposal 2, we may very well no longer have the ability to have preferences at the higher education level, which I think means that Justice O'Connor's point is incredibly well taken at this point. We have to figure out ways in which to correct disparities at the K-12 level. At a minimum, Justice O'Connor recognized something that's pretty obvious to all of us in this room. There's a tremendous connection between what happens before college and what happens in the college admission process and certainly in the law school admission

process. K–12 is vital. It is a vital ingredient in making sure that we have opportunities available to students as they enter college and law school.

So I want to talk to you all about that K–12 nexus between opportunities there and also at the higher education level, but I think to some extent Justice O'Connor didn't go back far enough. It turns out that pre-school is probably the single most critical step in educational readiness, and I want to spend a few moments talking to you not about K–12, but about Pre-K through 12. The data is truly dramatic. It turns out that many students upon entering kindergarten, are already 18 months behind in readiness. And as you might expect, that gap in readiness to enter school falls along socioeconomic lines and racial lines as well.

So therefore, if we're truly committed to curing the problem before students enter college, we can't start at kindergarten. We've got to start at three-year-old and four-year-old students. And the evidence is actually pretty overwhelming that when you do target Pre-K programs with targeted resources, the results are dramatic. And in fact, three studies have been done, one of them in Ypsilanti, Michigan. They're longitudinal studies and they demonstrate dramatically that targeting resources to Pre-K kids, three-year-olds and four-year-olds, reaps tremendous benefits. Some of the benefits are expected. Benefits, for example, in literacy; benefits in math skills; benefits in recognizing print media are not surprising. But some of the benefits are also a little bit unexpected.

For example, it turns out that students who have gone through Pre-K programs that are of high quality actually do not drop out as much down the road in school. There's a lower dropout rate, there's less truancy, there's more retention, less grade level repetition, there's lower special education costs, lower crime, less healthcare costs, and actually higher earning potential. In fact, in Ypsilanti, the Start Project followed students from age three to age forty and determined that the benefits to the community and society in terms of tax revenue far outweighed any kind of investment in Pre-K programs.

In all three studies, the investment in money at the Pre-K level reaped benefits that were at least 2.5-fold the investment. In other words, at a minimum, \$1 spent in three-year-old and four-year-old education in America would reap \$2.50 in benefits. In some studies, in fact, Ypsilanti was 17 to 1. So a dollar spent today in Michigan for example at the Pre-K level, would ultimately reap \$17 in benefit to the community: real dollars, real money.

In an era of scarce resources when we talk about ramping up our schools, the most targeted aspect of a beneficial resource allocation these days is for Pre-K education. So I would urge us as part of our advocacy in this area thinking about early education, for three-year-olds and four-year-olds. The evidence is dramatic. It is truly astounding.

But now the question is, assuming that we in fact have targeted students at the three and four-year-old level and now they enter

kindergarten and go on to 12th grade, what can public school districts do in the wake of Prop 2 and Prop 209 and in the wake of the Supreme Court cases to actually make a system of good schools?

And when I ask that question to my students in my education law class in law school, I ask it this way: I say, "Think back to your own educational experience and take a few minutes of silent meditation." Something law students can't stand doing, by the way. "But spend a few minutes and think back in your own experience and think about three or four indicia, ingredients of what was a really good school, a good educational environment for you."

And eventually, three or four things or maybe five things emerge and they tend to match the data. They tend to match the evidence. To the extent that we can know anything to a certainty, we know based on evidence that there are at least four ingredients of good schools, and by "good schools" I mean K-12 schools.

One of them is high quality teachers. No surprise. High quality educators are in fact an ingredient to good education measured in any way. Number two is an intensely involved parent community. A closely-knit involved parent community surrounding a school is a very strong indicator of a high performing school and good educational opportunities in that school.

Number three is guess what? Resources. Resources are incredibly important to good education. That means facilities, that means technology, that means the opportunity to actually have current textbooks and current media, and that means the resources to hire high quality teachers in sufficient numbers to maintain small class sizes. And finally, guess what? Diversity. In virtually every study that's been done, diversity turns out to be an incredibly good barometer, indicator or benchmark of a high performing quality education measured in terms of overall performance and test scores, standardized tests, authentic assessments, and assessments that are done by teachers at the grade level.

So diversity turns out to be a very strong ingredient to good education, and if that's true, then the question is this: If we want to create a nation of good schools at the K-12 level, one ingredient in that good educational environment is diversity. And the question then is: Well, what does that really mean? Well, it turns out there's additional evidence on what diversity means in terms of the quality educational experience and it goes along these lines.

Diversity actually benefits every child in a classroom environment, not just those from a minority group, and it benefits every child because it forces every child to confront something that's different. And educational psychologists tell us that cognitive dissonance actually is a critical ingredient in learning. To educate means to draw out. The word "education" is from the Latin "to draw out," which means that the process of education is actually a process of drawing out each other's experiences.

The best educators actually find a way to draw each other out in a classroom environment, and therefore, if you ask teachers if they will find ways in which to integrate groups within their schools, they will find every possible way to do that. Not because it's socially desirable, not because it feels good, because it's good for kids. It's the best educational experience for kids. It literally helps their synapses fire up. It literally helps their cognitive development on every possible level.

This concept of diversity that actually leads to educational outcomes has been sometimes characterized by school boards and educators as racial literacy. In other words, we're trying to create a school where literacy is important, but not just reading and writing, also racial literacy. And racial literacy is a concept that's developing in a nice way. It means not only experiences based on racial interaction of students in a classroom, but also it means trying to develop strategies to deal with people who are different from you, strategies to develop ways in which to confront your own biases, your own preset notions, your own world views, and overcome them. Many states now have established racial literacy as one curricula objective at the K-12 level.

And if that's true, and we're trying to create a nation of schools that in fact engender racial literacy in a classroom environment, the question now is how can school boards do that? Well, I'm on a school board. I've been on a school board now for 11 years in my district. My district is incredibly diverse. It's actually in a suburb of Chicago, but it's a diverse suburb of Chicago and involves an affluent area, but also a very non-affluent area. It's about 75% White and about 25% Latino.

And in that district, the school board sits down and decides: You know what? What's good for kids? Our mission, our passion is kids. We're all volunteers. We're not in it for the money. We're in it for kids. And we know from the research that diversity is good for kids because it engenders racial literacy and that in turn is good for kids. We don't want to send our kids out illiterate and these days, in this world, being racially illiterate is a huge disadvantage. So it's our goal as a district to create racial literacy in our classrooms.

Another question is: How do we do that? Well, in answering that question, we rely of course on our lawyers. This is where lawyers come in for sure. And our lawyers, very good lawyers, have read the latest Supreme Court cases, and of course, that means they've read the case that came out last summer, the last day of the term, *Parents Involved in Community Schools* against Seattle, sometimes referred to as *PICS*. And our lawyers had read that case and many people have read that case, as you might expect, and have come out differently as to what it really means. And I've read that case carefully along with our school lawyers and you know what? If a school district today wants to engage in race conscious decisions to try to create an integrated racial environment in its schools, it can still do it. It can still do it.

It can do it under the equal protection clause and it can even do it under Proposal 2 and Proposition 209. It can still do it. It can do it carefully, in a monitored way and with the help of lawyers, but it can still do it. And you know what? A lot of school boards want to do it. And I say that because of my own experience, but also because the National Association of School Boards actually wrote an amicus brief in *PICS* on behalf of Seattle and Louisville saying, "Please let us still do it. We've been doing it this way for years. We were ordered to do it for a while. We still want to do it because we like it. It's good for kids. It's resulting in excellent educational achievement. Let us keep on doing it." And if the National Association of School Boards wants to do it, my hunch is school boards want to do it. So if they're armed with lawyers that listen carefully to their clients, they can do it and here's how.

It turns out that although the majority of the Supreme Court actually struck down Seattle and Louisville's methods of trying to achieve racial diversity in their classrooms, the reality is that five members of the Court, the four dissenters and Justice Kennedy, actually came out in a way that's incredibly useful for strategies, rearguard although it may be, going forward and here's why. Justice Kennedy and the four dissenters all agreed that diversity in a classroom environment could in fact represent a compelling educational interest and in fact, Justice Kennedy at nine separate times in his opinion launched into what he believed were incredibly compelling interests all around the issue of racial literacy or racial diversity in the classroom.

He says things that are pretty dramatic. He says, for example, that we should recognize a compelling interest in altering racial composition to prevent racial isolation, to encouraging the kind of educational benefits that come from diversity. There is a compelling interest even in trying to do things that avoid interfering with the promise of *Brown*. He agreed with the dissenters that educational diversity is a compelling enough governmental interest to justify narrowly tailored race conscious decision-making.

Now where he went away from the dissenters was this: He simply believed, Kennedy did, that the methods used by Seattle and Louisville were not narrowly tailored to achieve that very compelling interest. And actually they weren't narrowly tailored because they were unclear to Justice Kennedy. He couldn't tell what they were doing. They were inchoate, he said, they were ad hoc, they were uneven, they were minimalist in some ways. His reasoning suggests to me at least that if the school district's methods were not unclear, inchoate, ad hoc, and in fact they were monitored precisely, they could actually survive strict scrutiny and become part of the landscape of K-12.

So with the dissenters, Justice Kennedy is, I think, pointing a direction, giving us a bridge to the future. He's saying in the future there are essentially two ways for school districts to go about satisfying our

jurisprudence. One is actually to engage race conscious decisions, but not racial classifications of students. Justice Kennedy says with the dissenters that you can actually engage in race conscious strategies to integrate schools and not even worry, as we've heard this morning, about strict scrutiny.

You can engage in race-neutral, but race conscious strategies such as picking a new school site in a way that takes into account racial demographics. You can do that, school boards—That's okay—and not even invite strict scrutiny. That's not even a racial issue according to Justice Kennedy and therefore I think would not be a problem under Proposition 209 or Prop 2 because it wouldn't be racially based in his mind.

You can even think about creating a magnet school or specially resourced program targeted to members of a minority group and still would not be subject to strict scrutiny. That's okay to do that. You can even do things like track enrollment and test scores based on race and that also would not be subjected to strict scrutiny. That's race conscious, but it's not a racial classification based on individual students.

So at the school board level, we have asked our lawyers to give us a road map. Tell us four or five strategies we can use in our district, since every district's different, to essentially create racial diversity without even engaging in precise classifications of students based on race. And the lawyers have come back and have begun to give us a road map and the lawyers in this room or budding lawyers could be asked to do just that. You will be asked by your clients to come back to us and tell us how to get it done. Not the barriers, not the burdens, but how do we do it? How do we get there from here? Give us some ways to go about doing it.

But you know what? Even if those don't work—and sometimes those race-neutral, race conscious but race-neutral strategies will not work—there's still one more option, and the option is this: Justice Kennedy and the dissenters also said, "But if you engage in a more nuanced, tailored, individualized determination of student needs and educational environments, you can still as a last resort," he said, "engage in precise racial classifications of students." So if you want to create an environment that is racially diverse, as a last resort, if you do so in a nuanced fashion to really achieve a precise educational goal and you can measure that, that's okay. And of course, the dissenters agree with that.

So what does that mean? That means that if a district cannot achieve its goal, its goal of creating a diverse environment by so-called race conscious but neutral methods, it can do so in a more precisely tailored way. Here's what I suggest: I suggest that districts adopt as a goal this notion of racial literacy. And it turns out the evidence is also compelling that in order to achieve racial literacy, you need, guess what, a racially diverse educational environment because that environment with a meaningful number of racially diverse students is actually required to achieve the goal of racial understanding, racial tolerance, and racial literacy.

You can't be taught racial literacy monolithically. You can't be lectured about it. You've got to experience it. You've got to draw it out. Therefore, the educational best practice method of achieving racial literacy is through a racially diverse environment. And if we can measure that and monitor it and be precise about it, I believe and I'm hopeful here, as a rearguard strategy, we can actually accomplish the goal of selecting students based on race at the K-12 level to achieve this incredibly compelling interest of teaching racial literacy.

