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CIVIL RIGHTS
WHO BENEFITS FROM AFFIRMATIVE ACTION AND GENDER
CONSCIOUSNESS?

PANELISTS:

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Moderator:

JUDGE CARLOS BEA
U.S. Court of Appeals, Ninth Circuit

12:00 p.m. to 2:15 p.m.
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Washington, D.C.

JUDGE CARLOS BEA: Good afternoon, ladies and gentlemen. Good afternoon. Could we get started?

[Tapping on glass.]

JUDGE CARLOS BEA: Thank you very much, Mr. Klausner.

Welcome to The Federalist Society presentation on "Who Benefits from Affirmative Action and Race and Gender Consciousness?"

Albion Winegar Tourgée, who was counsel for Homer Plessy in Plessy v. Ferguson, is often credited with originating the metaphor of "colorblind" law. For the past 40 years, Tourgée's concept of legal colorblindness has been considered by many legal scholars and policy makers and activists to be a hindrance to the advancement of racial minorities just as legal gender blindness has been considered a hindrance to the advancement of women.
Race consciousness, as its advocates put it, has become the norm. Gender consciousness is its twin. What have been the consequences of these experiments? This panel will examine two distinct areas of affirmative action: college admission and employment. Among other things, panelists will discuss the scholarly evidence that has been put before the Supreme Court in the fall term case of Fisher v. University of Texas.

Skeptics of race-preferential college admissions policies argue that the evidence shows that these policies have decreased rather than increased the number of minority physicians, engineers, college professors, and lawyers in the nation. They will also discuss evidence that affirmative action for men has become the norm at many liberal arts schools.

In the area of employment, the panelists will debate the extent to which the antidiscrimination laws have been interpreted in ways that make it more difficult for women and minorities with fewer job skills, or for that matter anyone with fewer job skills, to get their foot in a door in today's weak job market. Has the bureaucratic behemoth administering antidiscrimination laws gone too far in the regulation of private employment relationships? If so, who benefits and who is hurt? The issue not so much, is affirmative action right, but does it work?

So to discuss this we have a really wonderful panel, very distinguished and balanced between the academic and the practical and the persons who have been in the public arena. I will introduce each speaker before he or she talks and will advise you which side the speaker will take. The opening statements will take about 12 minutes. After that I will direct questions raised by the statements to each of the panelists and ask them to limit their response to one minute. Then we will take questions from the audience as time permits.

Our first speaker is Marty Castro. Marty Castro is the president and CEO of Castro Synergies, LLC, which provides strategic consulting services to corporations, entrepreneurs, and nonprofit organizations seeking to have a positive social impact on diverse communities.

In January 2011, President Barack Obama appointed Marty to the United States Commission on Civil Rights. In March 2011 he was elevated to the position of chairperson of USCCR, making him the agency's eighth chair since the formation of the commission, and the first Latino chairperson in the history of USCCR. Marty got his B.A. in political science from DePaul University and his J.D. from the University of Michigan Law School in 1988.

Let me stop right there. For those of you who haven't heard, the Sixth Circuit yesterday, in an en banc opinion 8-to-7, invalidated Michigan's Proposition No. 2, which bans race, sex preferences for admission to universities, and puts it on a collision course with the Ninth Circuit, which found exactly contrary to that in 1997 in an opinion penned by Judge O'Scannlain. If we have time, we'll discuss that.
Marty practiced law and was a partner of several prestigious law firms, including Baker & McKenzie, which was then the world's largest international firm. He was also vice president of external affairs for Aetna, Inc., where he had profit and loss responsibilities for Aetna's diverse market strategy in the Chicago regional market.

Please welcome Marty Castro.

[Applause.]

MARTY CASTRO: Thank you, Your Honor. And I want to thank The Federalist Society for inviting me here today. I especially want to thank my colleague on the commission, Gail Heriot, for extending the invitation personally.

Before I proceed with my remarks I just want to make clear that my remarks today are unrelated to my service on the U.S. Civil Rights Commission and are my own personal views, unrelated to any of my government positions.

Well, the interesting question we have today is who benefits from affirmative action? Frankly, I believe everyone in this room does in one way or another, or has, in the past, through programs that may not have been considered affirmative action, been the beneficiaries of racial preferences in society, whether through education, employment, et cetera.

I am the son and grandson of Mexican immigrants. My grandparents came to this country in the 1920s; my mother came in the 1960s, looking for better opportunities, and I am the result of that effort. They did not have formal education. I'm the first in my family to graduate high school, the first to go on to college and graduate there, and the first to go on to anything beyond that when I got my law degree at the University of Michigan.

And at Michigan, I am very proud to say, I was a product of the affirmative action program at that law school. It gave me an opportunity to prove myself despite all the challenges that I had to try to get to that point, not only economically and culturally but also, even though I was an excellent student in high school, my high school guidance counselor told me that I should not go to college. And that is not an unusual story in communities of color.

Also, I feel that the opportunity to attend the University of Michigan through their special admissions program has allowed me to live the American dream, not only for myself and my family, but to make a contribution for others. I am financially successful. I am personally satisfied. I have been, as you heard from my bio, involved in a number of prestigious businesses, and I am now allowed to serve my country. And I am not the exception to affirmative action. I am the rule.

There are those who say that affirmative action programs hinder minorities. They stigmatize us. They mismatch us and they put us in over our heads. Well, law school is a tough place. College is a tough place. But I can tell you, I wasn't in over my head. And studies show, contrary to the belief that maybe some folks in this
room have, that minority students who go to the prestigious schools, to the elite schools as the result of affirmative action programs actually are successful. In fact, my law school, during the Michigan litigation, conducted a study of those of us who were minority alumni. And I'll just read you a real quick quote from that report by one of my law professors, David Chambers:

"By any of our study's measures, Michigan's minority alumni are, as a group, highly successful in their careers although as a group they entered Michigan with lower LSAT scores and lower undergraduate GPAs than other students. In their jobs immediately after law school and in their jobs today, Michigan minority alumni are professionals fully in the mainstream of American economy. They are well represented in all sectors of the legal profession. They are successful financially. They are leaders in their communities and generous donors of their time to pro bono work in nonprofit organizations. Most are happy with their careers, and minority alumni respond no differently than white alumni when asked about overall career satisfaction.

"LSAT scores and undergraduate GPA scores, two factors that figure prominently in admissions decisions, correlate with law school grades, but they seem to have no relationship to success after law school, whether you measure that success by earned income, career satisfaction, or service contribution. In fact, if admissions at Michigan had been determined entirely by LSAT scores and UGPA, most of the minority students who graduated from Michigan would not have been admitted, even though the measure that would have worked to exclude them seems to have virtually no value as a predictor of post-law school accomplishments and success."

So why affirmative action? Those of us who support it have various reasons for it. There's the compensatory view, that is for past wrongs that folks are still suffering the effects from; corrective, that is injuries or inequalities that have existed in the not-too-distant past and currently; or diversity, which is really what has been the subject of most of the litigation of the Supreme Court, the diversity that brings different points of view to benefit and enrich who? Ultimately really the dominant culture, the white students in that school who, but for having diverse colleagues, might not see the different life experiences.

But I believe in the social justice reasons for the affirmative action programs, particularly when you look at discrimination and racism being not something that is in the distant past but it's something that exists today in our cities, in our schools, in our communities. We see that are schools are being resegregated. We see that children of color continue to live in communities that are segregated, whose schools lack the resources to educate them properly, whose schools lack the programs and processes that have given other students in majority communities an advantage by the time we get to college and law school consideration.

So I do believe that racism and exclusion does exist in our society and in our institutions today, and I believe that is one of the most important reasons for us to continue to have affirmative action programs. And I believe that programs must be race-conscious. I'm not saying that race should be the only factor, but it must be an
important factor because the reasons that those inequalities exist relate directly to race and ethnicity discrimination.

I don't support a colorblind approach. While it may sound wonderful, and that is a goal we all aspire to one day, it's not there yet. And in fact, I also don't believe in a color-mute approach. It is very difficult for us as Americans to talk about race. I think we need to do it more often and we need to do it in a context like this one. And I'm really glad to be here because I may not be able to convince anyone here, and I'm sure no one will convince me to change my point of view, but I think we need these kinds of dialogues in order to better understand where we come from on these issues, particularly one as controversial as race and admissions.

But as I said, historically there are inequities. For generations the system has been set up to provide racial preferences for the white dominant culture, which is responsible for the continuing lack of students in many of the institutions we see today, because not long ago, in the 1950s, the University of Texas did not admit blacks. Their stated reason was, well, we're training lawyers for the Texas bar and the Texas bar doesn't hire blacks so we're not going to train them. In the 1930s Harvard basically had the same view of Jewish lawyers. And that historic lack of access is still reverberating in the halls of higher education today.

We also have issues such as legacy. We really don't talk about the fact that there are more legacy admits than there are minority admits through affirmative action programs, yet I rarely hear anyone saying we should dismantle legacy, although I know that my colleague Gail Heriot has raised that. But by and large that goes unquestioned or unchallenged, although maybe folks want to challenge it now that we're seeing some minorities that are in legacy. But still, in Ivy League schools 96 percent of current alumni are white, so that legacy system continues in place.

