

1 In Bakke, the Supreme Court determined
2 that the attainment of a diverse student body was
3 constitutionally permissible as a goal for an
4 institution of higher education. In Grutter, the
5 Court not only upheld Bakke's reasoning, but
6 extended it. And in Justice O'Connor's analysis
7 of the benefits of diversity in Grutter included
8 promotion of cross- racial understanding,
9 breakdown of racial stereotypes, a more
10 enlightened and interesting level of discussion,
11 greater learning outcomes and, more importantly, a
12 better-prepared and more diverse professional
13 workforce, military and society.

14 Thus, the Court held that even under
15 strict scrutiny analysis, student body diversity
16 is a compelling state interest that can justify
17 the use of race in university admissions.

18 Now, O'Connor's opinion in Grutter
19 seemed to stretch the application on the benefits
20 of diversity far beyond the boundaries of higher
21 learning. The benefits of diversity that O'Connor
22 listed are not isolated to the context of a law

1 school but are, in fact, significant social
2 benefits of diversity per se.

3 Gratz, decided on the same day as
4 Grutter, provides an important point of
5 clarification. In Gratz, the petitioners argued
6 that "diversity" as a basis for employing racial
7 preferences is simply too open-ended, ill-defined
8 and indefinite. The Supreme Court rejected that
9 argument, citing its rationale in Grutter, without
10 limitation to higher education applications.

11 After Grutter, several lower courts
12 interpreted the structure of Grutter and Gratz to
13 suggest a broader reading of diversity as a
14 compelling state interest. In Lomack, in a case
15 about racial diversity in firehouses, the Third
16 Circuit overturned the New Jersey District Court's
17 interpretation of Grutter, stating that Grutter
18 does not stand for the proposition that the
19 benefits of diversity are always a compelling
20 state interest regardless of the context. However
21 the Court -- rather, the Court in Grutter held
22 that, or that holding stands for the proposition

1 that educational benefits of diversity can be
2 compelling to an institution whose mission is to
3 educate. Now, that can be interpreted as much
4 broader than just education -- schools.

5 There, the Court found that the fire
6 department's mission is not to education. However
7 in *Petit*, the Seventh Circuit used the rationale
8 in *Grutter* in its analysis of the Chicago Police
9 Department and found that there is an even more
10 compelling need for diversity in such a context --
11 thus applying *Grutter*'s compelling state interest
12 in the social benefits of a diverse police force.

13 *Petit* has not been overruled, and it
14 continues to be good law -- even with *Ricci*.

15 Now, Parents Involved's potential to
16 limit *Grutter* -- I suggest that Justice Kennedy's
17 concurrence is instructive in that regard.
18 Diversity remains a compelling state interest and
19 race may be used as a factor in attaining the
20 social benefits of that diversity, as long as all
21 other race-neutral options have been exhausted, or
22 race is used as only factor in a holistic approach

1 to examining an individual.

2 While it can be argued that the majority
3 holding in Grutter is context-specific to higher
4 education, Justice Kennedy's concurrence disagrees
5 with the majority on this point, shifting the
6 weight of the Court to the dissenting side. While
7 one plurality attempted to dismiss the benefits of
8 racial balancing altogether, it could not attain
9 the majority support and is only dicta. And, in
10 fact, although Kennedy did not join the dissent,
11 his concurrence gives the dissent a majority in
12 the premise that race-based considerations are
13 appropriate in pursuing the social benefits of
14 diversity.

15 Kennedy's concurrence held that
16 diversity, depending on its meaning and
17 definition, is a compelling education goal a
18 school district may pursue.

19 Now the dissent in Parents Involved
20 sought to expand Grutter, allowing the broad use
21 of race-conscious criteria, including to cure
22 racial isolation. But Kennedy declined to join

1 that, believing that this was too broad.

2 Therefore the standard that Kennedy
3 believes is appropriate is somewhere in the
4 middle, between a complete elimination of racial
5 balance, and a permissive, if you will,
6 racial-balancing standard. It is a narrow
7 standard under which race is merely one factor
8 among many that describe individuals and, as such,
9 it may be weighed and considered in contexts where
10 diversity is beneficial.

11 Just -- I know I have not much time left
12 and I want to move on to some other points.

13 The Commission also asked if the
14 Commission could show that broadcast diversity is
15 a compelling state interest, how could it
16 establish a sufficient nexus between ownership
17 diversity and diversity in viewpoint programming?

