

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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FRIDAY, JUNE 16, 2006

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The Commission convened in Room 540 at 624
Ninth Street, N.W., Washington, D.C. at 9:30 a.m.,
Gerald A. Reynolds, Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairperson

ABIGAIL THERNSTROM, Vice Chairperson

JENNIFER C. BRACERAS, Commissioner

PETER N. KIRSANOW, Commissioner

ARLAN D. MELENDEZ, Commissioner

ASHLEY L. TAYLOR, JR., Commissioner

MICHAEL YAKI, Commissioner

KENNETH L. MARCUS, Staff Director

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JOHN BLAKELEY
 MARGARET BUTLER, Acting Special Assistant
 CHRISTOPHER BYRNES, Attorney Advisor to the
 Office of the Staff Director + Acting Deputy
 General Counsel, Office of the General Counsel
 (OGC)
 DEBRA CARR, ESQ., Associate Deputy Staff Director,
 Office of the Staff Director (OSD)
 RANITA CARTER
 IVY DAVIS, Chief, Regional Programs
 Coordination Unit
 PAMELA A. DUNSTON, Chief, Administrative Services and
 Clearinghouse Division (ASCD)
 BARBARA FONTANA
 LATRICE FOSHEE
 PATRICIA JACKSON, Chief, Budget and Finance Division
 SOCK-FOON MACDOUGALL, Acting Assistant Deputy Staff
 Director, (OCRE)
 TINALOUISE MARTIN, Director, Office of Management (OM)
 BERNARD QUARTERMAN
 EILEEN RUDERT
 AUDREY WRIGHT
 MICHELLE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

CHRISTOPHER JENNINGS
 LISA NEUDER
 KIMBERLY SCHULD

PANELISTS:

RICHARD SANDER, Professor, University of
 California at Los Angeles Law School
 RICHARD O. LEMPert, currently on leave from the
 University of Michigan Law School while
 serving as Division Director for the Social and
 Economic Sciences
 DAVID BERNSTEIN, currently Visiting Professor at
 University of Michigan Law School and
 otherwise Professor at George Mason
 University School of Law
 STEVEN SMITH, Dean, California Western School of
 Law; Chair of the American Bar Association's
 Council on the Section of Legal Education and
 Admissions to the Bar

A G E N D A

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P-R-O-C-E-E-D-I-N-G-S

(9:46 a.m.)

I. Introduction

CHAIRPERSON REYNOLDS: Okay. On behalf of the Commission on Civil Rights, I welcome everyone.

Okay. At this briefing a panel of experts will discuss some of the effects produced by race-based admissions policies in law schools. The first two experts testifying at this briefing will address whether the costs of racial preferences to African Americans outweigh the benefits.

The second two experts will address the appropriateness of the American Bar Association's Equal Opportunity and Diversity Standard 211 and its accompanying interpretations. Standard 211 seems to require law schools seeking accreditation from the American Bar Association to practice racial preferences in hiring and admissions.

This morning we are pleased to welcome Professor Richard Sanders, Professor at the University of California at Los Angeles School of Law; Professor Richard Lempert, Professor of Law and Sociology at the University of Michigan; and Steven Smith, the President, Dean, and Professor of Law at California Western School of Law and the Chair of the Council of

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1 the Section on Legal Education and Admissions to the
2 Bar of the American Bar Association; and finally we
3 have David Bernstein, a professor at Georgetown
4 University School of Law.

5 MR. BERNSTEIN: George Mason.

6 CHAIRPERSON REYNOLDS: Oh, I'm sorry. Oh,
7 I'm sorry. What did I say?

8 MR. BERNSTEIN: Georgetown.

9 CHAIRPERSON REYNOLDS: Oh, okay.

10 MR. BERNSTEIN: Three Georges around here.

11 So --

12 CHAIRPERSON REYNOLDS: Okay. Thank you
13 for the correction, and that was no slight aimed
14 towards your institution.

15 I welcome all of you on behalf of the
16 Commission. I will introduce everyone and describe
17 your activities and then I will call on you according
18 to the order you have been introduced into the record.

19 First Professor Sander and Lempert will
20 address the issue of the benefits and costs of racial
21 preferences to minority law students, which Professor
22 Sander has analyzed at length in a recent Law Review
23 article.

24 Then President Smith and Professor
25 Bernstein will address the ABA issue.

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1 I'm just going to provide a background on
2 each of our panelists, and at that point we can start.

3 Professor Sander attended Harvard College
4 in the mid-1970s and graduated magna cum laude in
5 social studies in 1978. Professor Sander attended
6 graduate school at Northwestern University from 1983
7 to 1988, earning degrees in law and economics.

8 In 1989, Professor Sander joined the
9 faculty of the UCLA School of Law where he became a
10 full professor five years later. During this period
11 he pursued two new interests, the first being the
12 reasons behind the American legal profession's
13 explosive growth since the mid-1960s, and the
14 structure and effects of law schools' admissions
15 policies.

16 In 1990, he designed a new admissions
17 policy which was adopted by UCLA's law school that
18 sought to calibrate objectively the differences in
19 college quality and the grading that most graduate
20 programs take into account in evaluating the college
21 transcripts of applicants.

22 In 1995, he published a comparative
23 evaluation of seven academic support programs used by
24 the law schools to help academically struggling
25 students. The studies sought determine why some

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1 programs produced real academic benefits while others
2 had no measurable effect.

3 I could go on. I could spend quite a bit
4 of time discussing each of your CVs, but I will
5 truncate my comments so that we can listen to you.

6 Next up we have Richard Lempert, who is
7 the Eric Stein Distinguished University Professor of
8 Law and Sociology at the University of Michigan. He
9 is also the Division Director for the Social and
10 Economic Scientists at the National Science
11 Foundation, the recipient of the Law and Society
12 Association's Harry Calvin, Jr. prize for outstanding
13 socio-legal scholarship and a Fellow of the American
14 Academy of Arts and Sciences. Professor Lempert's
15 interest in applying social science research to legal
16 issues is reflected in his work on juries, capital
17 punishment, and the use of statistical and social
18 science evidence by courts.

19 His book, A Modern Approach to Evidence,
20 pioneered the problem oriented approach to evidence.
21 It was originally published in 1977, and it is in its
22 third edition and continues to hold its place as a
23 leading course book on evidence.

24 Next we have Dean Smith who is President,
25 Dean, and Professor of Law at California Western

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1 School of Law in San Diego. He is also Dean and
2 Professor of Law at the Cleveland Marshall College of
3 Law of Cleveland State University.

4 He also served as Deputy Director of the
5 Association of American Law Schools in Washington,
6 D.C. and Professor of Law, Associate Dean and Acting
7 Dean at the University of Louisville's School of Law.

8 He is an associate in medicine at the
9 Medical School at Louisville. He received his
10 Baccalaureate degree from Buena Vista College, his law
11 degree from the University of Iowa College of Law, and
12 a Master's degree in economics from the University of
13 Iowa.

14 Dean Smith has taught a variety of courses
15 primarily in the areas of law and medicine, mental
16 health law, and torts. In addition to teaching in law
17 school, he has taught at the University of Louisville,
18 School of Medicine and was a Director of the Medical
19 Institute for Law, co-sponsored by the Cleveland
20 Foundation and the Cleveland Marshall College of Law.

21 Professor Bernstein is a professor at the
22 George Mason School of Law in Arlington, Virginia,
23 where he has been teaching since 1995. He was a
24 visiting professor at Georgetown University -- maybe
25 that's where I got it -- Law Center for spring 2003

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1 semester and is a visiting professor at the University
2 of Michigan School of Law for the 2005-6 academic
3 year.

4 Professor Bernstein is a graduate of Yale
5 Law School where he was senior editor of the Yale Law
6 Journal and a John M. Olin Fellow in law, economics,
7 and public policy. He has authored over 60 scholarly
8 articles, book chapters and think tank studies,
9 including recent or forthcoming articles and review
10 essays in the Yale Law Journal, Michigan Law Review,
11 Northwestern University Law Review, and other
12 prestigious publications.

13 Okay. Professor Sander will speak first
14 for ten minutes, and after he finishes up, I will hold
15 everyone else to that ten-minute limit, and then we
16 will have a question and answer session.

17 Professor Sander.

18 **II. Effects of Race-based Admissions**

19 **Policies on Law Schools**

20 PROF. SANDER: Thank you very much,
21 Commissioner. And thank you very much to the
22 Commission for having this hearing today, and to the
23 patient audience members who have in many cases been
24 standing waiting for us.

25 I think it's a very important subject, and

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1 I'm very glad the Commission is focusing on this.

2 There is a hidden scandal in American
3 legal education today. It has been brewing for over a
4 generation and is now coming to light. It's the case
5 in American law schools that half of all African
6 Americans who enter law school end up in the bottom
7 ten percent of their class at the end of their first
8 year of law school.

9 African Americans will fail to graduate
10 from law school at two and a half times the rate that
11 whites do. They will fail the Bar in their first
12 attempt at more than four times the rate that whites
13 do, and they will fail to pass the Bar after multiple
14 attempts at more than six times the rate that whites
15 do.

16 That is an enormous disparity, and it
17 should be disturbing to everyone who encounters it.

18 But what is really disturbing about this,
19 the real scandal here is that these disparities are
20 largely the results of policies of law schools
21 themselves, and that's what I would like to talk about
22 briefly today.

23 I'm only going to be able to cover some of
24 the high points, but I hope and encourage members to
25 follow up on various points that I mention, and in

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1 particular, I hope that they will follow up and ask me
2 about the points that Dr. Lempert mentions.

3 The theses that I'm outlining have been
4 controversial, but I believe there is overwhelming
5 evidence in support of every single one of them. So
6 how does this happen? How is it that law schools
7 actually make outcomes worse for blacks and other
8 minority students?

9 Well, the first problem is that law
10 schools use essentially race norming practices to
11 achieve specified racial diversity goals in their
12 entering classes. The science that we don't have
13 access to today, but which I'll forward to the
14 Commission after the hearing shows clearly that if you
15 compare the college at the University of Michigan, the
16 undergraduate college, which was the subject of the
17 Gratz litigation that concluded before the Supreme
18 Court in 2003, if you compare with what that
19 undergraduate college did with what the Michigan law
20 school did, you see that the mechanical types of
21 automatic preferences that went to minority students
22 at the college are practiced even more vigorously by
23 the law school.

24 This is a point that was missed by Justice
25 O'Connor in her opinion, but many other members of the

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1 Supreme Court noted it and commentators throughout the
2 country noted this as well.

3 I argue this in my systemic analysis
4 article, and it has since been vigorously argued by
5 Ian Ayres in an article that's coming out later this
6 year in which he shows that the law school used
7 heavier preferences than the college did and gave more
8 mechanical weight to race and its consideration of
9 individual applicants.

10 So Michigan Law School failed the test
11 that was set for constitutional practices, and it's
12 typical of practices throughout law schools.

13 Now, what's disturbing about this is not
14 that individual law schools engage in these
15 preferences. What I find most disturbing is that the
16 practices are not self-curing or self-limiting. They
17 extend themselves. They pervade through the entire
18 system, and that occurs through something that I call
19 the cascade effect.

20 When an elite law school uses race norming
21 to achieve racial balance in its class, it essentially
22 sucks up a lot of the qualified African Americans,
23 those who would get into that school without any
24 consideration of race, but also those who would be
25 admitted to less elite schools without consideration

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1 of race.

2 And if you think of law school as a series
3 of tiers in which education and pedagogy proceeds in
4 different ways and at different levels, the elite
5 schools are pulling up people from the first three
6 tiers, and the second tier schools then have a choice.

7 They can either have a largely racially segregated
8 student body or they can admit minority students who
9 come from even lower tiers of the applicant pool.

10 Almost every school chooses the second
11 option, and as we'll discuss in part of the panel
12 today, the ABA tries to make sure that that happens.

13 So this cascade effect spreads throughout
14 all legal education and causes every law school except
15 for the mostly minority schools to have race norming
16 and have very large academic disparities between
17 blacks and whites.

18 And I'm not talking about tie breakers.
19 I'm not talking about small disparities. I'm talking
20 about enormous disparities, the sorts of disparities
21 that can produce very large differences in academic
22 achievement.

23 And it's these disparities that cause
24 African Americans, and to a lesser extent Latinos to
25 perform poorly in law school. It has nothing to do

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1 with their race. It has nothing to do with their
2 level of effort in school. It is almost entirely
3 caused by the preferences that are given to them, the
4 position that they are put in, which essentially sets
5 them up for failure.

6 Now, it might not matter even if we had
7 this problem. I mean, there's a certain amount of
8 demoralization. There's a certain amount of negative
9 stereotype and that can result if we have racial
10 disparities in racial performance in law school.

11 But if getting bad grades for the elite
12 school had the same career effects as getting good
13 grades at a less elite school, then we might not be
14 that concerned about these results. But those two
15 things do not actually balance out. Every way that
16 one analyzes the problem shows that grades are more
17 important and eliteness. They're more important in
18 graduation, but they're especially more important in
19 Bar passage.

20 If you do the regression analysis that
21 tries to compare what weight grades have compared to
22 school eliteness in determining who passes the Bar,
23 grades totally swamp eliteness, and if you do the
24 analysis in any number of other ways, you get the
25 exact same result.

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1 So the result of these preferences is to
2 severely academically disadvantage minorities who are
3 being admitted to more elite schools. It handicaps
4 them, and it leads to these large disparities in
5 graduation and bar passage rates.

6 Even that defenders might say it is an
7 acceptable price if, you know, we see dramatic long-
8 term benefits in the job market, you know, if those
9 who manage to graduate and pass the Bar are able to
10 reap enormous benefits from being affiliated with a
11 more elite degree.

12 We see that to some extent at the most
13 elite law schools, but up and down the range of law
14 schools, employers also give more weight to academic
15 preparation, law school grades than they do to school
16 eliteness. On average, African American graduates who
17 manage to finish law school and pass the Bar are
18 earning about \$10,000 a year less because of
19 preferences than they would in a race neutral regime,
20 and those starting salaries are only a precursor to
21 even more serious disparities that evolve later on.

22 So we have this whole domino effect of
23 very serious results that cumulate and build on each
24 other, and have dramatically handicapped blacks in
25 trying to achieve progress and parity within the legal

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1 profession.

2 I think I only have a couple of minutes
3 left. So I'd like to talk briefly about policy
4 recommendations. The Commission sent to me a copy of
5 the disclosure bill that was submitted by Congressman
6 King. I believe that this is a very important step
7 and a very important direction.

8 The idea of the disclosure bill is
9 essentially to require institutions of higher
10 education to provide detailed data on the way their
11 emissions process works, how they make decisions, and
12 to explicitly consider and disclose the way they take
13 race into account in their admission decisions.

14 Now, I'm not under the illusion that this
15 is going to produce complete candor for institutions
16 that are required to do it, but if you think about it,
17 this is essentially identical to what we currently
18 require financial institutions to do under the
19 Homeowner Disclosure Act and the Community
20 Reinvestment Act. The provisions are almost exactly
21 parallel, and from my own experience with Freedom of
22 Information Act requests, I find FOIA to be a very
23 limited tool in getting the kind of information that
24 would be provided through this mechanism.

25 It's also the case that African Americans

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1 come into law school not realizing the tremendous
2 disadvantages under which they're admitted. I'll
3 elaborate on that in the question and answer period if
4 I'm asked about that.

5 Other relevant policy initiatives, I think
6 it's very worthy for the Commission to endorse the
7 idea of a national exit exam for college
8 undergraduates so that we would have data comparable
9 to what we have for law students on the Bar exam.
10 That would help us understand whether mismatched
11 effects are occurring at the undergraduate level.

12 I think state Bars should be pushed
13 aggressively for additional disclosure. We need to
14 know what's happening. There's a lot of evidence that
15 these trends that I discussed have gotten
16 substantially worse in the last ten years, and there's
17 a lot the Commission can do to bring this better to
18 light.

19 I also think the Commission can support
20 very important, relevant research, including the
21 appointment of a panel of experts, expert social
22 scientists to provide some objective review to the
23 debate that we're discussing today. There has been a
24 lot of involvement of affirmative action partisans in
25 the debate, but neutrals who can really bring sobering

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1 analysis need to be encouraged, need to be supported
2 by a legitimate organization like this to enter the
3 debate and weigh in. I think that would be critically
4 important in providing additional impetus and balance
5 to the discussion.

6 Thank you very much.

7 CHAIRPERSON REYNOLDS: Okay. Well, you
8 gave up 18 seconds. That's your prerogative.

9 Professor Lempert.

10 PROF. LEMPert: Thank you.

11 You'll have to imagine a nice gentle
12 yellow in the slides with things going in.

13 Just let me state at the outset my values.

14 I believe in integration. I grew up in the '50s and
15 '60s. I believe in integration in society, in the
16 profession, in our law schools.

17 CHAIRPERSON REYNOLDS: Excuse me, sir.
18 Please attach the microphone.

19 PROF. LEMPert: I'm sorry. Start my time
20 again, if you could.

21 (Laughter.)

22 PROF. LEMPert: Thank you.

23 I believe in equality. I believe in
24 diversity, particularly in law schools. I was
25 teaching evidence when O.J. Simpson was being tried,

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1 and I was lucky enough to have about ten percent of my
2 class black. So I had a number of people who thought
3 O.J. might be innocent, and some who thought he was
4 guilty.

5 What was really nice, I had some black
6 students in my class who thought O.J. was guilty. It
7 showed it's not just a race difference because of
8 diversity.

9 And I believe in sound social science.

10 I and colleagues did a major study of
11 Michigan's graduates, affirmative action graduates
12 over a 27-year period. I might note that in the
13 written testimony the Microsoft gremlins were at work.

14 I wrote we took special care to check for non-
15 response bias and found considerable evidence that
16 this was not a serious concern. Microsoft put in and
17 found considerable serious concern.

18 DEAN SMITH: That's right. Bill Gates
19 just quit.

20 PROF. LEMPert: Yeah. But, for example,
21 at Michigan in the 1970s, 98.5 percent of our
22 respondents graduated and passed the Bar. In the
23 1980s, 95.1 percent; 1990s, 96.1 percent, pretty much
24 the same as our whites.

25 We also looked at what made for high

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1 income, what made for service, what made for
2 satisfaction with career. Minority status and being
3 black had no role, nor did LSAT scores have any role
4 in predicting who was earning what money or who was
5 satisfied with their career.

6 It did turn out that minorities and blacks
7 in particular did more service than whites did, and
8 none of this is inconsistent with what Rick Sander had
9 found in his work. The people at the top schools, at
10 the leading schools, blacks and other minorities do
11 extraordinarily well after they graduate both in
12 graduating law school and in passing the Bar and in
13 earning extremely high incomes.

14 Why does affirmative action at the top
15 schools matter? Well, 60 percent of all black law
16 faculty attended the top 20 law schools. Forty
17 percent of black judges and 50 percent of Latino
18 judges are from the top 20, as are 75 percent of black
19 partners at leading corporate law firms. If we were
20 to abolish affirmative action, it would hit these
21 schools the hardest because they're the fewest blacks
22 who would otherwise qualify on the basis of
23 credentials.

24 Are the results that Rick Sander gave you
25 reliable? We've debated this both orally and in

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1 print. I'm not going to dwell on this issue today. I
2 refer you to my written testimony and to the articles
3 referred therein, but I will tell you that of the
4 articles I know of in print or draft, the following
5 people disagree with Rick's conclusions: Ian Ayres,
6 who he cited favorably, and Richard Brooks, Yale
7 professors with Ph.D.s in economics; Michelle Dauber,
8 Stanford law professor, Ph.D. in sociology and law
9 degree; Daniel Ho, government Ph.D., Stanford
10 professor; Jesse Rothstein, Princeton economics
11 professor; Albert Yoon, Economics J.D., I think, at
12 Northwestern; Kathy Barnes, J.D., Ph.D. in statistics,
13 and several others.

14 What about people who have supported Rick
15 Sander's position in print or in draft I know of? I
16 know of no one.

17 Okay. I want to get to the other
18 questions, which the Commission asked. The effect of
19 ending affirmative action on the number of new black
20 attorneys. There were 4,000 black attorneys, more or
21 less, in 1970, 40,000 in the 2000 census, probably
22 about 45,000 today. Many of them were there and got
23 their education due to affirmative action.

24 If we were to abolish affirmative action,
25 though Rick predicted in print there would be a 7.1

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1 percent increase in the number of black attorneys, we
2 think there will be a much more substantial decrease.

3 The number of applicants accepted would
4 range from about 14.1 percent in 2001, a drop of 14.1
5 percent, to a drop of about 32.-some odd percent in
6 2004, 29.4 percent in 2005.

7 The number fluctuates so greatly because
8 it depends on the number of whites who are applying to
9 law school. The total drop in black attorneys
10 entering law school would be somewhat less on this
11 model, ranging up to 21 percent, but this is a bare
12 bones minimal estimate. Our estimate is it will be
13 far lower.

14 The reality of black performance. This is
15 a serious issue and one that should concern the
16 Commission. About half of black students entering
17 accredited law schools in 1991 graduated and passed
18 the Bar, which means that half, actually slightly
19 lower than half did not. That is something which is a
20 serious concern whatever side you are on, on this
21 issue.