The next step is this: So what if, and this is truly hopeful, we create a nation of schools in which racial literacy is a skill set, an outcome that we think is desirable? What if that's true? And what if we can measure that? And what if we gave each graduating senior of high school a test that was designed to assess the degree to which they have attained something called "racial literacy"? We give them an RLA score, a racial literacy acquisition score and we call it RLA. We could devise a test, an assessment, that would account for their experiences not just rote knowledge. And suppose we actually counted RLA scores, in the admissions process to colleges and universities? What if we said, "In order to apply to the University of Michigan undergraduate program, you've got to give us your GPA, your ACT, and your RLA"? And we could, therefore, count the RLA scores as coterminous with the other kinds of indicia assessed in a law school environment or a college environment. We think racial literacy is incredibly important as a skill set. Let's measure it, define it, and actually count it in the admissions process, and in that way, we could actually count RLA up with ACT and GPA and I think indirectly at least admit a higher percentage of minority students.

And then finally, what if we had a system in which RLA scores are actually valued by colleges? Well, it might just be that the parents of the children in the majority group, for example, might feel compelled or incentivized to move into environments and neighborhoods where their students or kids were more likely to attain a high RLA score? Those might just be diverse neighborhoods. So it's very hopeful. It's a proposal and I think we can get there from here if we have good lawyering, well-meaning school board members, preschool readiness programs, and a lot of good faith and support from those in this room. I know that exists. So thank you very much for the time. I appreciate it.

(Applause)

ELLEN KATZ: Our next speaker is Susan Benton.

SUSAN BENTON: Hello. I don't fit the profile. I'm a partner in a law firm in Chicago. Well, I fit the Chicago profile of this panel with one exception. I'm not a law school professor and I was asked to come here by Jeetander Dulani, who you guys know, your former Editor-in-Chief who is now with our D.C. office. He asked me to come and speak to this group about what our law firm is doing and I think a helpful part of that

discussion is how we got there because it's not always the easiest thing to do.

We like to believe that we are doing the most for public school education in the country out of any other large law firm. I think it is probably true, and I'm claiming it and no one else has claimed it, so I'm going with it.

(Laughter)

What I'd like to take out of the panel description is: are lawyers in a unique position to address the disparities? And the answer is obviously yes based on everything this panel and earlier panels have said. We come at it in different ways. The most typical way we come at it as lawyers is through our pro bono activities. A lot of those are legal aid based, but some of those are education based and I would say an increasing number within Winston are education based.

I'll give you one example. This past year, we represented the Chicago Coalition for the Homeless. The Coalition had sued the Chicago Public Schools System a number of years ago, got an order in place dictating essentially that the school district follow a protocol when closing schools that were attended by homeless children—and I assume there are some sociologists in the room because it was co-sponsored by your school of social work. The research is very clear that moving homeless children, first of all, their home is moving. When you move their school, it's devastating, so you need a supportive protocol. CPS, as we call Chicago Public Schools, had engaged in that protocol until it became too expensive essentially, and then had backed away from the protocol and the Coalition was suing to get that protocol back in place.

So we at Winston helped them to do that and fortunately CPS is moving toward a turnaround school model and not a school closure model under No Child Left Behind. So we feel we helped in that effort, so that's one education-based pro bono activity.

We also participate in internship programs. I think you have a hand-out in your packet. I have it in mine. Propaganda from various law firms, Winston is one that you'll see. We sponsor link students. We sponsor high school students through a number of corporate partnerships in virtually all of our offices. They come in, they do moot court competitions, meet with lawyers, a lot of activities. A little bit ad hoc, but an effort nonetheless at the high school level.

Our biggest effort started in 2002 when we were faced with our 150th anniversary in 2003. We put together a committee and I come at this—I'm a labor and employment practitioner, but I come at it also as chairing the firm's foundation. We had a big pot of money to spend on our anniversary. There were a lot of people who wanted golf outings, a big mega golf outing which has its own diversity aspects, so there were a number of us who opposed that.

Then we did the ball. We went through the—let's have a big ball, bring all the partners and their spouses, their significant others, and you're talking well over \$1 million to pull off something like that. And fortunately, cooler heads prevailed or maybe more passionate heads prevailed and we focused the money, about \$1.5 million, on education. And we did that by saying to each of our offices, "We want an educational project for underserved students in your city," and so we did something in every community and I'll share with you what we did.

To various degrees, we allocated money by attorneys in the office, so I don't think we can really say we're a Chicago-based firm anymore. I don't think we're supposed to say it, but in fact Winston started in Chicago. We had the most attorneys in Chicago, so we got the most money, which was, we got to have the most fun with the money. But I'll start in the smaller offices.

Our San Francisco office had just started, just opened up, and we did an arts project funding teachers from underserved schools. I heard under resourced today. I had never heard that. That's a good term. We gave them grants. They would have to apply for the grants through the public school system. We were in partnership with the San Francisco Public Schools System. They would submit requests for grants and so we gave the kids an opportunity to experience any kind of art: performing art, dramatic art, visual art, art art. What's art art? Visual I guess.

In Los Angeles we sponsored an after-school program. We did not join with the Los Angeles Public School System. They weren't interested at the time, so we worked through a non-profit agency sponsoring an after-school program and also an SAT training program. SAT/ACT training program for the high school kids who came to this—it was in conjunction with a number of shelters and after-school programs. So we hit both the K-8 and the 9-12 in that effort.

In New York, we did some really great stuff in Harlem with the New York Public Schools. I think they call it the Department of Ed in New York. We sponsored a tutoring program that was co-sponsored by the Department of Ed and the Urban League in New York in Harlem—PS 125 was the name of the school right in the center of Harlem. We built them a playground. We also built playgrounds in Chicago and in D.C.

And in D.C., we partnered with a client, a science association, to provide science training in partnership with the D.C. Board of Ed, science training for their high school teachers, and then we also did FAFSA. So it was ideas coming from attorneys in the offices and I'll hold what we did in Chicago for a minute.

The other thing we did was diversity scholarships. I would say we continue to struggle with diversity scholarships for law schools. We funded them initially at the first year level. We would award an entering first year a \$30,000 scholarship. You were awarded it your first year.

What we learned through the process of working with Northwestern; U.C.L.A., where we had to call it economic disadvantaged as opposed to a minority scholarship; Columbia; and Georgetown. Those were the four schools. What we learned primarily from the dean of Northwestern was a talented minority student admitted to one of the schools is going to get money. It's not going to change the pipeline.

We had this idea that we were going to provide opportunities for minority students to go to law school and that but for us, they would not be in that law school. And apparently that is not true, so we continued to fund in various degrees, but that's where law firms like us could use input from the academic community, from our associates, from the diversity community on a better way to use that money because right now, we're probably giving money to students who would otherwise be funded by the law schools from another source. Although I will say it's a great recruiting tool. We've always got an eye to that.

(Laughter)

So in Chicago, we did two things. We focused on teacher training, which Michael mentioned. I believe it was one of the key areas—if you don't have good teachers in the schools, you're not getting a good education. So we focused on teacher training, and then we adopted a school in an underserved community. If you know Chicago, it's right by the United Center, the Dodge Renaissance Academy. It was a school that had been closed by CPS as just an outrage—and it was—and then reopened. It closed for a year and then reopened under the auspices of the Academy for Urban School Leadership which was a teacher training operation at the time. Now it also has a turnaround model for our Chicago Public Schools, but we funded three teacher trainees that first year and we continue to do that today, and then we adopted the school, so we adopted Dodge.

And what does it mean to adopt Dodge? Dodge ended up being the star school of the CPS universe this year. It got the highest test score increases in one year, and of course, we take credit, but only among ourselves because that's the only group that'll listen.

(Laughter)

So this is what we did at Dodge. We give them \$50,000 a year for their extracurriculars. The reason being that a number of us grew up in areas where extracurriculars may not have been abundant, but it was there. And in these Chicago Public Schools in underserved or under resourced communities, there is no after school. There's no band. There's no athletics. There's no music, drama. So we funded all of that through firm dollars that we commit on an annual basis.

We started a tutoring program. We now have 50 attorneys and staff volunteers and that's why we claim the test scores because we have our tutors in there every day of the week all year. Fifty attorneys and paralegals signed up for that program. It's awesome and they love it, and the

firm funds their expenses. We bring the kids—we reward the kids who participate in tutoring. It's voluntary, obviously with a nudge from the principal, but it's voluntary. So we take those kids on field trips. We bring them down for moot court. We mentor them. We provide ongoing mentoring, and that's probably our key strategy there that's not monetary.

They reach out to us. For example, the first year they needed athletic uniforms. They were competing with t-shirts with magic marker numbers against other school who had funding of some kind, so we bought them athletic uniforms. We built a literacy lounge for their junior high kids. And when I say "we did it," we did it with person power. We went there and did it and when we raised funds, we just asked attorneys and staff, and some of the staff have been phenomenal, to pony up some money. So clearly, lawyers have the resources, the access to networks. We've brought computers in through clients. We can do it.

So this is really the next step. You leave law school and you get beyond the theoretical to figure out what you can do to contribute. And a lot of it's individual, but some of it is firm-based, but I'll tell you the firm-based stuff will never happen without individuals who push a lot because there are some substantial resources that go into it.

Now I'll mention one other program that the other Chicago panelists are probably aware of and that's the Renaissance 2010 effort, Mayor Daley's effort in the City of Chicago to essentially turn around the Chicago Public Schools and to get private dollars, \$50 million into the Chicago Public Schools. Law firms have had their arms twisted big time just to pony up \$500,000 over a five-year period and so we have joined the Renaissance 2010 effort in addition to our Dodge effort. So we've got K-12 covered at Dodge and we focused our Renaissance 2010 money on a high school in an underserved, under resourced community and it's actually a turnaround model school. So we just said, "Okay, if we're going to give this kind of money, we're going to get into the high schools." K-12 is critical. Now I'm feeling, while Michael was talking, I was feeling guilty. We have no Pre-K. We have got nothing at the Pre-K level.

(Laughter)

Except that Dodge starts at junior kindergarten. We got one year into it, but there's no question that's what the research shows. So I would just encourage all of you when you get out to push your law firms or to choose a law firm like Winston & Strawn. I'll give it a little plug.

(Laughter)

Talk to Jeetander. He's got some real experiences. This is important and they'll support your efforts both financially and as a matter of time. Thank you.

(Applause)

SUMI CHO: I was here for the inaugural symposium in 1995 and so it's great to see people who were students, then members of the *Journal*

back here as deans, established scholars, committed practitioners, and activists, not only on the panels, but also in the audience.

I think Yong Lee is one of those folks who has not yet been acknowledged.

(Applause)

Have we missed any other *Journal* alums who are here in the audience who haven't yet been acknowledged? Megan Whyte? Thanks for coming back. And also, thanks to the devoted staff like David Baum, who had to leave, and Maureen Bishop, as well as supportive faculty like those moderating these panels and Professor Alicia Alvarez in the audience. That's so important.

This *Journal* that was born during the turmoil of retrenchment on affirmative action has fundamentally changed the political culture at this institution and has a very proud tradition of leadership development nationally that Emily Houh so beautifully elaborated this morning. So it's great to see that the current *Journal* members not only embrace the theory and the practice of critical race theory, but also realize the importance of historical memory to the process of community formation. Thank you for including me in this critical intellectual, political, and cultural intervention.

The charge of this panel is to discuss existing and emerging efforts to remedy K-12 disparities. What duty do we have to focus our efforts on schoolchildren in K-12? We may also be looking at this topic not only because of the longstanding dire inequities in public education K-12, but also because of the arguments proposed by opponents of affirmative action like Ward Connerly, Pacific Legal Foundation, and Center for Individual Rights, among others, who assert that they are the "true progressives" because they seek to fix the problem of inequity at its root, at the K-12 level, in their efforts to eliminate affirmative action in higher education.

But I guess one obvious question is: Where are these progressives when it comes to devising remedies for inequity in K-12? Well, they're actually on the other side in the *Parents Involved in Community Schools (PICS)* case, seeking to eliminate even the small impact that race conscious admissions policies play there, and they're also missing in action in the movement to increase public school financing.

I frame the conversation of K-12 in this way to ensure that *Journal* folks do not understand the "K-12 vs. higher ed" framing as an either/or proposition, and also to put down the cultural lie that advocates of affirmative action in higher ed are simply elitists who don't really care about addressing inequality in primary and secondary education. And so it's important in our much-needed post-disenfranchisement debriefings like these that we make sure that in the very compelling and immediate quest to staunch the flow of bleeding, which is noble and just, that we also remain cognizant that these remediations under the new colorblind

regime may lead to the reinforcement of that regime and reinscription of the colorblindness/anti-classification mantra.