18 There have been a number of studies on
19 the nexus between minority ownership and broadcast
20 diversity, some of them authorized or initiated by
21 the FCC. There was one by Sandoval, most
22 recently, which was not authored--authorized by

1 the FCC but is a very good study, with some
2 support -- minor support -- from Hammond and Honig
3 that evidence of the nexus between minority
4 commercial radio ownership diversity and service
5 in the public interest.

6 Minority radio broadcasters
7 overwhelmingly contribute to the diversity of
8 American radio programs by airing
9 minority-oriented formats. 72.5 percent, or 591
10 of the 852 minority-owned commercial radio
11 stations air minority-oriented formats. And that
12 number is even higher if the silent minority-owned
13 stations are eliminated.

14 In Bachen, Hammond, Mason and Craft in
15 1999, which was a study initiated by the FCC, this
16 study addressed O'Connor's dissent in Metro about
17 how to measure viewpoints, and about the nexus
18 between race and -- or ethnicity of the station
19 owner and content. Given the First Amendment
20 values behind the diversity rationale, the
21 research focused on speech that courts have held
22 to be at the core of the First Amendment

1 protections, news and public affairs programming.

2 In this regard, the study also examined
3 whether race or ethnicity of the station owner
4 affected the quantity of news in the public
5 affairs programming, and whether it impacts the
6 likelihood of the stations to cover particular
7 issues of interest.

8 The findings revealed that
9 minority-owned stations, especially radio
10 stations, differed in several ways from their
11 majority-owned counterparts in decisions made
12 about programming and news focus. Minority-owned
13 radio stations were significantly more likely to
14 choose a program format that appealed to a
15 minority or ethnic audience, and to provide news
16 and public affairs programming of particular
17 concern to minority or ethnic audiences. They
18 were also more likely to tailor their news stories
19 to minority community concerns.

20 I'm assuming - am I out of time?

21 SPEAKER: (inaudible)

22 MR. HAMMOND: Yeah. I'm going to stop

1 there.

2 MR. LEWIS: Thank you, Professor
3 Hammond. Our final panelist for this first panel
4 is Professor LaVonda Reed-Huff. Professor
5 Reed-Huff is an associate professor of law at the
6 Syracuse University College of Law. She teaches
7 communication law, property, and wills and trusts.

8 Professor Reed-Huff has published
9 numerous scholarly works and law review articles
10 addressing broadcast ownership, political
11 broadcast advertisements, and placement of
12 satellite dishes in clean energy devices, which, I
13 guess, not necessarily part of the topic
14 presentation today.

15 In 2001 she was named a fellow with the
16 Institute for the Study of the Judiciary,
17 Politics, and Media at Syracuse University.

18 She earned her Bachelor of Arts degree
19 in economics from the University of Virginia, and
20 a law degree from the University of Southern
21 California.

22 Welcome, Professor Reed-Huff.

1 MS. REED-HUFF: Thank you. Thank you
2 for having me today. I want to thank the Media
3 Bureau and the Commission for addressing the issue
4 of media consolidation and ownership by women and
5 minorities. It's an honor to speak with you today
6 regarding these topics of great importance to our
7 American democracy.

8 As I wrote in a law review article
9 several years ago, it is imperative that while the
10 Commission goes about the issue of localism in
11 broadcasting, it must not lose sight of the
12 continued relevance and importance of minority
13 ownership. While localism and minority ownership
14 are closely tied, they must be addressed as
15 distinct issues.

16 Additionally, it is important that the
17 Commission not forget about broadcasting as it
18 goes about the important work of addressing
19 broadband availability and accessibility in rural
20 and low-income areas.

21 Unfortunately, as we have heard today,
22 the current landscape of media ownership is not

1 particularly encouraging. The number of minority
2 broadcast licensees, as we have heard, has dropped
3 significantly since the enactment of the
4 Telecommunications Act of 1996. And broadcasters
5 of all races are facing increasing competition
6 from the Internet and other media platforms.

7 Advertising dollars and bank financing
8 are harder to secure as a result of economic
9 challenges facing our country's business, and as a
10 result of broadcast markets laden with assets
11 bought at inflated prices in recent years.

12 Additionally, minority licensees, as
13 well as non-minority licensees broadcasting radio
14 formats appealing to minority audiences, continue
15 to face discriminatory practices by advertisers.
16 The sad reality is worsened by an overabundance of
17 syndicated programming on urban radio stations,
18 and the unfavorable allocation of advertising
19 dollars derived from syndicated programming.