As was mentioned earlier on the gender side of things, another issue I know that Gail has been a leader on, white men are being denied access—if you look at it that way—to colleges and law schools more by white women than by minority applicants. So I think we have to—if we're really going to take a look at this, we need to take a look at the whole thing.

Also, I think that today when you look at the communities of color, as I said they're high-poverty schools, and even minority students who come from well-to-do families still end up in schools that are unequal because of the segregation that we see in our schools. White students have more and better opportunities because of the way we fund our education to be able to participate more fully in their education, including having advanced placement courses in many of the schools where many minority schools do not.

Therefore, by the time we get to college admission or law school, we have not had the opportunity, as others, to be able to have advanced placement. We also have ability tracking, which places many qualified minority students into remedial courses, and folks like me who were told by my own counselor, despite my grades, I shouldn't go to college.
So it's not just a class issue, although there is that. To me really the issue becomes a catch-22. We have to be able to start not just at affirmative action and higher education, but we really have to look at what tools we need to bring to bear in the earliest parts of that pipeline so that when we do finally get to compete for applications in higher education, we have more of a level playing field.

I believe that students of color who are admitted to programs—and the studies show this—are not less qualified and are not less capable than their white counterparts. The test scores of students of color are more a reflection of the effects of racism and lack of resources than they are on merit. I also believe standardized tests are not predictive ultimately of that student's success. But ultimately I believe this problem was created by race consciousness and it has to be solved by race consciousness.

And I will end my remarks with a quote from a gentleman who I think a lot of folks in this room know: "Time and experience have shown us that laws and edicts of nondiscrimination are not enough. Justice demands that each and every citizen consciously adopt and accelerate a real and personal commitment to affirmative action so as to make equal opportunity a reality." And that was Governor Ronald Reagan. Thank you.

[Applause.]

JUDGE CARLOS BEA: Thank you, Marty.

Our next speaker is Stuart Taylor Jr. Stuart is an author and freelance journalist who has been focusing on legal and policy issues, and is also a Brookings Institution nonresident senior fellow and a National Journal contributing editor. He teaches law and the news media at Stanford Law School and practices law on occasion.

Mr. Taylor has recently coauthored a book with Mr. Sander on affirmative action. It was published October 9th and it's published by Basic Books, and it's entitled, Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit it.

Mr. Taylor also filed, with Professor Sander, an amicus curiae brief in the pending Supreme Court affirmative action case of Fisher v. Texas. He previously coauthored with KC Johnson a critically acclaimed 2007 book, Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Fraud.

Mr. Taylor graduated from Princeton University in 1970 with an AB in history. After working as a reporter for the Baltimore Evening Sun from 1971 to '74 he moved to Harvard Law School, serving as a note editor for the Harvard Law Review and graduating in 1977 with high honors.

Mr. Taylor practiced law with Wilmer, Cutler & Pickering from '78 to '80 and then he joined the New York Times Washington bureau in 1980, covering legal affairs from 1980 to '85, and the Supreme Court from 1985 to 1988.
Mr. Taylor characterizes himself as a critic of affirmative action but not an abolitionist. He seeks transparency in how affirmative action is conceived and administered. He seeks performance statistics of beneficiaries. And he warns that unless we do something about race preferences, they will still be around a hundred years from now, not the 25 years that Justice O'Connor thought necessary in 2003 in the case of *Grutter v. Bollinger*.

The effects of large preferences, as he will explain in his *Mismatch* book with Richard Sander, shows that although discrimination may exist out there, it does not exist in college admissions except as to whites and Asians.

Mr. Taylor.

[Applause.]

**STUART TAYLOR JR.:** Thanks very much for that kind introduction. And thanks to The Federalist Society for having me here.

Marty Castro has spoken very eloquently of the benefits of racial affirmative action. I call it racial preferences because that's what it's come to mean in university admissions. And I acknowledge those benefits. I applaud those benefits. I think that there were more benefits at the beginning of this process than there are lately, but surely there are benefits. There are also costs. I'm here mainly to talk about those costs, and it's a weighing of the costs and benefits that ultimately needs to influence policy making on these issues.

I should mention that Gail Heriot I think will speak more about affirmative action in the workplace. And so don't worry, those of you who wanted to hear about the workplace. It's not all going to be universities.

As Judge Bea indicated, in our new book Richard Sander and I argue that racial preferences hurt many and perhaps even most—this is an imprecise business—of the minority students they're intended to help by bringing them without warning—"without warning" is important—by telling them, you're going to do fine, and then bringing them into academic settings where they're likely to struggle academically and become demoralized.

And transparency—one reason we see transparency as a remedy is sort of a consumer protection measure to protect minority students who are being set up to fail, as we think in some cases, as to what they're getting into. Now, this is not to deny that many black and Hispanic students can compete at the highest levels, but many of those who receive large preferences—and I emphasize large preferences—are being set up to fail.

I'm not suggesting that somebody who gets a little tie-breaking preference is being set up to fail, but the students who receive large preferences, which are the norm, we contend—I think the evidence shows—are victims of what we call "mismatch."
They would do much better academically—and we think perhaps be much better off in many other ways—if they attended schools for which they were well qualified, if they attended schools where their entering academic credentials are more or less on a par with those of their classmates.

Now, Mr. Castro said he doesn’t think SAT scores prove much, but they’re—along with grades, that’s what the colleges and the other university institutions use as their guide to who’s best qualified, who’s best prepared academically. It’s just that they use a totally different scale depending on the race of the applicant, with Asians, by the way, the smallest and least politically powerful of minorities, being the systematic people on the losing end of these comparisons, as demonstrated by the facts from the University of Texas where Asian students are, on average, far better prepared academically than any other racial group, including whites.

These academic struggles have nothing to do with race as such. They have everything to do with large preferences, which cause similar problems for many athletes, for children of very rich donors, and the like. Mr. Castro mentioned legacies. I don’t support legacy preferences, but one distinction that’s important to keep in mind is that from the evidence I’ve see, the legacy preferences tend to be rather small. I’m not defending them but they’re rather small. The mismatch problem is a factor of large preferences.

An outpouring of social science evidence shows that this mismatch problem largely explains why black students tend to cluster toward the bottom of the class, why most of those who aspire to be science majors, who aspire to be professors and scholars, end up giving up those aspirations and fleeing to softer courses, why black law graduates fail the bar exam at something like four times the rate of white bar graduates, and why a careful survey shows them to have low—shows affirmative action beneficiaries, recipients I would say—to have low levels of academic self-confidence.

There are also new data from the University of California after racial preferences were banned by Proposition 209, effective 1998, indicating that contrary to a lot of the publicity about what a terrible thing this was for minorities at the University of California, grades—you know, what happened was kids who might have gotten into Berkeley and done not so well ended up at, let’s say, Davis or Riverside, other UC campuses, and did fine. Overall for minorities, grades went up, graduation rates went up, science persistence rates went up.

And there’s even a study by my coauthor indicating that the top—the best-prepared black and Hispanic students found the University of California campuses to which they could get admitted more attractive, on average, after preferences were banned than before. We suspect—we certainly couldn’t prove—we suspect that the attraction is having a degree that’s free of the taint that, oh, you just got in because of your race.

While mismatch theory is controversial—especially controversial is our claim that preferred minorities, many of them, would be better off at less selective schools—it
rests on a foundation of facts that are undisputed—largely undisputed among experts.

First, almost all selective schools routinely use very large racial preferences in admissions, leading to racial gaps of up to 200, 400 points in the mean SAT scores among admitted students and also in the mean high school GPAs. In any measure of academic achievement that's used by colleges in deciding who to admit, they end up with large racial gaps in their student body.

Second, this leads to half of black students roughly ranking in the bottom 20 percent of their class in college and in the bottom 10 percent of their classes in law school, and black dropout rates a multiple of white dropout rates.

Third, many black students who aspire to major in science or engineering end up doing so badly that they flee to softer courses and abandon their aspirations.

Fourth, the same is true, according to another study, of black students who aspire to be professors. They come in; they take hard courses; they do badly. Their academic self-confidence on average tends to be diminished. They give up on the idea of becoming professors.

Fifth, so far undisputed studies show that these students would have far better chances of sticking with science or engineering or pre-med and achieving their goals if they attended colleges for which well qualified.

Sixth, contrary to an oft-repeated myth, affirmative action recipients by and large do not gain ground on their classmates during the four years of college or the three years of law school, or whatever the education is. Often, the data suggests, they lose ground.

Seventh, these problems are least visible at the most elite colleges. At a law school like Michigan, for example, where Mr. Castro attended, these problems would be considerably less visible than they would at a law school 20 or 30 places farther down in the prestige rankings because at the top there's a much better supply of relatively well-qualified minority students. As you go down in the prestige curve, in order to fill their own targets for minority enrollment they're forced to create much larger gaps in academic preparation.