I was recently in post-disenfranchisement California where people are sort of competing to say how much earlier they were colorblind before other entities and how we should really just drop any mention of affirmative action whatsoever. And I completely understand the sort of legal strategy behind that and yet I think as people in the audience have pointed out, even though you may win somewhat in the legal arena, you may risk going backwards in political and social arenas if you're not careful. So you've got to be very cognizant of having a more unified approach as our opponents unfortunately have.

I want to address three questions regarding this topic of existing and emerging strategies in K-12 today—three questions, and the first is: How did we get here? Second: What can we do now for K-12 in a post-race environment? And third: Where do we need to go?

In terms of the first question, How did we get here? I'll answer this question in the form of three acts. Act one: litigation strategy as cultural movement; Act Two: referenda strategy is tyranny of the majority; and Act Three: industry capture of the judiciary.

Act One (in terms of explaining how we got here): First, we have to understand litigation strategy as a cultural movement. As I've argued in my previous work, we must have an understanding that affirmative action jurisprudence is important, not simply as legal precedent, but as cultural intervention. Political scientist Gruhl and Welch documented 20 years after the *Bakke* decision that that decision had little impact on actual practices in higher ed—among higher ed admissions officers. According to their study, over three-quarters of med school and almost two-thirds of law school admissions officers interviewed said that *Bakke* affected their policies "not at all."

And this perhaps led to two take-aways for the regression movement. One, outright prohibition. There needed to be outright prohibition on race conscious remedies to eliminate what was understood to be then the *silver lining of discretion* that civil rights advocates and admissions directors discovered post-*Bakke*, which I'll explore further in Act Two.

The second takeaway for the regression movement was, "It's the culture, stupid." And that is to say that regressive litigation is ineffective unless it's paired with a cultural movement. See not only *Bakke*, but also *Brown*. As Lee Cokorinos revealed in his book, *The Assault on Diversity*, affirmative action opponents such as Center for Individual Rights strategist Michael Rossman disclosed that the battle for affirmative action cannot be won if the Pacific Legal Foundation and the Center for Individual Rights and the Fifth Circuit are out there on their own.

Rossman further elaborated that one of the primary functions of a lawsuit is public education. He continued, "Lawsuits without the political will to enforce the results will often end up only changing the form of

race conscious decision making, making them less conspicuous. Litigation is as much about therefore, contesting for the hearts and minds of the next generation as it is about establishing legal precedent, which if you recall from the experience with *Brown v. Board* can be easily evaded and frustrated.”

So in terms of how did we get here, or Act Two: Grassroots referendum movements as tyranny of the majority. Now the citizen initiatives and referenda to reject and banish affirmative action present themselves as grassroots democracy. Letting the people speak giving rise to the political question distinction by courts reviewing such referenda under equal protection clause analysis to legitimate their non-intervention into the tyranny of the majority. And I’ve come to understand these referenda movements for regression alternately as a form of racial pornography, as Patricia Williams once coined the term.

Applied in the present case, these referenda are designed and pitched to flush out and cleave off White liberals and even progressives in the state-by-state acts of minority disenfranchisement, by appealing to majority voters’ most shameful, private, and narrow self-interests. In this sense, Prop 209, Initiative I-200, Prop 2, and the upcoming referenda in Arizona, Colorado, Missouri, Nebraska, and Oklahoma operate as an unusual form of racial pornography where Whites are able to release their pent-up, subordinating impulses toward people of color in the privacy of their voting booth, defying pollsters, and frustrating organizers, engaging in behavior that they would be too embarrassed to engage in public while emerging anonymously from their booth, cleansed and released as the model citizen.

And so we’ve seen first in California and then Washington and now Michigan and soon to be playing “in a state near you,” this exercise in regression referenda that I argue should not be understood as referenda on “civil rights” as many have already deconstructed the referenda’s very misleading titles, and neither should they be understood as referenda on affirmative action. Instead, I say they should be understood as referenda on Whiteness—that is, referenda on the *meaning* of civil rights or the *definition* of equality and discrimination. If you look at any of a variety of national opinion polls that have been done over the years, you will see a most striking racial disparity on how people of Color vs. Whites understand and define these terms.

For example, in 2004, where one poll asked whether racial inequality is attributable to discrimination, only 27% of Whites say yes, compared to 67% of African Americans. When asked whether Blacks should try harder, 58% of Whites agreed somewhat or strongly compared to only 38% of African Americans. Should there be preferences in hiring and promotion? Thirteen percent of Whites responded favorably compared to 54% of African Americans.

Or take the results of Prop 2 here in Michigan, which passed 58% to 42% in November of 2006, with 70% of White males and 56% of White females supporting the ban as opposed to 70% of men of color and 82% of women of color opposing it.

So let it be clear that these grassroots movements are little more than referenda on *White normativity*, and must be understood as such. I say this so that we don't feel discouraged in these referenda losses. The fact that White normativity exists and prevails in dominant majority states and that the tyranny of the majority continues in the political process is utterly unsurprising despite all of our grandiose proclamations to the contrary.

What is surprising is that the post-civil rights discourse of exclusion tends to obfuscate and repackage racial pornography as civil rights principle and the fact that a lot of people appear to be buying into that. I forward this understanding of the referenda process to ensure that the irony of racial regression posing as progressive grassroots democracy is not lost.

Which brings me to the next logical point, "industry capture of the judiciary"—the third act and narrow tailoring's inherent contradiction. I'm going to use Justice Roberts' plurality opinion in *PICS*, joined by Justices Scalia, Thomas, and Alito, to illustrate this point of industry capture of the judiciary.

The Supreme Court's jurisprudence on race-based remedies suggests that racial classifications are so bad that when used, like chemotherapy, it should be done only when absolutely necessary and as sparingly as possible. Strict scrutiny's imperative we know, has its two-prongs of compelling interest and narrow tailoring. We've seen compelling interest getting somewhat of a "pass" in the recent high-profile affirmative action higher education litigation—with the Court permitting forward-looking, indeterminate, less coherent, interest-convergence, majority-serving rationales for race conscious remedies that we saw in *Grutter*.

The real ground game currently revolves around narrow tailoring, from *Bakke*, *Grutter*, and onwards—a requisite that culturally and legally contracts the expanse of effective remedy for racial segregation and racial hierarchy through the limiting principle of narrow tailoring. *Grutter*, although understood as a win, achieved the unstated forward-looking, non-target, non-goal of "critical mass" to prevail—decidedly with non-racial balancing I should add. As long as you're not effective or explicit about racial balancing and diversity as pursued in this nonhistorically-contingent, hegemonically supportive, post-modernist "what is diverse?" confusion—i.e., "culture-not-race," undefinable critical mass, not goals, and certainly, not baselines or targets, then okay, we'll hold our noses and we will suffer it. Let the chemo begin.

In *PICS*, the K-12 case, the irony is that the court's inherent contradiction in policing racial remedies through strict scrutiny review is revealed through its compelling interest and narrow tailoring analysis. So here's the catch 22 of the Court's setup on affirmative action: If a plan survives compelling interest prong, it then has to go through narrow tailoring as we know. Okay? Or as the Court puts it, "the way in which that they've employed individual racial classifications is necessary in order to achieve their stated ends." But in *PICS*, factually what's interesting is that the school district in Seattle, if you recall this case for those of you who followed it closely, the school district established a very sparing use of race-determinative student assignments, and it was on that basis that you would think the judicious plan would pass narrow tailoring muster. However instead, Justice Roberts came back with the "Gotcha" in his plurality opinion when he stated: "The minimal effect these classifications have on student assignments, however, suggests that other means would be effective." Let me read that again: "The minimal effect these classifications have on student assignments, however, suggests that other means would be effective."

And he goes on to talk about how there's only fifty-two students who were ultimately affected adversely by the racial tiebreaker that resulted in assignment to a school that hadn't [been] listed as one of their preferences. So instead of seeing this statistic as clear evidence of narrow tailoring, the court instead presumed the opposite. Again, the minimal effect that race-conscious measures have on assignments suggests that there are better measures, i.e., non-racial measures that could've been undertaken.

And so we see strict scrutiny's inherent contradiction in its ends/means imperative i.e., the implicit cost-benefit imperative that defies and defines of strict scrutiny that Jed Rubenfeld had broken down previously in his Yale Law Journal essay. Now however, we're seeing a new efficiency argument emerge. That is, it not only need be efficient in terms of minimizing cost to so-called innocent White victims, but race-conscious remedies also must now be efficient in terms of being effective to the alleged beneficiaries, right, a logical impossibility. And so the complete fix is in from the get go, under the new Roberts Court, as one can unfortunately see.

And so there you have it. Damned if you narrowly tailor, damned if you don't. And as if anticipating the criticism of this narrow tailoring trap, the Roberts plurality had the audacity to state: "While we do not suggest that greater use of race would be preferable, the minimal impact of the district's racial classifications on school enrollment cast doubt on the necessity of using racial classifications." And then they cite to *Grutter* and how the consideration of race there was seen as indispensable to increase minority representation at the law school from 4 to 14.5%. As if Roberts

would have upheld *Grutter* had he been on the Court instead of Sandra Day!

So in any case, the point is, as was ably and eloquently pointed out in different ways by Justice Stevens, essentially there's no example or model of all the race-conscious plans that he's looked at in the fifty years of desegregation history that would permit the Court to say that Seattle and Louisville would achieve the objectives and also make less use of race-conscious criteria in their plans. In other words, Justice Stevens reveals how disingenuous the narrow tailoring requirement is under the Roberts' Court.

So we've got these three acts here in terms of answering the question of how did we get here. We had a bold litigation strategy as cultural retrenchment movement. We had so-called "grassroots democracy" in the form of regressive referenda-as-racial pornography combined with tyranny of the majority (despite our claims to being a constitutional democracy), we have industry capture of the judiciary by those who seek to transform the meaning of *Brown* and its progeny from an anti-subordination to an anti-classification principle (despite the valiant and creative efforts of our California and Michigan comrades in pursuing the Hunter-Ericson "political structure" argument).

So let me just close because I kind of failed in my time to actually talk about K-12 strategies. That was next, but obviously, I couldn't get that far, but I just want to highlight one example. We've talked about curricula innovations, like Professor Kaufman's racial literacy program, or for that matter, UCLA's outstanding Critical Race Studies program. There's also, of course, the "talented-tenth" kind of Texas plan that is applied through K-12, and class-based options that we've heard about, and the intriguing approach using discrimination metrics, as I'd characterize them, that we heard about in the second panel emphasizing racial disparities.

I think the thing that we haven't talked about is bolstering racially-isolated schools and offering more serious programming there. Actually, we've talked today about that somewhat, but the one example I wanted to give you was what's going on in one of the selective-enrollment high schools in Chicago, and one in particular, Jones College Prep, that used to be a secretarial school that saw a rapid decline in its African American and Latino enrollment in inverse relation to the incline in its test scores. At Jones in Chicago, diversity advocates had to use the consent decree in order to maintain racial balance, and after *PICS*, the Jones' principal saw the writing on the wall as he opted to pursue a geographically-based policy that identified four poor, mostly Black and Latino communities—Englewood, Grand Boulevard, Austin, and South Chicago—that historically sent few or no students to Jones.

And so they hired a recruiter to convince children in those communities to prepare for and apply to the school. They sought out all 7th graders in the competitive range of test scores. They wrote letters to them,

visited their homes, met with their parents, held informational meetings in the community, and encouraged them to apply. The end result was that eight students from the four historically underrepresented neighborhoods ended up enrolling in the school and the CPS has paid for the recruiters' salary, but administrators were characterized as somewhat standoffish when talking about playing a more active role. While it is clearly not a solution at large, it represents a creative approach to the increasing hostility to effective, race-conscious remedies.

So I'll just leave you with that example in terms of understanding what are some of the promises as well as some of the precautions in terms of thinking about the post-race era.

Thank you. (Applause)

ELLEN KATZ: We'll take questions from the audience. Please wait for the microphone.

AUDIENCE MEMBER 1: This is a question for Professor Kaufman. I was interested by your idea of a test of racial literacy and being able to quantify that and I just had a question for you as to how you imagine that links up with admitting a higher percentage of minority students into schools. How is scoring well on that test an indicator of your race or of your being a minority student and how does that correlate?