20 The answer to the question of how the
21 Commission might improve minority and women
22 ownership statistics is not an easy one, and I

1 commend the Commission for undertaking it.

2 As a communications law scholar, and a
3 member of the Syracuse community, I have witnessed
4 the impact of the lack of any minority-owned
5 broadcast outlets in the city's communities of
6 color.

7 In the 1990s, local businessman Robert
8 Short and Butch Charles were licensed to operate
9 full-power radio stations in Syracuse. They were
10 the first and only African-Americans ever to hold
11 an FM radio license in the city. During their
12 time as licensees, both men fulfilled lifelong
13 dreams of becoming broadcasters and delivering
14 relevant, useful and high-quality informational
15 and entertaining programming to their community.
16 By most accounts, they were successful in that
17 endeavor.

18 However, the consolidation resulting
19 from the 1996 Act made it nearly impossible for
20 them and other small licensees, regardless of
21 race, to compete with conglomerates for
22 advertising dollars which are necessary to manage

1 overhead and other financial costs. As a result,
2 both men were saddled with significant debt
3 burdens and opted to sell their stations to
4 non-minorities who had less of a connection to
5 their audiences, and who saw the urban format
6 primarily in terms of dollars and cents, and less
7 as a platform for civic engagement and education.

8 The result is that Syracuse now has only
9 one radio station primarily serving its
10 African-American community. The station is owned
11 by non-minorities and, although having made
12 significant positive changes in the past year,
13 struggles to maintain simultaneously profitable
14 and relevant -- remain, excuse me, simultaneously
15 profitable and relevant to its target audience.

16 The new public affairs program offered
17 by this particular station was just launched last
18 week and seems to be successful. It's a two-hour
19 long program hosted by a local leader. It's a
20 call-in program where members of the community are
21 able to discuss topics of relevance on the
22 national level as well as on the local level.

1 In the past year, Syracuse also lost an
2 African-American television station due to a
3 shared-services agreement that transferred
4 management of that station to a non-minority-owned
5 corporation that also owns and operates another
6 major network affiliate in the market. The two
7 television stations now simulcast the same news
8 programming, depriving the market of an essential
9 voice and independent source of information.

10 In my work with local media outlets, I
11 hear a continuing concern among those serving
12 communities of color about the difficulty they
13 face in securing advertising dollars from local
14 and national businesses. In 2010, there is still
15 a reluctance of advertisers to purchase time on
16 urban radio. Although the Commission requires
17 broadcasters to certify, upon license renewal,
18 that they include in their advertising sales
19 contracts non-discrimination clauses prohibiting
20 so-called "no urban and no Spanish dictates," this
21 practice continues, making it more difficult for
22 stations serving those communities to survive in

1 an advertising-driven radio market.

2 Advertisers continue to forego
3 purchasing air time on urban radio stations so as
4 not to encourage minority patronage of their
5 businesses, products and services, and because of
6 a sentiment that the minority listening audience
7 cannot be persuaded via the medium to patronize
8 their businesses, in some cases.

9 The Commission must actively enforce the
10 rules prohibiting discriminatory practices in
11 advertising. Additionally, to the extent that
12 licensees and advertisers are suspected of
13 violating other Federal and state anti-
14 discrimination laws, the Commission must not turn
15 a blind eye.

16 In recent years, as we have heard, the
17 Federal judiciary has not been particularly
18 friendly to affirmative action programs intended
19 to help racial minorities. The Supreme Court, as
20 we have heard, has held that the appropriate
21 constitutional standard to evaluate race-based
22 governmental programs is that of strict scrutiny.

1 Under this standard, the government's program must
2 serve a compelling governmental interest, and the
3 program must be narrowly tailored to serving that
4 interest.

5 In 1990, the Supreme Court in Metro
6 Broadcasting applied a lower standard in the
7 context of broadcasting. But in Adarand v. Pena
8 and, most recently, in Parents Involved in
9 Community Schools v. Seattle School District --
10 cases not involving broadcast licensees -- the
11 Court has adhered to the more formidable strict
12 scrutiny standard.

13 In Metro Broadcasting, the Court upheld
14 two FCC programs designed to increase minority
15 broadcasting ownership. It held that neither the
16 Commission's minority enhancement credit policy
17 nor its distress-sale policy violated the equal
18 protection component of the Fifth Amendment
19 because the benign race-conscious measures
20 mandated by Congress, even if they were not
21 remedial, served an important governmental
22 objective and were sufficiently tailored to that

1 end.