22 The situation should, however, be better
23 today. In 1991, 22 percent of black martriculants at
24 law schools had index scores below 500, which is the
25 true danger score for failing to pass the bar. In the

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1 last three years, that figure below 500 has ranged
2 between four percent and eight percent. The bottom 15
3 percent of blacks are not in law schools anymore, but
4 the Bar may be tougher.

5 If the Bar is tougher, that's just another
6 issue that concerns the Commission. Is it tougher
7 because it was passing people who were not competent
8 to be attorneys? That's one thing, or is it tougher
9 because it's a movement by a cartel to limit the
10 number of lawyers which has a serious adverse impact
11 on blacks?

12 The causes of low rate success. You asked
13 for that. One cannot blink at the fact that one cause
14 is lower skill levels, as indicated by LSAT UGPA
15 scores. A low index score increases the risk of
16 failure, but by no means means that risk is certain.
17 A cause which is not a cause is mismatch. The problem
18 is not that a black attorney or black lawyer or law
19 student is going to a school where he fails, where if
20 he went to a weaker school he would pass. If
21 anything, the data suggests particularly for those
22 attending the best schools a reverse mismatch effect.

23 A second cause of black failure is greater
24 financial need. One reason why so few blacks fail to
25 graduate and pass the bar is they fail to graduate,

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1 and the most common reason they fail to graduate is
2 unmet financial need or a sense of financial
3 difficulty or a sense their law degree will not pay
4 off to the extent it is worth paying for law school.

5 And then there is a third set of causes.
6 These are racially related. Hostile or uncomfortable
7 environments, stereotype vulnerability,
8 discrimination, and the like.

9 What are the cures? In large measure the
10 cures do not lie in law school or even in our
11 universities. They lie in pre-K through 12 education.

12 They lie in improving the skills of blacks at all
13 levels from the time, even before the time their
14 formal education begins.

15 But they also include more adequate
16 financial support. They include a more welcome, more
17 supportive environments. They may include actually
18 more affirmative action.

19 In Michigan, I think, our black students
20 have flourished as the number of black students has
21 increased, and they include more research and why
22 individuals succeed and why schools succeed because
23 there are law schools in which blacks do every bit as
24 well as whites with similar credentials.

25 Then finally, let me just conclude with

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1 one factoid for you. If affirmative action is defined
2 as securing admission to a school when one's LSAT and
3 UGPA index predicts admissions denial, then in 1991
4 according to a model that Linda Wightman advanced,
5 2,748 black students secured law school admission
6 through affirmative action. They would not have been
7 there but for affirmative action.

8 In that same year, 6,321 white students
9 secured law school admission through affirmative
10 action, and had we only based law school admission on
11 credentials, more than two times as many white
12 students as black students would not have gotten their
13 education.

14 Thank you.

15 CHAIRPERSON REYNOLDS: Okay. Professor
16 Sander, would you care to respond to Professor
17 Lempert?

18 PROF. SANDER: Yes, thank you very much.

19 Briefly --

20 COMMISSIONER YAKI: Point of order.

21 CHAIRPERSON REYNOLDS: Yes.

22 COMMISSIONER YAKI: Was that agreed upon?

23 I thought we were going to go through all four and
24 then with questions. People will preserve their time
25 or it's just going to be --

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1 CHAIRPERSON REYNOLDS: We basically
2 bifurcated it.

3 COMMISSIONER YAKI: Bifurcated it?

4 CHAIRPERSON REYNOLDS: Yeah.

5 COMMISSIONER YAKI: Okay.

6 PROF. SANDER: Let me just briefly touch
7 on the main points Professor Lempert mentioned. In
8 terms of values, I share the values that he
9 articulates, and I've been very active in civil rights
10 in Los Angeles. I was President of the Fair Housing
11 Commission in Los Angeles for many years.

12 Many of the arguments that have been
13 advanced have been at a far superficial media appeal
14 and don't bear close examination, and one of the
15 reasons why I strongly urge the Commission to appoint
16 a body comprised of eminent social scientists who are
17 politically neutral to examine these issues closely is
18 because the facts are overwhelming. The facts speak
19 for themselves, and the facts have been systematically
20 distorted by Dr. Lempert and others making arguments
21 in defense of affirmative action.

22 Let me just give you a few examples. Dr.
23 Lempert consistently cites Michigan Law School as an
24 example of affirmative action working, and his
25 evidence for that lies primarily on a study, well,

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1 pretty much entirely lies on a study that he did in
2 1997-98, when he sent out surveys to Michigan alumni.

3 He matched a survey of women alumni who generally
4 under performed against minority alumni and then
5 compared the results.

6 What he doesn't mention is that at most
7 only half of the blacks who received that survey
8 responded, and he gets numbers that he has cited over
9 and over again, like a 95 percent ultimate Bar passage
10 rate for African Americans, that are incredible and
11 totally inconsistent with the other things that we
12 know about Michigan's successful Bar passage rates.

13 So if you take the white and black Bar
14 passage rates for Michigan and you figure out what
15 that implies about first time Bar passage, it implies
16 something like a 95 or 96 percent Bar passage rate.
17 But the State of Michigan has provide Bar down at the
18 University of Michigan that shows it has a much lower
19 Bar passage rate.

20 In California, out-of-state Michigan
21 students perform worse than UCLA students perform. So
22 what he's really reporting is a skewed sample in which
23 blacks who never passed the Bar at Michigan choose not
24 to respond to a professional development survey that
25 asks about their accomplishments as lawyers. It's not

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1 very surprising.

2 He talks about, well, the last statistic
3 that he cited where he said that 2,700 blacks and
4 6,000 whites would not have been admitted to law
5 school without preferences.

6 Well, the analysis that he's talking about
7 ...is simply analysis of who would have been admitted to
8 that particular law school. It's not analysis of who
9 would have been admitted to law school generally.

10 So because there are 180 law schools and
11 they each admit mostly from a fairly narrow band, that
12 type of analysis totally obfuscates what's really
13 going on. What you have to look at is who would have
14 gotten into law school somewhere. Who would have
15 received a legal education?

16 Again, he argues that the causes of black
17 failure in law school have to do with financial aid.
18 They have to do with an unsupportive environment, and
19 so on, but there's no evidence to support this. Two
20 thirds of the blacks who drop out of law school after
21 their first year are in the bottom five percent of
22 their classes. Is that because of financial aid or is
23 it because they believe that they're not going to
24 graduate and pass the Bar?

25 I think it's pretty obvious, but if you do

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1 the regression analysis and you see how do people
2 perform and you control for both their undergraduate
3 institution and their LSAT and undergraduate GPA, race
4 washes out. There may be some small negative effect
5 of race. For example, I've done some research
6 suggesting that blacks who join study groups in law
7 school tend to have difficulty getting into groups that
8 have sort of high achieving members, probably because
9 the negative stereotyping arises only from racial
10 preferences. And that has some small negative impact
11 on their performance.

12 But overwhelmingly, these results are
13 entirely due to preferences. There's no statistical
14 difference in overall performance rates when you
15 control for the incoming preferences of students.

16 CHAIRPERSON REYNOLDS: Okay. At this
17 point, Professor Lempert, would you care to respond?

18 PROF. LEMPert: Yeah. I just want to
19 comment on one thing Rick said in his presentation and
20 then I'll comment on some of the comments he just
21 made.

22 His idea that school eliteness is
23 overwhelmed by grades comes from work with the After
24 the J.D. study that he had like six other co-authors
25 on. All six other co-authors disagree with him on

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1 that conclusion.

2 The things he said about my study about
3 Michigan, I should note the study won a prize as the
4 best social legal article published in the particular
5 two-year period it came out. One major reason it won
6 that prize was that care that we took in insuring that
7 our sample was not substantially biased, that the
8 problem is not a low response rate in surveys. The
9 problem is a biased response rate.

10 But we had a lot of information on the
11 non-respondents, on the non-responding black students
12 because we knew what their LSAT scores were and what
13 their law school grades were, and they were very, very
14 close to respondents.

15 We also through Martindale-Hubbell other
16 sources could track them into the field, and we also
17 knew that most of the people didn't respond were
18 active in the Bar. So that's not the serious problem
19 that 50 percent number would have you believe, and it
20 has been professionally recognized not to be a serious
21 problem.

22 There is a place where I agree with him, I
23 should note. We both strongly support commission if
24 you have the money commissioning neutral people to
25 analyze the data, and we both think we know how it

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1 will come out. I do know how it will come out.

2 I should also note that the information
3 that we have that our alumni is quite consistent with
4 work that David Wilkins has done with Harvard's black
5 alumni. I can't resist this back and forth UCLA-
6 Michigan. Bar passage rates in California change year
7 by year. There have been years during the period of
8 our study when Michigan graduates had a far higher Bar
9 pass rate in California than UCLA or any other
10 California in-state school. That fluctuates from year
11 to year.

12 You know, there are always people towards
13 the bottom of the class, and it is true that black
14 students tend to have the lowest grades. Most of them
15 pass. They pass through school, and I think if you
16 look, many of them pass the Bar. It depends on what
17 level school they're at.

18 If there were no blacks in your schools,
19 there would be whites in the bottom five percent of
20 the class. It doesn't tell us very much.

21 The real issue is what have they learned,
22 what is their skill level, and to go to Rick's work,
23 the issue is whether the so-called mismatch plays any
24 role at all. That is his hypothesis.

25 We both in a sense agree, I think, that

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1 the skill levels of some blacks is responsible for
2 their failure to graduate or pass the Bar, but where
3 we really disagree is whether we'd be better off
4 without affirmative action, without the so-called
5 mismatch.

6 And I gave you a list of probably ten
7 different people, including some people Rick thinks
8 very well of at leading law schools with terrific
9 degrees all of whom disagree with Rick's mismatch
10 conclusion. He is unable to cite anybody in print who
11 agrees with his conclusion, as eloquent as he is when
12 he makes presentations of this sort.

13 And, again, he does a survey, and he
14 accepts the data he wants to accept, and students tell
15 us that they're dropping out of school for financial
16 reasons. He ignores it and says, "Well, they have low
17 grades. That must be the reason they're dropping out
18 of school." They tell us it's financial.

19 The last point, which is a difficult point
20 I just want to make here, and this is the issue. What
21 does one do with the situation in which based on,
22 let's say credentials in a school a black student has
23 a 50 percent chance? In advance we might predict a 50
24 percent chance of graduating and passing the Bar.

25 Do we say that is too much of a risk;

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1 we're not going to admit you," or do we say that a
2 risk which is up to you to decide whether or not to
3 take?

4 Now, 60 years ago when my father, who was
5 not a lawyer, but he wanted to be a lawyer, was a
6 young man and might have gone to law school and some
7 of your parents might have gone to law school, this
8 was not an issue. Law school tuition could have been
9 60 or \$100. Everybody who wanted to go could go to
10 some law school. They didn't have to pay very much.
11 A third of them would flunk out even out of the best
12 law schools after the first year, and the others would
13 sink or swim on the Bar and in law practice.

14 So the law was the most egalitarian of all
15 professions. Anybody who wanted to risk it could get
16 in. That has changed today. So, you know, there's a
17 real question of what do we want to do.

18 Rick has another suggestion which I do not
19 think is silly, that I think we have to deal with with
20 great care, which is at least we tell people what
21 those risks are and let them decide for themselves,
22 but without affirmative action, we would have far
23 fewer black lawyers. We would have far fewer black
24 lawyers in the future. We'd have very few black
25 professors because they would not be at the best

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1 schools, black partners are major law firms and the
2 like.

3 And as someone believes in integration and
4 equality, I think that would be a tragedy.

5 CHAIRPERSON REYNOLDS: Okay. Commissioner
6 Yaki, I suspect that you have a comment or two.

7 COMMISSIONER YAKI: No, I'll wait. I'll
8 wait.

9 CHAIRPERSON REYNOLDS: Okay.

10 COMMISSIONER BRACERAS: Are we --

11 COMMISSIONER KIRSANOW: Are we questioning
12 now?

13 CHAIRPERSON REYNOLDS: Yes.

14 COMMISSIONER YAKI: Oh, okay.

15 CHAIRPERSON REYNOLDS: Commissioner
16 Kirsanow.

17 COMMISSIONER KIRSANOW: Professor Sander,
18 you do not disagree with the decision in Grutter v.
19 Bollinger, do you?

20 PROF. SANDER: Well, yes, I do.

21 COMMISSIONER KIRSANOW: Let me back up.

22 PROF. SANDER: Okay.

23 COMMISSIONER KIRSANOW: If the
24 suppositions made by Justice O'Connor are correct,
25 that is, the suppositions she made that the University

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1 of Michigan Law School race was only a flexible plus
2 factor, just a feather on the scale, would you
3 disagree with the outcome in Grutter.

4 PROF. SANDER: Thank you for rephrasing
5 that.

6 I'm somewhat agnostic about it, but I
7 certainly have throughout my life supported
8 affirmative action of that kind. I have always
9 thought that we should not completely preclude the
10 consideration of race if we could show that that
11 really made a difference.

12 In the early 1970s and late 1960s, I think
13 affirmative action was important and convincing blacks
14 and other minorities who had historically had very
15 little access to a legal education that things had
16 changed, and we saw a dramatic increase in interest
17 among minorities at that time.

18 It's the case now that blacks who graduate
19 from college are more likely to apply to law school
20 than whites are. So I think in changing attitudes and
21 singling opportunity, affirmative action can play an
22 important role, but as I think you're alluding to in
23 your question, the problem with Grutter is that
24 Justice O'Connor's empiricism was all wrong. She
25 misunderstood how the Michigan law school program

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1 worked, and she accepted at face value a lot of very
2 dubious assertions about the benefits of affirmative
3 action as it operated.

4 COMMISSIONER KIRSANOW: In Graths the
5 finding was that the 20 point advantage afforded to
6 blacks and Hispanics was the equivalent of full grade
7 point average or a perfect LSAT score. You've posited
8 that the advantage of the law school level, despite
9 the fact that there was this holistic review was even
10 greater.

11 And what do you base that on?

12 PROF. SANDER: Well, if I had the slides
13 it would be easier to show, and I can send those to
14 you later.

15 If you analyze cohorts of applicants and
16 look at the admissions rate, you get a very stark
17 pattern. If you sort of put the law school and the
18 college on both a 1,000 point scale and you equalize
19 the way that they weigh two different factors, the 20
20 points in the undergraduate case becomes 140 points --
21 no, I'm sorry -- 120 points, and the law school's
22 system becomes a 140 point difference.

23 So it's about an extra Senate.

24 The article that I mentioned by Ian Ayres
25 uses completely different methodologies but looks at

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1 similar data and comes to exactly the same
2 conclusions. He finds that the law school gave
3 substantially more weight and did it in, if anything,
4 a more mechanical way than the undergraduate college
5 did.

6 And my evidence, my research on other law
7 schools finds that Michigan law schools' practices
8 were entirely typical. You get almost the exact same
9 statistical output when you put in similar data from
10 other law schools.

11 CHAIRPERSON REYNOLDS: Commissioner
12 Braceras.

13 COMMISSIONER BRACERAS: First just a brief
14 comment about the debate. I find it a little bit
15 unfortunate that part of the discussion here has
16 revolved around who won what prizes and who has more
17 academics lining up behind them. Because I think as
18 we all know, you know, the child pointing out that the
19 emperor isn't wearing any clothes is often the lone
20 voice crying out in the wilderness.

21 So to be somebody who is pointing out
22 evidence of things that are going on in society and to
23 be the only person currently making those claims does
24 not necessarily make that person wrong.

25 So I would much rather have heard more of

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1 a discussion about the data itself and why you believe
2 it to be wrong than to hear a list of who's on who's
3 side because that to me is an irrelevant question.

4 PROF. LEMPert: May I respond?

5 COMMISSIONER BRACERAS: Sure.

6 PROF. LEMPert: To that point? That if
7 you look at the Daubert case, for example, one of the
8 major considerations the courts look at in deciding
9 whether scientific evidence is admissible is whether
10 it's replicated and peer reviewed. These people are
11 highly reputable social scientists. These are not
12 people who, you know -- many of them did not have a
13 large stake in the debate, and they kind of
14 consistently in one direction using many different
15 methods, all of which are inconsistent.

16 In the time I have, without benefit of
17 PowerPoint, it is impossible to go into the technical
18 details of the problems. You will find them described
19 in some detail, the testimony. You'll find them
20 described in much greater detail in two articles, one
21 on the Web and one in Stanford Law Review which I have
22 written, as well as in articles that other people have
23 written.

24 Rick himself, if you read his reply in the
25 Stanford Law Review, you will find he, in essence,

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1 repudiates his original methodology. He develops a
2 completely different methodology. He achieves the
3 same outcome, but ironically it's an outcome and a
4 method which is inapplicable, given what he had just
5 told you today.

6 He has just told you that law schools
7 mechanically admit law students based on their LSAT
8 and undergraduate grade point averages. If that is
9 right, if that's how they select law students, then
10 his second methodology which looked at something
11 called selection bias would be an apposite.

12 So you can read his own reply to see that
13 he argues that the data and methods he used in his
14 original article were not the methods that should have
15 been used.

16 PROF. SANDER: Commissioner, I know you --

17 COMMISSIONER BRACERAS: Please.

18 PROF. SANDER: -- you are trying to get to
19 your question, but very briefly, on that last point
20 the missing variable is undergraduate quality, which
21 every law school takes into account college quality,
22 but none of the disclosed data has that, and that
23 explains the anomaly that Rick is referring to right
24 now.

25 But the large point is very well taken, I

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1 think. When my article first came out, there was a
2 substantial effort to buy a lot of stout defenders of
3 affirmative action, to simply say this isn't even
4 social science. Professor Dauber at Stanford said it
5 was cold fusion, and Rick Lempert endorsed that.

6 That was before he found out that the
7 University of Michigan press had decided to publish a
8 book based on my research, and in that book we're
9 going to have six eminent social scientists commenting
10 on the work.

11 So the problem has been, as I think you
12 suggest, that when you're exposing a raging scandal at
13 a set of institutions that has been defended by the
14 palace guard for decades, it is very hard to induce
15 other people to come and jump into that debate. I
16 receive dozens of E-mails and calls, some from people
17 who later published studies that appear to be somewhat
18 critical, saying this was wonderful research and badly
19 needed.

20 I'd also like to point out that of the
21 various critics that Rick mentions, there are enormous
22 internal contradictions between their work. He
23 mentions Jesse Rothstein of Princeton and Albert Yoon
24 at Northwestern who did a very interesting analysis.
25 They ignored what I think was the most relevant data

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1 to the point they wanted to ask, but they reanalyzed
2 the data in my original article, and they found that
3 there was substantial evidence for a mismatch effect,
4 although they said that it was limited to the bottom
5 80 percent of all of blacks going in law school.

6 So, you know, Ian Ayres and his co-author,
7 again, cooperate in many of the findings in my
8 research. Members at the AJD who he mentioned who he
9 says are opposed have privately told me that they
10 support a lot of the research.

11 And Rene Didivitzer, one of the members of
12 the AJD, did an extensive replication of my analysis
13 of how grades and elitists interact in earnings and
14 came up with substantially the same results.

15 So I think the statements are wrong.

16 COMMISSIONER BRACERAS: My comment was
17 simply to say that I think sometimes just because
18 somebody is the only person saying something doesn't
19 mean that what they're saying lacks value, and over
20 time often those lone voices in the wilderness in
21 history have been proven to be right.

22 So the fact that you may be able to muster
23 a certain number of experts to support your position
24 at this moment in time doesn't prove the ultimate
25 truth of your assertion in my view.

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1 All that being said, I'd just like to ask
2 you very specifically, Professor Lempert, how you
3 believe African Americans would be worse off without
4 affirmative action at elite law schools. In other
5 words, how would -- if, for example, some of the
6 minorities that currently attend Harvard and Yale were
7 to instead attend Boston College and University of
8 Virginia or Georgetown, how would that make them worse
9 off in the long run?

10 PROF. LEMPERT: It would make them worse
11 off in a number of ways. First, let me just say as a
12 teacher it would make the law schools worse off. I
13 gave you the example --

14 COMMISSIONER BRACERAS: Wait, but that's -
15 -

16 PROF. LEMPERT: I'm just --

17 COMMISSIONER BRACERAS: Wait a minute.
18 Let me. That is a completely different question
19 because --

20 PROF. LEMPERT: I understand.

21 COMMISSIONER BRACERAS: -- because that,
22 the answer to that goes to how you as a white
23 professor feel about yourself. In other words, law
24 schools often like to justify affirmative action by
25 their own white guilds, I think, frankly, and they

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1 often justify it by saying, "Well, we feel better
2 about ourselves because we have these people here."

3 But the question that I think Professor
4 Sanders' research is asking and the question that I'm
5 asking you is how does it help or hurt the alleged
6 beneficiaries.

7 PROF. LEMPert: I understand.

8 COMMISSIONER BRACERAS: I don't care how
9 it helps or hurts Yale or Harvard.

10 PROF. LEMPert: I understand. I'm going
11 to get there, but I want to say I don't feel guilty at
12 all, and when I say worse off, it's because of the
13 dynamics of what happens in the school, but let me go
14 on to the question of how would they be worse off.

15 They'd be worse off in the same way that
16 white students are worse off who go to Boston College
17 instead of Harvard. They'd be less likely to have
18 entry into law school teaching. They'd be less likely
19 to get high paying jobs at the most coveted law firms.

20 They'd be less likely to have careers that bring them
21 to federal and other judgeships over their lifetime.
22 In every way that white students who go to Harvard and
23 Yale and Michigan and UCLA and Chicago go there
24 because they know they will be better off if they went
25 to other perfectly good schools.