MICHAEL KAUFMAN: That's a great question, and this is actually something that I would love some input on helping me answer because this is something that is brand new obviously. I can't suggest that there would be a one-to-one correspondence between scoring well and the racial makeup of the applicant, for example. I think it's probably a good thing given the jurisprudence that's out there, but I could suggest that students who have come into school with more diverse experiences and encountered more hardships frankly because they had to engage in the cognitive dissonance from racial conflict in their lives would actually be at an advantage, a foundational advantage in scoring well on racial literacy assessments.

So, I think, there would be a leg up essentially for the students who come into kindergarten, for example, who have experiences of dissonance over students of the majority group have not had that level of racial dissonance and have had to catch up in grade school. But it's predictive, it's speculative, and I hope to be able to study that. Thanks.

MARGARET MONTOYA: My colleague, Christine Zuni Cruz and I—she's a pueblo woman—are developing some performance art that attempts to identify what the elements of racial literacy are and then to teach them by performing them. And so the kinds of things include autobiographical narratives. For example, we juxtapose a family memoir told from the perspective of a woman from the Isleta-Okey Ohwingeh Pueblos with that of a Hispana mestiza from northern New Mexico. We use hair, props, lighting, music, poetry movement, and silence to communicate the similarities and differences in our life stories. We have identified some

seven or eight different characteristics of racial literacy: narratives of different types, kinds of raced and gendered humor, the use of racial statistics, and others. We propose that these literacies involve both skills and knowledge and are teachable and they are assessable. We don't believe that only people of color can learn these literacies, but we do think that there may be an affinity for or a greater openness to the notion of racial literacy from certain communities.

AUDIENCE MEMBER 2: Hello. I just want to say that it's wonderful to hear the discussion about what the opportunities are regarding focusing on K-12, not in opposition to affirmative action, but in concert with. And just as a disclosure, I'm a graduate of UCLA's critical race studies program, so I certainly understand the necessity to continue to fight for spaces where inclusion and discussing issues regarding racial inequality are central.

And I guess just building on this idea of racial literacy, my question goes to the panel's thoughts on whether or not schools have actually ever been integrated in terms of really respecting and incorporating the life experiences of racial minority groups?

And I'm especially thinking about young Black children who are often in schools where initially whether they go to preschool or not; they perform well or at par with their White counterparts and at a certain point those scores or their performance begins to go down precisely because the school environment is not integrated. And the fact the environment is hostile doesn't take into account the way in which Black, Latino, Latina communities, API communities learn and incorporate information or to encourage them.

And this goes on, in my opinion, not only through K-12, but I think we also saw this at the law school. This was also a part of our experience with the critical race studies program notwithstanding the fact that the law school had sponsored this program. There was still a great deal of racial hostility facing those students which implicated our ability to learn and to thrive at the law school.

So I'm just wondering what the panel's thoughts are in incorporating new types of ways of thinking about integration that really responds to focusing on teachers and the way in which a student learns, if this is a part of this racial literacy.

MARGARET MONTOYA: I don't know if you know the experience in the Tucson School District, but they created a Chicano studies program, a Native American studies program, and an African American studies program. They set out to create curricular and pedagogical methods associated with the different life experiences of these major population groups.

I believe that they were in existence for something like eight to ten years. They had very dramatic improvements in terms of reading ability, and all of the standardized things. Well, this past year, a school board

member who is White decided to take this on as race specific intervention that he wants undone, and as far as I know, they are disbanding the programs. They are getting rid of all of these programs. So there is some evidence out there that introducing at least racial identity materials, associated with racial literacy. That's true for Chicano studies in middle school and high school, the few studies that have been done, but I don't know of any studies that have been more comprehensive than that. We've done some in New Mexico, but I have to tell you they're spotty. They're not system wide, nor are they longitudinal.

MICHAEL KAUFMAN: I'm not sure this is responsive directly to your question, but I would just share that Gary Orfield, who is a phenomenal researcher and heads up the Harvard Civil Rights Project has done tremendous data work in this area. He's come up with a benchmark, and this sounds bizarre to me, but apparently it is what is done in industry now, something called "contacts a day," by which he means if a member of one racial group makes contact with, or has exposure to some kind of interpersonal relationship with someone else from another racial group approximately 20 times a day, that tends to be a tipping point in terms of the benefit of both members of that class, for example.

So to translate the notion into meaningful numbers where racially diverse students are a critical mass, Gary Orfield has come up with this notion of "contacts per day." So now we can measure actually whether or not we are achieving our goal of racial literacy in that regard by saying for example, "Okay, we have 19 contacts, but not quite 20. We can encourage more racial diversity in our classroom to hit the 20 contact mark."

AUDIENCE MEMBER 3: I guess this is a question for Michael. I think your RLA test is very interesting, although it sort of pre-supposes that you think what will happen if it became prominent that what parents would do would be to chase the schools where you could get the best version of this, but our experience with the material resource question tells us something different, right? You've just created Kaplan's next big boom.

(Laughter)

Because what will happen is people with resources will search out better schools. They'll search out better RLA test preparation sites, and we don't really want that. I hope you're right that what people will see is that this racial literacy or appreciation of difference will become inculcated in what we hope to be meaningful in education, but what I think might happen is that people with money will do what people with money do—which is find a way to dot the I and cross the T—and the substantive point might be lost.

MICHAEL KAUFMAN: That's a great point. I did envision the idea of a Kaplan crash course on racial literacy coming out—because you're right. Now we have parents who will be incentivized to get their kids a higher RLA score. And we can talk for probably another day at

length about standardized testing, and what it means and, whether it's authentic or not. But I think there's a way to measure racial literacy in a more authentic way apart from standardized testing, which is why I think the assessment that will be devised would be more what I call "surround sound." It'd be an authentic assessment. It'd be more interviewing. Again, this is going to be incredibly cost intensive because it's going to take a lot of time to assess these students, frankly, because we're not just measuring them in terms of filling in a circle in a standardized test, but also measuring their interpersonal skills on a one-on-one basis. If we can come up with an assessment that's authentic, I think we can undercut the problem of the Kaplan shortcuts, but it's a great point.

MARGARET MONTOYA: It made me imagine a Dave Chapelle skit on racial literacy.

ELLEN KATZ: I was struck by something similar in what all of you were saying. Michael has a new test, Margaret has these wonderful programs in the schools from performance art to moot court, and Susan described a phenomenal commitment for which her firm should be praised and I hope other firms will stand up and follow this example. Sumi offered something at the end that I think addresses my question which is, namely, when thinking about the things we can do to address problems in K-12, lawyers acting as lawyers seems to be missing. The very talented lawyers in Susan's law firm get together and think, "What can we do to help?" They don't answer that question by filing a lawsuit. No one on this panel suggested that we file a lawsuit, which in many ways repudiates what has been the heroic tradition in education law and policy. So my question is: why not? I think I know what you're going to say, but is it true that in a certain sense it is hopeless to think that that avenue for reform is still something we should be pursuing?

MICHAEL KAUFMAN: I think there is a real strong role for lawyers both as litigators and also as advocates to legislators. The Educational Law Center, which is in Newark, New Jersey, currently has pending 10 lawsuits challenging school districts throughout the country in 10 spots, obviously, for the failure to provide adequate preschool programs.

One of them as you may know happened in New Jersey. The *Abbott* case is an infamous case in New Jersey. It has now gone through the New Jersey Supreme Court seven times. There are seven *Abbotts* and *Abbott Five*, actually, was a case in which the Supreme Court of New Jersey said to the legislature, "You know what? You tried five times to get this right to provide funding more equitably to your state schools and you can't get it right. This time, we're going to tell you how to do it."

And one of the remedies that the Supreme Court in New Jersey ordered was a provision of high quality preschool programs throughout the state. Actually the benefits are already tremendous, Ellen Boylan, who is in charge of this project at the Education Law Center in Newark, has nine

more cases pending to litigate this issue on an impact basis and is doing quite well. So there's a huge role for litigation.

The other aspect is the initiatives now in 38 states toward the expansion of Pre-K programs to three and four-year-olds. One just took hold in Illinois and it was led by three attorneys who worked hard for six months and lobbied hard in the Illinois legislature to pass what's called Pre-K for all. And so their advocacy was not in litigation form, but it was incredibly effective and actually that legislation passed. It's still waiting for funding, but it passed and created a tremendous public educational environment, which was seen as incredibly necessary to long-term development of all students in Illinois.

MARGARET MONTOYA: I think that it's not possible to talk about what lawyers do without sort of winding this back to the *Bakke* case. One of the rationales for *Bakke* was that minority doctors go out and deliver services to minority communities. That argument was rejected by the court because the data didn't exist to prove that.

And so over the last 30 years, the medical profession has been out there putting that data together and it is now provable, it is empirical, it's not debatable that minority doctors deliver considerably more service to minority communities than White doctors. So there is in the medical profession a huge concern about health deficits and the fact that people of color are sicker than White people—and that the medical profession has to do something about it.

I contend that there are justice deficits, and until we start talking about the fact that poor people get less justice than rich people, that notion should be driving our curriculum in the same way that health deficits drive the medical school curriculum. I think that we should in fact be urging students to graduate and go out and deliver services that will correct those deficits, and it's across both civil and criminal areas.

SUMI CHO: The courts have also sabotaged both integration as well as more equitable financing through its own decisions, without having to go back to *Milliken v. Bradley* and the “no inter-district remedy” mantra, and so what you're left with is this bizarro kind of Mad Max world of civil rights where integration is mostly illusory in most public school districts across the country. So more than half of the 16,000 school districts in the United States have student enrollment that is either more than 90% White or 90% minority according to James Ryan's recent *Harvard Law Review* article. Only two of the ten largest public school districts in the country have more than 30% White enrollment with the remaining eight out of the ten largest having only between 3% and 14%.

In Chicago Public Schools, what do you think it is? Eight percent. What is it at some of the most highly sought after magnet schools like the ones that my kids are enrolled in, a public—one of the few, public Montessori magnet schools? Forty percent even though the consent decree says it should be between 15–35%. So for me and maybe for the Critical

Race Studies alum and other folks here, it's like, what the heck is the baseline? How is it that this engine of integration in magnet schools are actually sort of reinforcing "whiteness as property" through these baselines? It's kind of bizarre to me so I can't even begin to articulate how that would be an engine for progressive change. It's just completely upside-down in this post-civil rights world.

SUSAN BENTON: The access to justice deficit, the big bar associations are taking this on. The Chicago Bar Association just started an annual campaign last year. They're going to push it again this year, X dollars for partners, X dollars for associates. It's really a toll you have to pay within your law firm and at Winston, we match it through the foundation. But there's a big push to get money to the lawyers working for these pro bono legal aid services across the board, so that is being addressed. It's not being cured, but it is being addressed.

AUDIENCE MEMBER 4: [Inaudible] in favor of the racial literacy especially when I hear about beans and pipelines and then try and weigh it out. And as one of the few White people at X118 a Bronx Middle School, as a 7th grade English summer school teacher, I quickly learned that the racial literacy that they lack might be significantly different from the supposed racial literacy that a White suburban school in Michigan or an inner city school in Detroit would lack. So I don't quite understand how you would stereotype except for maybe by talking about different pockets, in which case you'd have to talk about every single community pocket in the United States to form the racial literacy, and then you might not discriminate.

But there's also a trade-off with the beans because there was barely enough time to teach math or English to the students who are multiple grade levels behind. Do you think that it's a valuable tradeoff for students under a certain threshold to learn about racial literacy? And especially Professor Montoya because of the beans and the pipeline, I'd like to hear what your thoughts are.

MARGARET MONTOYA: Oh, I think that this isn't an either or trade off. I think that if in fact we have a racially conscious classroom, then you might very well accelerate math literacy. That it isn't a matter of I'm going to do this instead of that. I'm going to do both at once. Therefore, I'm going to develop math-related activities that are also racially conscious and racially sensitive. I think that's part of what we found out in the Tucson School District.

AUDIENCE MEMBER 5: Professor Kaufman, I know you've been talking about having racial diversity in [inaudible]. How do you propose going about that? Coming from a Detroit Public School system where it's predominantly a lot of African American students in the classroom, how can you propose having diversity in racial classroom settings?

MICHAEL KAUFMAN: That's a great question. I'll take the example of the Seattle school. Essentially what they did is they figured out

where their geographic pockets of students were, and then they used this racial tiebreaker to try to create a diverse learning environment across the entire district. But in order to even begin that process, you have to sit down with your own demographics and your own school buildings within your district and decide you want to actually do it right, which is to create good schools, great racially-integrated schools.