Eighth, as to law school, even when one compares black and white students who enter law school with very comparable academic qualifications, the black students are still far more likely to fail the bar exam.

I repeat, the above facts are largely undisputed among experts. There has been great dispute, on the other hand, about my coauthor Rick Sander's work on law school mismatch, and there's two briefs in the Supreme Court devoted largely to attacking his work on law school mismatch. Many scholars have attacked his statistical methodology. As best I can tell, most of these have also happened to have staked
their reputations over the years on the premise that racial preferences are altogether benign, and so I'm not sure they're completely disinterested.

The detailed law school mismatch debate and the statistical arguments back and forth are much too complex to try and summarize here, but one point is clear: None of Rick Sander's critics has suggested a remotely plausible theory for why black students are so much more likely to fail the bar exam than whites with comparable academic credentials on entering law school.

Our theory is that the blacks are learning less in law school than comparably qualified whites because they are systematically brought into schools for which they are not well prepared. They're falling behind in class, many of them. They're getting poor grades. They're learning less. And they're graduating, if they graduate, with diminished academic self-confidence. That's our theory. Rick's critics have a lot to say about his statistical methods but they don't seem to have a plausible theory of their own.

Just a couple of random points, responding to Marty Castro. He mentioned social justice reasons for supporting affirmative action. It is true that at the outset in the '60s the same students who tended to get racial preferences also tended to come from, you know, families where nobody had previously gone to college, to come from the lower segments of the income distribution. That's no longer true. That hasn't been true for a long time.

Now racial preferences are given mostly to the best-qualified black and Hispanic students, and the best-qualified black and Hispanic students are disproportionately the wealthiest black and Hispanic students. And the way the system works, these students are systematically being preferred to less wealthy, better-qualified Asian students and white students. So I think that affirmative action, as it operates today, is making socioeconomic inequality worse, not better.

Also, Mr. Castro mentioned Jewish lawyers being discriminated against—or Jewish would-be lawyers—in decades past. And that's true and that was terrible. I think it reminded me of the haunting resemblance between the view of people in the '20s of the Ivy elites that, well, we have too many Jews here; they're doing too well; we have to keep the numbers down. Well, that's what's going on with Asians right now all over the country. Too many Asians doing too well. Have to keep the numbers down. And racial preferences are one of the tools of doing that.

I'll stop there. Thank you.

[Applause.]

JUDGE CARLOS BEA: Thank you.

Our next speaker is Gail Heriot, who is a professor of law at the University of San Diego and a member also of the United States Commission on Civil Rights. Among
her areas of expertise are civil rights, employment law, product liability, remedies, and torts.

Her work has appeared in legal journals like the *Michigan Law Review*, the *Virginia Law Review*, and the *Harvard Journal on Legislation*. She also writes for popular newspapers and magazines including the *Wall Street Journal*, the *Weekly Standard*, *Los Angeles Times*, and the *San Diego Union Tribune*.

Gail is a former civil rights counsel to the United States Senate Committee on the Judiciary and a former associate dean for academic affairs at George Mason University Law School. Prior to entering academia she practiced law at the Washington law firm of Hogan & Hartson and the Chicago law firm of Mayer, Brown & Platt. She clerked for Justice Seymour Simon of the Illinois Supreme Court.

Professor Heriot graduated with highest distinction from Northwestern University in 1978 and earned her J.D. cum laude in 1981 from the University of Chicago Law School, where she served as an associate editor of the *Law Review*. Professor Heriot will discuss principally affirmative action in the employment area.

Professor Heriot?

[Applause.]

**PROFESSOR GAIL HERIOT:** It's dark over in my little corner and I've got presbyopia, so I guess I'm going to have to talk from up here.

Stuart Taylor has told you a story of how good intentions have backfired in the area of college admissions. I want to talk about a few other policy areas involving race and gender consciousness that have also backfired.

First I want to point out, however, that you can't blame all this on liberals. I believe some of the blame belongs to conservatives. Yes, I mean people like you and me here. Savvy conservatives hate to talk about issues of race and gender because they're afraid it will get them in trouble. They are afraid that their liberal friends and colleagues will unfairly accuse them of racism or of engaging in a war on women, so they clam up.

But these are not issues that you can clam up on. They are too important. When small-government types are AWOL on race and gender issues, you can pretty much figure that the policies that will get adopted are going to be big-government policies. And as usual, big-government policies will fall victim to the rule of unintended consequences.

If you are looking at the question of who benefits in this area, alas it turns out not to be the women and minorities who are the intended beneficiaries that benefit. If there's anyone who benefits, I would say that it is the throbbing federal leviathan and those who benefit from that leviathan.
Let me give you an example in the area of education. One of the Obama administration's gravest errors, in my opinion, was its school discipline initiative. And of course that's an ongoing initiative. It is a fact that African-American students are disciplined in school more often than white students. It is also a fact that white students are disciplined more often than Asian students.

Like a general fighting the last war, Secretary of Education Arne Duncan believes that intentional discrimination is the root cause of all of this. In an emotional speech that he gave on the Edmund Pettus Bridge in Selma, Alabama marking the 45th anniversary of the "Bloody Sunday" confrontation there, Duncan vowed that he would aggressively root out that intentional discrimination. But what his armies of Department of Education bureaucrats were really doing—with the best intentions of course, but what they were really doing was mistaking aggregate rates of discipline for racism on the part of classroom teachers.

The Oakland, California school system recently agreed, under pressure from the Department of Education to, quote, "targeted reductions" in the use of student suspensions for African-American and Latino students. These are disciplinary quotas, plain and simple, forced on schools by the Department of Education. The danger should be obvious.

First, what if an important reason that African-American students are being disciplined more than white students, and that white students are being disciplined more than Asian students, is that they are misbehaving more often? Think of it. Study after study has shown that children who grow up in fatherless households are more likely to misbehave in school than students who have intact families. The out-of-wedlock birth rates for African Americans these days are over 70 percent. It's 28 percent for whites and much lower for Asians. For that not to have a very profound effect on rates on misbehavior would take a miracle.

Second, what if the cost of failing to discipline misbehaving students falls on the misbehaving students themselves, or even worse, upon their fellow students? And of course with African-American students, disproportionately their fellow students will be other African-American students who are trying to learn amid classroom disorder. Will unleashing the Department of Education on these schools—will it cause the schools simply to tolerate more classroom disorder, thus making it difficult for students in the same classroom to learn?

Here is where a healthy dose of conservative values—values that I'm afraid were AWOL in this case—should have been applied. Trying to control a problem like this, a nuanced, fact-specific problem, from inside the beltway is simply not possible. Even the most well-meaning federal edit tends to be devoid of nuance by the time it gets down to the foot soldiers, in this case the classroom teachers: Don't discipline misbehaving African-American students unless you have a good reason.

An edict like that is going to be naturally understood by school district officials as: Don't do it unless you are confident that you can persuade some federal bureaucrat,
whose judgment you have no reason to trust, that you've done it for a good reason, sometime in the future. In turn, that gets translated to the school principal as: Don't discipline African-American students unless you've jumped through the following inconvenient procedural hoops that we've set up for you so that we can satisfy that federal bureaucrat of the future. That in turn gets translated to the school teacher as: Don't do it. It's only going to get us in trouble.

Now, if how and when to discipline "little Johnny" in school is not a local issue, then I'm afraid there are no more local issues. It is entirely possible, I believe, that the way schools discipline children today needs improvement, but to look at it as a race discrimination issue is a profound error.

So let's move to employment, because I believe it is a tribute to the resilience of the American people that anybody gets hired today, given our laws.

[Laughter.]

PROFESSOR GAIL HERIOT: We must never lose sight of the fact that overly restrictive and overly complex laws regulating the employment relationship only encourage employers to take jobs overseas. So here we have another policy backfire. It is the least-skilled among us who are hurt most by policies of this sort.

We all of course remember Martin Luther King's justly famous statement that he looks forward to the day that his children will be judged by the content of their character rather than the color of their skin. My friend Roger Clegg, who I believe is in the audience here somewhere, has said that the law as it exists today does precisely the opposite. An employer can consider race and gender as well for affirmative action purposes, but under the EEOC's guidance it is illegal in most cases for an employer to decline to hire an applicant because he has a criminal record.

If there's one matter of record about a person that lets others know something about the content of his character, it is his criminal record. The idea appears to have been to benefit young black males, who are more likely to have criminal records than, say, elderly Asian females. But a policy like this can backfire. There is already published empirical evidence that young black males may be worse off under the new guidance. If an employer cannot check, he may err on the side of caution and not hire from pools that he may believe, rightly or wrongly, are of higher risk.

Imagine a small businessman who has 10 jobs, let's say, that are really good entry-level jobs, don't require any particular skills, and in the past he's hired recent high school grads without skills, or even some high school dropouts. And as a result, maybe in the past, out of the 10 hires, maybe even eight were young African-American males.

When that small businessman looks at the new guidance and says, okay, you know, I cannot check on these criminal background—I can't make a criminal background check anymore the way I used to—maybe even I was disobeying the last guidance—
but he may decide he can't take the risk and so he hires 30 part-time employees instead, college students from the nearby elite university.