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1 COMMISSIONER BRACERAS: I mean, is there
2 empirical data that demonstrate that? Because I mean,
3 if you look, just to take one segment of the
4 profession, if you look at partners at major national
5 law firms, I'm not sure that partnership decisions
6 were in any way based on where somebody went to law
7 school.

8 Partnership decisions are based on
9 billable hours and revenue generation and all of those
10 other things. Now, --

11 PROF. LEMPert: But the people who are
12 hired at those -- I mean, just to give you an example,
13 looking at Michigan, Michigan gets probably two or
14 three recruiters who visit the school to recruit
15 students for every student they have on the job
16 market. Schools like BU may get one or may get less
17 than one recruiter per student.

18 If you look at the people who are hired by
19 the law firms, if you look at the people who go into
20 teaching, I gave you the -- 60 percent of black law
21 teachers went to one of the top 20 law schools. I
22 don't know what the data is for whites, but my hunch
23 is it's pretty similar. It may even be more extreme.

24 If you look at partners in major law
25 firms, white partners, you'll find that overwhelmingly

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1 they come from the top 20 law schools. Why do they
2 come there? Because they're the ones who get the
3 jobs.

4 CHAIRPERSON REYNOLDS: Professor Lempert,
5 why shouldn't similarly situated black students be
6 treated like their white counterparts? So if they get
7 into St. John's Law School, they have the benefits and
8 the burdens of attending that school along with their
9 white counterparts.

10 What's wrong with that? Isn't that how
11 it's supposed to work?

12 PROF. LEMPert: Well, if by similarly
13 situated you mean whites and blacks going to St.
14 John's, you have a lot of people who don't make it in
15 law practice at all. So a lot of them take low paying
16 jobs. You have almost none who go to major law firms.
17 You have almost none who go to law teaching.

18 CHAIRPERSON REYNOLDS: You're not saying
19 that unless you got to an elite institution that your
20 likelihood of having a successful career in the law is
21 very small, are you?

22 PROF. LEMPert: What I am saying is that
23 the quality of law schools you go to, particularly
24 going to elite law schools, has a tremendous effect on
25 your career. It has a tremendous effect on lifetime

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1 earnings. It has a tremendous --

2 CHAIRPERSON REYNOLDS: Okay. Here's a
3 fix.

4 PROF. LEMPert: -- effect on the niche
5 that you enter practice in.

6 CHAIRPERSON REYNOLDS: How about this fix
7 though? Why won't the elite institutions then -- it
8 seems to me that you have two admissions processes in
9 place, one for whites and Asians and the other for
10 Blacks and Hispanics. Why don't you just use whatever
11 metrics that you use for blacks and Hispanics? Use it
12 for the whites and Asians. That way you have a single
13 admission standard. It's applied across the board.

14 Apparently the consequences for a low
15 college GPA and a low LSAT doesn't matter over the
16 long term, if I understand what I read this morning.
17 Wouldn't that be the effect so that we can do away
18 with this conversation over racial preferences?

19 We don't have to have them, and now, I
20 guess this is not a question, but it seems to me that
21 institutions are externalizing the cost of this value
22 that has been embraced by the academy in a number of
23 ways.

24 Whites and Asians have a different
25 standard in terms of the commissions. Blacks and

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1 Hispanics have lower standards. There are
2 consequences that flow from this decision. The
3 supporters of racial preference policies highlight the
4 benefits, but there are costs.

5 I suppose I should give you a question.

6 (Laughter.)

7 PROF. SANDER: Commissioner, could I --

8 CHAIRPERSON REYNOLDS: Well, the question
9 is though: what is wrong then? If the academy feels
10 so strongly about this, then lower your admission
11 standards to the level that's required to have racial
12 diversity. You will have racial diversity. You will
13 have a single standard apply across the board. You
14 will no longer have a constitutional question.

15 PROF. LEMPERT: We don't have one now. So
16 that doesn't seem to be the rationale.

17 A couple of points by way of response. I
18 mean, one could radically restructure the social
19 structure of the Bar and law schools, and maybe, you
20 know, maybe there's something to that. We could
21 abolish in a sense and say, "Okay. We're not going to
22 have elite law schools."

23 My hunch is there's a kind of dynamic in
24 society that you can't engineer that kind of outcome,
25 but also --

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1 CHAIRPERSON REYNOLDS: So is --

2 PROF. LEMPert: Let me -- let me -- let me
3 also go --

4 CHAIRPERSON REYNOLDS: Are the elite
5 schools elite because of the credentials, the
6 requirements, the high barrier that is set on the
7 front end for admission?

8 PROF. LEMPert: I think that a lot of --

9 CHAIRPERSON REYNOLDS: And if so, then are
10 these schools elite for those students who get in
11 under a different admission standard?

12 PROF. LEMPert: You know, it's an
13 interesting question. I think that often law school
14 eliteness depend upon kind of the modal, quote,
15 visible qualifications of the students there and
16 candidly, probably the social class from which they
17 come, and the whole school doesn't have to be from the
18 upper middle and upper classes and the whole school
19 doesn't have to have top credentials to be an elite
20 school. It's kind of a social process, but a lot of
21 students do, and that's the benefits that blacks gets.

22 Something I wanted to say about the point
23 that Rick made about the Grutter case. Two dimensions
24 of that. You know, there was a marvelous moment in
25 the trial when our Dean of Admissions was trying to

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1 describe how she settled on whether or not black
2 applicants should be admitted, and she had a file in
3 front of her, and she did not think that it was this
4 mechanical process that you've heard described, and
5 she actually kind of lost herself kind of reading the
6 file, almost lost track of where she was because the
7 depth that she went into reading the file.

8 The fact of the matter is that given the
9 average credentials of the white and black students
10 who applied in Michigan, even if we selected at random
11 so that affirmative action had nothing to do with it,
12 there would be a substantial credential difference
13 between our white and black students.

14 It's also the case that Rick says, "Well,
15 there's this one other variable, school elitiness."
16 School elitiness, undergraduate elitiness plays almost
17 no role, and the law school admissions counselor showed
18 that it plays almost no role in how well students do,
19 and a school like Michigan doesn't even consider it in
20 its formula.

21 Maybe there's some slight consideration,
22 but it's not a major factor.

23 CHAIRPERSON REYNOLDS: Well, how does IQ
24 play --

25 COMMISSIONER BRACERAS: Can I?

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1 CHAIRPERSON REYNOLDS: I'm sorry. IQ,
2 does that play a role? Does that have a correlation?

3 VICE CHAIRPERSON THERNSTROM: You know,
4 Jennifer had a series of questions.

5 COMMISSIONER BRACERAS: I just want to get
6 back to my one question.

7 CHAIRPERSON REYNOLDS: Well, Jennifer, I
8 thought you were done, and I thought it was someone
9 else's turn. I blame the panelists for this dispute
10 because it's the interesting issues that were
11 discussed.

12 Okay. Commissioner Braceras, let's go
13 back to you.

14 COMMISSIONER BRACERAS: I'll be brief.
15 I'm still trying to understand how graduating from
16 Boston College Law School has long-term negative
17 career consequences compared to graduating from
18 Harvard Law School.

19 Now, I went to Harvard Law School. I'm
20 the first person to admit that going to Harvard Law
21 School opened some doors. However, I'm not sure that
22 those doors would not have been opened to me anyway
23 even if I had gone to Boston College or Boston
24 University, and I want to separate out the question of
25 careers in law teaching because that is an inherently

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1 elitist career track. Professors making hiring
2 decisions at Harvard and Yale like their own. They
3 want to hire people from Harvard and Yale and
4 University of Chicago, and it's inherently incestuous
5 and elitist segment of the profession.

6 So taking those opportunities out of the
7 discussion for a minute, how does attending Boston
8 College versus Harvard Law School negatively impact
9 your chances of being a successful lawyer?

10 PROF. LEMPert: Okay.

11 COMMISSIONER BRACERAS: I just don't see
12 it.

13 PROF. LEMPert: Well, let me answer. I do
14 not have the data at hand, which I would like to have,
15 but I'll tell you what I'm quite confident the data
16 would reveal.

17 COMMISSIONER BRACERAS: Okay.

18 PROF. LEMPert: That if you took the
19 average incomes after 20 years out of law school of
20 Harvard graduates and you took the average incomes of
21 Boston University or Boston College graduates, we'd
22 find a substantial difference in favor of the Harvard
23 graduates.

24 If you took out the number of people that
25 were partners in major law firms who had Harvard

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1 degrees as a proportion of the Harvard class and the
2 number who had Boston University degrees as a
3 proportion of the Boston University class, you'd find
4 a substantially higher proportion who had Harvard
5 degrees, and any other --

6 COMMISSIONER BRACERAS: I'm not sure that
7 would be true if you looked in the Massachusetts legal
8 market only.

9 PROF. LEMPERT: If you look at a small
10 local legal market, you'd probably still find it true,
11 but it would be less true than if you look at a
12 national market, but that is an answer.

13 CHAIRPERSON REYNOLDS: Jennifer, can I
14 just in?

15 PROF. SANDER: Can I just add some facts
16 to the discussion --

17 PARTICIPANTS: Okay.

18 PROF. SANDER: -- make reference to
19 speculations? I mean, one of the major achievements
20 of the analysis was to do this comparison, which
21 people will speculate about for 20 or 30 years. The
22 relevant issue is not whether Harvard graduates make
23 more than Boston College graduates because Harvard
24 attracts the strongest people in the country. So,
25 yes, of course, they on average have more successful

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1 careers.

2 COMMISSIONER BRACERAS: Right.

3 PROF. SANDER: The issue is if you take a
4 person with a given level of credentials and they go
5 to School A which is elite or School B which is less
6 elite, what will happen to them in the long term?

7 Now, we don't know the answer to that yet
8 because after the J.D. study, it only carries into the
9 early years of their careers.

10 CHAIRPERSON REYNOLDS: And that's also --

11 PROF. SANDER: But the other that we have
12 so far clearly shows that grades are better. Rick
13 Lempert's argument is based on the assumption that
14 somehow if we change admission standards for certain
15 groups, we'll fool all of the employers out there into
16 thinking that they're just like all of the other
17 people we've entered into the standards and,
18 therefore, we should give them all the same preference
19 that we do otherwise.

20 But he's living in a world that
21 disappeared 30 years ago. Elite law firms no longer
22 hire from just the elite law schools. I just
23 published an article in the North Carolina Law Review
24 I can forward to the Commission that has the first
25 systematic data looking at this question, and it finds

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1 a dramatic increase in the range of law schools that
2 are being recruited from in my law firms.

3 That's why in my analysis I found that
4 getting high grades from a less elite school was far
5 more valuable.

6 Now, Rick talks about faculty recruitment,
7 but there is no study that has been done that has
8 compared similar people from different material law
9 schools and looked at how they do in the faculty
10 market over the long term, and there's every reason to
11 think that if the number of African Americans or
12 Hispanics went down at Harvard and Yale, then law
13 schools would not say, "Oh, well, we're going to stop
14 hiring minority academics because we only want people
15 that went to Harvard and Yale." They're going to hire
16 the strongest people that they can find.

17 That's so obvious that it's only because
18 so many people make the argument that Rick makes that
19 anyone believes it.

20 CHAIRPERSON REYNOLDS: So intellectual
21 fire power, cognitive ability, those track closely
22 with income. If that's the case, what do we say about
23 the fact that the average 17 year old black male reads
24 on the same level as his 13 year old white
25 counterpart?

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1 That has huge implications in terms of the
2 pool from which law schools have to pick from. It has
3 huge implications in terms of lifetime earnings. I
4 don't think that this can be ignored. Assuming that
5 our grades are a proxy for intellectual capacity, then
6 there is a problem that starts as you pointed out,
7 Professor Lempert. The problem doesn't start at the
8 law school. The problem is a K through 12 problem and
9 also a larger societal problem, and I think that this
10 fix called racial preferences in the admission
11 process, it's not a very good fix.

12 PROF. SANDER: Commissioner.

13 CHAIRPERSON REYNOLDS: In fact, it hides
14 the problem because we're not talking about the
15 underlying problem here. We're talking about, in my
16 view, a faulty fix to a very significant societal
17 problem.

18 PROF. SANDER: I'd like to give you some
19 data to strengthen the argument you just made,
20 Commissioner. There's a new study by two scholars,
21 one of them Steven Levitt, the author of Freakonomics,
22 who used a new database that's really unparalleled in
23 its comprehensiveness that looked at children in their
24 first six years of life and found that if you
25 controlled for just seven factors about their

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1 upbringing, you totally eliminated the black-white gap
2 in achievement. Okay?

3 No one has ever shown that before. We've
4 argued and we've assumed for many generations that
5 genetics is not what's going on here, but this proves
6 it. These seven environmental factors completely
7 explain away the racial disparities. Those
8 disparities don't get aggravated by the K-12 system,
9 but things like birth weight, number of books at home,
10 preschool education, there are basic things that we
11 can do.

12 And I agree with you that when we have
13 this sort of papering over of the differences through
14 preferences at the college and graduate level, it
15 essentially blinds elites to the real problems that we
16 need to address.

17 CHAIRPERSON REYNOLDS: That they can't do
18 anything about. It's easier to deal with it in this
19 way.

20 But in any event, Vice Chair Thernstrom,
21 if we'd like to go along on this, if there are no
22 objections, it's perfectly fine with me.

23 PROF. LEMPert: Can I just say one more?
24 I mean, here I think we should emphasize and I think
25 we're all agreed that this is an area of major social

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1 problems. Anything this Commission can do to increase
2 the quality of K-12 education and even pre-K is all to
3 the good.

4 When we get to the law school level, these
5 are highly selected and really the fact that 17 year
6 olds diminishes the pool, but is not directly on
7 point. However, one of the most moving testimonies
8 that occurred in the Grutter case was of a --
9 actually, it was in the Gratz case, where if some
10 people at Detroit high schools, black students, who
11 talked about the incentive that they had to do well
12 because they knew that Michigan was a welcoming place,
13 because it was an affirmative action program, and they
14 saw a possibility of getting to Michigan if they
15 worked really hard, even though they might not have
16 SAT scores that were as good as some of the whites who
17 were applying.

18 COMMISSIONER BRACERAS: How does that mesh
19 with your statement before that law schools are a
20 hostile place for minorities?

21 PROF. LEMPert: What I said was -- I did
22 not say law school were a hostile place per se. What
23 I said is if one of the aspects of why blacks do
24 poorly, in some schools there's some evidence it may
25 be hostile environment. It's clearly race related

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1 beyond the other facts that we're talking about.

2 There's recent work by Kathy Barnes.
3 There's other work by Tim Clydesdale which suggests
4 it's a hostile environment. There ironically it may
5 be worse the fewer blacks there are.

6 And by hostile environment I do not
7 necessarily mean a racist environment. I'm using this
8 in a more general sense. It could be that it's simply
9 the fact you feel on the spot because you're one of a
10 small number of minorities. It could be that you've
11 chosen to go to school in Cheyenne, Wyoming or
12 whatever, the University of Wyoming which is located
13 in a community that's just completely -- you know, it
14 just doesn't feel right to live there.

15 There are a number of different dimensions
16 to the environment, culture, et cetera.

17 COMMISSIONER KIRSANOW: Could it be
18 affirmative action itself? I will tell you my
19 experience at University of Michigan when I had a
20 couple of debates there at the law school was when I
21 made the point that at the University of Michigan Law
22 School you're 174 times more likely to be admitted
23 than your similarly situated white comparative,
24 afterwards a number of black students came up to me in
25 great despair not having realized that the advantage

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1 was that great, but knowing that they were sitting
2 next to white comparatives who had stellar GPAs,
3 stellar SATs, and they felt as if "I don't belong
4 here."

5 A hostile environment can very easily be
6 generated by the mere fact that your sheer presence
7 there was the result of some extraordinary sleight of
8 hand that got you into a place papered over major
9 differences in your skill levels and said, "Go ahead
10 and compete against a guy who's well more prepared
11 than you are."

12 CHAIRPERSON REYNOLDS: Okay. Vice Chair
13 Thernstrom.

14 VICE CHAIRPERSON THERNSTROM: I'm going to
15 run through a bunch of questions, and they're all
16 directed to Professor Lempert, and then let them pick
17 and choose, and I will tell you what you already know,
18 is that I think I wrote a long Law Review piece myself
19 on this, that the Grutter and Gratz decisions were a
20 total disgrace, and O'Connor as far as I'm concerned
21 would have gotten a D in law school for such shoddy,
22 slippery thinking.

23 But -- pardon me? A D? Okay.

24 COMMISSIONER YAKI: I gave Bakke an F. So
25 we're even.

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1 VICE CHAIRPERSON THERNSTROM: Look. Let
2 me start with the fact that Jennifer made a point that
3 troubled me a lot, as well, Professor Lempert. I
4 mean, you gave people's credentials. You talked about
5 prizes. You talked about a prize for yourself, and I
6 have to tell you I'm a total cynic about this kind of
7 thing.

8 The people who get prizes in the academy,
9 in my view, are in general the kings and queens of
10 mediocrity, and you know, so it's a strike against you
11 that you come up with this stuff.

12 Of course, there's a certain --

13 CHAIRPERSON REYNOLDS: Let's -- let's --

14 VICE CHAIRPERSON THERNSTROM: -- a
15 circling of the wagons on the part --

16 CHAIRPERSON REYNOLDS: Commissioner
17 Thernstrom.

18 COMMISSIONER BRACERAS: Let her go.

19 CHAIRPERSON REYNOLDS: We're bordering on
20 being uncivil.

21 VICE CHAIRPERSON THERNSTROM: I'm not
22 bordering on being uncivil. I'm saying what I think.

23 CHAIRPERSON REYNOLDS: Well, it's possible
24 to say things which you think that are uncivil.

25 VICE CHAIRPERSON THERNSTROM: All right,

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1 all right.

2 COMMISSIONER YAKI: We're called the Civil
3 Rights Commission.

4 VICE CHAIRPERSON THERNSTROM: I will up
5 the civility, although I don't think I'm being
6 uncivil.

7 And, you know, of course, there's a
8 circling of the wagons by preferential supporters of
9 racial preferences.

10 And then you've got the Daubert standard
11 for scientific evidence, and then you come up with ...
12 Patricia Gurin, David Wilkins and company.

13 Now, who's our social scientist whose work
14 has been utterly shredded by other very good -- no, I
15 won't say "other" because I don't regard them as very
16 good -- by very good social scientists. So, you know,
17 they don't meet as far as I'm concerned your own test
18 for scientific evidence.

19 You started out saying you believe in
20 integration, equality, diversity, but those are three
21 terms that I see some tension between. Equality with
22 racial double standards, integration and diversity?
23 You walk into law schools that have strived so hard
24 for diversity? They don't look very integrated to me.
25 You walk in lunchrooms. You look at study groups.

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1 What have you?

2 The whole integration concept breaks down
3 and that I would argue is because you are admitting
4 kids on the basis of racial double standards. You say
5 look if you look at law professors, you know, various
6 prestigious categories, but of course it's not only
7 that racial preferences have operated in colleges and
8 the colleges promise they'll close the racial gap and,
9 of course, the racial gap is not closed in the college
10 years. In fact, it widens and then they go on to law
11 school and the racial gap is not closed in law school,
12 and they go on in the professions as well.

13 There are racial double standards that run
14 throughout the society because a lot of people believe
15 in them. They think they are, you know, racially
16 fair.

17 And so, you know, it doesn't -- when you
18 look at who gets what in life, when we've got a
19 society that is permeated with racial double
20 standards, it just doesn't impress me that there isn't
21 suddenly a meritocratic system that kicks in.

22 I'm a big spokesman as you must know for
23 doing something about K through 12 education as the
24 beginning of this entire problem. I do believe that
25 we can deliver good education and in the K through 12

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1 years, and we are not choosing to do so, and that is a
2 political problem rather than educational problem
3 because we know how to teach kids.

4 Your talk of stereotype vulnerability, of
5 hostile environments, it doesn't feel right to be
6 there, sign on to what Commissioner Kirsanow says.
7 Doesn't feel right to be there. Well, no, it doesn't
8 feel right to be there. If you think unfairly that
9 whites are looking at every black or Latino,
10 particularly black students, but Latino students to
11 some extent as well, looking at them and saying you're
12 an affirmative action baby.

13 It, of course, is unfair, but, you know,
14 talk about stereotypes. The admissions policy is
15 generating them, and you ask why can't we say to black
16 students, "You decide on the risk"? Okay. Let's say
17 it to whites, too. This is piggybacking on what the
18 Chair said.

19 In fact, throw the applicants down the
20 stairs, and pick, you know, the ones that land at the
21 bottom of the stairs. I mean, if you want to say to
22 students, "We've got high standards. We're admitting
23 you with low qualifications," then say it to students
24 across the board or do a random admission or
25 something.

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1 And you say, "Look. You are going to
2 have" -- even if you got rid of preferential
3 admissions, there'd still be disparities. There
4 wouldn't be the same disparities, and that's really
5 the point.

6 Finally you said, "I don't see any
7 constitutional problem with these racial preferences,"
8 well, I don't regard that as a settled issue at all,
9 and particularly because it is widely known that the
10 preferences at the Michigan law, as Professor Sanders
11 said, at the Michigan Law School were even greater
12 than those given to the college.