Then you've got to sort of take your facts as you have them, frankly, and then figure out the best, most lawful, and effective way to get there. And that's going to be difficult in a district where you have, frankly, not even the critical mass to begin to classify students based on race, if you have to go that route, or to be able to draw attendance zones or create magnet programs or to create new school sites based on racial composition, because we have an incredibly intensely segregated district as it is.

It's very hard to even create the kind of fluidity that you will need to get that kind of environment, but my point is that I think it's possible at least to begin that process and to know that with the help of really good lawyers, there are ways you can do it so they're lawful, and again every district is different.

One thing we hear a lot about in the Supreme Court is tremendous deference to local control and local community facts. And so I think if we let well-meaning school boards do the right thing, they are able to use what I would call race conscious but neutral methods to try to achieve that goal, but also if they have to they can explore finely tailored methods to do that and again, it's difficult in some districts. No question about that.

ELLEN KATZ: Please join me in thanking the panel.
(Applause)

CLOSING ADDRESS
DEAN GUY-URIEL CHARLES

RACHEL JOHNSON: Dean Charles joined the Law School in the fall of 2000. He clerked for the Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit. While at the University of Michigan, he was an Editor-in-Chief of the *Michigan Journal of Race & Law*. From 1995 to 2000 he was a graduate student in political science at the University of Michigan. Prior to joining the University of Minnesota law school, he taught as an adjunct professor at the University of Toledo School of Law. Dean Charles teaches and writes in the areas of constitutional law, civil procedure, election law, law and politics, and race. His articles have appeared in *Constitutional Commentary*, *Michigan Law Review*, *Michigan Journal of Race & Law*, *Georgetown Law Journal*, *Journal of Politics*, *California Law Review*, and the *North Carolina Law Review*, among others. He was the 2002–2003 Stanley V. Kinyon Teacher of the Year at the University of Minnesota Law School. Dean Charles was a member of the National Research Commission on Elections and Voting, and the Century Foundation Working Group on Election Reform. He is a frequent television, print and radio commentator on issues relating to constitutional law, election law, campaign finance, redistricting, politics and race. In the spring of 2006, Co-Dean Charles was the James S. Carpentier Visiting Professor of Law at Columbia Law School.

RACHEL JOHNSON: Thank you. Please welcome Dean Guy-Uriel Charles.

(Applause)

GUY-URIEL CHARLES: Thank you. So, thank you *Journal* members for inviting me this afternoon. I got a call from Maureen, wondering if I was coming, and if I am I had better do something useful. So, doing something useful means that I have to close out and to do it in a hurry. So I'm going to try to do my best, orders from Maureen must be obeyed, and I know better. Hardy knows better.

Thanks to the *Journal*. I'm so glad to see the work that all of you are doing. You have sponsors for stuff. That's amazing. Could you imagine if we had had sponsors and law firms, etc. So, I don't know, Hardy, why didn't you think of that? They're obviously smarter than we were. We're very proud and very glad to see the work that all of you are doing.

All right, so I was debating for a while what to say this afternoon, actually debating about ten minutes ago what to say this afternoon. At first, I thought that I would talk about race and citizenship, but that's pretty dry. It's important, but I think too dry and depressing. Because we'll have to tell you, for example, people of color are the last to be born and the first to die and everything in between is bad. And so, what does that mean? Well, it's true if you look at the statistics. What does that mean for questions of citizenship? And I don't want us to go out like that, because I

think Maureen ordered me to make it happy and peppy. I'm sorry Maureen, I will not say another word about Maureen.

I was also ready to do more of a scholarly talk, but that too is a little too dry and boring. So what I think I'm going to try to do is tell stories. I'm going to try to do it in a way that responds to the theme of the symposium this afternoon. I'm going to talk specifically to the students in the room and the *Journal* members, and try to ignore my scholarly colleagues, but might also try to be more responsive to the question of how do we respond to anti-affirmative action and anti-race initiatives?

So let me start out with what I view to be the key question, and I'm going to take as my task this afternoon much more of an encouraging and hopeful talk to the students in the room. The question that faces you is, how do you respond to this context in which you find yourselves? As Emily Houh mentioned earlier, when we entered Michigan Law School, we had a lot of colleagues to draw from. In fact, I remember that distinctively. There isn't much that I remember about this stuff—about law school—so some of my stories may not be accurate. So this may not be an accurate description, although there are those that will be accurate. I do remember the first MAP event, which is the Minority Affairs Program. Emily hosted that. They got rid of it after Hardy graduated. Since I'm the last to speak I'm going to get my digs in, so Luis you've got it coming. One of the first things that happened is that a whole bunch of MAP people got together to play basketball. I distinctively remember that. The distinctive impression that I had in my mind was that I had finally arrived, because you've got a whole bunch of folks—Black, Asian, Latino, etc., and none of us could play basketball, quite frankly. [Inaudible] I was at home, and I knew that my brethren and sisters were the folks surrounding me. We were going to have a glorious three years together. For us, we had a community of people to draw from that I'm not sure to what extent you currently do. And if you're second-years, whether you will in the next couple years, given what is going on here in this state. So, I take as the key question here, how does one respond to the material deprivations that beset folks of color, especially from one's perspective as a student, as well as more broadly the material deprivations of much more broadly. And I'm going to do this through the prism of our eyes as students when we are thinking about this. Not necessarily because I want to equate the circumstances that surrounded us with the serious circumstances that confront folks of color today, but also because I think the circumstances that surrounded us are microcosms for the circumstances that beset folks of color more generally. I think there are some lessons to be learned there. So permit me to do this through the story—a little bit about the *Journal*.

So, people often ask, why was this *Journal* started? I've basically spent the thirteen years carrying Luis. So, one explanation could be; "look, the *Journal* was started to help Luis out." It was their particular event. Kim Forde-Mazrui had asked earlier, "Was there a particular catalyst?" I don't

think there was a particular event or catalyst. Maybe it was pity on some folks. But I think when the number of us got together to think about the *Journal*, and I was one among many, although I get blamed for a lot of stuff, and more credit than I deserve. But I should say that I was one among many. I don't remember much of what that process looked like anyways, I've mentioned earlier. The realization, though, that hit us was that the lives of students of color as they were going through this law school was very different from those of White students. It was fairly clear, I think, relatively early on: access to professors, access to the best jobs, access to the best clerkships, access to the best grades, who was valued, and who was not. In fact, this is storytelling, which is an important academic narrative. So, I feel that I am fulfilling my academic mission as well as my wrap-up mission. I distinctly remember there was a Black student who was a year ahead of us who was on the *Law Review*. And so that, at that time, was a sign, and I don't know what it is now. I have no idea. I've not really kept in touch at that level. A sign that you've made it. So, one of the professors said to him, "Hey, why don't you come and see me? I want to talk to you about clerking." So, when he went to this professor's office they started talking. And then the professor finally asked him, "Well, tell me about your grades, etc., etc." And he revealed his grades, and the professor said, "You know, I'm sorry. This is not going work out for you. You need to find an alternative path." And this was a second year student. We were first year students. And this was a small example of the life that confronted us when we were students at this law school. Everything, in some senses, was stratified, and the racial stratification, at least to most of us, was very clear. So, we didn't have very many—as Emily talked a little bit about earlier—we didn't have very many professors of color. There was Sallyanne Payton, who was here, and at some point in time we'll say [inaudible] was here, and the class that graduated around '96-'97, Sherman Clark came, I think, our second or third year. I can't recall. So there really wasn't anyone that you could talk to, or to help work with your experiences. And so the question for us was, how do you respond to racialized differences, and the material distinctions that existed in our context.

So there were various strategies that one could take. One option was to ignore it and move on. And there were some folks who did that. You just kind of said, "Hey, that's life. That's the way it happens. Let's ignore it, and let's move on." There were folks who were a bit angrier. Remember Travis Richardson? Travis was your prototypical angry Black man, in terms of who Travis was. If Travis were here he would laugh about this. Just that he kind of looked like it. I mean, he was tall, big, bald, all right? Sort of, Let's fight. Let's do something about this. Protests. Anger. I'm short, delicate, sort of. Really, I mean this fighting thing, and all that kind of stuff, I could get hurt. That didn't quite register in my long-term plans. So, one needed to find alternative actions, and for us the action was to engage.

So, why a journal? Why that specific thing? For the many reasons that Emily stated earlier, but let me emphasize one or two different issues, too, in addition to that. One was solidarity. There needed to be a space, I think, where a number of us could feel that we belong, and that we can make it through. And so, that provided an excuse for the mechanism for building solidarity. And the second related reason is that we needed a space where we felt that we belonged. And the currency here was purely intellectual and academic. Indeed, when students were starting journals, and *Race & Law* was among the journals being started, the idea among the faculty was, "look, if these students can't get on the *Law Review*, and they can't get on the other two journals that existed at that time, the other two main journals, we really should not support starting new journals because that means that you really now are scraping at the very bottom of the barrel, all right? I mean, if you're really good, you go on the *Law Review*. If you're not really good, but you're okay, then you go to the other two. Now by the time you get down to something like a *Race & Law*, you must be really, really bad in terms of sort of your intellectual capability to contribute, all right? So the currency was intellectualism, and our task to try to essentially say, "You know, look, we are good. We're smart. We're capable, though you may not be able to see that and understand it." And part of a journal was academic affirmation, because this was the currency of the land. We wanted to create a space that valued us as much as we valued ourselves, and that's a key point that I'll return to in a second. So, for us, a journal seemed like the best vehicle for creating a lasting institutional space. It was also a space that could be redefined with each succeeding class, and I hope and am guessing that you have redefined it for yourselves. For it to mean whatever you want it to mean, to serve your purposes, and not to be bound by the dead hand of the past. When you look at a number of us we are indeed getting old. There are a lot of lessons that I personally learned in the process of that experience that I think are responsive to the theme of the Symposium today. And some of those lessons I'd like to share in the time that I have remaining. I will try to be very quick.

Notwithstanding the alluring concept of a trans-racial or post-racial world, the first lesson that I learned was that, one must confront that concept head-on. In my version of the experience, again the part that I remember, it seemed when we talked to people about what we wanted to do, why a journal, and why a journal on race? We've kind of moved beyond that, and if you students were good, you would be like the other ones who have gone before you, who have either graded on or made it on the *Law Review*, or some other established journal. We've really moved beyond that space. Part of what needed to be done was to articulate why it was that we felt our experiences weren't being represented and that we needed a different vehicle. In the face of a post-racial or trans-racial theoretical framework, one has to have a response, and I think the response has

to be swift, direct, and forward. And what became clear to us at the time is that not to confront this theoretical framework would be to be complicit in our own marginalization and/or in the marginalization of others. Not to say to this institution, "Look, we are capable. We are good. We are entitled to the best that this elite school has to offer." One of the things that stands out for me today, as I listen to a number of especially the faculty of color who graduated from this law school, and listen to the faculty of color from other law schools who participated in here today, I'm absolutely in awe of these folks because of their tremendous intellectual abilities. And to have an institution that would have said to a Hardy Vieux, or to a Yong Lee, or to a Mario Barnes, Emily Houh, Daria Roithmayr, that, "Hey, we don't think you have that capability," would be to be complicit in one's own marginalization. And the choice for us, at least as we viewed it, was whether we were going to benefit from the fruits that Michigan has to offer. This is a great, wonderful, elite school at various levels, or whether we were going to only get a very small and pale version of the benefits of this institution. So, to me that was the first lesson: how do you think about this. Well, let me provide a distinctive example. I will not name names. Some of them have been named in other venues, but I will do impressions though I will do them badly. So if you can figure stuff out, I will not confirm nor deny. The first year that the *Journal* was started, I was working on a note, and so I went to a professor at this law school. I knocked on the door and the professor answered and said, "What do you want?" And I said, "Professor, I'm Guy-Charles. I'm working on a note for the *Journal of Race & Law* on X topic and X issue." Professor looked at me and said, "Is this for the *Law Review*?" I said, "No, it's for the *Michigan Journal of Race & Law*." And he responded, "Well, I don't have time right now, come back later." I said, "Fine, no problem." I'm a very patient individual. I was born in Haiti. You've got to be patient if you're born in Haiti, because of life there. I now reside in Minnesota. I've learned to be even more patient. So, I came back a week later. Knock, knock, knock. Open the door. "What can I do for you?" "Professor, my name is Guy-Charles, I'm working on a note for the *Michigan Journal of Race & Law*, and I'd like your help." I do not make this up. This I remember distinctively. I am not lying to you. His response, "Is this for the *Law Review*?" And I respond, because now I understand the routine, and I said: "No, it's for the *Michigan Journal of Race & Law*, and I'd like your help." Not making this part up either. "I don't have time right now, come back another time." No problem. Did I tell you I was born in Haiti. I'm very patient. No issues. I come back a week later. Knock on the door, go through the same process, at which point I say, "I've been here twice, you've asked me the same question, I need your help, and I'd like to have it." "Okay, come on in." All right. Now, after that, things went very smoothly. [Inaudible], lay of the land, lay of the office, my casa your casa, whatever language you want to speak. We were cool, okay. But it took three shots at the apple, all

right, and it was very clear that these resources that I have—my intellectual capability—is not meant to be shared with the likes of you. And one has to decide how you deal with that; I'm going to come back to that theme in a moment. One has to decide how you deal with that. And the way that we dealt with it, and a number of us dealt with it was to be persistent, but to confront it, to deal with it. I mean, not to allow it to slide.