And now, instead of a majority of African-American males, maybe there's only one or two in that pool that get the part-time job. Maybe there's just one African-American male who gets that part-time job now and he's an African-American male who is the son of a dermatologist from Bethesda.

Some of you might be scratching your heads and wondering how it can be a violation of Title VII, which bans discrimination based on race, sex, religion, and national origin, to not be able to consider why it's a violation to consider criminal background. If that's what you are thinking, all I say is, you know, wake up, mom and dad; it's 2012.

Those who supported the new guidelines, although you can quibble around the edges, their view was that this is basically an ordinary application of Title VII. And, you know, again, you can quibble about that on the edges, but they're not entirely wrong on that. Once you accept the disparate impact theory as an appropriate theory of liability under Title VII, it's easy to get there.

That's the problem. The EEOC took the position very shortly after the passage of Title VII, the original Title VII, that it prohibits both conscious discriminatory treatment and unconscious discriminatory treatment, and they're right on that. Of course it does. But they also took the position that it bans qualifications that have a disparate impact that cannot be justified by business necessity; alas the notorious Griggs case. In that case the Supreme Court appeared to accept that analysis, and Congress acquiesced in 1991.

The problem with this analysis is not simply that it contradicts the original language of Title VII. The problem is that all job qualifications have a disparate impact on some group. Job qualifications that require heavy lifting have a disparate impact on women. Job qualifications that require fine handiwork have a disparate impact on men. Job qualifications that require experience in the donut industry have a disparate favorable impact, and thus a negative impact, on the rest of the world. The favorable impact is on Cambodian Americans who disproportionately have that experience. Hotel-motel management; subcontinent Indian Americans do very well there. And winter wheat; Scandinavian Americans are good at that one.

I will happily write a check for a thousand dollars to anyone in this room who can come up with an actual job qualification that separates actual successful applicants from unsuccessful applicants that doesn't have a disparate impact on some group somewhere—some religion, one of the genders, a racial group, a religious group, an ethnic group somewhere. I don't think you can do it.

The upshot of all of this of course is that all employment qualifications are illegal. Enforcement is thus utterly lawless, arbitrary, and racially discriminatory to boot. No employer who announces that it has any clear job qualifications can feel safe under this regime. And, surprise, they also aren't allowed to have subjective job
qualifications. So that pretty much rules everything out. If you're thinking this is good for America, I would suggest that you rethink that. This causes the economy generally to suffer. And if employment rates are any guide on this, minority members suffer more than others.

I will stop there. I have other examples that we can talk about in the question-and-answer period if that's what you want to do.

[Applause.]

**JUDGE CARLOS BEA:** Our next speaker, and batting clean-up, is Ted Shaw. Mr. Shaw is counsel to the firm of Fulbright & Jaworski. His practice involves civil litigation and representation of institutional clients on matters concerning diversity and civil rights.

Prior to joining Fulbright, Mr. Shaw was director, counsel, and president of the NAACP Legal Defense and Education Fund, for which he worked in various capacities over the span of 26 years. In 1990, Mr. Shaw left LDF, the Legal Defense Fund, to join the faculty at the University of Michigan School of Law, where he taught constitutional law, civil procedure, and civil rights.

While at Michigan, he played a key role in initiating a review of the law school's admissions practices and policies and served on the faculty committee that promulgated the admissions policies and programs that was upheld by the United States Supreme Court in 2003 in the case of *Grutter v. Bollinger*. At present Mr. Shaw is Professor of Professional Practice in Law at Columbia, the university law school.

Mr. Shaw.

[Applause.]

**PROFESSOR TED SHAW:** Thank you. I am grateful for the invitation to spend some time with you at The Federalist Society convention. I've done this before and will be happy to do it again if you'll have me again. But I also want to say that every time I come I am, in many ways, stimulated by what I hear. I won't always say how I'm stimulated—

[Laughter.]

**PROFESSOR TED SHAW:** —but I am. And I think it's a very valuable thing when those of us who share different views of the world and the most compelling issues that confront us have an opportunity to exchange ideas. I deeply believe that.

Having said that, I was thinking about the opinion that came down yesterday in the Sixth Circuit, a deeply divided opinion, 8-to-7. None of us I think would fool ourselves about where this is headed. And I looked in the opinion to see if one of my former students, who is now serving on the Sixth Circuit, which way he went. He didn't participate. I'm told that he is on the faculty of Michigan Law School now.
But the reason I raise it is because he was one of my favorite students in Michigan, very conservative, and a person of high integrity in my view. We didn't share all of the same views. Many of them we didn't share. But I deeply respected him and I think he deeply respected me. There's a great difference between people who are, in my view, intellectually and instinctively conservative and open-minded, and people who are ideologues. And I'm sure that you would say the same thing, or many of you, on the same—with respect to people who are liberals who are not open-minded and who are ideologues. I think that's an important distinction.

Having said that, there's a lot on the table. I won't have an opportunity to say all that I would like to say. And I want to resist the temptation by and large to engage in a kind of personal testimony. I think it's powerful, or can be—nothing wrong with it. But I have learned as I've gotten older that we all have our stories to tell. And, you know, it's interesting when you get to know people and their personal backgrounds. As I said, we all have our stories to tell.

But I can't resist saying this: I grew up in a public housing project in the Bronx in a family, therefore, that was poor, without my father in the household. And I am also a beneficiary of affirmative action. And I say that unashamedly, unabashedly. And I don't suffer any psychological problems that many people say affirmative action beneficiaries struggle from. And I have no question that I am better off where I am right now because of the opportunities that were open to me.

And it didn't mean that I was unqualified. What it meant was that the light of opportunity historically hadn't some to shine in places like the project where I grew up, and still doesn't for the most part. We have deep-seated racial and financial, economic inequality in this country, and we continue to have it. Some people care about that issue a little bit more than others. I care about it deeply. I don't apologize for having been a beneficiary of affirmative action.

Now let me say a few words about Fisher. There's all kinds of reasons that this Court shouldn't have taken Fisher. You know, we could talk about stare decisis. We could talk about standing. But the Court did take it, and I suspect that most of us believe that the outcome is more likely than not going to be that Grutter doesn't survive, or if it survives, it doesn't survive in a form that it exists now, that it will be significantly and substantially gutted. I'd be happy to be wrong about that but I don't think I am.

Let me say something about the oral argument in Grutter. I was deeply disappointed in that argument. And while I'm sure that almost everybody in this room disagrees with me on the substance of the issues that are before the court in Grutter—I'm sorry, not in Grutter but in Fisher—if you have not read the transcript of the oral argument, I encourage you to read it. It was, in my view—and I'm not going to mince words—extraordinarily low brow. It didn't do justice to the significance and the importance of the issues that were before the Court.

People can and do disagree deeply about those issues, but that oral argument and the exchange there shed almost no light on anything. So I was deeply disappointed
about that. I think we all have to ask, you know, what's going on here with the consideration of these cases? I believe if we and the Court owe the country anything, it's to come to these issues not only soberly but to apply the highest intellectual standards to our exercise of our consideration of these cases. I challenge any of you—I really do—to tell me that that oral argument reflected that.

Okay, so there's some sour grapes. Let me turn then to some substantive things.

One of the disappointing things about the argument I think goes to the core of what has happened about affirmative action and diversity issues over the last 40 years or so. And when I say that, I take—for example, if you look at the transcript of the oral argument, if you look at the part of the oral argument in which Justice Alito had an exchange with the lawyer from the University of Texas and he said that: You seem to be arguing something that I haven't seen before.

The lawyer is making the argument that the University of Texas was not in a position where it was admitting students from the—African-American or Latino students from the second decile and non-10 percent students. And his point, had he been allowed to articulate it a little bit more—but I understood the point that he was trying to make—was that some of the best-prepared black and Latino students may not have been in the top 10 percent only worked because of segregation in high schools, you know. And people call that "colorblind" I suppose in some places. I call it "don't ask and don't tell" when it comes to race.

Everybody knows that the only reason that the 10 percent plan produced diversity in the aftermath of the Hopwood case is because of segregation in high schools. In any event, when Justice Alito said that he didn't understand the argument that was being made, he then pointed to what I presume to be a hypothetical situation in which the son, or the daughter presumably, of a physician, an African-American physician, or a law partner whose wife was also a partner in a firm in the top 1 percent of income makers in the country, and he said, if you're talking about those folks getting in, I don't understand your argument because I thought that these efforts really began as an effort to help those disadvantaged minority students.

On that point I at least partially agree with Justice Alito with respect to the origins of these efforts. He's right about that. That's where it began. The problem is, is that the Supreme Court threw the remedial rationale on affirmative action under the bus in Bakke all those years ago. And what we got was Powell's rationale—that's diversity—which is much more palatable to many Americans because you don't have to talk about that unpleasant history of racial discrimination.

You know, we can talk about diversity efforts, but it was rooted not in the 14th Amendment Equal Protection Clause interests of students of color in getting access into these institutions, but rather in the First Amendment interests of the university in having a diverse student body.