13 I don't expect over time that O'Connor's
14 shoddy decision will hold up, and a careless decision,
15 a careless opinion, and so I don't think this is a
16 closed question at all. I think there are serious
17 constitutional questions still on the table.

18 Anyway, I will stop there. Pick and
19 choose.

20 PROF. LEMPert: Okay. I won't try to
21 defend mentioning a prize except to say that -- well,
22 I won't try to defend that at all. I don't think it
23 needs a defense.

24 I do want to say that I think that the --

25 VICE CHAIRPERSON THERNSTROM: I believe

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1 that remark was uncivil on my part. I apologize.

2 PROF. LEMPert: Thank you. I accept.

3 But I do think this dismissal of the other
4 studies and so forth really reflects a lack of
5 knowledge of social science.

6 VICE CHAIRPERSON THERNSTROM: I'm sorry.
7 I am a social scientist.

8 PROF. LEMPert: Well, I did not mean
9 personal. I'm just talking generally in the following
10 sense. It is true that there are voices crying in the
11 wilderness who turn out to be right. It's true that
12 being alone doesn't mean that you are mistaken, on the
13 one hand.

14 On the other hand, there is a certain
15 solidarity, if you will, to social science data. It
16 has its own reality, if you will, and you know, you
17 can manipulate it. You can look for results that
18 favor what you want to find.

19 One of the methodological principles that
20 I followed assiduously when I wrote this Michigan
21 article was I did no, almost no exploratory analysis.

22 I had hypotheses. I tested them, and I presented
23 virtually every result that I came up with precisely
24 because I knew that if I wanted to look to prove what
25 I was doing, you know, you can always do that because

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1 there's error in these data.

2 And what's crucial about these
3 replications that I mention is that we're all working
4 with the same data set. People are using all sorts of
5 different models, and these are very good people, and
6 they are all coming up with different -- with results
7 that are inconsistent with what Professor Sander
8 found.

9 VICE CHAIRPERSON THERNSTROM: But people
10 working with the same Bach and Bowen, Bowen and Bach,
11 I should say, data set, in fact, some insiders to the
12 Mellon foundation read that data very differently.

13 PROF. LEMPERT: And that says something.
14 When you have a number of people reading data very
15 differently, it says something. When you have one
16 person reading it one way and you have six or seven
17 very well trained people using different methods
18 coming out with a different result, you must be highly
19 suspicious of the one person, however congenial you
20 find those results.

21 Maybe it will turn out that that one
22 person is right and the six or seven or wrong, but to
23 deal with the presumption against the science to me
24 denigrates social science.

25 VICE CHAIRPERSON THERNSTROM: Your

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1 standard was not met by Patricia Gurin or ...neither
2 one. That was results driven work.

3 CHAIRPERSON REYNOLDS: And, Professor, you
4 don't talk about the prevailing zeitgeist (phonetic)
5 on the college campus. I mean, if you want to be a
6 president of the university, if you want to become a
7 dean or at least at most universities, to accept
8 Professor Sander's view is professional suicide. I
9 don't think that you can take that position without
10 paying a professional cost as demonstrated by the
11 reaction that Professor Sander had.

12 I will point to a young Daniel Moynihan, a
13 young James Coleman who faced the same thing, and the
14 same issue, too. It's race. It's the third rail.
15 They were castigated because of their findings.

16 PROF. LEMPert: Neither Daniel Moynihan
17 nor James Coleman went on to lead poor careers because
18 of that. Indeed, and each of them --

19 CHAIRPERSON REYNOLDS: Let's look at --

20 PROF. LEMPert: -- each of them --

21 CHAIRPERSON REYNOLDS: That's the long
22 term.

23 PROF. LEMPert: But, again, in each case,
24 one of the reasons why their successful careers is
25 that other research supported their results.

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1 CHAIRPERSON REYNOLDS: Over time --

2 PROF. LEMPert: They did not contract
3 itself.

4 CHAIRPERSON REYNOLDS: -- the immediate
5 aftermath of -- well, upon the publications of their
6 findings, the immediate aftermath was very similar to
7 what we're experiencing here.

8 PROF. LEMPert: No. The immediate
9 aftermath was research on both sides, some of which
10 supported it and some of which contradicted it, and
11 over time things got more sorted out and actually more
12 complex.

13 VICE CHAIRPERSON THERNSTROM: Senator
14 Moynihan never got over the attacks on him. I knew
15 him very well. Pardon me?

16 PROF. LEMPert: Moynihan was not doing
17 quantitative work.

18 VICE CHAIRPERSON THERNSTROM: He wouldn't
19 go back to the whole topic of race at all. He was
20 so --

21 CHAIRPERSON REYNOLDS: And he's not the
22 only one who left the field. People left that field
23 after witnessing what happened to Coleman and
24 Moynihan. They left the field, work that could have
25 been done. Well, it took quite a bit of time for the

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1 dust to settle and for men and women to have the
2 confidence and the courage to go in and examine these
3 difficult issues.

4 PROF. LEMPERT: No, you're right. Race is
5 a sensitive topic. I think you're also right that
6 even though some people -- I mean, there's two kinds
7 of worlds. I mean, Rick has been all around the
8 country and how many lectures he's given, how many
9 radio shows he's been on. He's been celebrated in
10 circles as well as castigated in other circles.

11 What I'm talking about is data analysis.
12 The worst thing you can do as an academic -- you know,
13 these people don't aspire to be college presidents - -
14 is to do shoddy data analysis. People have to have
15 integrity. They have to use good methods, and I'm
16 saying, and I don't think Rick would ever contradict
17 the kinds of groups we're talking about, Ian Ayres or
18 Richard Brooks or Jesse Bernstein, these people.
19 These are good people doing good analyses coming out
20 with different and inconsistent results.

21 To go on though to some --

22 COMMISSIONER BRACERAS: And we should have
23 a discussion about why that is the case instead of I
24 have more checks in my column than you.

25 COMMISSIONER YAKI: Well, wait a minute.

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1 Come on. We had a briefing at this Commission several
2 months ago at which the whole idea of incorporating
3 better social science and relying on social science
4 rather than lawyers and other people to drive decision
5 making came about. I find it extremely I'm not going
6 to say hypocritical, but I just find it very
7 interesting that here when you have social scientists
8 who are critiquing in great numbers this particular
9 research, all of a sudden the social science may not
10 be as good as it should be, when in our disparity
11 study report that we put up that's laying out there
12 somewhere, it talks about the need for a natural
13 academy of sciences for rigorous studies, peer review,
14 blah, blah, blah, blah, blah, and --

15 COMMISSIONER BRACERAS: Let me clarify
16 that because --

17 COMMISSIONER YAKI: -- then all of a
18 sudden here --

19 COMMISSIONER BRACERAS: -- certainly that
20 is not -- I certainly don't mean to suggest that the
21 studies pointed out by Professor Lempert are invalid
22 or that they shouldn't get careful consideration. My
23 only point was --

24 COMMISSIONER YAKI: Oh, no, that was your
25 point.

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1 COMMISSIONER BRACERAS: Now, wait a
2 minute.

3 COMMISSIONER YAKI: The point was it was
4 nice to talk about this --

5 COMMISSIONER BRACERAS: No, that was not
6 my point.

7 COMMISSIONER YAKI: But it was.

8 COMMISSIONER BRACERAS: My point is --

9 CHAIRPERSON REYNOLDS: Folks, do I have to
10 use my gavel? Let's move on.

11 VICE CHAIRPERSON THERNSTROM: Well, wait a
12 minute.

13 COMMISSIONER BRACERAS: Let me finish what
14 I was saying. My point was not that those other
15 studies aren't valid or that they shouldn't be
16 considered on their own merits. My point is that it
17 is not enough simply to point to Professor Sanders and
18 say, "You are wrong because I have a list of ten
19 people who disagree with you."

20 PROF. LEMPert: I've told you already
21 today several things. I've told you that Professor
22 Sander himself pointed to serious flaws in his
23 original analysis: the ignoring of selection bias, as
24 well as problems with the data.

25 I could tell you, and I tell you in my

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1 written testimony, for example, Professor Sander
2 misinterpreted the meaning of significance tests, an
3 error that someone taking Stat. 101 should not make.

4 I could tell you that Professor Sander did
5 not present all of the diagnostics he should have
6 presented with respect to certain logistic regression
7 analyses. All of these things I tell you in quite
8 detail and referred you to, but without PowerPoint,
9 talking orally, trying to go into technical details
10 here I thought that the best thing I could tell you
11 was that many other reputable people have pointed to
12 flaws.

13 If you want to see the flaws, read the
14 articles by him, his response. Read my article. Read
15 other articles. You will see them.

16 COMMISSIONER BRACERAS: Contrary to what
17 Commissioner Yaki had suggested, I am a strong
18 believer that more research, more transparency, more
19 data, more disclosure are always better, and then we
20 can sort out as policy makers; we can sort out which
21 we want to credit and which we think are valid. That
22 is one of the reasons I support the King bill that was
23 submitted to you for consideration, because more data
24 and more disclosure can only further the debate and
25 further the analysis.

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1 PROF. LEMPert: The King bill is a
2 straightjacket.

3 CHAIRPERSON REYNOLDS: Okay.

4 COMMISSIONER YAKI: Can I continue on with
5 my comments? Because I've been waiting very
6 patiently, Mr. Chair.

7 PROF. LEMPert: Can I just move on to one
8 more of Professor Thernstrom's comments?

9 VICE CHAIRPERSON THERNSTROM: And, by the
10 way, talk in civility. Saying that Professor Sander's
11 work flunks Statistics 101 I think is uncivil.

12 COMMISSIONER BRACERAS: My only point in
13 raising this to begin with was to say that I didn't
14 like the tenor of the presentation and the way that it
15 was --

16 CHAIRPERSON REYNOLDS: Okay. Let's give
17 the other Commissioners an opportunity to ask
18 questions.

19 PROF. LEMPert: Can I respond to --
20 Professor Thernstrom gave a number of questions. I
21 just want to respond to one more.

22 CHAIRPERSON REYNOLDS: All right. After
23 you have finished responding, we'll have Commissioner
24 Taylor, then Commissioner Yaki.

25 PROF. LEMPert: This has to do with the

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1 racial double standard issue. I just want to point
2 out that we have a tremendous problem of racial double
3 standard and bias in this country. There's a whole
4 host of research which is showing things today, the
5 disadvantage attached to black names, the fact that if
6 you have a vita and you're black, you may do worse or
7 no better in the job market than a white with a
8 criminal record.

9 The IAT test, substantially strong
10 research in stereotype threat. So we are in a country
11 that is permeated by racial double standard. It may
12 not be racism because a lot of it is unconscious. A
13 lot of it is not intended, but we are in a country
14 where black people face disadvantage at every turn
15 which they would not face if they were white because
16 of their race.

17 VICE CHAIRPERSON THERNSTROM: Well, that
18 is another data question.

19 CHAIRPERSON REYNOLDS: Okay. Now,
20 Commissioner Taylor.

21 COMMISSIONER TAYLOR: Thank you.

22 Thank you all for coming.

23 Let me make two quick disclosures. The
24 first is that I'm not a social scientist. I'm just a
25 lawyer. So I'm not going to be able to challenge you

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1 all.

2 The second thing, and this is what really
3 troubles me, you all have consistently referred to the
4 top 20 law schools, and I'm a graduate of a law school
5 that is routinely ranked between 21st and 23rd. So we
6 generally refer to the top 25.

7 (Laughter.)

8 COMMISSIONER TAYLOR: Professor Sander, I
9 think I'm clear as to where you are both with respect
10 to the cost of affirmative action and we've all paid
11 due homage to the fact that we all worship at the
12 church of diversity and inclusion, et cetera. So I
13 think I know where you are both with respect to the
14 cost and the benefit.

15 Professor Lempert, I'm clear as to whether
16 or not you agree, first of all, that there indeed are
17 costs associated with affirmative action, whether
18 there are different costs than the costs identified by
19 Professor Sander, and if you agree that there, indeed,
20 are costs, I'd like you to detail the cost of
21 affirmative action to the same degree that you were
22 able to detail the benefits, if possible.

23 And the second thing I'd like to do is I'd
24 like to start all of the comments and start from a
25 slightly different perspective. I joined this

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1 Commission for the purposes, I hope of contributing
2 the public discourse as a way to improve the black
3 community among minority communities. So I come to
4 these debates from a single perspective, that is, if
5 you are the black student, I don't care about the
6 university, frankly. I don't care about society. I
7 want to talk about that black student you identified
8 as the -- internally you all know that that person has
9 a 50 percent chance of flunking out, all right, or not
10 doing well, washing out of the system.

11 And whether it's in the best interest of
12 that black student to attend an elite university
13 versus a second tier university; whether it's better
14 for that black student and, therefore, better for the
15 black community.

16 Frankly, I have a real concern on that
17 critical issue, particularly since my sense is that if
18 you are a black student and you're trying to make
19 these difficult life decisions, you aren't aware of
20 the fact that you fall into this desperate category.

21 I mean, I have a real concern about that.

22 So, please address the cost specifically and whether
23 or not you think it's in the best interest of the
24 black student and the black community when they're at
25 that critical decision making stage.

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1 PROF. LEMPert: Yeah, a couple. Let me
2 deal with your second question first. First of all,
3 with respect to the black students who attend the
4 elite universities, the top 25, let us say, they don't
5 pay any costs in terms of flunking out, not
6 graduating, not passing the Bar any more than white
7 students do. There are some who don't make it.
8 Almost all do. Almost all go on to good careers.

9 COMMISSIONER TAYLOR: Am I hearing you to
10 say that a black student admitted to an elite
11 university pursuant to an affirmative action policy is
12 in no greater danger of washing out, that is, washing
13 out of the university, not passing the Bar, not
14 succeeding, with the same degree that their peers are
15 succeeding? Is that --

16 PROF. LEMPert: If there's a difference,
17 it's very small indeed.

18 COMMISSIONER TAYLOR: Okay. Is that
19 something you agree with?

20 PROF. SANDER: No, and I actually have
21 facts to back it up with.

22 COMMISSIONER TAYLOR: Okay, all right.

23 PROF. SANDER: Can I comment on that
24 briefly?

25 CHAIRPERSON REYNOLDS: Oh, what the hell.

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1 Go ahead.

2 PROF. SANDER: One of the key analyses
3 that we did in the file work (phonetic), which did not
4 contradict the earlier work but simply developed a new
5 test for looking at the same ideas, was what we call
6 the first choice/second choice analysis. We looked at
7 students who were admitted to the schools that they
8 most wanted to get into, and then we compared students
9 who went to that school with students who turned that
10 school down to go to a less elite school, usually for
11 geographic and financial reasons.

12 And we found generally that students who
13 went to the most elite choice had dramatically better
14 outcomes than those who went to the more elite choice.

15 They were half as likely to fail the Bar. They were
16 half as likely to not graduate. Those are really big
17 differences when you're talking about a 40 percent
18 flunk-out rate at the BAR.

19 Now, Rothstein and Yoon came back and they
20 did an analysis that has a serious selection bias
21 problem in which they said, "Well, we think that the
22 problem Sander is talking about exists for the bottom
23 80 percent of black students, but not for the top 20
24 percent, which was exactly the point that you're
25 inquiring about. Okay?

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1 If you go back and do that first choice,
2 second choice analysis and you split the sample and
3 you look at the top 20 percent and the bottom 80
4 percent, you find essentially identical results. I
5 actually prepared a slide showing these regressions to
6 show you today.

7 So Rick bases his claim that the elite
8 schools are fine because of his Michigan data, but
9 I've shown that, you know, his Michigan data can't be
10 reconciled with Michigan Bar data, and all of his
11 results in Michigan show that grades are very
12 important and that blacks are as affected by grades as
13 everyone else.

14 PROF. LEMPert: Let me just briefly deal
15 with the technical issues that Rick raises and then go
16 back to your question.

17 First of all, Rick's measure in his first
18 choice/second choice study is only first time Bar
19 passage rate. The significant results disappear when
20 you look at whether they pass the BAR eventually.

21 COMMISSIONER TAYLOR: In your mind. In my
22 mind it's significant.

23 CHAIRPERSON REYNOLDS: Same here.

24 PROF. LEMPert: I'm just saying these
25 people become lawyers.

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1 PARTICIPANT: Pass the Bar in California.

2 PROF. LEMPert: Secondly, the difference
3 between his first and second choice schools, it's not
4 completely clear what it is, but it seems like it's
5 small because there are actually more second choice
6 people in elite schools, a higher percentage than
7 there are first choice people.

8 And if there's any fall-off, it's not
9 likely that there's a substantial difference in the
10 quality of schools of people going to the second
11 choice. It's still a strong act, and you can find in
12 my written testimony that I go into those issues.

13 As for the Bernstein and Yoon work, to be
14 much more precise -- Rothstein-Yoon -- they find no
15 evidence or even evidence for perhaps a reverse
16 mismatch in the top 20 percent. In the bottom 80
17 percent, they do find there may be some mismatch, but
18 their best estimate -- and I have an E-mail
19 correspondence on this -- is it only affects about ten
20 percent of that 80 percent or about eight percent of
21 all students.

22 But now to get back to your questions
23 about cost to the community and cost to the students,
24 first of all, I'll simply reiterate that the black
25 students in the Michigan data and all of the data I

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1 know of, including the data Rick is working with pay
2 no cost of that sort in terms of flunking out or
3 graduating or if they do, it's a very, very -- you
4 know, maybe seven percent don't pass the Bar as
5 opposed to four percent if they were white, and
6 there's no reason to believe they do better at a
7 lesser quality school.

8 They seem to have great benefits. They
9 move into these positions where they can be role
10 models for the black community like law school
11 teaching.

12 One of the things we also found in our
13 data was that for better or worse, the legal
14 profession is still highly racially structured; and
15 even when, that black lawyers are much more likely to
16 serve black clients than white lawyers. Every ethnic
17 group, Hispanics, Asians, Native Americans are more
18 likely to serve people of their same ethnic group
19 relative to people who are that ethnic group.

20 Everybody from Michigan serves whites more
21 than anybody else, but there are lots of practices
22 which are predominantly black. So in terms of the
23 black community, the graduates from a school like
24 Michigan go out. They form sometimes all black law
25 firms or if they're in white firms, they serve blacks.

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1 So in terms of community benefit, I think
2 there's a huge benefit that it goes to the community.

3 With respect to cost, I think there are two kinds of
4 costs that black students pay. One is not paid, as I
5 just said, by black students at the elite schools, but
6 is paid by black students at the third, fourth, fifth
7 tiers, and this is the cost of going to law school and
8 dropping out, and that's a cost that's not unknown to
9 white students, but overall in 1991, again, I think
10 the record is probably better now through the increase
11 in black credentials, but in 1991, about 50 percent,
12 slightly over, who were concentrated in these data --
13 again, you didn't find them in the top schools hardly
14 at all, but were concentrated in the bottom tier
15 schools, particularly the bottom three tiers, and
16 that's a serious cost.

17 They drop out in debt. They don't have
18 the career. Some of them graduate in debt and pass
19 the bar, but they never make it. This is a cost. If
20 they hadn't gotten into law school, they probably
21 wouldn't have paid that cost, and one has to recognize
22 that.

23 The question becomes do we leave that to
24 the people to decide. If we did, we get them more
25 information, or do we say we're not going to have

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1 affirmative action because if half pay the cost, half
2 may get tremendous benefits.

3 The other cost is the one that Mr.
4 Kirsanow -- I don't know if it's Doctor or Professor
5 or Esquire --

6 COMMISSIONER KIRSANOW: You can call me
7 anything you want to. It doesn't matter.

8 PROF. LEMPERT: Whatever you point to,
9 your honorary doctorate points to, and this is -- and
10 I think one has to face this -- a potential cost of
11 stigmatization by being known as an affirmative action
12 baby. How great that is and how much it exists is
13 another question.

14 Certainly if you talk to Michigan law
15 students they're delighted they're at Michigan.
16 Whatever that cost is, they're very happy to be at
17 Michigan law school, and we do not get reports. For
18 example, you'd expect blacks to be less satisfied in
19 their careers if they graduate stigmatized. No, we
20 don't get that. They're as happy and satisfied with
21 their careers as whites are.

22 And when you look at how whites regard
23 minorities, ethnic minorities, by the 1990s more than
24 half the whites said that having ethnic minorities
25 present at Michigan added on a seven point scale --

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1 five to seven I call considerably -- considerably to
2 the value of their classroom education, classroom
3 education. Virtually none gave no value.

4 I think that respect is shown. At
5 Michigan, for example, one thing we have, which we
6 would not have but for our minority students, is a
7 journal to focus on race law issues. That journal has
8 blacks on it. It has Hispanics on it. It has Native
9 Americans on it, has Asians on it, has whites on it,
10 all working together respecting one another.

11 It's also the case -- and I'll just say
12 this as a law professor -- that I have noted over the
13 years in my teaching that a common experience is that
14 a black student whom we gave a very good performer in
15 class; some of my best performers have been blacks,
16 and then do relatively poorly on the final exam.

17 What the white students see is that good
18 class performance. They don't see the exam score, and
19 I think that leads to respect for black students and
20 breaks down stereotypes and breaks down
21 stigmatization.

22 But, yes, one has to recognize that there
23 are costs, and there are costs to this very debate
24 that we're having to divisiveness in society. Now,
25 one of the cures, I think is to advertise the fact

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1 that I think David Wilkins found that blacks who were
2 out 20 years from Harvard averaged like \$312,000 or
3 something like that annual in income. We find hugely
4 successful black alumni of all kinds at all levels.