The related point to this is, if you are White and if you're a person of color of high status, you should also confront marginalization, because otherwise you're complicit in the marginalization of others. And I think that's also particularly important. And part of that point, building upon this for those of us, was that we needed to build a trans-racial alliance. And Emily talked about the Rainbow Coalition that was those first couple years, and it was a Rainbow Coalition of folks. We had men and women represented, we had White, Asian, Latino, Native American, etc. represented. We had straight folks, gay folks, etc. So it was a veritable coalition of a lot of individuals who came together in order to address these issues. And there were costs to that trans-racial alliance: who would wield power, what language would we speak in terms of hierarchy, non-hierarchy, etc., but it was a necessary alliance that enabled us to divide the work, and to be able to build upon some of the things that ended up becoming the *Journal*.

The other lesson that I learned was, find powerful allies, even when they are imperfect. And here I think persistence matters also. So, Luis and I were talking about this yesterday, when we ran into Jeff Lehman at a MAP—MAP was invaluable—at a MAP event, beginning of the fall semester, and we said, “Dean Lehman, we have an idea for you.” And Dean Lehman said, “Well what—” he was then the Dean of this law school. He said, “Well, what is the idea?” And we proceeded to tell him what the idea was. He said, “Go talk to Debra Malamud.” So, we proceeded and went and talked to Debra Malamud. A number of people were helpful at various levels. Again, they weren't perfect. I'm not going to tell stories here. Those of you who know the stories know the imperfections, but our allies were reticent allies. We had to drag some of them in kicking and screaming. But we were persistent. We were patient, and over time they became supportive at various levels.

I learned to beware of same-race detractors. So, when were recruiting AEs, one Black student who was a member of the *Law Review* said to a young woman who was debating about journals, “You don't want to be a member of *Race & Law*, that's the blind leading the blind.” Now, he was right. It was the blind leading the blind, because we had no clue what we were doing. And quite frankly, if at the end of the time I graduated, if someone had told me what one had to go through, I would have said to these folks, “Hey, I'm behind you. I will write you a check. I will sing your praises, but I'm out.” It was the blind leading the blind. But, what was interesting to me is that this man said to this woman not to be a

member of *Race & Law* on the aspiration that you would win the *Law Review* lottery, and essentially that's what it was. And, of course, this poor woman didn't, and she was devastated at the end of the process. And the interesting thing for me is that there were two levels to think about. This was our level, where we're looking at this, because part of the reason why one creates this *Journal* is to enable folks in her position to have an intellectual community that she wouldn't otherwise have, and the emotional effect that it would have not having that community. But also, that each person has to make their own choice about how it is to build community and to find an intellectual support system. But beware of some race detractors, Ward Connerly's name has been mentioned, because their impact can be tremendous, especially at the formative years of one's event. One also must focus and think about an important point, which is to expand the rubric of equality to include others outside of your own original group. There's another journal who was founded around the same time as *Race & Law*, and they put us in the library, and we had a little bit of an office. And there was the *Law & Policy Review*. So basically, for all intents and purposes, it was the new White journal, and the Colored journal. That's essentially what it was, all right. So we're in our little office, and the walls are thin, all right. So we're hearing the conversation in the next room. And it's like, "This school sucks. Nobody cares about us. We feel marginalized," on and on and on. And we're thinking, "Wait a minute. Wait a minute, wait. They feel the same way we do! Come over here, join us! Together we can rule the world, all right?" The idea that, we were alone, was not true. It was a hierarchy, and if you were at the bottom of the hierarchy irrespective of whether you were Black, Asian, Native, White, it made no difference. If you're at the bottom of the hierarchy, slam the door in your face, that's just the way it is. The lesson there was to think about broadening the concept of equality to include those that are disadvantaged on whatever basis in which they are disadvantaged. And where alliances can be built, they must be built.

And then lastly, one must choose one's vehicle wisely. So, in our case, we chose a scholarly journal. Was that wise? Quite frankly, I don't know. I think that the judgment there is for others to make. We were law students, it was an intellectual environment, it seemed to be the best vehicle to engage the inequality that we saw. There were other options. I said one could protest for more faculty of color, for example, which the *Journal* didn't necessarily do. We didn't hold rallies and say, "We will not go to class until we see more people of color coming through as faculty members." We could boycott things, we could have done a lot of different things that we didn't do. Perhaps they might have been much more effective than starting a journal. It's not clear to me one way or the other. But that was the vehicle that appealed to those of us at that time. My advice to current students will be to nurture your vehicle, to make it your own,

to preserve it, to give it credibility. And if that vehicle is a journal, so be it. If it's something else, choose the vehicle wisely.

So, bringing this home, how do we respond to anti-race themed direct democracy measures? I think it is important that one engages. It seems to me that those things cannot be ignored. Because to ignore them is to be complicit in one's own marginalization or to be complicit in the marginalization of others. It has to be engaged. It seems to me that one must build trans-racial alliances. It seems to me that one must find powerful allies, because they make a difference. They may be imperfect, true. They may sometimes need to be brought in kicking and dragging. They are definitely impure, but aren't we all? But, you must find your allies. It seems to me that one must directly address and counteract the effects of same-race detractors, because there will be others out there that look like you, that sound like you, but that say things very, very differently from you. And they can be very, very effective. And part of this issue, I think, in particular with respect to anti-affirmative action measures, is that it's been difficult to take on a person like Ward Connerly, but it has to be done. I think one has to expand the rubric of equality to bring in other folks who suffer similarly, though it may not be on the basis of race. It may be on the basis of other inequalities. And then, one must think about the vehicle. So, a few minutes on the vehicle.

So those opposed to anti-race initiatives must think carefully about their options. Do you engage in a broad, grass-root movement? Do you engage a legislative process? Do you engage the courts and litigation? Those are not mutually exclusive options, but they are important options, and sometimes the focus must be on one or the other. I think deciding upon the vehicle and the means and the methodologies and the ways is particularly important. It might be the case that a movement led by lawyers thinks much more of litigation as playing an important role, than a movement led by activists, than the movement led by individuals who are inclined to the legislative process. But the vehicle here is particularly important, and a critical part of the game. As I think about some of this stuff, and I think about the role that we all must play, it seems to me that we have to be creative and thoughtful with respect to how we each confront inequality in our own daily lives. For journal members, and for current students, do not be discouraged by the world in which you find yourself. One can have impact and change. It may not mean that you give up everything that you've worked hard for and decide that you're going to dedicate yourself to the cause, but I will say, the cause depends upon you. The cause depends upon you to do what you can, when you can, and to know that you can make a difference. The lesson that I learned, in this process coming together with my friends and allies, is that, Hey, we could make a small difference. Perhaps it didn't—our lives have not diversified this law school in terms of the faculty, but it seemed to me that what it does is it did was create a process by which we each became better indi-

viduals. We each were able to achieve the things that have been set out for us to achieve, and I think we left the world, this world, a better place than when we first got there. And what I encourage you to do, no matter how daunting the task, no matter how difficult it is, is not to be complicit in your own marginalization. Do not be complicit in the marginalization of others. And in the face of racial inequality, stand. Fight, though you may be delicate, but also rage against that machine. Thank you.

(Applause)

RACHEL JOHNSON: Thank you, Dean Charles. On behalf of the *Michigan Journal of Race & Law*, I would just like to thank everyone for coming out today. I want to especially thank our speakers and our moderators and our keynote speakers. So, for those of you who are going to the banquet, it starts at 6:30. And for the rest of you, have a good evening and be safe. Thank you for coming.

(Applause)

DINNER BANQUET ADDRESS

DR. JOHN MATLOCK

CHIOMA NWACHUKWU: Hello, everyone. Thank you. My name is Chioma Nwachukwu, and I am the current Editor-in-Chief of the *Michigan Journal of Race & Law*, Volume 13.

I want to take this opportunity to thank everybody for all of your heartfelt enthusiasm and support and for being at the Symposium today. I think we had a very productive and wonderful day today, and I am so happy that everybody was able to make it out. So thank you.

At this time we are going to begin the evening portion of the Symposium and I would like to introduce our speaker, Dr. John Matlock. Dr. Matlock is Associate Vice Provost for Academic Affairs and Director of the Office of Academic Multicultural Initiatives at the University of Michigan—OAMI. OAMI has been recognized nationally for its ability to use diverse staff, faculty, and students to advance campus diversity initiatives, implement innovative programs in the areas of student academic success and involve students in leadership, student research, and pre-college mentoring activities.

Dr. Matlock also serves as one of the principal architects of the Michigan Student Study. This nationally recognized research project is a longitudinal study of the University of Michigan students, and examines how diversity initiatives and policies impact students during their four years on campus. This social science research was used to help establish the educational benefit of a diverse student body, which is one of the highlights of University of Michigan's cases that went before the United States Supreme Court. Nine PhD dissertations have been produced from this ongoing work, which was funded in part by the Ford Foundation.

Prior to returning to the University of Michigan nearly twenty years ago, Dr. Matlock served in Washington, D.C. for nearly a decade as Chief of Staff to United States Representative John Conyers of Detroit and United States Representative Harold Ford, Sr. of Memphis. Dr. Matlock is a native Detroiter who followed a unique path to higher education. He dropped out high school and worked on an automotive assembly line for five years before going to college.

He holds a Bachelor of Science in Business Administration from Ferris State University and a Master of Arts in Journalism from the University of Michigan as well as a PhD from the University of Michigan Center for the Study of Higher and Post Secondary Education. Mrs. Rosa Parks has always been his most significant role model and one of his greatest honors was working with her for five years with Congressman Conyers before she retired. Please, join me in welcoming Dr. Matlock.

DR. JOHN MATLOCK: They made the mistake of putting dessert down just before I got up to speak. A tough decision but please try to stay awake for a few more minutes. I would like to thank you Chioma,

Nwachukwu for the wonderful introduction. We found that we have much in common. I looked at her name, and I said, "That is Nigerian, right?" My wife and I were married in Nigeria and are from the same area, from the Ibo territory. Again, thank you for the gracious introduction.

I also realize that it has been a very long day for you, and I am standing between you and the door. I will bear that in mind as I move through my comments and observations.

I also would like to say hello to Dean Charles who started the *Michigan Journal of Race & Law* with a group of students—Travis Richardson and a few others—a while back, and they convinced the provost office that this was a good idea. No one would give them any money, and we were foolish enough to give them money because they came all dressed up and were very business like. Students do not know that when they come dressed up to meet with top administrators, they are always rewarded.

I know that you have been getting various legal points of view and analyses throughout the day. What I want to do is give you a little bit of the social science perspective and the social science research work that went into the Michigan lawsuits, but also to give you my personal perspective and observations along the way.

I grew up in a place, a very segregated place, and lived in a public housing project—even though my father worked full time. The one thing I always remember is that we would play baseball in the projects, and if you hit the ball over a wall into the White community on the other side of the wall, you had to ask White people who lived on the other side of the wall for permission to get the ball. Now you are probably wondering what part of Mississippi or what part of Alabama that I come from. I am talking about Detroit, Michigan, forty miles from here. Detroit, as you have read, is still one of the most segregated communities in the country.

To a certain extent, walls are still being built around our nation and around our cities and communities. The strange thing about walls is that when you build them, they keep people and ideas out; but they also keep people and ideas in the confines of the wall. Think about the Berlin Wall and the Great Wall of China.