I take that as a second-best rationale, but frankly—and I don't have the time to tell you why I say this except to refer to it very quickly—frankly the reality is that even
now in 2012, if you do the math and start with 1619—we'll commemorate the 400th anniversary of the arrival of Africans at Jamestown in a few years. If you do the math and you look at the history of both slavery and segregation in this country, which really didn't end as a formal matter, as a legal matter, until the late 1960s—if you challenge me on that I can tell you why I say that—even now, nine out of 10 days of the presence of Africans in North America has been spent in either slavery or Jim Crow segregation, okay?

And almost immediately after the end of that era we have the assault on efforts to try to do something and a remedial justification to address that. That's been thrown under the bus. It's unpalatable. Nobody wants to talk about that. What we're left with is the rationale in Bakke. And then of course that became attacked—came under attack, rather.

But if we are to be honest about it and to think about this and the question that Justice Alito was pointing to, if you are talking about diversity, then diversity would allow people from all kinds of backgrounds, all kind of economic strata, to be subject to the efforts of colleges and universities to enroll them. If you're going to talk about disadvantage, you're talking about a remedial rationale. And as I said, the country has, and the Supreme Court for the most part, has abandoned that. So there's a lot of confusion in the jurisprudence and the discourse that we're engaged in.

Much more I could say about that. Let me just say a few words about some of what we heard about employment and discipline. You know, I really wasn't prepared to say much about that, but I'll just say this: The employment and discipline issues are issues that we ought to spend some time about. I do not think—and, you know, I'll go back and do some more looking at this, but I don't think it's true or accurate to say that people—employers cannot consider, in any circumstances, whether somebody has a criminal record in employment. And they're doing that all the time.

Now, we do have disproportionate criminalization of African Americans and Latinos, and there are studies that have been done, one study that I know you're aware of, which talks about the—a study where black men who had no criminal record have less of a chance of being hired than white men who had criminal records. You still have a lot of inequity in these issues, but even if you only look at people who are subject to the criminal process because, in fact, they did violate the law, you'd see disproportionate sentencing, you'd see disproportionate, you know, taking people to trial as opposed to putting them, if it's drugs, into some kind of diversion program.

I'm not saying that there isn't a problem within the African-American community or Latino community. Yes, we have demons in our own communities, external and internal, just like any community has, but you still see a lot of disproportionate over-criminalization of young black people. And it starts, in many instances, in schools—and Latinos—with discipline: a 6-year-old girl in Florida who throws a temper tantrum being taken away in handcuffs.
You know, I could go on and give you more examples. Look at the Advancement Project report on those kinds of issues. So I think that we need to have a little bit more complex and nuanced a discussion about these issues.

My good friend—well, actually maybe we're not good friends—

[Laughter.]

PROFESSOR TED SHAW: —but my adversary Stuart Taylor and I, we bumped heads on a lot of issues over the years, and we could bump—

STUART TAYLOR JR.: Will you settle for "friend"?

PROFESSOR TED SHAW: Pardon me?

STUART TAYLOR JR.: Friend?

PROFESSOR TED SHAW: "Friend" is fine.

[Laughter.]

PROFESSOR TED SHAW: You know, we've bumped heads, and there's a lot that he said that I would just take issue with, starting with terminology. You know, when we talk about loaded language, you know, preferences, et cetera—I mean, the debate is almost over, and he knows that, when you use that kind of language.

But substantively I'd also say that there's a deep, deep-seated belief, I think, on the part of many Americans still, many white Americans, and frankly it's been internalized in many black Americans and other Americans also, about the intellectual inferiority of African Americans, about black people in general. It is impolite to talk about it. People don't want to admit it. But I think that it underlies a good deal of discourse about issues of race.

And I'll stop there and just say that race continues to be one of our biggest issues in this country. I agree with you, Gail. We need to talk about it, and we need to talk about it honestly and openly. We need to explore what we think about it. There's a lot of discomfort in quarters like this about the changes that are going on in this country demographically and otherwise that got reflected in the election. But I believe that that discomfort probably will be alleviated better by an open and honest discourse about issues of race.

So, much more that I would love to say, Stuart, in response to what you've said. Time doesn't permit. I've probably gone on past my time anyway. I wish you all the best in your convention and in many of your endeavors.

[Laughter.]

[Applause.]
JUDGE CARLOS BEA: Now it comes time for me to ask questions of the panelists, but it occurred to me that as I saw the panelists listening to each other and taking notes that maybe they'd like to have a minute or two of rebuttal or comment on anything that another panelist said.

So we'll start with you, Marty. Do you have anything to add to—

MARTY CASTRO: Oh, I've got notes and notes here.

[Laughter.]

JUDGE CARLOS BEA: Okay.

MARTY CASTRO: Let me find the ones that I really want to address.

You know, I think—to talk about some of the things Professor Taylor—

ATTENDEE: Microphone.

MARTY CASTRO: Oh, I'm sorry. How's that? Better? Is it on? Okay—Professor Taylor mentioned. You know, I think that the issue of access to education—as actually Governor Scott was saying earlier—if you have an education, you can have anything. And I think that there is an effort underway to cut off the spigot based on the demographics of—the changing demographics of the country of folks who look like us, who look like me. Because of the numbers there is a fear, and the fear is that we are going to take the positions of power and we're going to ultimately be the majority and dominant group, and one of the best ways to stop that from happening is to actually limit access to education in the elite schools.

And the argument that—which is a very paternalistic argument, in my view—that, well, we don't want to put these minority students in over their heads; let's send them to the schools where they'll be—you know, better to get a B-plus there than to get a C-plus at Michigan, and they'll be better off, they won't be stigmatized, it will fit them better—I think is really a false argument. I think that, based on the studies, it shows that the students who do go to the elite schools actually do better.

But then he talked about those schools not being—you know, the schools—the lesser schools were not statistically—or not as good as they should have been. So I think that there's an internal conflict there. Why would we want to send folks to schools where they're not going to do as well and they're not going to get into positions at more prestigious law firms and corporations? It becomes self-fulfilling. Those folks then cannot build the equity and the wealth that will allow their children to be able to, in the next generation, overcome that.

So I think it becomes a cyclical situation. By sending us to the schools that are not as prestigious in a way to help us, you're really actually hurting us. And to suspect—although you can't prove, you say—that there is a taint, I think that that's, again, a
false argument. We can all suspect a lot of things, but if you are going to be saying that we as people of color are being tainted by a system, you need more proof than a suspect statement like that, particularly coming from, you know, someone who is as prominent as you are. People hear those things and they believe them without any real, solid support.

So there's a few other things but I'll leave it at that. I did want to say a few things about Gail but we'll talk about that later, on employment.

**PROFESSOR GAIL HERIOT:** I have an idea for you.

**JUDGE CARLOS BEA:** Stuart?

**STUART TAYLOR JR.:** Yeah, I'll follow up and respond on a couple of things.

First, Ted Shaw seems to think that the phrase "racial preferences" is somehow not fit for polite conversation. I emphatically disagree. The Supreme Court uses the term "racial preferences." Everybody uses the term "athlete preferences." Everybody uses the term "legacy preferences." Why should "racial preferences" be off limits, especially since affirmative action, when it began with President Kennedy's Executive Order, meant, quote, "Take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, creed, color, or national origin."

Affirmative action used to mean colorblind plus recruitment and outreach. And some people think it still means something like that. So if we want to talk about what the controversy is about, it's racial preferences. That's why I use that term.

In terms of the stereotype of intellectual inferiority, I deplore that stereotype. I maintain that racial preferences do more to maintain that stereotype than anything else. When half of black students are at the bottom 20 percent of their classes on average in colleges, the bottom 10 percent in law schools, that sends a message to everyone in that school, you know, as to academic capabilities.

People are too polite to talk about it but I know that when we interviewed African-American former students and administrators for this book, and we interviewed quite a few, the most universal complaint was that everyone assumed the reason they were in their college was they got in on account of race, and they resented this deeply. And I can see why they resented it deeply, but the assumption is being fed by racial preferences.

Marty Castro on "taint"—well, I think I responded to that.

The last thing, what Ted Shaw was saying about Justice Alito and his comments on affirmative action for wealthy African-American or Hispanic-American students, reminded me of something in our book that my dear friend Bill Coleman—William T. Coleman Jr., longtime chairman of the NAACP Legal Defense and Education
Fund, U.S. Cabinet member—and I assume he's a friend of Ted's too—he wrote in his memoir the following—and I wonder whether Ted or Mr. Castro disagree:

"Today race in and of itself is not usually an impediment to success at the highest levels of our society, or at any level for that matter," says Bill Coleman. "We need, therefore, to modify our diversification policies to focus more on creating opportunities for people entrapped in the cycle of poverty and those with special needs and challenges who have not had the benefit of strong family and community support systems.