5 If we were to talk about these successes,
6 Clarence Thomas in the Supreme Court; black attorneys
7 who benefited from affirmative action; all sorts of
8 high status, important positions doing excellent work;
9 blacks doing pro bono; if we broadcast that message, I
10 think we can even break down some of these
11 stigmatizations, particularly if we admit that a good
12 majority of these people would not have been where
13 they were, but for affirmative action.

14 COMMISSIONER TAYLOR: One follow-up. You
15 did not mention among your list of costs lower grades.

16 You indicated that blacks tend to have I think in
17 your earlier testimony lower grades on average. Is
18 that not a cost?

19 PROF. LEMPert: I do not think that that
20 is a great cost. The one area where I think there's
21 some substance to the points that Rick makes, and it
22 makes perfect sense, is if you have a black student
23 who comes to school like Michigan with credentials
24 that ordinarily would only suffice to get him into
25 Wayne, let us say, or Boston College; it is very

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1 likely that that student will do worse grade-wise in
2 Michigan than he would have done in a Wayne or a BC or
3 what have you.

4 Now, maybe that has some ego cost and to
5 some student it does. To some it doesn't, but career-
6 wise -- and it's life we're talking about, I think,
7 not that three years in law school -- career-wise
8 students come to Michigan because it's all to the good
9 that they went there.

10 PROF. SANDER: Mr. Chair, if I can just
11 briefly add a couple of things, most of Rick Lempert's
12 arguments are based on this highly skewed sample of
13 half of the minority graduates of Michigan. The
14 objective data on actual long-term results compiled
15 painstakingly in the national study done by the LSAT
16 found that the disparity in rates of graduation and
17 Bar passage was as great at the elite schools as it
18 was at the less elite schools.

19 Now, it's true that the magnitudes are
20 smaller because we're talking about much successful
21 people generally, but the ratios, the four to one
22 ratios, the six to one ratios are still there at the
23 top 30 schools the way they are at the other 150
24 schools.

25 And the underlying issue, I think, the

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1 thing that's probably driving all of these findings is
2 the question of in which environment do you earn more.

3 If you do dramatically worse on your first Bar exam,
4 that's because you learned less in law school than you
5 would have at another school, and it makes sense that
6 if schools have an extreme hierarchy of different
7 pedagogies and regimes under which they're teaching,
8 that big disparities in credentials are going to lead
9 to less efficient learning.

10 That's totally borne out by the Bar data.

11 The other thing that's related to this that I think
12 is so important to emphasize is that blacks are not
13 making a meaningful choice when they get into the
14 system. They are being told by the schools that race
15 is a tie breaker, that it's an insignificant factor,
16 that they are doing holistic review, and because
17 blacks are very aggressively recruited by these
18 schools, they receive on average three times as much
19 financial aid as white do, and much of that is
20 recruitment financial aid as opposed to lead-based
21 financial aid.

22 Blacks come into the first year of law
23 school projecting higher expected GPAs than whites do.

24 They believe that they are, you know, the most sought
25 after student. They are the most sought after student

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1 by the law school, and they believe that their success
2 is going to be commensurate. So there's this crushing
3 process of discovery during the first and second year
4 of law school that the reality is totally out of
5 keeping with everything that they've been told and
6 their expectations.

7 That's one of the reasons why disclosure
8 is so important. You know, we can argue about whether
9 or not we should allow people to make different
10 choices based on race, but clearly, there's no doubt
11 on which they can make an intelligent choice.

12 PROF. LEMPert: You know, Rick's four-to-
13 one ratio I have to point out in the lead schools is
14 what Alfred Hitchcock called a McGuffin. It distracts
15 from what the facts are.

16 People are numbers. They're not
17 percentages. At Michigan among the 1980s graduates,
18 99.-some percent of the whites passed the Bar exam.
19 Something like 95 percent of the blacks. That's a
20 five-to-one ratio, but when you look at numbers it's
21 something like, you know, eight blacks didn't pass the
22 Bar or something like that, and you know, probably
23 eight whites because there were more whites didn't
24 pass the Bar.

25 The number of people affected at these

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1 elite schools is very, very small and insubstantial.
2 As for financial aid, blacks get more gift financial
3 aid, but they need more financial aid. Again, we had
4 excellent data on this in our Michigan data, and it
5 turns out that the average black graduates with a debt
6 of something like 60 -- in the 1990s, I think it was
7 like 66,000 and 94 percent or something, 93 percent
8 had debt.

9 The average white had a debt of like
10 53,000, and only 76 percent had debt.

11 As for first time Bar failure rates, one
12 thing which would be very nice to know which we don't
13 know is how much of that difference is due to blacks
14 who are much more needy than whites not shelling out
15 for that high quality, gold standard Bar review course
16 the first time because if they can pass without
17 paying, it means a lot more to them than it means to
18 the white student whose parents can help pay for the
19 Bar review course.

20 We don't know how much it's simply a Bar
21 review course phenomenon.

22 PROF. SANDER: Actually we do know that
23 because there was a very careful study done by Steven
24 Klein of graduates in the Texas Bar. He looked at
25 that exact question and a ---

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1 COMMISSIONER YAKI: Okay. Can we stop
2 this study war going on?

3 VICE CHAIRPERSON THERNSTROM: Well, I
4 would like to hear the --

5 PROF. SANDER: We're talking about the --

6 CHAIRPERSON REYNOLDS: To answer your
7 question, no, because this is what this is all about.
8 It's a battle over methodology, although I think that
9 that --

10 COMMISSIONER YAKI: But now we're bringing
11 up studies that are --

12 VICE CHAIRPERSON THERNSTROM: I want to
13 hear the rest of --

14 COMMISSIONER YAKI: Mr. Chairman, I've
15 been very patient during this entire time.

16 CHAIRPERSON REYNOLDS: Yes, but I'll point
17 out that I gave you the opportunity on the front end.
18 So Commissioner Yaki --

19 COMMISSIONER YAKI: Does that mean I'm
20 being penalized on the back end? Is that what I'm
21 hearing you say?

22 VICE CHAIRPERSON THERNSTROM: I would like
23 to hear the rest of Professor Sander's --

24 CHAIRPERSON REYNOLDS: Commissioner Yaki,
25 ask your question, please.

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1 VICE CHAIRPERSON THERNSTROM: But he was
2 in the middle of a sentence.

3 CHAIRPERSON REYNOLDS: That is true, but
4 we have to give all Commissioners an opportunity, and
5 we also have Commissioner Melendez on the line who may
6 also have questions and comments, and we have to get
7 on to the second portion of the briefing.

8 VICE CHAIRPERSON THERNSTROM: Okay. I
9 don't think it would hurt to let him finish the couple
10 of sentences he has to say.

11 CHAIRPERSON REYNOLDS: No one is going to
12 be satisfied. I have tons of questions I'd like to
13 ask.

14 PROF. SANDER: Twenty seconds? Okay.
15 Just two points. We have done the financial aid
16 studies. The reason why it makes so much sense for
17 the Commission to appoint a panel of neutral experts
18 is to go over these things. Rick and I could go
19 through our data and I believe that on 90 percent of
20 these issues you would get a clear judgment from the
21 independent panel on which way the data points.

22 Thank you.

23 VICE CHAIRPERSON THERNSTROM: There is
24 such a thing as a neutral social science?

25 (Laughter.)

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1 PROF. SANDER: There is actually. Bill
2 Henderson at Indiana University is a wonderful law
3 professor who is a strong support of affirmative
4 action, has been trying to put together a neutral
5 panel and get people on both sides of this debate to
6 agree to have them do an analysis, but the Civil
7 Rights Commission gave it some premature (phonetic)
8 to that. It would greatly facilitate.

9 PROF. LEMPert: I agree. We're one on
10 this one.

11 CHAIRPERSON REYNOLDS: Commissioner Yaki,
12 you have questions, comments?

13 COMMISSIONER YAKI: Yeah. I mean, as with
14 my fellow Commissioner Taylor, I am not a social
15 scientist. I have a deep aversion to math of all
16 types, and as a former policy maker, I sort of
17 subscribe to the theory or the old saw that there is
18 lies, damned lies, and then there's statistics.
19 Because when it comes right down to it, when it comes
20 right down to here, I think we are now arguing not
21 just missing the forest for the trees. We're now
22 arguing individual species within an arboretum not of
23 our own choosing. Let's go back to what this is all
24 about and why this came about, why this controversy
25 exists.

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1 And that is the supposition that at the
2 elite law schools, affirmative action is somehow
3 detrimental to minority students such that the
4 affirmative action should be done away with so as not
5 to be detrimental to them. Because what is this all
6 about? This is all about the number of slots
7 available in the elite law schools, to whom it should
8 go to and one size says it should be based on
9 completely color blind criteria, and the other side
10 says we must give due to consideration to the issues
11 and factors of race and ethnicity.

12 To quote Justice O'Connor in the
13 apparently ill written opinion in Grutter, the fact
14 that these law schools are the training ground for
15 leaders and the path of leadership must be visibly
16 open to talented and qualified individuals of every
17 race and ethnicity has been lost in this entire
18 debate.

19 What bothers me and what Mr. Sander, with
20 all due respect, is that I take you at your word in
21 the beginning of your article that said you were
22 someone who in the past has favored race conscious
23 remedies, blah, blah, blah, blah, blah.

24 But let me just say this. You're a good
25 speaker, but in the tone of your language, I don't

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1 know if it has always been this way or if it started.

2 When you start saying things like, "Well, but for
3 racial preferences, they wouldn't feel that way," or,
4 "but for the fact that they were there, they wouldn't
5 have this kind of hostility felt toward them," what
6 have you.

7 I mean what part of the problem that I see
8 here is that we create this stigmatization that's been
9 talked about? When we talk about the fact that, oh,
10 it must be that the African American or the native
11 American or the Hispanic or the Asian, and I remember,
12 I mean -- unfortunately I am now old enough to
13 remember to remember when being a student when Bakke
14 first came down and being old enough to remember that
15 there are only two Asians at the Yale Law School when
16 I was there and maybe a handful of African American.
17 I had no concept of what affirmative action even meant
18 at that time because I was too busy, quite frankly,
19 doing other things at the University of California
20 which I can't even talk about, but, you know, the idea
21 is that, you know, we've lost in this discussion the
22 basic route of why we're here, and that is -- and it
23 goes back to Brown. It goes back to the very fact
24 that diversity and racial -- seeing people from
25 different racial and ethnic backgrounds in your peer

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1 group is per se a benefit to this nation, and we've
2 forgotten all about that. Instead we sit here and we
3 talk about the fact it's really -- I mean to me, my
4 belief is that it comes down to the fact that people
5 are upset that they didn't get one of the 275 slots
6 and Yale Law School and one of the 550 slots at
7 Harvard Law School, one of the --

8 COMMISSIONER TAYLOR: Hundred and 20.

9 COMMISSIONER YAKI: -- 120 at Washington
10 Lee and the top 25 law schools.

11 And we sit here and we spend all of this
12 time and people throwing stats back and forth at each
13 other and this study and that study, the battle of the
14 studies, when it really comes down to the mission, I
15 think, of what this Commission is all about, and that
16 is what is the policy of this nation and what should
17 it be.

18 And I think that there are disagreements
19 on this Commission. I respect them, and I understand
20 where it comes from. I don't think it comes from a
21 bad place, but I don't think that we should be sitting
22 here talking about which study is better than the
23 other without really attacking the real core issue,
24 and that is: is it good? Is there a greater good
25 served, as Justice O'Connor said in Grutter, to be

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1 served by diversity in education, and how does
2 affirmative action play a role in that?

3 And, again, I say when we sit here and
4 talk about the fact that they're under qualified or
5 they're not going to succeed or they're going to fail
6 out, we are perpetuating that stigma that people talk
7 about, and one of these things in our handbook where
8 this white student says, "Oh, yeah, I looked over at
9 this African American student, and I just knew that he
10 got in because my friends who are better qualified
11 didn't get in. That's the only reason he got in, and
12 therefore, I don't like blacks."

13 I mean, we perpetuate this by this talk,
14 and I think that it bothers me to the core as how this
15 discussion goes and where it has been. You know, I
16 respect the research that you do, Professor Sander. I
17 know that you've taken a lot of crud for it. You've
18 also gotten a lot of kudos from people as well, you
19 know.

20 I would urge you to keep the independent
21 track of research and scholarship and not fall into
22 being funded by some of the groups out there whom I'm
23 sure want to lavish lots of money on you to continue
24 your studies on this one or that one because all it
25 does is just perpetuate this perpetual battle that we

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1 have which at its heart is really a policy battle
2 camouflaged with these statistics, studies, one way or
3 another.

4 The fact of the matter is it goes back to
5 Brown through to Grutter about the need, I think the
6 compelling need for our nation and our universities
7 and our elite law schools to have diversity, to have
8 different points of view and different viewpoints and
9 different experiences just like we all have on this
10 Commission here, brought up, debated, and discussed in
11 harmonious manner as you can, but sometimes you get a
12 little heated, but in the end you shake hands and you
13 go on.

14 But I think that I worry about how -- my
15 concern about your study, I'm not going to go into,
16 you know, the fact that my law school buddy Ian Ayres
17 is busy blackberrying me saying, "Oh, no, no, no.
18 That's not how my thing is done," and everything like
19 that. It is to say, you know, this is a bigger issue
20 than about numbers. We can use and play with the
21 numbers all we want, but it's a bigger issue that goes
22 to the heart and fabric of who we are and what we want
23 to be as a nation, and I thank you for bringing this
24 information to light. I think it brings up important
25 questions, but it ultimately cannot be determinant of

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1 what we do or what we should do as a country.

2 CHAIRPERSON REYNOLDS: Commissioner
3 Kirsanow.

4 COMMISSIONER KIRSANOW: Thank you.

5 I was remiss when I first asked questions
6 not thanking both of you for coming. You've done a
7 spectacular job, and this is, I think, precisely what
8 we should be doing, and I appreciate the back and
9 forth.

10 I have several specific questions.
11 There's been some competing contentions with respect
12 to data. I just want to see if we can get some
13 agreement on certain issues. Maybe we can't, and I
14 think most of these can be answered very discretely
15 and specifically.

16 Is there agreement between both Professor
17 Lempert and Professor Sander that blacks -- and I'm
18 talking about all schools, and Professor Sander has
19 tables within his study that suggest this or show this
20 -- that blacks are two and a half times more likely
21 not to graduate from law schools than whites? Does
22 that sound approximately right?

23 PROF. LEMPert: In 1991. We really don't
24 have the data today.

25 COMMISSIONER KIRSANOW: Okay. The most

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1 recent data shows that, and that's 1991.

2 PROF. LEMPert: 1991.

3 COMMISSIONER KIRSANOW: Okay.

4 PROF. SANDER: Commissioner.

5 COMMISSIONER KIRSANOW: Yes.

6 PROF. SANDER: There is more recently data
7 available, and it shows that black graduation rates
8 have been falling a little bit since 1991.

9 COMMISSIONER KIRSANOW: Okay. So it's
10 even a little bit worse than that possibly?

11 PROF. SANDER: Yes.

12 COMMISSIONER KIRSANOW: Two and a half
13 times, Professor Lempert, you wouldn't disagree that
14 the most recent data shows that?

15 PROF. LEMPert: I have not seen the data
16 he refers to, but I'm not going to question it.

17 COMMISSIONER KIRSANOW: I just want to get
18 the parameters. The most recent data shows that
19 blacks are four times more likely to fail the Bar exam
20 in the first attempt. Does that sound correct?

21 PROF. LEMPert: That is from what Rick
22 referred to as a subset of his analyses which I do
23 quarrel with.

24 COMMISSIONER KIRSANOW: Okay.

25 PROF. SANDER: But that number has been

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1 replicated by several people.

2 COMMISSIONER KIRSANOW: Okay. The gaps
3 that we see in both attrition rates and Bar failure
4 rates, can those be explained by factors other than or
5 to what extent can they be explained by factors other
6 than what Professor Sander says is preferential
7 policies?

8 PROF. LEMPERT: I think to a large extent
9 and financial matters, I think, play a major role in
10 explaining the gap. Also to some extent they are the
11 result of preferential policies. That's for people at
12 the low end. It's not a mismatch. It's not a
13 preferential policy. I think to zero extent basically
14 or close enough it doesn't matter for people on elite
15 scores when we get to the bottom of it.

16 But I also want to make just one other
17 point. You know, it's so easy to talk in terms of
18 percentages and numbers, but the tragedies, the costs
19 are paid by people who can count as numbers. The
20 numbers of whites exceed the numbers of blacks in most
21 of these categories. The numbers of whites who drop
22 out of school, who invest and don't graduate are
23 higher than --

24 COMMISSIONER KIRSANOW: I appreciate that,
25 and I would expect that --

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1 PROF. LEMPert: I just want to be clear.

2 COMMISSIONER KIRSANOW: -- since three
3 times more whites than blacks.

4 PROF. LEMPert: Exactly.

5 COMMISSIONER KIRSANOW: It would only make
6 sense.

7 Would you agree that 50 percent or
8 approximately 50 percent of black law students cluster
9 in the bottom decile in terms of grade point averages
10 at law schools?

11 PROF. LEMPert: I think that's right in
12 the data that we have.

13 COMMISSIONER KIRSANOW: Okay. And just
14 one other question, and you've spoken very eloquently
15 about what you perceive to be the need for affirmative
16 action. There's a good possibility that even if
17 there's not any more further litigation post Grutter
18 on this issue, if Grutter means the law of the land,
19 that pursuant to Justice O'Connor's aspiration that
20 preferences end in 25 years, that we have 22 more
21 years of preferences.

22 Do you think that we're going to be able
23 to erase the need for affirmative action of racial
24 preferences in the next 22 years?

25 PROF. LEMPert: Without doing what Dr.

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1 Thernstrom talks about, which is really investing
2 heavily in pre-K through 12, without increasing the
3 equality more generally in our society, I'm sorry to
4 say I'm a pessimist on that.

5 VICE CHAIRPERSON THERNSTROM: I didn't say
6 anything about investment if that means money.

7 PROF. LEMPert: You don't want to pay
8 money in pre-K ---

9 COMMISSIONER KIRSANOW: I'll stipulate to
10 that.

11 VICE CHAIRPERSON THERNSTROM: I don't
12 think that money is the central problem.

13 PROF. LEMPert: There are many kinds of
14 investments.

15 VICE CHAIRPERSON THERNSTROM: Okay.

16 COMMISSIONER KIRSANOW: Mr. Sander.

17 PROF. SANDER: Yes.

18 COMMISSIONER KIRSANOW: With respect to
19 the gaps in attrition rates, Bar passage rates, and
20 also the clustering toward the bottom end of the grade
21 point scale, I looked at one of your tables that
22 suggested that those gaps are twice as large as could
23 be explained by any factors other than preferential
24 treatment. Am I reading your graph correctly?

25 PROF. SANDER: Yes, that's correct.

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1 COMMISSIONER KIRSANOW: Okay, and then one
2 other thing. I saw one graph, and I think it was on
3 page 479 of your Law Review article, where you
4 indicated that similarly situated black students or
5 black students similarly situated to their white
6 comparatives, that is, the same grade point average
7 when they come out of law school, have first year
8 starting salaries six to nine percent higher than
9 white students.

10 PROF. SANDER: Yes, that's correct.

11 COMMISSIONER KIRSANOW: Is there anything
12 that explains why that is?

13 PROF. SANDER: Yeah, racial preferences by
14 employers, mostly large firms and government.

15 COMMISSIONER KIRSANOW: Then I guess one
16 more question, and this is not a very specific
17 question, but it begs the question. If there is
18 extraordinary preferences exerted by colleges to get
19 black students, extraordinary preferences exerted by
20 law schools to get black students, and extraordinary
21 preference exerted by employers to get black law
22 graduates, then the underlying initial theses for
23 affirmative action going back to when Hubert Humphrey
24 debated it on the floor of the Senate in '64 and
25 saying there weren't going to be preferences, to the

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1 Philadelphia Plan and Lyndon Johnson, and that is that
2 it was a form of making amends for the invidious, the
3 pernicious racist history of the country toward
4 blacks, seems to me that that has evaporated.

5 If we don't have that moral imperative for
6 these things, then what is the bases for extending
7 these preferences for another 22 years if everybody in
8 the world is trying to get more black students?

9 PROF. SANDER: I think that the sort of
10 social reparations motivation that existed a lot in
11 the '60s and '70s has now been displaced by the
12 diversity imperative, and employers, schools, large
13 law firms, all feel that it's essential that they at
14 least make gestures indicating a commitment to racial
15 diversity.

16 COMMISSIONER KIRSANOW: And, Professor
17 Lempert, you were cut off unfortunately. I think you
18 were making a point that you wanted to make. You were
19 asked a question about what's the benefit to students,
20 but I think you wanted to talk more about the benefit
21 to the school as a whole by having racial preferences,
22 the benefit to the law professor in having a diverse
23 class, and I wanted you to have an opportunity to
24 explore that a little bit more.

25 PROF. LEMPert: Okay. Thank you.

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1 Let me just touch on these other points
2 very quickly. You know, unfortunately, and through no
3 fault of Rick's, I and others have been unable to get
4 a hold of the after J.D. study data that he's using
5 for some of his comments, and I can't make any -- you
6 know, I just can't endorse or quarrel with some of
7 that.