So I am just delighted to be here especially with law students and lawyers who are so committed to social justice, civil rights and racial/ethnic equality. The fight for social justice and civil rights is a never-ending battle. One of the things you will realize is that battles that were fought fifteen, twenty, thirty years ago are still with us today. Just when you feel like everything has been done and accomplished, the same problems suddenly pop up again. We must always be vigilant. Each generation will have its challenges—preserving gains from the past and continuing to move forward.

I am always scared when our alums come back to campus, years after graduation—they often talk about the good old days at Michigan and express a desire to return to the *good old days*. I always have to do a double take and say, “What good old days are you talking about?—when you had low numbers of women, and even lower numbers of racial minorities?”

I had a meeting yesterday with a couple of individuals who went to Michigan back in the late sixties and early seventies. These are what I called neighborhood friends because many of us went to high school together in Detroit. Saul Green, who is one of your distinguished graduates, was among them. We were reminiscing about what Michigan was like back in those days. I have to tell you that Saul and these other individuals came directly to Michigan from high school because they were very smart. I was not as smart as them so I could not go to Michigan as an undergraduate student. It seems that I suddenly got smart since I graduated

I came to the University of Michigan as a graduate student because of affirmative action; something that I am very proud of. The individuals that I met with yesterday are the real heroes of the social justice movements at Michigan—these were the original Black Action Movement (BAM) members who in 1970 proclaimed to the university’s leaders—“open it up” or “shut it down.” These students, including a number of law students, made tremendous sacrifices to open the doors of the university and to make it accessible to hundreds of Black students, who in the past, could not go to U-M, no matter how smart they were—this is the history of many, many higher education institutions in the nation.

The University of Michigan has this propensity for having major protest movements every ten years or so. We had BAM 1 in the late 1960s, BAM 2 about ten years later and then we had BAM 3 about ten years after that. BAM 3 was very interesting because the agenda was no longer just Black students.

During that movement, students introduced the phrase “students of color” for the first time. The agenda had expanded and not only just African Americans were included, but also Latino/Hispanic, Asian American, and Native American students, and it also had an international focus—South Africa and the Middle East as well as concerns for gay and lesbian rights—all were on what had become a fairly multicultural agenda. The issues were recruitment, access and retention of not only more students of color but also faculty and staff of color as well. The agenda was truly multicultural. I should also note that the three movements were supported by many White students, faculty and staff as well.

Those students made tremendous sacrifices to open doors and create opportunities for students of color to be able to come to the University of Michigan. I wish that I could say that diversity at Michigan, for all of its current reputation, was something that the university thought about and planned. It did not happen that way. Diversity just did not drop out the sky here or at any campus. Diversity was put on the front burner at

U-M because students were protesting and had taken over the administration building; they were occupying the president's office, and they had formed a tremendous coalition of people on the campus and throughout the local communities.

I suppose it is easy and practical to start thinking about diversity when students are saying "we are not leaving your office until we get something." At that time the president was President Jim Duderstadt who was an engineer—a very process-oriented person. You could tell by the documents that he produced that he was an engineer. They were all gray and they all had Version 6.2, 6.5, etc. The document looked like a Microsoft document.

One of the traditions at U-M is for the president to negotiate directly with students in hearing and addressing their grievances. This goes all the way back to the time that another lawyer who was president at U-M and that was Robben Fleming. He had been a labor negotiator so he loved to bring students in and say, "What do you want?" Then he would tell a joke, and while you were laughing, he would move on to the next subject. And students always left the meeting wondering if they really got anything in terms of concessions. He was really good at this.

This is how real racial/ethnic diversity started at Michigan. To President Duderstadt's credit, what he did was to say, "Okay, things are changing in this country and either Michigan will be dragged into the future or it will step into the future having the opportunity to shape its destiny." So he put forward a document called the "Michigan Mandate" which was to address and implement the agreement that had been negotiated with students.

One of the things that was very clever and interesting, and would prove very important later when we went to the courts over our admission's policies, is that the document was called "The Michigan Mandate: Combining Diversity with Academic Excellence." That phrase "academic excellence" became extremely important because so often diversity initiatives and goals are left hanging out there by themselves, and are not connected to any of the three values of the institution, the academic, service, and research missions. So it was very important to include them in the mainstream of what the university is all about.

We had no idea that we were going to get sued about ten years after the Michigan Mandate was implemented. What we did in the mean time was to get very aggressive about diversity. Our student of color numbers went from about nine and a half percent to over twenty five percent over a 15-year period. We had significant increases in faculty of color, and we implemented and institutionalized many, many diversity programs across the campus and in various communities.

These successes represented a tremendous commitment and investment on the part of the institution. It also drew a lot of national attention

from both admirers and from those who did not want diversity and felt it would lower the academic quality of U-M.

It eventually got us sued.

The next president after President Duderstadt stepped down was a former Dean of the Michigan Law School, Lee Bollinger, who is President now at Columbia University. President Bollinger, being a lawyer, knew how to communicate with the lawyers working on the Michigan cases after we got sued. This is in stark contrast to President Duderstadt. As an engineer, President Duderstadt focused on getting things done, which the institution needed at that time because, as always, there was considerable resistance in the academy to campus diversity. Campuses that preach change and who see as their mission to prepare students for a changing world, are often slow to change themselves.

President Bollinger's perspective was, during the lawsuit, that we were not going to compromise our diversity principles. The one thing that I have learned from my legal friends is that they try very hard, in many cases, not to go to court but rather attempt to settle matters without going to court, where things can get pretty unpredictable with juries and judges. Michigan has been blessed to have very strong leadership at the top as it took more than ten years, and numerous presidents and interim presidents.

Despite the presidential changes, the strong commitment to diversity has always been there. I believe that it has become a big part of Michigan's culture. It is doubtful that we will select any future president that didn't have a superb commitment to diversity.

At some point we started getting wind that we were going to be sued. It really gets your attention when lawyers start showing up at your office with these luggage carriers and ask to see your letters, emails, and files and say, "We will sort through everything and then we will bring it back after copies are made." So they cart all your files away. Under the discovery process, everything was collected, including some rather embarrassing letters and emails.

That is when many people realized that things were getting real about the lawsuit. I would say as an administrator, one of the big transitions between the academic people and the lawyers is that they think very differently. The academic folks will say that you can't compromise academic values while the lawyers would say that you have to provide in court evidence that diversity makes a difference. Over this period of time, it was very important that we learn to understand the lawyers and the lawyers understand the academic folks. We were very fortunate, some of our campus lawyers taught courses here, and plus the president was a former law school dean.

That was very important, but working through that process took a while. At some point, someone joked that the lawyers were sounding like academicians and the academicians were sounding like lawyers.

Furthermore, in 1990, my office, the Office of Academic Multicultural Initiatives, started collecting extensive survey information on students because one thing that Michigan does well is research everybody but itself. So we had very little information on what our students were thinking, what they believed, and what type of experiences were they having. The president wanted to know if U-M's diversity initiatives were really making a difference, and more importantly, that our diversity priorities had not introduced a backlash among White students.

So we started surveys on students from the moment they checked into the institution. They had luggage in one hand and we were giving them a survey in the other because we wanted to capture what values the students were bringing to the institution before they figured out the Michigan way.

The Michigan way is: "I am not doing surveys unless you pay me and feed me." It got tougher at the end of the first year when we resurveyed the students and then in the senior year, it really got tough because we discovered that students love for you to chase after them and by that time, they were tired of pizza. We had to give them considerable more incentives in the fourth year, but as the result of our efforts, what we had over time was a sequence of students' expectations ranging from the day that they set foot on campus until they graduated four years later. This gave us a considerable social science database that could be used to assess institutional impact relative to students' perceptions of diversity.

We could really, from a social science perspective, using complex statistics, show the change and impact of campus diversity initiatives and policies over time. Some of you may be familiar with the work of Patricia Gurin, our distinguished social psychologist, and Professor Sylvia Hurtado (now at UCLA) and others who put together these statistical analyses that were eventually presented to the courts to demonstrate that diversity was a benefit to all students.

What was the bottom line? The more exposure students have with diversity and others who are different than they are, the better student you are on all dimensions, the more committed you are to key factors such as civic engagement, voter participation, leadership, empathy to others, citizenship and having strong commitments to working with individuals from various racial/ethnic, gender, socio-economic background. We have to also remember that students at Michigan come from extremely segregated backgrounds, and the campus, in many respects, will be the only place that they get an exposure to diversity.

With the support of the Ford Foundation, we also got a grant to replicate the study nearly ten years later with a new cohort, and we also had the opportunity to survey students who had been out of Michigan (through graduation) for ten years and who participated in the original study in their first year. So in the end, we had a pretty comprehensive longitudinal study. We were delighted that students indicated that they

learned about and experienced diversity, when at the University of Michigan and that those commitments to diversity were even stronger nearly 10 years after graduation.

I have to say that as a social justice/equity person, I initially was troubled that the university did not fight the lawsuit from a social justice perspective—addressing past practices of discrimination. Michigan chose to approach this from the perspective of diversity providing a clear educational benefit to all students. This principle goes back to the 1978 *Bakke* decision and the comments of Justice Powell.

However, the question constantly raised by the legal profession was whether Justice Powell was speaking for himself or for his colleagues on the Supreme Court when he talked about race being used as one factor in admissions (in that case, it was medical school). In the end, the decision to push the “educational benefit for all” doctrine was probably the best one, since the courts, in general, have been very hostile to legal arguments relative to social justice/redressing past practices of discrimination.

As a sidebar (I’m starting to sound like a lawyer), the one thing that we all were very proud of was that when our cases were presented to the Supreme Court, thousands and thousands of students were rallying outside the Supreme Court, and University of Michigan students were leading the way.

They left Ann Arbor the night before the case was heard, traveled all night, went to the Court, stayed about three hours and then got back on the buses, and returned to Ann Arbor for classes. And for many it was tremendous sacrifice, but it was something wonderful—knowing that student activism was still alive. As an administrator, I get concerned when our students get quiet and don’t push for change—Michigan has always had an activist culture and the student voices are very important to the institution.

As you probably have noticed recently, students were very vocal in bringing to the administration’s attention their strong distaste for the decision to move this year’s graduation to our sister university, Eastern Michigan University—I must admit that we were caught totally off guard relative to how strongly they felt that they wanted their graduation to be on the U-M campus—as has been the tradition. The decision, which made a lot of sense at the time, was reversed pretty quickly.

My point is that you as students and as future lawyers have to continue to have strong commitments to trying to make a difference in life. You have to believe that you can make a difference, and you have to believe that throughout the rest of your lives. Michigan’s job is to prepare students for the future and to be leaders and citizens of the future, and that’s why our social science research was so important—we had to prove it. You can’t just say that you think it’s a wonderful idea.

I also am saying this because throughout the lawsuit there had been so much focus on the legal aspects which, of course, were extremely im-

portant, but there are a lot of things happening that were very critical and often overlooked: the commitment of our students, the sacrifices that they were making in Michigan's efforts to defend our admissions and Affirmative Action policies. They really wanted to be a part of this because they wanted to be a part of what was sizing up to be a historic event, and they wanted to be a part of Michigan putting up the good fight. It was a first for many.

A student once told me, "Everything (the big social justice issues—the anti-war movement, the civil rights struggles, women's liberation efforts and the war on poverty marches), seemed to happen in the sixties and early seventies. I was born at the wrong time because I was raised in the eighties and nothing was happening then in terms of activism. I just missed it all."

I believe that students look in retrospect and romanticize the Black Action Movements and the other activism efforts that occurred on campuses throughout the nation. We sometimes neglect the fact that people made tremendous sacrifices for many of us to have the opportunity to be at Michigan and to be sitting here tonight—some people including children gave us their lives. The question that I always raise to students is "What are you doing and what sacrifices are you making or willing to make?" People did their thing in the 60s and 70s. What are you committed to?"

Professor Sylvia Hurtado who is an expert in student activism and engagement used to tell me that the more engaged students are, the better and more well rounded that they are. I would always respond that perhaps we should inform the campus leadership that they should strongly encourage students to march to the Fleming Building and take over the president's office. I'm sure that would make President Coleman very happy (smiles).