"We must also take into account generations of poor whites in rural and urban areas, some of whom have been disadvantaged by government policies that focus only on providing racial preferences, regardless of circumstances. We should consider abolishing all distinctions based on race and ethnicity except targeted programs to assist African Americans still in need, in order to remedy the vestiges of slavery and government-sanctioned racial discrimination." This from a man who sat next to Thurgood Marshall when he reargued Brown v. Board of Education.

MARTY CASTRO: Well, I think that there are indeed still issues, as I said earlier, of racism and discrimination that exist today, directed at people of color. So I think for us to say that, you know, race ought not to be considered and that we ought to look just at economics, I do believe that we ought to factor in economic class as one factor, but not to the exclusion of race, because race still is a viable and actual bar to individuals, even wealthier individuals, to access.

And I don't think, as you said earlier, that wealthy minorities are really getting into these schools more often than those who are historically economically disadvantaged, not in what I have seen. And in fact, the legacy students that you talk about also are not small. They actually are much larger a share than the minority students who are coming in on these programs.

So I think there is active and current—I'm not talking about the historic issues of slavery. I'm talking about today there are issues of segregation and re-segregation in our communities that disadvantage students of color that we need to remedy for.

JUDGE CARLOS BEA: Let me change the subject matter just slightly. We've talked a great deal about diversity, and I would like to ask Gail—since one of the rationales of diversity is that it is actually beneficial to, say, the white or non-minority groups in school as a way of acclimatizing them for the real world—you're a teacher at the University of San Diego. Do you have any insights or observations as to whether diversity, as practiced today, is actually reaching that goal of better acclimatization for the non-minority students?

PROFESSOR GAIL HERIOT: I've got some other comments I want to make as well, but let me address your question first.

You know, first off, there's not a minority way of looking at the tax code and such or chemistry and such. I think most people agree on that. So, you know, putting that
aside, also putting aside the point that was already made—Stuart's point that instead of getting the kind of interactions that are imagined when we engage in these big racial preferences we sometimes get the opposite, that what happens on campus is the stereotypes are promoted because there is a gap in academic credentials that is largely an artifact of preferences, and so in that respect we're not getting the kind of benefit from diversity that I think that Powell was thinking of in the Bakke case.

But the most important point I have to make here relates back to the mismatch issue, and the evidence is not slight in the area of science and engineering, that mismatch is a problem. There have been, you know, quite a few studies at this point and the evidence is overwhelming. We would have more doctors, more dentists, more minority engineers, more minority scientists if we didn't engage in racial preferences.

So what are we saying when we're saying that there are some benefits from diversity? What we're saying then is that somehow minority students should nevertheless go to a school where they're not going to flourish as much and that they are essentially public utilities for the benefit of white students. That makes absolutely no sense, the notion of let's send minority students to a school where they're less likely to come out physicians, less likely to come out with high-prestige science and engineering majors because we want them somehow to benefit the white students. I mean, that just seems just bizarre to me.

I did want to make a couple of other comments here, though. I'm trying to look for some common ground. Like, Ted, I want to be your friend too.

[Laughter.]

PROFESSOR GAIL HERIOT: And it occurs to me that we're already agreeing on one point here, on the discipline issue. You are making the point that there are some pretty darn bizarre school discipline issues. But looking back at the notes of what I said here, I said in my initial remarks it is entirely possible that the way schools discipline children today needs improvement, but to look at it is a race discrimination issue is a mistake. Boy, is that ever true. There are some utterly bizarre discipline issues that I've been reading about in the paper.

And why do you think some of these things happen? You know, it's a complicated world out there and we get back to big government versus small government. For example, did you know that a few years back Congress passed a law that provided a nice big pot of money to those schools that wanted to hire more police officers to patrol the schools?

Well, what happens when there's money for police officers but not for other kinds of discipline? You know, the hammer is the only tool Congress gave them, so everything is a nail. Students get arrested for things they used to get a paddling for or they used to simply, you know, be sent to the library and told to sit still and not make another noise. But instead they get sent down to the police department.
I agree with you, Ted, that that's a problem. But if we look at it as a race discrimination problem we're not going to solve it. What we need to do is look at it for what it is, a problem of over-criminalization in the area of schools. And so there's something we can agree on, and I would be glad to help you out with that in lobbying Congress to stop that.

Other things that I think maybe with Marty we might have some common ground, and number one, Marty, I think that the U.S. Commission on Civil Rights should study legacy preferences because I think we both might get some information out of that that we'd be interested in.

But, number two, if you look back at the history of state universities, it's only in the last generation or two that some state universities have become super elite little Harvard, Yale, Stanfords in their own right. I don't think that's a particularly healthy thing. I would prefer that state universities bear in mind that taxpayers are footing the bill for that and that that's probably not the best institution to be super-elite. And if the schools were less elite, there would be less of a problem with racial diversity. It would come naturally without having to have preferential treatment. Let Harvard, let the Cal Techs of the world, and a lot of private schools, maybe be more academically elite. But there are some state universities that in my opinion are over the top on this.

MARTY CASTRO: May it please the court, may I respond to my colleague, Your Honor?

[Laughter.]

PROFESSOR TED SHAW: Can I get some equal time?

JUDGE CARLOS BEA: Sure.

PROFESSOR GAIL HERIOT: But I agree with you, Ted.

JUDGE CARLOS BEA: Go ahead.

MARTY CASTRO: Gail, I do consider you a good friend and we've actually collaborated a lot at the commission. I appreciate that. But I don't agree with you on the premise or the studies that you cite that say that if you eliminated affirmative action programs you'd actually have more minority—and I don't know if you said women as well, but more minority professionals that are being admitted to these schools.

I think the facts and the history is just the opposite. We've had schools prior to affirmative action that have been there for centuries, for decades, and they did not start spewing out minority—African American, Latino, or women—lawyers, judges, doctors. Not at all, until affirmative action programs were in place. And I think studies exist that show that quite the opposite of what you're saying is true. And in
fact, the studies that show that there would be more without affirmative action have faulty methodology. It's just plain and simple.

**PROFESSOR GAIL HERIOT:** Nobody has even criticized the methodology in any of the many science and engineering studies.

And let me just say one more quick thing, and that is a little earlier you were saying that your impression may be that some white people are sort of worried about minorities becoming more prosperous. Note what happens to white students. They go to the school that their academic credentials allow them, you know. What we're doing is we're treating minority students in a way that we don't treat white students. So if the belief is that somehow there's, like, this group of white people that are deciding what to do to keep minorities down, look what they're doing to the white students.

**MARTY CASTRO:** But there are white students who are being—

**JUDGE CARLOS BEA:** I'm sorry—

**MARTY CASTRO:** —being admitted over less-qualified—less-qualified white students are being admitted over more-qualified white students. What about that?

**PROFESSOR TED SHAW:** I'm only standing up because—

**MARTY CASTRO:** It's your turn.

**PROFESSOR TED SHAW:** —a lot of folks here I can't see. We're out of line of vision. I'm not getting up to give a speech but I do want some equal time.

[Laughter.]

**PROFESSOR TED SHAW:** So a few thoughts.

You know, I'm doing triage here. So, Stuart, I would love to have a dialogue with you—and, you know, we can have it offline if you like—about terminology. Suffice it to say that just because the Supreme Court uses some terminology doesn't mean to me that it's beyond criticism.

You know, I'm mentoring a young black man who is in the Bronx, grows up in very challenging circumstances, and I'm mentoring him. And the other day he told me he was about to take the SAT, and I had asked him before about taking an SAT course. He told me that, you know, the course was something like, you know, thousands of dollars. There's no way that he could take it. And I didn't have the money to give it to him. I would have if I did.

You know, there's a lot of common ground we probably can find, and that should be one of them, when we talk about what the SAT reflects and who gets to prepare for it and how that goes beyond race.
On that point I want to make very clear, my new best friend Gail—

[Laughter.]

PROFESSOR TED SHAW: —that I do believe that working-class and poor white Americans have gotten the short end of the stick in this country, for a lot of reasons—not affirmative action for the most part, though people believe disproportionately that was it and we could have a bigger dialogue about that. But I'm all in favor of thinking consciously about having to address the inequality that they experience also for, as I say, a lot of reasons.

But I do want to—the core of what I want to talk about for a quick moment is taint, this notion of taint, you know. And, you know, with the degrees of African Americans and Latinos who go to, quote, "lesser" institutions—and you can use that terminology; I'm using it—would they be respected more? Would there be less taint than the degrees of somebody who goes to a greater institution? But more importantly, how do you know how to apply taint?

You know if you apply it—what I hear you saying is that the degrees of all minorities—African Americans, Latinos—are tainted because it's suspected they got in because of affirmative action. There's a deep, deep problem with that kind of analysis, you know? Why should I not apply taint to men, primarily white men, maybe some women, of a certain age and say, look, you went to college at a time when you got a pass, or at least you got in, to schools where no people of color could get in, you know, so I question your qualifications? I don't do that. I don't question that.