8 I do know in the Michigan data, which we
9 looked at very carefully, there is very little reason
10 to believe that the earnings data for our black
11 students, certainly the ones who have been out more
12 than a few years, has anything to do with any
13 reference given blacks in the work force.

14 The second point about moral imperative, I
15 think Rick is right that officially things have
16 switched to a diversity imperative, but I personally
17 believe there still is a moral imperative for
18 affirmative action. I think the people who place
19 discrimination as, "Well, it really ended in the Civil
20 War. No, maybe it was Brown v. Board of Education.
21 Well, maybe it took 20 years" are blind to what occurs
22 today and recently.

23 Up until around 1970, for example,
24 federally insured loans, a black with the same income,
25 the same earning prospects as a white could not buy a

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1 house because he could not get a mortgage at least in
2 a desirable area.

3 If you look at the earnings of blacks and
4 whites today, they have closed considerably. Blacks
5 are in 75, 80 percent, I think, of whites. If you
6 look at the wealth, it may be about 13 percent.

7 Why is that? Well, that prime source of
8 wealth for middle income America is that house that
9 your parents you inherited it from purchased in, let's
10 say, 1968. This difference, which is a recent
11 difference well into our lifetimes, tremendous
12 disadvantage for blacks, continues to have its effects
13 felt in things like needing more financial aid, not
14 being able to afford Law Review courses and the like.

15 I think that's a moral imperative. When
16 you do these studies, audit studies, whenever they're
17 done, whether it's car buying or renting houses or
18 resumes, you find that prejudice against blacks
19 persists.

20 So I do think that there is a moral
21 imperative today still to make this a racially more
22 equal, more egalitarian society.

23 With respect to the law school, I gave you
24 that example. You know, it stands out in my mind is I
25 came to Michigan Law School. I transferred out of

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1 Harvard Law School, I should note, went to a better
2 place. In 1965, we had approximately 1,100 schools,
3 maybe 1,050 students in three classes. We had one
4 black student across the entire three classes.

5 That's not America. That doesn't raise
6 various issues. It doesn't put things in the
7 forefront. We had obviously no black student
8 organizations, issues. So issues were not discussed.

9 You talked about police brutality. You didn't have a
10 student to speak up. We could talk about what
11 happened to a neighbor of theirs or about the crime of
12 driving while black. This is the diversity imperative
13 for law schools for education, and it's one that we've
14 found over the years as our minority presence was
15 built up. The white students as well as the black
16 students increasingly came to recognize, particularly
17 the white male students.

18 COMMISSIONER KIRSANOW: Let me ask one
19 more question with respect to --

20 PROF. SANDER: Commissioner, could I just
21 make one 20 second comment on that?

22 COMMISSIONER KIRSANOW: Sure.

23 PROF. SANDER: Because of the race norming
24 that occurs in law school admissions, the focus of the
25 admission is entirely on race, meaning color. Now,

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1 Rick has talked about reasons why it's important to
2 have diversity, which I very largely agree with, but
3 you know, if you really cared about diversity, you
4 would look at all characteristics of the person.

5 Black students at elite law schools are
6 very nearly as socioeconomically elite as white law
7 students at elite schools. That's not being factored
8 in because the schools are trained to minimize the
9 credentials gap to the extent that they can within
10 their race imperative.

11 So I think the diversity is in many ways
12 cosmetic.

13 COMMISSIONER KIRSANOW: It's not the
14 viewpoint diversity. It's simply color diversity, and
15 it may apply to a place like a law school or some
16 social science course, but there's no black viewpoint
17 on the speed of light. There's no black viewpoint on
18 what "Gilgamesh" means. There's no black viewpoint on
19 gradient derivatives.

20 So I'm not sure, but that being said, I
21 can see at least the argument is more plausible in a
22 law school setting, but that argument also feeds into
23 stereotypes, that black students are going to have
24 necessarily an experience with being arrested or
25 racial profiling and things of that nature.

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1 But that being said, given that there's
2 not been tremendous disagreement that there are some
3 disparities between black students and white students
4 in terms of graduation rates and clustering toward the
5 bottom of the grade point spectrum, do you think it
6 may be useful simply from a standpoint of getting
7 consumer information out there to have these
8 statistics broadly known so that a consumer, someone
9 who's going to apply to Michigan Law School would know
10 that, well, your odds of flunking out of Michigan Law
11 School if you're black aren't necessarily appreciably
12 greater than a white student, but if you go to another
13 law school it's 20 times greater. Would you think
14 that that kind of information may be useful?

15 PROF. LEMPert: You know, that's a really
16 tough question. You know, I do think that that
17 information might be useful, but it's also for reasons
18 that you yourself pointed out very early -- there's
19 danger of stigmatization which may lead to a self-
20 fulfilling prophecy at some level.

21 I would like to see it researched, and
22 there are also some issues. I mean one issue is that
23 all of these things about rates require certain
24 numbers to get stability. If you don't have
25 sufficient numbers, they go all over the ball park.

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1 One year you tell people it's 100 percent pass you
2 pass. The other year you tell people there will be a
3 25 percent chance that you pass.

4 And it's key to credentials probably
5 interacting with schools, and what the base should be
6 for that is difficult. So in principle, I think that
7 there is that benefit, and it's a kind of consumer
8 protection benefit, if you will.

9 On the other hand, there's the danger of
10 both stigmatization and the danger of misleading
11 information because you give people information about
12 rates that is not stable.

13 I think we have to do some research into
14 those issues to decide whether or not it makes sense
15 and how those costs and benefits balance off.

16 COMMISSIONER YAKI: I have to just say
17 this. I absolutely agree with that because I think
18 that all of us have heard the reports of the guidance
19 counselors in some parts of the country who have told
20 students of a certain race or ethnicity, "Don't even
21 try there. Don't even go there. You're not going to
22 succeed. You're not going to do well there," and you
23 know, to the extent that the staff has become a self-
24 fulfilling prophecy, I worry about that.

25 I think that, you know, if you have it in

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1 concert with the kinds of programs that people talk
2 about in K through 12, which you have to do, you just
3 can't have a national high school exit examination in
4 and of itself without putting investment in on the K
5 through 12. Otherwise all you're doing is
6 accentuating, making a bad situation even worse. I
7 would be very loathe to go there.

8 CHAIRPERSON REYNOLDS: Vice Chair
9 Thernstrom.

10 VICE CHAIRPERSON THERNSTROM: Look. I
11 appreciate very much what Commissioner Yaki said.
12 There are huge normative issues here, and they have to
13 do with the racial fabric of American society, and at
14 the end of day, race is still the American dilemma.

15 And one of the real undebated questions
16 here, but it's running through everybody's comments
17 and particularly those of Professor Lempert is the
18 level of racism in America today. You know, is there
19 ongoing prejudice such that X and Y happens?

20 And again, we're back there to data
21 questions over which we would have a lot of
22 disagreement. But you know, I thank Professor Yaki
23 for kind of saying --

24 COMMISSIONER YAKI: Commissioner,
25 Commissioner.

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1 VICE CHAIRPERSON THERNSTROM: Commissioner
2 Yaki.

3 COMMISSIONER YAKI: Please.

4 VICE CHAIRPERSON THERNSTROM: Sorry. On
5 the other hand, Commissioner Yaki, the last I knew,
6 Brown v. Board was about de jure segregation. Grutter
7 was not, and I don't see the straight line between the
8 two of them.

9 But getting to my question, I want to talk
10 about the flunk-out rate. David Reisman --

11 COMMISSIONER YAKI: I'll draw you the line
12 if you want.

13 VICE CHAIRPERSON THERNSTROM: Pardon me?

14 COMMISSIONER YAKI: Between Brown and
15 Grutter, with the big detours along the way, Suange,
16 Mecklenburg, Hockey, all of these other kinds of
17 things.

18 VICE CHAIRPERSON THERNSTROM: I'd be happy
19 to see it.

20 COMMISSIONER YAKI: Okay.

21 VICE CHAIRPERSON THERNSTROM: I'm going to
22 disagree with your drawing, but that's all right.
23 David Reisman --

24 COMMISSIONER YAKI: O'Connor mentions
25 Brown in --

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1 VICE CHAIRPERSON THERNSTROM: That's not a
2 recommendation.

3 (Laughter.)

4 VICE CHAIRPERSON THERNSTROM: David
5 Reisman, everybody knows.

6 COMMISSIONER YAKI: Your guys appointed
7 her. So what can I see?

8 VICE CHAIRPERSON THERNSTROM: David
9 Reisman was --

10 COMMISSIONER BRACERAS: Everyone makes
11 mistakes.

12 VICE CHAIRPERSON THERNSTROM: -- I used to
13 say to students as Harvard undergraduates, "Go to the
14 law school where you're going to be on Law Review."

15 Now, Reisman was not only -- he was known
16 as a sociologist. He was, in fact, a law school
17 graduate who clerked for Justice Brandeis, and there
18 has been some discussion here about the flunk-out
19 rate, and Professor Lempert said, "Well, it used to be
20 very high in the '60s, has gotten very small now, very
21 low rate," and that of course, raises the question are
22 the students smarter or perhaps there's a combination
23 of grade inflation and racial double standards.

24 But in any case, one of the facts about
25 the elite law schools is no one flunks out

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1 practically. It's hard to flunk out. You've got to
2 work hard at flunking out, it seems to me, but if you
3 disagree with me, you know, I'd like to hear that.

4 Last comment, I was troubled by your
5 reference to Justice Thomas and his being a
6 beneficiary of racial preferences in his admission to
7 Yale Law School. You like to have hard facts. That
8 is not an established fact. He did very well at Yale
9 Law School as the dean of his time testified at his
10 hearings.

11 So you know, I think there is an
12 unfortunate level of a kind of gratuitous ugliness
13 towards him, and I was unhappy about that easy
14 assumption that, of course, he was the beneficiary of
15 racial double standards, but the real question here is
16 the flunk-out rate, and what happened between the '60s
17 and now and isn't it a fact that it is hard to flunk
18 out of these law schools?

19 PROF. LEMPert: You know, on Justice
20 Thomas I was just listing prominent blacks, but I
21 don't want to, you know, -- obviously I don't know the
22 data. No one has ever revealed his, including
23 himself, but if you do know the number of black
24 students across the nation who the year he got into
25 law school could have gotten into Yale without some

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1 benefit of their race, it is extraordinarily,
2 extraordinarily small.

3 VICE CHAIRPERSON THERNSTROM: Well, Lani
4 Guinier was in his class. Did she get in because of
5 her race, too?

6 PROF. LEMPert: I'll just say it was
7 extraordinary. The whole -- I mean, even in recent
8 years, you know, the number of blacks who might get
9 into any law school would be like 30, any of the top
10 ten law schools.

11 But putting that aside, I just want to be
12 clear. The flunk-out rate in the elite law schools I
13 said in the 1930s, not the 1960s.

14 VICE CHAIRPERSON THERNSTROM: I'm sorry.
15 I missed that.

16 PROF. LEMPert: Which is a really big
17 difference because in the 1930s admission was pretty
18 open, even to the elite law schools. Since the LSAT
19 test and the high selectivity, flunk-out rates have
20 been minimal not just in the elite law schools, but
21 going pretty much down, but I think they should be
22 minimal. Most of the -- again, you look at the
23 Michigan data, and you find overall 97 percent of the
24 graduates passed the Bar exam.

25 Well, there's not many room to flunk out

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1 people who would have flunked the Bar. One of the
2 things that Rick and I are agreed on that we differ on
3 issues of functional form is that the curve of the
4 relationship between your credentials and how well
5 you're going to do is not a smooth, linear curve, but
6 there's either a threshold or it's curvilinear in some
7 way such that if you get above a certain level of
8 credential, you're pretty much going to be able to
9 make it in law school.

10 And my view is that the minorities
11 admitted affirmative action at the elite law schools
12 are all above or almost all above that level of safety
13 and comfort. You go down a couple of notches, they're
14 not above that level.

15 VICE CHAIRPERSON THERNSTROM: Of course,
16 there are very few whites taken with those precise
17 credentials. That's an argument for --

18 PROF. LEMPert: I also want to point out,
19 again, that number I gave you was in my talk. Twenty-
20 seven hundred blacks are in a sense misplaced, and
21 this is 1991 data. By misplaced, we mean they are in
22 schools they would not have gotten into given their
23 credentials.

24 Over 6,000 whites were misplaced. They're
25 in schools at all levels. We don't see them. We

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1 don't know who they are.

2 VICE CHAIRPERSON THERNSTROM: It seems to
3 me they're proportions here.

4 PROF. LEMPERT: Well, the number of
5 people. We deal with people are the human beings.

6 PROF. SANDER: It's a totally misleading
7 statistic because the white displacement is by, you
8 know, a half of a tier --

9 VICE CHAIRPERSON THERNSTROM: Exactly.

10 PROF. SANDER: -- and the white
11 displacement is by two to three tiers.

12 VICE CHAIRPERSON THERNSTROM: Exactly.

13 CHAIRPERSON REYNOLDS: Okay, folks. We
14 could go on for a very long time, but we have a second
15 panel. One last question, very short, I promise.

16 COMMISSIONER KIRSANOW: You know I asked
17 for questions.

18 Professor Sander, what's a better
19 predictor of Bar passage rate and future earnings,
20 graduating at the bottom of a top tier school or
21 graduating in the middle of a middle tier school?

22 VICE CHAIRPERSON THERNSTROM: Or why not
23 at the top of a --

24 COMMISSIONER KIRSANOW: Let's keep it
25 simple.

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1 VICE CHAIRPERSON THERNSTROM: Well, why
2 not the Reisman point, a lower tier school, but --

3 CHAIRPERSON REYNOLDS: Vice Chair
4 Thernstrom, it's his question. Go ahead.

5 PROF. SANDER: It's a complicated
6 question, but the general answer is that being in the
7 middle of a lower tier school leads to higher
8 graduation rates, higher chance of passing the Bar on
9 the first time, higher chance of eventually passing
10 the Bar, and a higher earnings in the job market.

11 COMMISSIONER KIRSANOW: The second
12 question goes to specific constitutionality. I think
13 you're saying that the application of racial
14 preferences in law schools across the board is an
15 anvil on the scale not feather on a scale. In your
16 estimation based on the statistics you've seen, is
17 there any law school in the country or are there very
18 few law schools in the country that are actually
19 complying with the dictates of Grutter?

20 PROF. SANDER: I think that the
21 predominantly minority law schools are probably
22 complying. They have, you know, very diverse student
23 bodies already. So they don't feel as compelled to
24 use racial preferences to make distinctions among the
25 students. So I think that they probably come pretty

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1 close.

2 There are a few law schools that have
3 small preferences, there were sometimes -- after
4 Proposition 209 was passed, although that's eroded
5 over time. So there are a few examples, and there's
6 much to be learned from those examples, but that's a
7 tiny, tiny minority of schools.

8 CHAIRPERSON REYNOLDS: Okay, folks. It's
9 clear that we can go on for quite some time, but we
10 have a second --

11 COMMISSIONER MELENDEZ: May I have a
12 question?

13 CHAIRPERSON REYNOLDS: Oh.

14 (Laughter.)

15 CHAIRPERSON REYNOLDS: Commissioner
16 Melendez, take as much time as you like.

17 COMMISSIONER MELENDEZ: Yes. I just
18 wanted to -- because we covered mainly the issue of
19 black law schools, I'm just wondering even one of the
20 panelists -- how does, you know, Native Americans and
21 the other minorities -- do they basically follow the
22 same pattern?

23 VICE CHAIRPERSON THERNSTROM: Well, not
24 Asians certainly.

25 PROF. SANDER: It's hard to talk

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1 statistically about Native Americans because the
2 numbers are relatively small. The numbers of
3 Hispanics are now large enough that you can do a lot
4 of the similar types of analyses, and the short answer
5 is that the preferences extended to Hispanics are
6 about half as large as the preferences extended to
7 blacks, which means they're still quite substantial.

8 The grade effects are about half as large.

9 The Bar effects are about half as large so that you
10 see these similar types of things extending pretty
11 much in a parallel fashion for Hispanics, less
12 severely, but still quite notable.

13 CHAIRPERSON REYNOLDS: Additional
14 questions, Commissioner Melendez?

15 COMMISSIONER MELENDEZ: I just wanted to
16 thank both panelists. I think you know, they really
17 covered a lot, and I know that it seems like the
18 debate is going to continue, but I just wanted to
19 thank them both because it was very informational.

20 So thank you both.

21 PROF. LEMPert: And could I on behalf, I
22 think, of Rick also thank this panel for giving us the
23 time to really probe these issues which we've not had
24 another forum and for the probing nature of the
25 questions you asked that allowed, I think, each of us

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1 to, you know, tell you what we believe.

2 CHAIRPERSON REYNOLDS: Okay.

3 PROF. SANDER: Thank you.

4 CHAIRPERSON REYNOLDS: Well, I appreciate
5 you folks carving the times out of your busy schedule
6 to come here to have this discussion. It's an
7 important question, and as Professor Yaki pointed out,
8 it goes beyond--

9 (Laughter.)

10 CHAIRPERSON REYNOLDS: It's an issue of
11 principle. It's an issue of who we want to be at
12 least in the 21st Century or, you know, distributing
13 benefits and burdens on the basis of race, something
14 that we want to do in the 21st Century. There are
15 costs and benefits associated with going down either
16 road.

17 So the fact that we've fleshed out some of
18 these issues here today, I think it's good that we
19 have these conversations where we can discuss these
20 issues in a place where we can be respectful to each
21 other and where we can have an exchange of ideas on
22 these controversial topics.

23 So let's take a five-minute break, and
24 then we'll start up with the second panel.

25 (Whereupon, the foregoing matter went off

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1 the record at 12:05 p.m. and went back on
2 the record at 12:14 p.m.)

3 CHAIRPERSON REYNOLDS: Everyone, let's
4 take our seats.

5 Okay. I think we have everyone.

6 All right. I hope we have as many sparks
7 and fireworks during the second half as the first.
8 You've already been introduced, and at this point I
9 would appreciate it if, Professor Smith, you would
10 just frame the issue for us since we've been talking
11 about an issue that's related, but somewhat different.

12 **III. Appropriateness of Equal Opportunity and**
13 **Diversity Standard 211**

14 DEAN SMITH: Thank you, Mr. Chairman and
15 members of the Commission. Thank you for inviting me
16 to this.

17 You have my full written statement. So I
18 won't repeat all of it, and I'm dealing, at least,
19 with a very narrow slice of what you have been talking
20 about, which is the accreditation standards, and we
21 start really with what I think is the consensus in
22 legal education that all students benefit from
23 diversity, and that that was, indeed, recognized for
24 those who approve or those who don't approve in Greer
25 v. Bollinger.

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1 But the point is that the accreditation
2 standards that I'm talking about as the court
3 recognized there, I think, legal educators would agree
4 with, that classroom discussion is livelier, more
5 spirited, and simply more enlightening and
6 interesting, as the court said, when students have the
7 greatest variety of backgrounds, and we have found
8 that to be the case, as the court said, inside and
9 outside of the classroom.

10 The Commission has been particularly
11 interested in the accreditation standards, especially
12 211, and let me spend a few minutes talking about the
13 accreditation standards in 211.

14 The council recently, as you know,
15 proposed changes in those standards. So I wanted to
16 talk a little bit about what those standards,
17 particularly Standard 211, does and then talk about a
18 couple of misconceptions that are abroad and describe
19 one change that the council last weekend recommended
20 during our meeting in Cleveland.

21 Standard 211, as it is revised, imposes an
22 obligation for law school to demonstrate by concrete
23 action a commitment to having a student body that is
24 diverse. These standards allow law schools latitude
25 to implement the commitment to diversity in a manner

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1 that takes into account each law school's individual
2 mission and circumstances and the laws under which
3 they operate.

4 Law schools notably may make the required
5 demonstration of commitment to seek a diverse student
6 body by methods other than employing race conscious
7 admissions decisions. That is left to the law school.

8 For many educational reasons, it's
9 important that law schools also have a commitment to
10 diversity in faculty and staff, and the rationales for
11 this parallel, I think, the reasons for educational
12 diversity in the study body.

13 The ABA will also note is hardly unique in
14 insisting that the institutions it accredits have a
15 commitment to diversity. That's a fairly common
16 standard among accrediting agencies.

17 Let me now, as I indicated, turn to some
18 of the misconceptions that we have seen about these
19 proposals and mention the one change, and indeed, if
20 you don't have it distributed so that you have it in
21 writing, let me know.

22 CHAIRPERSON REYNOLDS: We have it.

23 DEAN SMITH: Okay. So let me talk about
24 what the proposals do not do. Number one, the
25 proposals do not impose significant new requirements

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1 on law schools. Rather, they continue the
2 requirements of the existing accreditation standards
3 while providing greater clarity and more guidance. In
4 fact, since 1980, since 1980, the ABA standards have
5 required law schools to demonstrate a commitment to
6 providing full opportunities for the study of law and
7 entry into the legal profession by members of minority
8 groups.

9 Secondly, the revised standards and
10 interpretations do not require law schools to consider
11 race or ethnicity. Rather Interpretation 211.2 states
12 only that law schools may use race and ethnicity in
13 their admissions decisions in a manner permitted by
14 the Supreme Court in Grutter.

15 And third, the revised standards and
16 interpretations do not establish or mandate a system
17 of quotas for minority enrollment. Standard 211.3
18 does indicate that the results that a law school
19 achieves in diversity, those results are relevant.