After the Supreme Court ruling, one of the surprises that we received was the realization that there are two courts in society, and we had won only one. The other one is the court of public opinion that doesn't care much about the court of law. We had spent a tremendous amount of time, energy and money in the courts, only to discover that the public itself still held a strong belief that affirmative action and admissions policies that considered race, as one factor in a holistic review process, were simply unfair, and that undeserving and unqualified students were being admitted over deserving and qualified students—generally they were talking about White students.

You can get a nice victory in the court of law and experience major setback in the court of public opinion. That is exactly what happened with Proposal 2, which, in general, banned affirmative action in Michigan. The message was clear. Despite what the Supreme Court ruled, there were a lot of citizens who did not like the decision and pretty much decided to take matters into their own hands through a public referendum

which would constitutionally ban affirmative action. This is similar to what happen in California and Washington—before the Supreme Court even considered these cases.

Now we have Proposal 2 to live with, which took effect in December 2007 after the election had been certified. One of the first things that we did after the lawsuit was to look at all of our various diversity programs and to make sure they were in legal compliance and to protect them. The holistic approach worked really well as we moved past the mere consideration of grade point average and test scores, and expanded our ability to look at the whole person including their family background, letters of recommendations from teachers and counselors, and difficulties overcome in life, among others.

I started to tell prospective students applying to Michigan that if they had a sad story to tell, tell it in the essay. If you were raised in the back of a bus in a parking lot some place, please tell the story because it really mattered when we started to consider their applications. You have to realize that Michigan gets about 28,000 applications for 5,500 slots—we are extremely competitive.

It also means that if Michigan did not take a single student of color, your chances of getting into the university go up less than 1%. When you hear people saying that an African American took my space as though you were the next one in the line, it is a pretty interesting comment because you cannot get anymore presumptuous than that. It's like saying you have an entitlement to be here. Unfortunately, this notion is also based on some major stereotypes that we, as a nation, have not come to terms with—no matter how open minded we say we are.

Additionally, after the Supreme Court ruling, we also found that our computer models for predicting our enrollment class no longer worked. For several years afterward, we exceeded our enrollment targets by over 700–800 students because we didn't have history on student behaviors after we revised out enrollment process. It also meant that despite years of controversy over the admissions lawsuits, Michigan is still an enormously popular place to be, and students want to be here.

Then Proposal 2 came to Michigan (it was announced shortly after the Supreme Court decision). We figured that the voting would be close and were surprised that voters passed it by such a wide margin. From my point of view, no matter how you try to rationalize or analyze what happened, it's rather apparent to me that race is still a factor in our country. When you think about competitive admissions processes, the name of the game is to expand and protect your advantages—it's a zero sum game. So Proposal 2 did not go after legacies; it did not go after the fact that this is a state school and that takes 30% out-of-state students; and it certainly did not go after individuals who get in because they are well connected, or have special talents such as music, art, or athletics.

I point this out because if people accept grade point average and test scores as the ultimate criteria for anybody's admission, our admission process becomes very easy. You just rank order everybody take 28,000 students and have a cutoff. Nobody would be happy with that process. But folks want the legacies; and they want any considerations that give them an advantage over other applicants. I worked for two Congressmen; so I know what a strong endorsement letter from the Congressperson will do for someone applying to a college.

One of the looming questions that society is trying to cope with is "what defines merit." Some want it to be just grades and test scores.

As we reviewed our admissions, program, policies, and scholarships related to racial minorities and women, I was extremely happy that we worked with one of your own graduates, Maya Kobersy, who works in our General Counsel's office—the emphasis on the these academic and non-academic reviews was to work out strategies to protect.

The reviews were done in collaboration with the General Counsel and Provost's offices. This was important because too many college campuses are caving in to pressures to eliminate their affirmative action and diversity programs. Some campuses eliminated their programs even before the Supreme Court decisions. I will not name the schools, but they just folded and quit and said that they were eliminating various diversity programs, and scholarships.

Michigan had a tremendous commitment to protecting its programs and our efforts have been directed to doing that. In some cases we had to tweak them; some cases we had to change aspects of these programs, but there was a significant institutional commitment to protect our programs and do what we could, within the limits of the Court's guidelines, to maintain our commitments to diversity.

This past year, we didn't take a big hit in terms of student of color numbers going down as they did in California, Texas, and Washington. However, we might, despite our best efforts, experience some declines during the current admissions process.

By the way, President Lyndon Johnson used to say that the best time to have friends is before you need them, so we invited all our friends from campuses in California, Texas, Washington and Georgia in for a two day workshop and they shared a tremendous amount of valuable information that really helped us—we learned from their experiences since they have been dealing with this, in some cases, for nearly a decade. However, they really wanted to help us to avoid the mistakes that they made.

If you look at what is happening now and you look at the issues that are before us, it is quite disturbing that we seem to want to build walls instead of bridges. Our country is changing demographically, and from a social science perspective and a demographic perspective, the numbers are changing across many dimensions. Within your lifetime, minorities will

become the majority as we have seen in California and several other states.

The country is becoming more diverse and will continue to do so—that fact cannot be reversed. Yet, look at the two hot buttons issues, affirmative action relative to who gets into college and immigration. The fight for education opportunities has played a major issue in our history—it was once against the law to teach slaves how to read—a major part of the civil rights movement was over equal access to educational opportunities that resulted in some landmark Supreme Court decisions including the *Brown* and *Bakke* decisions, and now the Michigan cases.

This is because education is still the gateway to economic and upward mobility. At a time when we need as many educated people as possible, some want to continue to build walls. I find it striking that in the year 2008, we are still fighting over educational access and opportunities, based on race.

It is so important that you as students have this strong commitment to social justice. You cannot afford to drop in and out of movements or only be engaged while you are in college. It is very trendy to be a student protester when you are a student. I tend to look at what happens to students five years after graduation and commitments that they have after graduation. The question for you this evening is what type of commitments to social change will you have 5, 10, 15 years from now?

We are a nation at risk, and it's important that we deal with these significant issues as a nation. When I was a student, my first student loan was from the Defense Department. After the Russians launched Sputnik and put a man on the moon, the nation realized that education itself was a national security issue—we had to get more people educated and trained. The Defense Department started providing loans to encourage more young people to go to college.

I would close by saying that as a nation, we are facing a tremendous national security problem. Ballot initiatives to eliminate affirmative action in Michigan, California and Washington have been very successful. Similar initiatives are occurring in other states now. There are six or seven ballot initiatives to constitutionally ban affirmative action coming up this year.

As you leave this evening, we must remember that there are a lot of people who opened doors for many of you to be here tonight. They created an open door for you to walk through.

There is also a door that only you can open in your mind, and in your heart is the key. You must always be looking for ways to open doors for yourself.

To me the most important door is the one that you will have to open for others. That is why I am so happy, as I see people such as Dean Charles and others years after they graduate, still committed to opening doors for others to walk through and benefit from their efforts.

Finally, I just want to say that I am extremely appreciative that speakers, faculty, students and alumni gave up their busy Saturday to come together to discuss such the important topic of race and educational opportunity. I have learned a lot from many of you.

It is always inspiring to have a room full of people who are committed to the same issues to which you are committed, and no matter how many years ago you graduated from law school, that you are willing to come back to engage us in the important and critical dialogue, to inspire us, to motivate us, and to guide us in the right direction.

Again, thank you all for allowing me to share my thoughts with us, and I hope you have a safe journey home.

CHIOMA NWACHUKWU: Thank you, Dr. Matlock for such an inspiring speech. We appreciate it. At this time I know that you are probably eager to go home, but we just have to do a couple thank you's. I am just going to go down a list of people. Please when your name is called we have something for you. First off we would like to thank our academic sponsors: the University of Michigan Law School, the University of Michigan Office of the Provost, and the Executive Vice President for Academic Affairs. If there are representatives from these organizations here, please stand. The University of Michigan Social Work, Center for Afro-American and African Studies at U of M, the University of Michigan Ross School of Business, and the National Center for Institutional Diversity at U of M.

Next we would like to thank our corporate sponsors: Winston and Strawn; Marshall, Gerstein and Borun; Mayer Brown; Vinson & Elkins; Neil, Gerber and Eisenberg; D.L.A. Piper, and Pillsbury, Winthrop, Shaw, Pittman.

Now for the speakers, again could you please stand when your name is called: first off Dean Frank Wu from Wayne State University Law School who was not able to be here with us tonight; Dean Guy-Uriel Charles from University of Minnesota Law School who also is one of the founding members of the *Journal* and the very first Editor-in-Chief of the *Michigan Journal of Race & Law* and is now interim Co-Dean at the University of Minnesota Law School. He is a really special guy. Professor Emily Houh, University of Cincinnati College of Law. She is one of the founding members of the *Journal*, an Article Editor for Volume 1, and is also Professor of Law at the University of Cincinnati College of Law. She is not with us at the moment. Professor Matthew Fletcher is from Michigan State University College of Law. Professor Fletcher was Executive Note Editor for Volume 2 and is now Assistant Professor of Law and Director of the Indigenous Law and Policy Center at Michigan State University College of Law; Martha Kim from the Level Playing Field Institute who is on a flight back to San Francisco right now; Professor Kim Forde-Mazrui from the University of Virginia Law School, who also graduated from the University of Michigan Law School. Professor Luis

Fuentes-Rohwer from the Indiana University School of Law-Bloomington. He is currently driving back. He was the Executive Editor for Volume 1 and the Reading Group Coordinator for Volume 2; Professor Daria Roithmayr from the USC Gould School of Law; Professor Mario Barnes from the University of Miami Law School; Professor Margaret Montoya from the University of New Mexico School of Law; Dean Michael Kaufman from Loyola University Chicago School of Law; Professor Sumi Cho from DePaul University School of Law.

And we would also like to thank Susan Benton from Winston and Strawn who is a panelist but had to head back to Chicago. We would also like to thank Professor Mark Rosenbaum from the University of Michigan Law School who graciously stepped in at the last minute. We would also like to recognize our moderators: Ellen Katz and Christina Whitman from the University of Michigan Law School who I do not believe are here tonight, but they did a great job. Finally we would like to thank Hardy Vieux for stepping in as the moderator for the first session.

As I mentioned, there are quite a few *Michigan Journal of Race & Law* alumni in attendance, and we just wanted to recognize the alumni who have not served as panelists or moderators, but who have always been here for support. So first off, Yong Lee who was Executive Editor for Volume 2 and is now in-house counsel at Microsoft. We would also like to thank Megan Whyte who was the Editor-in-Chief for Volume 10 and is an Associate at Fried, Frank, Harris, Shriver & Jacobson LLP. We would also like to thank Jeetander Dulani who was the Editor-in-Chief for Volume 12 and is an associate with Winston & Strawn in Washington, D.C. We would like to thank Heather Freiburger who was Executive Book/Film Editor for Volume 12 and is with Neil, Burger and Eisenberg. We would also like to thank Stephanie Burum, Executive Editor of Volume 12.

I would like to take this opportunity to thank a very special person without whom no journal on this campus would ever survive. Maureen Bishop is a very, very amazing person. She is looked upon fondly by *MJR&L*, and we really wanted to take this moment now to thank Maureen because without her assistance, without her ability to just retain a sensational institutional memory like she has, and without her guidance and support, this *Journal* would never have happened in the first place. This Symposium certainly would not have happened without her. We would like to take this opportunity to thank Maureen. Maureen, if you can come up here. We need to take the time to present Maureen with this plaque that is commemorating the *Journal* and this Symposium. This is a plaque thanking her for helping us with the Symposium as well as a gift certificate to help her relax a little bit after all this. So run away from us for a little while.

It is appropriate that these two people are standing next to me right now because they have been standing next to me this entire year as we tried to get this Symposium together; as we have come up with ideas; as I

have e-mailed them at one in the morning with some half-cocked idea about how we should contact this person; run to this high school and do a presentation. These two have been phenomenal; they have done so much to make this happen. So I would like to thank Priya Baskaran and Rachel Johnson, and we have pretty plaques for you also. Most importantly, we have spa gift certificates. They will be vanishing off to the spa to relax. Thank you so much because without you, this would not have happened. Thank you for all of your work.

I am going to let you go now. I just want to say again, thank you for coming together to discuss such an important topic. I know that I have learned a lot. It is always inspiring to have a room full of people who are committed to the same issues that you are committed to, and no matter how many years have passed since they graduated from the law school they are willing to come back to engage us in dialogue, to inspire us, to publish with us, to motivate us and to guide us in the right direction.

Thank you all for your attendance, and I hope you have a safe evening.