2 The Court held in *Adarand*, however, that
3 the Court in *Metro Broadcasting* had applied the
4 wrong standard. It remains unclear after these
5 cases whether the Court will deem broadcast
6 diversity to be a compelling governmental
7 interest.

8 Equally unclear is whether the Court
9 will require, additionally, that the commission
10 demonstrate use of the least restrictive
11 alternative in furthering an interest in broadcast
12 diversity, as could be inferred from a requirement
13 -- as a requirement from reading cases challenging
14 FCC policies and roles in other contexts.

15 Although the Court has recognized
16 diversity in education as a compelling
17 governmental interest, it has differed in *Grutter*
18 *v. Bolinger* and *Parents Involved* as to whether the
19 particular program in question actually did serve
20 a compelling governmental interest, and whether
21 the program was narrowly tailored to serving that
22 interest. It remains unclear to what extent

1 analogies can be drawn between diversity in
2 education and diversity in broadcasting.

3 I would argue that diversity in
4 broadcasting is no less, and perhaps even more,
5 compelling than diversity in education as it
6 relates to our American democracy.

7 In 1998, in Lutheran Church Missouri
8 Synod v. FCC, the D.C. Circuit, in reviewing the
9 Commission's equal employment opportunity rules,
10 indeed questioned whether broadcast diversity
11 could ever be a compelling governmental interest.
12 I believe it is.

13 The government has a compelling interest
14 in broadcast program diversity, as well as
15 broadcast ownership diversity. The broadcast
16 media is essential to our democracy, serving as a
17 check on the three branches of government, and
18 continuing to serve a compelling government
19 educational and informative function for the
20 millions of households that still rely solely on
21 free over-the-air signals for television, the
22 millions who listen to broadcast radio for news

1 and information, as well as the millions who
2 receive broadcast programming via subscriptions,
3 cable or satellite service.

4 Despite a highly competitive current
5 media landscape populated by cable and satellite
6 service, the Internet and highly capable mobile
7 devices of all sorts, the broadcast media
8 continues to be relevant, and vital part of our
9 democracy, serving to educate and inform children
10 and adults as well, on issues of paramount local
11 and national importance, including politics,
12 education, health care, the arts and social
13 justice, as well as variety of global issues.

14 The fact has been brought to bear, or
15 was brought to bear so profoundly last election
16 cycle, in 2008, in the Presidential campaign.
17 Today, people of color continue to rely
18 significantly on free over-the-air broadcast
19 signals to keep them connected and engaged in the
20 world around them, as was shown by Professor
21 Baynes in his slides.

22 Barriers to entry, such as monthly

1 access fees for broadband services, and early
2 termination fees for mobile service suggest that
3 the Internet and mobile devices are not adequate
4 substitutes for free over-the-air broadcast
5 service. As such, significant efforts must be
6 expended to ensure that they continue.

7 Diversity of programming choices is
8 essential to achieving a balanced view of current
9 issues and events. And a diverse ownership is
10 essential to achieving diverse programming. As it
11 relates to localism, local communities are best
12 served by locally-owned, managed and operated
13 licensees. As it relates to people of color, it
14 is logical to assume that their interests are best
15 served by outlets that are managed and owned by
16 licensees who are people of color, with local ties
17 to those communities.

18 Any race-based program adopted by the
19 Commission must be narrowly tailored to achieving
20 the compelling governmental interest. In order to
21 satisfy strict scrutiny, the Commission must have
22 data on the programming choices of its licensees

1 in order, first, to address the concerns about a
2 nexus between minority ownership and programming
3 and, second, to address the issue of narrowly
4 tailored-ness.

5 The Commission should evaluate and
6 compare the programming choices of small licensees
7 operating one or two stations, and compare those
8 with their larger competitors. It must also
9 gather accurate and analyze the data about
10 ownership on Form 323.

11 One thing that is apparent from our
12 discussion today is that the Commission must have
13 accurate and current data. And, more importantly,
14 it must thoroughly analyze this data.

15 Finally, the Commission must investigate
16 and evaluate its own past practices, with an eye
17 to any disciplinary practices it might have
18 engaged in over the course of history.