20 Results, however, would be only part of
21 the wide range of facts that would be considered,
22 including facts concerning the efforts that a law
23 school makes to achieve diversity. Thus, results are
24 not dispositive of the question of it's law school's
25 commitment to diversity, and it would be but one of a

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1 number of factors.

2 Finally, the revised standards and
3 interpretations do not require law schools to violate
4 state or federal laws. Law schools that are subject
5 to a constitutional or statutory prohibition against
6 race conscious selection policies would have to
7 demonstrate the commitment that the standards require
8 by means other than those prohibited by the applicable
9 constitutional statutory provisions.

10 And to emphasize that point, the council
11 recently added a sentence to Interpretation 211.1 that
12 says -- and I'm going to quote it here -- "A law
13 school that is subject to such constitutional or
14 statutory provisions would have to demonstrate the
15 commitment required by Standard 211 by means other
16 than those prohibited by the applicable constitutional
17 or statutory provisions.

18 So in closing in these brief highlights, I
19 believe that the standards implement three values that
20 should have broad consensus in legal education and in
21 our society.

22 One, diversity is important. It enhances
23 the education of the next generation of our profession
24 inside and outside of the classroom.

25 Two, flexibility is appropriate. The

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1 standards should and do allow law schools considerable
2 flexibility in implementing a commitment to diversity.

3 And, three, law schools consistent with
4 Grutter are permitted but not required to use race as
5 a factor in admissions decisions.

6 I am grateful for the opportunity to
7 participate in the hearing. Given the hour, I thought
8 hitting the highlights was what you were asking.

9 CHAIRPERSON REYNOLDS: I appreciate that.

10 COMMISSIONER BRACERAS: Thank you.

11 CHAIRPERSON REYNOLDS: Okay. Next up we
12 have Professor Bernstein.

13 PROF. BERNSTEIN: Yeah. So I had a
14 PowerPoint presentation and obviously it's not
15 working, but I have the slides here. It's not exactly
16 the slides I was going to present today, but those of
17 you who want to follow along with the text, you might
18 -- it's the one that says Standard 211 on the front.
19 It might be helpful to look at the actual language as
20 we go through it.

21 So we have Standard 211, which is the
22 proposed standard that the ABA will be voting on
23 officially finally in August, and it is expected to
24 pass, and my objections to this standard are twofold.

25 First, despite what Dean Smith said, it

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1 requires law schools to act unlawfully.

2 And, secondly, it requires law schools to
3 act unwisely to the great detriment of minority
4 students who are supposed to be the beneficiaries of
5 the standard.

6 Now, the law itself is pretty vague and
7 flexible of the standard, and I don't have any
8 specific objections to it, although even that could be
9 abused, but it was drafted very carefully, I think, to
10 stop any such objections like by me.

11 The problem came in January where there
12 was a meeting of the section at the annual law
13 professors conference, and what happened then was that
14 a group of radical left wing law professors demanded
15 that they change the standard to require basically
16 explicit quotas.

17 And they eventually made a compromise
18 between the original standard and its interpretations
19 and the very extreme standard that was requested and I
20 think so hastily dropped in language as to try to
21 compromise this. They would up doing the things I
22 said.

23 So the devil is in the details. It's not
24 understanding it itself in the interpretations. Any
25 interpretations according to ABA rules are just as

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1 important as the standards, not just legislative
2 history. It's the standard itself.

3 So the next slide that you have shows
4 Interpretation 211-1, which says that a constitutional
5 provision or statute that purports to prohibit racial
6 and ethnic preferences is not a justification for
7 noncompliance.

8 The word "purports" is obviously very odd.
9 We know Proposition 209, among other laws and
10 statutes and constitutional provisions in various
11 states, requires that schools not consider race and
12 ethnicity. So that suggested at least to me that the
13 ABA was at least tentatively implicitly adopting the
14 somewhat wacky constitutional theory that was already
15 shot down by the Ninth Circuit that if you prohibit
16 racial discrimination in favor of minorities, that you
17 are, in fact, violating the Constitution.

18 So "purports" means that the laws are
19 invalid and you have to challenge them. But putting
20 aside these odd constitutional theory, the
21 interpretations states that laws banning purposes are
22 not an excuse for schools' noncompliance with Standard
23 211.

24 Now, the interpretation has apparently
25 been modified or suggested to be modified as we just

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1 heard to specifically that you don't have to disobey
2 the law. That law, we'll see how that works out, but
3 nevertheless, I found it impossible to credit the
4 denial that at least schools that are not subject to
5 constitutional or statutory provisions will not have
6 to engage in preferences.

7 Now, I don't want to infer Dean Smith
8 isn't an honest guy, but Dean Smith is not necessarily
9 the person who goes around the law schools with the
10 accreditation bodies deciding who to put on probation
11 and who to disaccredit, and I have a knowledge from
12 several deans I've spoken to, people at different law
13 schools that every since the Supreme Court decided
14 Grutter v. Bollinger, accreditation officials have
15 been pressuring law schools to use or increase the use
16 of racial preferences using their accreditation
17 authority as blackmail.

18 Of course, if you're not accredited, your
19 students can't take the Bar. They've made it clear
20 that you'll be put on probation or even disaccredited
21 if you don't use lower emission standards for minority
22 students especially African American students, even if
23 you believe as a law school that the students you'd
24 have to admit under this lower standard are not
25 qualified for admission.

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1 So in other words, since Grutter, ABA
2 accreditation officials, even without a new Standard
3 211, even in the absence of a rating authority to do
4 so have been requiring law schools to use racial
5 preferences. And, indeed, the relevant standard used
6 to say that you're only allowed and required to admit
7 qualified students, and they've been ignoring that.

8 So if they were requiring these for racial
9 preferences when there was no authority to do so, when
10 there's the least ambiguous and perhaps more ambiguous
11 authority to do so, you can imagine what these
12 accreditation authorities will do.

13 The second reason that I find it -- well,
14 I was going to say the second reason I thought it
15 impossible to accredit them was that the original
16 Interpretation 211-1 said that you're only allowed to
17 do this in accordance with the law. The new standard
18 seems to say, the new interpretation seems to say you
19 have to do this even contrary to the law.

20 Apparently the interpretation is once
21 again being modified so that hopefully that will
22 become a non-issue, hopefully.

23 There's further evidence that the ABA
24 wants law schools to violate the law. You can find
25 that in Interpretation 211-2, which is a couple of

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1 slides ahead. That says consistent with the Supreme
2 Court's decision in Grutter that a law school may use
3 race and ethnicity in its admission processes to
4 promote equal opportunity and diversity.

5 Now, this misstates the law of Grutter.
6 Yes, they're saying you have to obey Grutter, but this
7 is not Grutter. Grutter never says that any law
8 school whenever it feels like it can engage in racial
9 preferences for equal opportunity purposes. Indeed,
10 Supreme Court precedent is quite consistent that mere
11 general discrimination and making up for it is not a
12 lawful reason to engage in racial preferences.

13 Second, even to provide to diversity is
14 not true that under Grutter any law school can pursue
15 diversity whenever it wants by engaging in racial
16 preferences. Rather, and I have a slide here where
17 Grutter actually said Justice O'Connor wrote that
18 we're deferring to the law schools educational
19 judgment that such diversity is essential to its
20 educational mission.

21 Now, not all law schools think it is
22 essential to its educational mission to have
23 diversity. Although some law school faculties think
24 that, they've never sat around and discussed it. Such
25 law schools are not allowed to engage in diversity

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1 just because it's a popular thing to do, and certainly
2 you're not allowed to do it just because the ABA tells
3 them to.

4 It's just not the case under Grutter that
5 you can say, "Well, the ABA wants us to. So we have
6 to defer to the ABA's desires." It has to be the law
7 school's individual educational judgment, and I can
8 tell you for a fact there are some law schools out
9 there that in their own educational judgment would not
10 have the kind of educational or racial preferences
11 that the ABA has been demanding.

12 So let's then turn to Interpretation 211-
13 3, which is also on the slide, which is the last of
14 the relevant interpretations of Standard 211. Two,
15 eleven, dash, three says that Dean Smith said we're
16 not officially going to specify the means that you
17 achieve or pursue racial diversity, but we are going
18 to look at both the totality of the law school's
19 actions and the results achieved.

20 Now, ABA officials, including Dean Smith,
21 will quote 211-3 to say, "See, we're not requiring
22 racial preferences." You can do all sorts of things.

23 If you look at the next slide you could have special
24 recruitment efforts, programs of special financial
25 aid, special programs that meet the needs of minority

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1 students entering into law school. I have a couple of
2 other quotes in the next two slides from other ABA
3 officials of things that you could do.

4 Essentially in very brief terms, a law
5 schools has the choice of just engaging in racial
6 preferences and stop satisfying the ABA or spending
7 hundreds of thousands of dollars every year. And not
8 all law schools, including my own, could throw away
9 hundreds of thousands of dollars. There are few
10 faculty positions. It's extra financial aid, it's
11 extra assistance to students in finding jobs. You
12 spend hundreds of thousands of dollars on something
13 your admissions staff to historically black colleges
14 are having special summer programs for minority
15 students, special financial aid for minority students,
16 and then you'll hope the ABA will be satisfied with
17 the results.

18 There is no safe harbor here. Results
19 will still be considered whatever you do. There will
20 be no safe harbor. Any sensible Dean will just go for
21 the results. It would be a violation, I think, in
22 fact, of a dean's fiduciary duty to his constituency
23 in the law school and in the university to risk
24 spending hundreds of thousands of dollars and then not
25 come up with the results that the accreditation people

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1 want and then have the law school be put on probation
2 or even deaccredited.

3 Obviously, the path of least resistance is
4 to make sure you have the results that the ABA wants.

5 Now, the ABA's determined to mandate racial
6 preferences in law school admissions might at least be
7 understandable if it were, in fact, wise, but already
8 without additional diversity pressure from the ABA,
9 approximately 42 percent of African American students
10 who matriculated law school never become lawyers.
11 They either fail out of law school or they failed the
12 Bar, and I agree with Professor Lempert that the elite
13 schools is much less of a problem. The vast majority
14 of black law students, like the vast majority of law
15 students in general, don't go to University of
16 Michigan, don't go to Harvard, don't go to Georgetown.
17 They go to schools like American or Catholic or D.C.
18 College of Law or whatever, and they are more affected
19 by this.

20 I did some quick and dirty math in what
21 you could find in the slides here as on Bok and
22 Williamson who obviously supported affirmative action,
23 and doing this quick and dearth math, we found out
24 that 42 percent of black law school martriculants
25 never become lawyers. It's also the case that the

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1 bottom two thirds of law schools, 52 percent of black
2 martriculants never become lawyers, and undoubtedly
3 it's the case if you take sort of a Bell curve
4 approach to this, that at 52 percent of students in
5 the bottom two thirds of law schools never become
6 lawyers. At the lower ranked law schools, lowest
7 ranked law schools especially at the law schools in
8 states with tough Bar exams, well more than 52 percent
9 never become lawyers. You're talking I'm sure of 60,
10 70, maybe even 80 percent at some law schools, black
11 martriculants never become lawyers.

12 Now, many law schools have a LSAT cutoff
13 point. Professor Lempert suggests, I think that you
14 never know whether someone is going to succeed or not.

15 From discussions I've had with people who know the
16 statistics, any law school that wants to try and look
17 over its data and come up with an LSAT cutoff point
18 where they know that students with an LSAT below a
19 certain level have a rather poor chance of passing and
20 ultimately passing the Bar as well, and most law
21 schools, in fact, do have an informal or formal cutoff
22 point under which they will not admit students,
23 unless, of course, they are pursuing diversity in
24 which case often these cutoffs are put aside.

25 One last point. The ABA itself prohibits

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1 law schools under Standard 501(b), which is also in
2 your slides -- I think it's a little bit out of order
3 -- from admitting applicants who are unlikely to
4 succeed in law school and the Bar exam. So at least
5 in the past law schools had the out of saying, "Look.
6 We're really trying to pursue diversity, but you've
7 banned us from admitting students that we think are
8 going to fail. We just can't go any lower in our
9 statistics."

10 However, the ABA is poised, as the last
11 sentence, the ABA is poised to amend the
12 interpretations to that standard to say that to the
13 extent that your efforts to admit only qualified
14 students are going to conflict with Standard 211, you
15 have to ignore the standard. You only admit students
16 you think are going to succeed.

17 CHAIRPERSON REYNOLDS: Okay. Commissioner
18 Kirsanow.

19 COMMISSIONER KIRSANOW: Three quick
20 questions.

21 First, Professor Bernstein, you've heard
22 some of the testimony in the previous panel --

23 PROF. BERNSTEIN: Yes.

24 COMMISSIONER KIRSANOW: -- with respect to
25 at least Professor Sander maintains that it is highly

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1 unlikely that the vast majority of law schools could
2 comply with the strict dictates of Grutter v.
3 Bollinger in terms of diversity or race simply being a
4 thumb on the scale in the admissions process, and that
5 the vast majority of law schools, therefore are not
6 complying with Grutter.

7 If that is, in fact, the premise, let's
8 just take that as a fact for now, and I understand
9 there may be some dispute about that, do you see any
10 means by which universities could, in fact, comply
11 with Section or Interpretation 211.2 that says, you
12 know consistent with the Supreme Court's decision in
13 Grutter is there any university they think could
14 comply with that?

15 PROF. BERNSTEIN: I'm not sure I agree
16 with you. I think Justice O'Connor was just trying to
17 let the law schools do whatever they were already
18 doing, but if we take your premise as a given, that
19 it's only supposed to be used as a plus factor akin to
20 other plus factors that a law school might be using as
21 Justice Powell suggested in Bakke, I think that for
22 the vast majority of law schools, the only plausible
23 way of complying with that would be to -- I forget who
24 suggested it earlier -- but would be to lower their
25 admission standards to the level of the standards

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1 they're using for minority students, and then just
2 take the students in by lottery.

3 COMMISSIONER KIRSANOW: And this is for
4 Professor Bernstein and Dean Smith, and by the way,
5 thanks both of you for coming. This is very helpful.

6 Dean Smith, you mentioned at the outset
7 there was a statement made, and I think in terms of
8 goodwill, all of us probably adhere to it, that
9 diversity is a good thing, but one of the things that
10 interests me is I went through in great excruciating
11 detail the record both at the District Court, the
12 Court of Appeals, Supreme Court in Grutter and Gratz
13 looking for empirical data to support the statement
14 that diversity, in fact, somehow engages in or sparks
15 spirited classroom discussions or creates greater
16 enlightenment, and I couldn't find that data. It was
17 simply taken as a given, as a presumption.

18 Does anyone here on the panel know of any
19 empirical data that supports the theory that classroom
20 diversity somehow creates a more enlightened
21 atmosphere, prompts more spirited classroom
22 discussion, and most importantly, produces better
23 lawyers?

24 CHAIRPERSON REYNOLDS: Okay, and
25 Professors, Lempert and Sanders, please feel free to

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1 jump in.

2 PROF. LEMPert: Just on the Michigan data
3 where we asked white alumnae whether or not their
4 classroom experience had been enhanced by diversity,
5 by ethnic diversity specifically. Over 50 percent of
6 the class in the 1990s or about 50 percent of the
7 class in the 1990s gave this rating a five through
8 seven and virtually no one gave it or said there was
9 no back.

10 COMMISSIONER KIRSANOW: Are you familiar
11 with I think it was Professors Rothman Yvette and
12 someone else. Somebody help me. There was three
13 professors who came up with a study that suggests
14 that. In fact, there's evidence that goes the other
15 way, and there's a more recent study than that I think
16 that just came out about six months ago that suggests
17 that diversity actually has a net deficit based on the
18 same kind of inquiries, that they were asking people,
19 well, what was your experience like? And the greater
20 the amount of diversities, both blacks, Hispanics and
21 whites all said --

22 PROF. LEMPert: The study had tremendous
23 compounds of the quality of school with the degree of
24 diversity, and I don't think that's reliable data. I
25 don't know the more recent study. I did look, and you

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1 know, I have not refreshed my memory, but they did not
2 sort out a number of factors you want to control for
3 before you reach that conclusion.

4 CHAIRPERSON REYNOLDS: Thank you.

5 I'm sorry. Go ahead.

6 PROF. SANDER: Just to briefly, you know,
7 I think impartial observers generally agree that all
8 of the research in this area is weak, and that we need
9 to do real controlled studies of diverse environments
10 of different types and evaluate educational outcomes
11 in some objective way to really get at this question.

12 Professor Lempert mentions for the study
13 that Mike Gary Orfield suffers from the fact that if
14 you ask anyone in 2006 does diversity benefit your
15 educational experience, they'll say yes. You know, no
16 one says no. Would be hard to imagine.

17 But he's also right that the study done by
18 Professor Rothman suffered from the fact that Rothman
19 controlled, arranged different schools that had
20 different racial make-ups and asked people about, you
21 know, different educational outcomes that they
22 experienced, and there is a difficulty in controlling
23 for different types of environments because you can
24 end up sort of comparing community colleges which are
25 very diverse but have, you know, resource limitations

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1 versus elite schools that all have very similar racial
2 make-ups, but have great educational resources.

3 So you can get a result from that
4 regression that indicates a greater diversity is
5 correlated with different problems.

6 No one has carefully done the kind of
7 control study that we need to do to get at this.

8 COMMISSIONER KIRSANOW: And one last
9 question to Dean Smith. In the interpretations, it's
10 clear that the ABA is not mandating that a law school
11 engage in preferences per se. There could be other
12 vehicles by which you could arrive at this goal of
13 diversity.

14 Would the ABA -- and I don't know if
15 you're entitled to speak for the ABA on this issue,
16 but do you think it may be useful and would the ABA
17 support disclosure to students as to the mechanisms or
18 vehicles by which discrete schools achieve their
19 diversity goal?

20 DEAN SMITH: I think it depends on how the
21 question is asked. It is not something we've looked
22 at. Having spent many years working on questionnaires
23 to law schools and how you gather information, I think
24 that would be a very difficult question to ask because
25 for most law schools how it plays a role is far from

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1 mathematical. I mean, it is not mathematical.

2 It's an admissions committee decision
3 that's taking a lot of things into account and an
4 interplay of a lot of factors. So it may be very
5 difficult for the school to say exactly how that is
6 done because it is just not done with the mathematics.

7 CHAIRPERSON REYNOLDS: Dean Smith, may I
8 jump in?

9 DEAN SMITH: Sure.

10 CHAIRPERSON REYNOLDS: What I find
11 striking is that year after year schools hit for the
12 most part the same number. It's a range.

13 DEAN SMITH: Yeah.

14 VICE CHAIRPERSON THERNSTROM: Narrow
15 range.

16 CHAIRPERSON REYNOLDS: Ten percent, 13
17 percent. I don't think looking at the academic
18 preparation of your average black student that you can
19 hit those numbers naturally. There has to be a plan.

20 I suspect that you folks or at least the
21 folks in the admissions office, they have policies and
22 procedures, and they review the data. They look at
23 the numbers on an ongoing basis, on a rolling basis,
24 and the preference given stops.

25 So if you hit your target early in the

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1 admission season, I suspect that the admissions
2 committee is not going to provide the same level of
3 preferences.

4 So to say that there is no method to this
5 approach, I just would have to disagree with you.

6 DEAN SMITH: May I answer that as a dean,
7 not as an ABA representative?

8 CHAIRPERSON REYNOLDS: Sure, sure.

9 DEAN SMITH: Because from the ABA's
10 perspective I don't think that's an issue, but as a
11 dean I think that's not -- and as a former member of
12 an admissions committee and chair of admissions
13 committee, which is the reason I became a dean. It
14 was too hard to be the chair of the committee because
15 of all the factors you had to take into account.

16 I don't think that's what's going on. It
17 may be at some schools, and you're right. We get
18 weekly reports that break out our student body by 50
19 different factors of what's going on week to week, but
20 I don't think the consistency -- and, by the way, ten
21 to 13 percent is the substantial variance, I mean, in
22 some respects, but in other respects I think the truth
23 of the matter is the pools may go up and down in any
24 given year compared with the prior year, but the pool
25 from one year to the next is not hugely different.

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1 So I wouldn't expect grammatically
2 different --

3 COMMISSIONER YAKI: Can I break in for a
4 second?

5 CHAIRPERSON REYNOLDS: But it should be
6 different. Looking at the credentials of the students
7 applying to the school, again, your numbers don't
8 occur in nature. There is a conscious policy at work
9 here because, again, if you do it by the numbers, if
10 you just look at undergraduate GPA and the SAT scores,
11 whatever test is being used, you can't reach your
12 numbers at least with respect to under represented
13 minorities.

14 DEAN SMITH: But your question, if I
15 understand it is do law schools have essentially a
16 quota once they hit it, they quit admitting minority
17 students. I do not think that is the way it is. I
18 think rather the pool is essentially the same, similar
19 from year to year, which explains it more than that.

20 PROF. BERNSTEIN: Well, I think what
21 you're getting at is most law schools do not do a
22 holistic -- it is not a Harvard College trying to find
23 out a one poly player to fill out a polo team. Most
24 law schools especially outside, again, the top few who
25 have their pick of the cream of the crop, have a

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1 formula, a GPA and LSAT. They take the vast majority
2 of students with that formula. They do look at other
3 criteria for a certain fraction of their students, but
4 a small fraction, and then for the most part African
5 American students and to a lesser extent but still
6 significant extent, a few students won't meet that.