Now, some people might say, well, you have no reason for doing that, because you presume that they're qualified, which is one of the things that's wrong with the dialogue about so-called reverse discrimination as opposed to just plain old discrimination. But where that presumption comes from, I don't know. But this whole "tainted" business is a problem. You know, when I graduated from Columbia Law School and took the bar, I didn't take the "black bar," you know? I took the New York bar and then the California bar, and passed them, you know.

So this "taint" business is deeply problematic, but if the question is whether or not people have a taint because they attended a first-rate institution and they're people of color, I think that reflects more a problem with how people see race than it does anything else. I don't think it's about affirmative action. I think that's about something else. But, you know, we can disagree about that.

I'll stop there except to say that, you know, you all have colorblindness, conservatives. That's yours now. It's not my goal, you know? We all see race. The question isn't whether we see it. The question is what its significance is, how we treat one another. Look at all of the reaction to the election, you know, what Romney is saying, what others are saying about why he lost, you know?
We all talk about race, you know. The Republican Party sure is talking about race. Now, I realize it's not the Republican Party. But it's not about colorblindness. The question is whether we, in spite of seeing race, whether we do justice, whether we treat each other fairly and work for opportunity.

JUDGE CARLOS BEA: Thank you, Ted.

[Applause.]

JUDGE CARLOS BEA: We're now going to take questions from the public. Would you please state your name and where you're from, and direct your question to one of the panelists, if you would?

MAYA NORONHA: Okay. Well, I have a question for all of the panelists.

JUDGE CARLOS BEA: All right. What's your name?

MAYA NORONHA: My name is Maya Norohha.

JUDGE CARLOS BEA: And where are you from?

MAYA NORONHA: I'm a Georgetown Law graduate.

Why do all of you have the premise that individuals of a certain race or those who come from a certain continent are homogenous? There are different countries, different religions, different languages, and different castes in Asia. Who is an Asian American anyway? Legalizing stereotypes is wrong. Judge me by what I have done right or what I have done wrong and not by a racial category that I did not choose.

[Applause.]

JUDGE CARLOS BEA: Does anybody want to answer that question?

PROFESSOR TED SHAW: Well, I'll just say that I don't make the presumption that you just talked about, although immigrants that have come to this country have come to this country that has a deep, deep, and long history and, you know, it doesn't get wiped away because somebody comes to this country.

I'm not saying that you should be categorized in a way that America tends to categorize things, but there's a legacy here that's still being worked out and worked through with respect to discrimination. And I think that people who come to this country have to recognize that too.

MARK MITTELLEMAN: Mark Mittelman from St. Louis. The title of the program I think is, affirmative action; who benefits? And while I'm not sure that any of us can solve today the problem of who's hurt by it, we know that there are some people who definitely benefit. And there are people with titles like "dean of diversity" and "head of diversity outreach" in the corporation. And those people are getting paid,
and maybe following the money is the way to address this question. Would anyone like to speak to that issue?

**PROFESSOR TED SHAW:** Sure.

**PROFESSOR GAIL HERIOT:** I—

**PROFESSOR TED SHAW:** Well, go ahead, Gail.

**PROFESSOR GAIL HERIOT:** I just want to point out that during the Proposition 209 campaign in California I debated dozens and dozens of people on the issue of whether or not that initiative should pass. And almost all of them were people who had jobs in the diversity industry. Those were the people that were most interested in making sure that it got defeated. And I don't think that's just, you know, an odd, random fact. I think that that is, in fact, the group that is most interested.

**STUART TAYLOR JR.:** Two points I might add in response to that. One, if you read Heather Mac Donald's article on this, there is just an astonishingly long list of diversity bureaucrats at various University of California campuses. And Roger Clegg, who may be here, could tell an interesting story about one of the heads of—how one of the heads of diversity at the University of Wisconsin helped orchestrate a near-mob occupation of his press conference when he went there to criticize racial preferences.

**PROFESSOR GAIL HERIOT:** I wouldn't call that a near-mob. That's a mob.

**STUART TAYLOR JR.:** Well, I'll leave it to Roger to say whether it was a mob.

**JUDGE CARLOS BEA:** All right. Next question?

**PROFESSOR TED SHAW:** Well, wait a minute. With all due respect, Judge, you know, I passed on to Gail but somebody else on this side ought to get an opportunity to say a word about that.

And the one thing I would say about diversity goes back to what I said before. You know, advocates for African Americans at the moment of time that Bakke was decided thought it was a loss, for reasons that I don't have the time to go into now. But it was Powell who created that diversity rationale, as I said, because people thought that the remedial rationale was unpalatable. You know, you don't want to talk about it. It's unpleasant. So having created that, there are consequences that have followed. But if diversity is the rationale, then I think people shouldn't be surprised that what you get is people who work on implementing it.

Now, the other thing is diversity has become another way of saying, let's do something to continue to see that we bring people in who historically have been excluded. Would I apologize for people having that as part or whole of their jobs? I wouldn't, but maybe you all think that's improper. I don't apologize for that.
JUDGE CARLOS BEA: Next question?

MARCO BROWN: Marco Brown from Salt Lake City.

So my wife and I have a son. His name is Elliot, and he's a black American. We got him from—adopted him from St. Louis. And so we put him in private school because no, you know, socioeconomic group or no group does worse in public schools than little black boys, unfortunately. We speak, you know, our respective foreign languages to him in the home. You know, I'm an attorney; I have my own firm. My question is, does my son deserve racial preferences when he gets to apply to college?

JUDGE CARLOS BEA: What do you think, Marty?

MARTY CASTRO: Well, your son may be going through, as he grows up, a society that still has institutional racism. There are studies that show that African Americans of equal wealth and education to white Americans still live in segregated communities. Their children still go to substandard schools. Their children have less money spent on their education than others, based on how we fund our education.

My sons, they live in a community that's much more affluent than the one I grew up in, yet my son—my eldest son has faced bullying and harassment at school based on his ethnicity. And it has had a dramatic and negative impact on him and his studies and his school—his school involvement. So there are issues such as that that many children, because of their color or their ethnicity, are still going to confront. And so I think I would not write off your child as someone who should benefit from a program like affirmative action in the future.

STUART TAYLOR JR.: One quick footnote: President Obama, then Senator Obama, was asked in 2007 by George Stephanopoulos in a TV interview whether his daughters, coming from a fairly prosperous family, should qualify for racial affirmative action preferences, whatever you call it, in admissions. The short answer was, no, my children are pretty privileged. That is not the way the policies have been implemented, of course, during the Obama administration.

PROFESSOR TED SHAW: Maybe, maybe not. It depends on his experiences, not as a—maybe not as a remedial rationale. I don't know. If diversity is still around, maybe, because his experience is going to be different from if he was white.

In all likelihood there are some things that he's going to experience—you know, you're raising a young black man. You know, there's a talk that you're going to have to have to him that you don't about. I'd like to talk to you about it if you don't know about it, you know, about how we interact, for example, with the police, you know? There's some experiences he's going to have that are going to be different. I commend you in what you're doing. I wish you the best.
JUDGE CARLOS BEA: Next question.

ATTENDEE: My name is Jay Schweikert [ph]. I'm a law clerk on the D.C. Circuit.

It seems to me that a substantial portion of the disagreement on the panel is almost entirely empirical about—specifically on the questions of, one, how well the beneficiaries of affirmative action perform relative to other students in schools, and then what they go on to do afterwards and what effect affirmative action programs have on the number of minorities in particular fields. That's probably not a question that we can actually really resolve here unless we all sort of sat down and bent over charts and tables and really hashed out the methodology.

But the question that I want to ask, I think particularly for Mr. Castro and Mr. Taylor and Ms. Heriot, since I think you were the ones talking about this more so—and obviously Mr. Shaw can weigh in as well—if the sort of empirics on those questions really were as your opponents in this debate say—if they really were flipped and, you know, the studies that we sort of made abstract reference to a number of times, showed what your opponent says they're showing, would that be sufficient for you to change your mind on the desirability of affirmative action policies?

STUART TAYLOR JR.: All right, I'll go first.

I think there really isn't much dispute about the underlying facts that I outlined, the low grades in college, the subpar graduation rates, the bar exam flunk rates, the science dropout rates, the scholarly aspirations disappointment rates. None of those have been plausibly disputed by anybody and I didn't hear them disputed today exactly.

The dispute is about whether all of this depressing effect on black academic performance within colleges where affirmative action has brought them is leaving them worse off than they would be if they were at colleges for which they were well qualified. There is a very honest dispute about that, and obviously it's a matter of degree. Some people are probably worse off; some people are probably better off, you know? And then the numbers get complicated on how many there may be in each set.

I would say that if I were convinced that I was wrong in my premise that a very large percentage of black students, and to a lesser extent Hispanic students, who were supposed beneficiaries of affirmative action—if I was wrong on my premise that they'd be better off at less prestigious institutions, I would be far more favorable towards the policy than I am. I'm not untroubled by all of the traditional arguments about affirmative action—the stigma argument, the unfairness argument—but I'm most troubled by what I see as the negative effect on a lot of black students.

JUDGE CARLOS BEA: Go ahead.