19 In sum, any program or policy designed
20 to enhance minority ownership must clear
21 significant Constitutional hurdles. We take
22 comfort -- albeit little comfort -- in the

1 acknowledgment by the Court in Adarand that strict
2 scrutiny is not necessarily strict in theory but
3 fatal in fact.

4 With current analysis and current data,
5 I think that we can survive strict scrutiny.

6 Thank you, and I'm happy to assist the
7 Commission in any way that I can.

8 MR. LEWIS: Thank you, Professor
9 Reed-Huff. And thank you to all the panelists.

10 I guess this is the time period where we
11 have for questions. And I figured I'd take the
12 opportunity as moderator to start with the first
13 question to all the panelists.

14 I take it there's consensus -- and I
15 think I heard consensus -- that the current state
16 of the law is that race-conscious measures, at
17 least, by the Commission would be subject to
18 strict scrutiny. And strict scrutiny under the
19 established standard means that we have to show a
20 compelling interest, and that the measure we take
21 has to be narrowly tailored to advance that
22 interest.

1 I have a question that's slightly off to
2 one side of that, but on the narrow tailoring
3 part, which relates to the Commission's own
4 institutional competence.

5 There's a theme in the case law that,
6 whenever you take such measures for narrow
7 tailoring, there has to be some kind of
8 individualized consideration given. People can't
9 be reduced to categories or to stereotypes.

10 The Commission had, I think, some
11 ability to give that kind of individualized
12 consideration back in the day of comparative
13 hearing. Now, when most licenses or spectrum is
14 auctioned, and comparative hearings are a thing of
15 the past, what are your thoughts about how the
16 Commission can comply with the obligation -- even
17 assuming we can show a compelling interest --
18 comply with the obligation to give individualized
19 consideration?

20 And I leave it up to you. Whoever's got
21 the first idea can talk first. Or I'll call upon
22 Professor Baynes, since he's first. Since he had

1 the most time to think about it.

2 MR. BAYNES: Yes. And the perils of
3 your name beginning with the first part of the
4 alphabet.

5 I think that, in terms of individualized
6 consideration, that what the Commission probably
7 needs to do is make sure they view each potential
8 applicant individually. And under the comparative
9 hearing process that was easier. Of course, we
10 don't have comparative hearing processes now, but
11 there's no reason why the Commission couldn't have
12 some sort of hybrid process, where they did some
13 sort of internal review of candidates before they
14 put them out for auction -- you know, so that, you
15 know, all the candidates that you're looking at
16 have to meet some sort of test.

17 And remember, it can't be just race, it
18 has to be a variety of different factors that
19 you're looking at. And in making those
20 determinations -- whether it's, you know, veteran
21 status, new business entrants, low income, a
22 racial minority, women, et cetera -- that you then

1 sort of make sure everyone sort of fits into that
2 category, and meets whatever your various
3 standards are for review, and then put them out
4 for auction if that's what you're planning to do.
5 Or, under the text of your policy, those are the
6 ones who would quality.

7 And I think that would be a way --

8 MR. LEWIS: Does that mean the
9 Commission, or maybe the Media Bureau, has to
10 establish a sub-office that replicates, to some
11 extent, the law school admissions office that was
12 at issue in Grutter?

13 MR. BAYNES: Probably yes. It would
14 probably some sort of review like that. That
15 would be my suggestion -- which would be to see if
16 you can sort of parallel it as closely as
17 possible, tagging on the FCC's current regime in
18 terms of distributing licenses with sort of a
19 process sort of very similar to what law schools
20 do in terms of admissions.

21 MR. LEWIS: Do any of the other
22 panelists have a reaction to that idea?

1 MR. HAMMOND: I guess I would support
2 Len's observation. It seems to me that in the
3 auction process, the Commission still establishes
4 at least a minimal set of criteria by which it
5 determines that someone is eligible to even
6 participate in an auction, or in a lottery if you
7 were to do a lottery.

8 So the real issue is the criteria that
9 you establish.

10 It seems to me that historically,
11 broadcasting has had an educational function,
12 whether you talk about news and public affairs, or
13 children's broadcasting, or political
14 broadcasting, those are phenomenally important.
15 There's quite a bit of ink that the FCC has
16 expended on that. I would think that that would
17 be one of the criteria that you would have. And
18 then the question would then be, to the extent
19 that you are using minority-ownership or female-
20 ownership as one of a number of different
21 criteria, that there be some evidence that that
22 ownership will result in the kinds of educational