MARTY CASTRO: I think he wanted us to all comment on that.
First of all, I don't agree with that, but if I did, if that was the premise that I undertook, what Stuart just said, that students of color who are well qualified to be in non-elite schools—that means ultimately that they're not qualified enough to be in elite schools—would I still support affirmative action, I would say I would support an expansion of it beyond just looking at college and professional schools because ultimately if I accept the premise that those students are not well qualified to matriculate at an elite school without some sort of taint, that means to me that I've got to go back, if I really want to make a change on this, to the beginning of that pipeline and ensure that the student in pre-K and in K and on forward has equal access and equal resources, so that the point when they get here to apply to college or law school they are better situated to be well qualified to matriculate into those schools.

So it really says to me that we should expand the program and make sure that, do we really want to be helpful to the minority students? If our effort here is not to stigmatize and to really advance them, then let's start really changing the pipeline at the very beginning.

PROFESSOR TED SHAW: Assuming what Stuart said is true—and I'm not going to—you know, let's assume that for a moment. You know, my issue is this: Even if you have minority students tending to congregate at the bottom of their class, I think that it's still—first of all, they're still qualified to be at those institutions. They're graduating from those institutions. They shouldn't be any more tainted than the other white students who may be with them who go out untainted because they have a degree from Harvard or Yale or whatever.

So, you know, that's part of my answer. Am I willing to look at the facts and think more about some of this? I always am. But the question I think—I think Stuart is right about this. The question isn't at the bottom of the—at the end of the day, what the facts are. The question is what we do about them.

JUDGE CARLOS BEA: Thank you very much.

Manny?

PROFESSOR GAIL HERIOT: Wait. I didn't get to—

[Simultaneous speaking.]

PROFESSOR GAIL HERIOT: I just wanted to comment on this as well. I want to also preface it with the notion that, again, on the science and engineering area this is not like some, you know, one empirical study. There's one by Rogers Elliot that was more than 10 years old now. There's one by Frederick Smyth and John. J. McArdle. There's one by Sander and Bowles. And now there's a new study out of Duke that basically supports those studies. That's four studies that suggest mismatch in science and engineering, and nobody's laid a single, solitary hand on one of them. You know, the evidence is overwhelming.
All that said, if we go into the alternative universe where it turns out that all of this is untrue—I have to confess, I am not a Puritan by nature. This would not be my issue if I did not believe that mismatch is a problem. I'm not certain, you know, how I would feel about the other aspects of it but I am absolutely certain that I would not be up here if it were not for the mismatch issue. That doesn't just, you know, tip the scales. It's huge, and it's certainly always been at the center of my thinking on this issue, even before I had data as solid as we have now.

**JUDGE CARLOS BEA:** Manny?

**MANNY KLAUSNER:** Manny Klausner from Los Angeles.

I think that there would be probably agreement among all the panelists that there is a racial gap in achievement in terms of grades, GPA, in high school graduate rate—high school graduation, at colleges, and in law schools. I think all of the panelists would probably agree that there is a racial gap in attrition rates and those who don't graduate from high school or college for especially top-tier colleges and law schools.

And to the extent that the racial gap is agreed to—and we realize there are many inequities and inequalities in the system—I'm particularly curious from the defenders of having race-conscious policies whether you favor, as perhaps a more tailored and less polarizing approach, to focus on going to the beginning of the pipeline, as Marty referred to, and look at K-through-12 as producing a very inequitable result—frequently underfunded schools that are dysfunctional; some people call them cesspools or worse—and maybe favor, instead of the present system, more focus on school choice: school vouchers, charter schools, home schooling some of the more modern technological means of bringing up to level the quality of education K-through-12. And then you have people have a more likely chance for success when they go on—in order to graduate high school, do better and go to better graduate schools.

**MARTY CASTRO:** Manny, I didn't mean to say that we would focus on the early childhood to the exclusion of continuing to focus on higher education. I think we need to look at the entire pipeline, because if we were just to focus exclusively on pre-K and K-through-12, we would have to wait many, many years.

**MANNY KLAUSNER:** But would you favor school choice?

**MARTY CASTRO:** But I do agree with you that we ought to look at—and I'm not a—I'm in the minority on this in my community. I am actually willing to look at issues like vouchers. I don't think it's going to necessarily work for everyone but I'm willing to have that conversation, because in certain urban schools like the City of Chicago there are a lot of schools that are failing our kids. Forty-four percent of schools in Chicago and 22 percent of schools in Illinois are now majority—you know, are Latino schools. And so I'm willing to look at other alternatives such as that but not to the exclusion of other possible scenarios.
PROFESSOR TED SHAW: I take the point. I agree to a great extent. Vouchers—you know, that debate happened. The Supreme Court upheld their use. I don't think they're a magic bullet but they're part of, you know, the overall educational scheme. The same thing is true of charter schools that are playing an important part in education. I'm not opposed to them, but I am not willing to give up on the vast majority of students who are in public schools who are experiencing the poor education you're talking about. So the danger is in focusing on those things and not focusing on these other students. But, you know, in general I agree.

PROFESSOR GAIL HERIOT: Touchback? Can I—

JUDGE CARLOS BEA: Go ahead.

PROFESSOR GAIL HERIOT: I just wanted to point out that Manny and I both worked on Proposition 209 in California, and right after that election one of the most gratifying things that happened was that people who had opposed Prop. 209 started thinking about, gosh, what are we going to do at the K-through-12 level? And, for example, the University of California at San Diego started a school—the Pruce [ph] School I think it's called—that was intended to help minority students, and the school has been a success.

So it's something that's important that when racial preferences are taken off the table, as they were in California, that has the beneficial effect of getting people to think about what other solutions might be out there and to concentrate where we should be concentrating, and that is in the K-through-12 level.

STUART TAYLOR JR.: Very quickly, Chapter 17 of our book, which you can all take a break and run out and buy—

[Laughter.]

STUART TAYLOR JR.: —is about fixing K-to-12 schools and about what the root of the problem is. And certainly one point is—one reason why, as Judge Bea said, I'm afraid we may have these preferences a hundred years from now is that what's coming out of schools is a very unequal racial group, and the gap is not closing.

Second, I'm proud that my wife Sally volunteers in one of the charter schools to try and make a difference in this downtown D.C. Prep.

Third, I think, although I could not prove, that one of the reasons for low achievement of minority groups in the schools is affirmative action. John McWhorter, eloquent black critic of affirmative action, has written in essence: I knew from the age of 10 that there was something called affirmative action and that it meant that I would not have to work as hard as my white classmates to get into a good college, and I acted accordingly.

JUDGE CARLOS BEA: Next question.
PROFESSOR TED SHAW: Well, there's one point of view.

STUART TAYLOR JR.: Once again, I think but cannot prove.

ALISON SOMIN: Alison Somin, U.S. Commission on Civil Rights. The title of this panel mentions, who benefits from race and gender consciousness, but the dialogue so far has been almost entirely about the race part of that and I would like to shift focus slightly.

Increasingly there is a lot of evidence that in the university admissions context the answer that, perhaps surprisingly, is men—in many universities that are more than 50 percent female there is increasing evidence that men actually get a leg up in admissions. I wondered if the defenders of affirmative action actually support this policy. And if so, why?

Also, what's interesting about the gender affirmative action debate is that several panelists have talked about the relationship between the compensatory justice and diversity rationales. When defending preferences for African Americans or Hispanics, the two rationales work together. In the gender one they really don't because men, the advantaged sex, are getting preferences, which seems to be very odd to many people. So I wonder if you could comment on that issue as well; that is, how the pulling apart of the two rationales in the gender context changes the debate.

JUDGE CARLOS BEA: And your question?

ALISON SOMIN: Do you support gender affirmative action? And, two, does the pulling apart of the compensatory and diversity rationales in the gender context change the discussion in the race context?

JUDGE CARLOS BEA: How about that, Marty?

MARTY CASTRO: Well, I didn't make reference to the fact that white males were now being admitted less than white females, and that maybe white females could expect a similar lawsuit from white males at some point to the extent that they may argue, as folks are arguing that, from race-based affirmative action that race and ethnicity are taking seats away. And I don't believe they are taking away seats.

But I do think that white women have really been the true beneficiaries of affirmative action. You know, law schools I believe now are over 50 percent white women.

ALISON SOMIN: That's not affirmative action. That's the whole point.

MARTY CASTRO: But they're not over 50 percent people of color. So, you know, women have really been the beneficiaries of programs such as this. And whether that's a success now or whether someone would argue, well, we've reached
that level of gender equality, I don't know. I don't know the answer to that. But when you look at society still, women are still underpaid for the same kind of work. Women are still discriminated against in society in ways that men are not.

So you cannot discount that and say, well, you know, we're going to say the women have made it now; they're outstripping the admissions of men and we're going to then just say, okay, work is done.

**JUDGE CARLOS BEA:** I'm sorry; I'm going to have to call this session because it's 2:15. We could go on and on and on, but the program says that we have to end at 2:15.

**ALISON SOMIN:** Okay.

**JUDGE CARLOS BEA:** So let's have a hand for the panel.

[Applause.]