7 Just to get an idea of what we're talking
8 about, I mean, I read the lower court opinions in
9 Grutter. So I'm familiar with Michigan's admission
10 statistics. The African American students at Michigan
11 that admitting in the 1990s would not for the most
12 part have got into George Mason, which is the school I
13 teach at.

14 In the '90s when we were a lower ranked
15 school than we are today, that's just a statistical
16 fact. So obviously if George Mason, you know, is
17 under an obligation for their internally provided for
18 the ABA to look for African American students; we
19 can't look for anywhere near our statistics for white
20 students or we won't get anybody.

21 We do; we have in the past in the years
22 when we had a race blind policy, we used to have a
23 good reputation for being more or less race blind.
24 Then we would get a few black students who wanted to
25 go to a law school where they knew that no one would

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1 question why they got in and how they did, and the ABA
2 informally and formally tells us we don't want you to
3 have any such policy. They tell all law schools that.

4 CHAIRPERSON REYNOLDS: Isn't that an
5 infringement on academic freedom?

6 PROF. BERNSTEIN: Absolutely.

7 CHAIRPERSON REYNOLDS: I mean in the
8 Grutter case, the argument in support of racial
9 preferences in part said that universities are the
10 part of academic freedom should be permitted to come
11 up with its own selection standards for its students,
12 and if that's the case, what happened to that
13 argument? It's academic freedom.

14 PROF. BERNSTEIN: It's one of the great
15 ironies. I have to say I'm a skeptic of some forms of
16 affirmative action. I'm not against affirmative
17 action in all possible circumstances or even many
18 possible circumstances. I think it would be a very
19 bad idea for Harvard Law School to have one to five
20 black students in this entering class, which is what
21 would happen for a pure race blind policy based on
22 statistics.

23 However, it is the case that advocates of
24 affirmative action who have argued made substantial
25 academic freedom arguments which I think have some

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1 weight and which I think help to persuade Justice
2 O'Connor, and as soon as the decision came out, the
3 first thing the advocates of affirmative action did
4 within the ABA is say, "Oh, now that we have the
5 academic freedom to have affirmative action if we want
6 to, we're going to force everyone to have racial
7 preferences even if they don't want to.

8 CHAIRPERSON REYNOLDS: Dean Smith, what
9 happened?

10 DEAN SMITH: Thank you very much. I
11 disagree that that's what the ABA said. There may be
12 advocates who said that. That's just not where the
13 standard have come out. The first sentence, if I may,
14 the first sentence of Interpretation 211-3 says
15 expressly, "This standard does not specify the forms
16 of concrete actions a law school must take to satisfy
17 its equal opportunity and diversity obligation."

18 CHAIRPERSON REYNOLDS: But, Dean Smith,
19 also in the case the arguments were made that but for
20 racial preference policies they could not have the
21 diversity that we have today. In other words, nothing
22 else works.

23 So if nothing else works, where are they?

24 DEAN SMITH: I think that we can learn a
25 lot. I think that's not universally true. It may be

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1 true for some law schools. It may be not true, but we
2 should look at our colleagues from California.

3 CHAIRPERSON REYNOLDS: The outliers don't
4 matter.

5 DEAN SMITH: No, no. We should look at
6 our colleagues from California by way of demonstrating
7 that it is possible to abide by the law, which I
8 assume those law schools are, and create a diverse
9 student body.

10 CHAIRPERSON REYNOLDS: But you're not --

11 COMMISSIONER KIRSANOW: We do have some
12 data that shows that California is not abiding by 209.

13 CHAIRPERSON REYNOLDS: Dean Smith.

14 COMMISSIONER KIRSANOW: They've got a
15 smoke screen there by which they're still continuing
16 to do things.

17 CHAIRPERSON REYNOLDS: Dean Smith, I would
18 like you to --

19 COMMISSIONER KIRSANOW: The fact of the
20 matter is that the last data that we have available,
21 the median GPA and LSAT for students at the elite law
22 schools was 3.8 and 98 respectively. Only 20 black
23 undergraduate students in the entire country meet
24 that, which means that at Michigan where you have
25 approximately 30 black entrants every year, Michigan

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1 would eat up that entire cohort and there would still
2 be ten spaces left over. You can't fill it without
3 huge preferences.

4 CHAIRPERSON REYNOLDS: Dean Smith, I want
5 you to address the central issue that I put on the
6 table, which is academic freedom. It is it important
7 or no? If it's a principle it should apply across the
8 board, and it seems to me it would be wholly
9 inappropriate for the ABA to use its power in terms of
10 the accreditation process to force a particular point
11 of view, to force schools to adopt particular values
12 that members of the ABA feels important.

13 I mean, what happened to academic freedom?

14 DEAN SMITH: I think academic freedom is
15 important, and it's written into the standards. I
16 think the mission of a law school is important, and
17 it's written into the standards.

18 CHAIRPERSON REYNOLDS: So the mission
19 is --

20 DEAN SMITH: The flexibility -- Mr.
21 Chairman, the --

22 CHAIRPERSON REYNOLDS: -- that diversity
23 isn't important at this particular university, that at
24 least racial diversity. So if the entering class is
25 all black, that's okay. If it's all white, that's

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1 okay so long as we have an admission process that does
2 not discriminate on the basis of race.

3 Now, in this hypothetical institution
4 where that is the stated mission, how would they fare
5 under this standard.

6 DEAN SMITH: I think when --

7 VICE CHAIRPERSON THERNSTROM: I think on a
8 Never-Never Day when we have such an institution.

9 CHAIRPERSON REYNOLDS: I agree.

10 DEAN SMITH: Well, and therefore, it's
11 probably not worth using a hard case to make that
12 work, but --

13 CHAIRPERSON REYNOLDS: It's on the table.
14 It's on the table for you.

15 DEAN SMITH: -- under the hypothetical, a
16 law school has to have a commitment to diversity
17 because it matters.

18 CHAIRPERSON REYNOLDS: Why?

19 DEAN SMITH: If it doesn't have a
20 commitment to diversity, then there would be a
21 problem, to answer your question.

22 COMMISSIONER BRACERAS: Why?

23 CHAIRPERSON REYNOLDS: Yeah, but why?

24 DEAN SMITH: Because -- I'm sorry.

25 CHAIRPERSON REYNOLDS: The mission of the

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1 university, if it says that a nondiscrimination
2 principle is good enough, that what this institution
3 values is diversity of viewpoint and that this
4 university also believes that looking at the history
5 of the United States, the use of racial preferences,
6 distributing benefits and burdens on the basis of race
7 is toxic and we don't want to do it.

8 Now, is that a principle argument? And if
9 you have a principle argument for not embracing
10 diversity can you get accredited by the ABA under
11 those circumstances?

12 DEAN SMITH: I think in a hypothetical law
13 school that we all agree does not exist and is
14 imaginary there would have to be a commitment to
15 diversity because it matters in the classroom, and
16 that that is a value.

17 CHAIRPERSON REYNOLDS: that is being
18 imposed by the ABA on all institutions regardless of
19 their mission.

20 DEAN SMITH: No, it's not regardless of
21 their mission because to have an imaginary law school
22 in which you say we will not accept diversity, we will
23 not accept diversity --

24 COMMISSIONER BRACERAS: No, no.

25 VICE CHAIRPERSON THERNSTROM: Defined by

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1 race.

2 DEAN SMITH: We will not accept diversity
3 and we won't make a commitment to it, I think that
4 would be a problem in terms of accreditation.

5 PROF. BERNSTEIN: Could I point out that
6 it's perfectly plausible even in a law school that
7 within theory seeks to pursue racial diversity if
8 they've determined that their policies to pursue
9 diversity have led to 75 percent of their African
10 American martriculants either failing out of law
11 school or not passing the Bar, which I'm sure is the
12 case in certain law schools.

13 They might say, "Well, even if we value
14 it, can't do what the ABA wants us to do. It's
15 supposed to be our educational judgment. That's what
16 Standard 211 says in the non-interpretation part.
17 It's our educational judgment that bringing in
18 students who are going to fail out is bad for them,
19 bad for the school, and bad for the profession.

20 CHAIRPERSON REYNOLDS: Commissioner
21 Braceras.

22 COMMISSIONER BRACERAS: Yeah, I want to
23 piggyback on the point the Chairman has raised about
24 academic freedom, but I think that part of the issue
25 here has to do with your underlying assumption that

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1 there is, in fact, a consensus as you put it that all
2 students benefit from diversity, and then, again, an
3 assumption about what the term "diversity" means and
4 what the definition of "diversity" is.

5 If your definition of diversity is
6 diversity of viewpoints, then there probably is some
7 sort of general consensus that in educational
8 institutions that's a good thing. However, diversity,
9 I think, as it is defined in common parlance and in
10 this whole debate is not about diversity of viewpoint,
11 but rather racial and ethnic diversity, which sort of
12 brings me to my next point and question, which is what
13 do you see the difference between educational
14 opportunity and diversity to be?

15 Because there seems to be a collapsing of
16 the terms into one goal, equal educational opportunity
17 and diversity. It's one goal. We're all supposed to
18 get on board with it.

19 In my view, equal opportunity speaks to
20 process. When you talk about equal opportunity you're
21 talking about the fairness of the process, the
22 nondiscriminatory nature of the process, the fact that
23 people have equal access, are similarly situated
24 people have equal access.

25 When you talk about diversity, you are

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1 inherently talking about outcomes. You're talking
2 about what does the student body look like, and that
3 is something that can only be measured numerically,
4 and if you are saying that law schools must be
5 committed to diversity, aren't you in effect saying
6 they must make a commitment to having their student
7 bodies look a certain way?

8 DEAN SMITH: I think the standards do not
9 say that. I think the standard says that
10 consistent --

11 COMMISSIONER BRACERAS: Well, then
12 specifically what does diversity mean to the ABA?
13 Because you define it here as racial, ethnic, gender.

14 DEAN SMITH: We say, I think, including,
15 particularly, particularly, but not exclusively.

16 I think the commitment -- there has to be
17 a commitment to achieve diversity. I think the
18 standards in interpretations make it clear that there
19 is no specific result, that there's no quota, there's
20 no magic --

21 COMMISSIONER BRACERAS: But that brings me
22 back to my difference between equal opportunity and
23 diversity. If you have to show a commitment to
24 diversity, you are showing a commitment to an outcome,
25 and if you don't produce the outcome, then all the

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1 trying in the world isn't going to necessarily get you
2 accredited by the ABA if your class lacks a certain
3 number of racial and ethnic minorities.

4 DEAN SMITH: And I think that the
5 standards themselves try to alleviate that fear, which
6 is not what the standards say by saying the results
7 are only one of a number of things that will be
8 considered. So the accreditation committee would have
9 before it the language that says results in and of
10 themselves do not define a school's commitment. It's
11 one of the things to be considered.

12 COMMISSIONER BRACERAS: But wait. Let me
13 ask you this. If the results are not what the ABA
14 thinks they should be and if the school is also not
15 using racial preferences, then how do you prove that
16 you have a commitment to diversity if your process
17 projects racial preferences and your outcome is,
18 therefore, one that's not acceptable to the ABA based
19 on the color of the skin of the people sitting in the
20 classroom?

21 I don't think any number of race neutral
22 alternatives that universities' law schools might come
23 up with would then satisfy the ABA.

24 DEAN SMITH: May I answer very briefly? I
25 don't agree with that. I think the efforts that the

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1 school has made, what it has tried, whether when
2 something doesn't work it tries something else was
3 another kind of results or anything; if something is
4 not working that does try something else, the
5 commitment, the efforts that the school have made are
6 very relevant to determining diversity, without it
7 having achieved a specific result.

8 COMMISSIONER BRACERAS: Going back to what
9 the Chairman said and the question he raised, if a
10 school decides and you specific said if a school
11 decided that diversity as you define it is not
12 important to the Commission, then they would be,
13 quote, unquote, in trouble I think was how you put it.

14 I mean, if a school were to decide that
15 racial and ethnic diversity were not integral to their
16 educational mission, although diversity of viewpoint
17 was integral to that mission, and if they tried to
18 comply with your standard through race neutral
19 alternatives and ended up with a study body that
20 didn't look the way you wanted it to look, wouldn't
21 they, as you said, be in trouble?

22 DEAN SMITH: First of all, there isn't a
23 student body that looks the way we want them to look.

24 I'm sorry to argue with that premise, but it just
25 doesn't exist. The school would not necessarily be in

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1 trouble. It depends because it didn't have achieved a
2 particular result.

3 The question would be: so what other
4 efforts not using racial preferences was it using to
5 demonstrate a commitment to diversity?

6 COMMISSIONER BRACERAS: But what if their
7 commitment is to intellectual diversity? What if the
8 school decides -- and you're saying this is a
9 hypothetical that doesn't exist. I'm not sure that's
10 true -- but what if there's a school that decides we
11 are 100 percent committed to equal opportunity, but we
12 are not committed to racial diversity per se. We're
13 committed to intellectual diversity, and whatever the
14 class looks like, if it ends up being all white or all
15 Asian or all black, it is what it is.

16 DEAN SMITH: The question would be: what
17 has it done consistent with the discussion to achieve
18 the diversity described in the standards?

19 COMMISSIONER BRACERAS: And that's my
20 point. What has it --

21 CHAIRPERSON REYNOLDS: Okay. Commissioner
22 Yaki has to leave soon. So I'd like to give him an
23 opportunity to weigh in.

24 COMMISSIONER YAKI: Yeah, just a quick
25 procedural question. Are we going to be -- how does

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1 the King bill fit into this discussion? Are we going
2 to talk about it at all?

3 CHAIRPERSON REYNOLDS: I don't know. It
4 has been brought up.

5 COMMISSIONER KIRSANOW: I have a few
6 questions on it.

7 COMMISSIONER BRACERAS: Well, yeah. I do,
8 too.

9 PROF. BERNSTEIN: I ran out of time before
10 I could briefly address that.

11 CHAIRPERSON REYNOLDS: Would you like to
12 ask some questions?

13 PROF. BERNSTEIN: I would be happy to --

14 COMMISSIONER YAKI: No, I don't think I
15 have enough time to do all of that, but let me just
16 start by saying that one question, dean Smith. How
17 long has Section 211 or versions of it been around?

18 DEAN SMITH: Since 1980.

19 COMMISSIONER YAKI: Okay. So this is not
20 something new.

21 DEAN SMITH: No.

22 COMMISSIONER BRACERAS: Well, the newness
23 of it is the diversity language versus the equal
24 opportunity language.

25 COMMISSIONER YAKI: Well, but I don't see

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1 the words "race conscious" in there. I don't see if
2 you look at the strikeouts of what used to be there
3 pre-Grutter, it was a different kind of animal. Then
4 I'm sure you would have, Commissioner Braceras, very
5 much disagreed with, but I don't see in here anything
6 that says or either advocates for or against race
7 conscious or race neutral remedies, as you term them,
8 for the purposes of achieving the, quote, unquote,
9 totality of the result that they're looking for,
10 number one.

11 So this thing has been around for quite
12 some time in one way, shape or form.

13 Number two --

14 VICE CHAIRPERSON THERNSTROM: Well, then
15 why don't you just go back to the old language that
16 would satisfy us?

17 CHAIRPERSON REYNOLDS: Yeah, what's the
18 purpose of the change --

19 COMMISSIONER BRACERAS: Right.

20 CHAIRPERSON REYNOLDS: -- if there is no
21 change?

22 PROF. LEMPERT: Can I interject a point
23 here, please?

24 CHAIRPERSON REYNOLDS: You've just got to
25 throw some sharp elbows to get in.

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1 PROF. LEMPert: Yeah, I will use them.
2 You know, it's obvious to you all that I'm a strong
3 supporter of affirmative action. I'm quite agnostic
4 about the particular change that's being proposed, but
5 in response, let me just make a couple of
6 observations.

7 It seems to me there are several
8 legitimate reasons for the new language. One is the
9 diversity as education, and it doesn't matter where
10 you are. I think it is the case that people do not
11 have viewpoints at least on many issues that can be
12 separated from their identity, particularly their
13 racial identity.

14 When I have a black student who says he
15 thinks that O.J. is guilty, that has a different
16 impact on all students black and white than when I
17 have a white student who says the same thing.

18 But as Rick told you a while back, the
19 research on that issue is very weak. I mean I cited
20 some research I have done, but I don't dispute the
21 fact that there's very little research on this
22 particular value, and we could use a lot more
23 research.

24 So secondly --

25 CHAIRPERSON REYNOLDS: Shouldn't you be

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1 agnostic? Because first you say that the data is weak
2 over here, and then I assume that you believe that
3 academic freedom is important. I assume that you --

4 PROF. LEMPert: I'm going to answer this.

5 CHAIRPERSON REYNOLDS: -- that
6 institutions should be free to craft its own vision.

7 COMMISSIONER YAKI: Mr. Chairman, I think
8 there's a difference between academic freedom and the
9 hypotheticals that you're talking about, whether it's
10 -- in other words, we can talk all we want about
11 academic freedom, which is important, but then, again,
12 this body later on in the agenda is going to be
13 talking about involving the Department of Education on
14 Title 6 grounds on anti-Semitism issues, which could
15 be argued on the other side as an academic freedom
16 type of issue.

17 CHAIRPERSON REYNOLDS: No.

18 COMMISSIONER YAKI: The idea that they --
19 I'm not arguing for it.

20 COMMISSIONER BRACERAS: For them to
21 discriminate?

22 COMMISSIONER YAKI: I'm not arguing. I'm
23 saying that people who -- I am sure that the
24 professors who are making the statements, and I don't
25 defend them. I'm just saying I don't think the word

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1 "academic freedom" is as cut and dry as you would
2 think it to be.

3 CHAIRPERSON REYNOLDS: I would disagree
4 wholeheartedly. The anti-Semitism issue in no way
5 relates to what we're talking about in my view. I
6 don't think that someone arguing that discriminating
7 against Jews is somehow protected by --

8 COMMISSIONER YAKI: No. I'm just saying
9 that the argument that we made is that it doesn't
10 constitute academic freedom. I subscribe to that.
11 That is something that I agree with.

12 However, I am saying that I would then
13 allow the dollars. The other side would raise that as
14 an --

15 CHAIRPERSON REYNOLDS: But why do we want
16 to impose our views? Why can't we allow universal --

17 COMMISSIONER YAKI: Well, first of all, I
18 don't think --

19 CHAIRPERSON REYNOLDS: Hold it, hold it.
20 And we can talk about this, you know, the two of us
21 one on one, but I don't have these gentlemen here too
22 often so I want to direct my questions to the
23 panelists.

24 VICE CHAIRPERSON THERNSTROM: But wait a
25 minute. I think with Commissioner Yaki about to leave

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1 he needs to finish his --

2 COMMISSIONER YAKI: I was asking questions
3 and responding to the debate that was going on.

4 CHAIRPERSON REYNOLDS: Okay. My memory, I
5 was the one who was talking and you said that you'd
6 respond.

7 VICE CHAIRPERSON THERNSTROM: I know, but
8 you did interrupt his line of questioning.

9 PROF. LEMPERT: Well, I could directly
10 respond to this. If nothing else, Grutter is premised
11 on the notion that we are to find to the law school's,
12 University of Michigan's specifically, choice because
13 Michigan has determined that in their exercise of
14 academic freedom, diversity is crucial to the
15 education their students are getting.

16 Not all law schools would either have or
17 even would if they thought about it agree that this
18 sort of diversity at least is crucial to the academic
19 mission. Therefore, not only is the ABA violating
20 academic freedom. They're also asking law schools to
21 violate Grutter.

22 COMMISSIONER YAKI: but my point is that
23 it's not a point of academic freedom whatsoever.
24 Under Title 6 for universities, they are not allowed
25 to take certain kinds of action, such as eliminating

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1 all African Americans from their pool.

2 COMMISSIONER YAKI: That's illegal.

3 COMMISSIONER BRACERAS: But, again --

4 COMMISSIONER YAKI: In other words, we're
5 talking about a situation that's not going to exist.
6 They're under an obligation to insure equal
7 opportunity. The ABA standard is about that
8 obligation, and also --

9 COMMISSIONER BRACERAS: That goes right to
10 my question. That goes right to my question which is
11 is there a difference between diversity and equal
12 opportunity.

13 You are equating the two. Commissioner
14 Yaki is equating the two. I do not happen to believe
15 that adherence to the diversity principle is the same
16 thing as equal opportunity. People can reject the
17 diversity principle without being discriminators.

18 PROF. LEMPert: You know, academic freedom
19 does not allow a law school to get accredited if it
20 gets rid of all of its library books because it's
21 cheap. Academic freedom does not allow a law school
22 to get accredited if it gives no clinical
23 opportunities to its students.

24 So part of the issue here is what is the
25 educational value of diversity. If we could

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1 hypothesize --

2 CHAIRPERSON REYNOLDS: And you say it's
3 weak?

4 PROF. LEMPert: If we could hypothesize --
5 yeah, but there's very little evidence.

6 CHAIRPERSON REYNOLDS: And so we --

7 PROF. LEMPert: I'm not debating. Let me
8 just say if we can hypothesize that there was strong
9 evidence that diversity contributed to quality
10 education, academic freedom would not be an argument
11 that should bear much weight.

12 VICE CHAIRPERSON THERNSTROM: Wait a
13 minute. And we have to agree on the definition of
14 quality.

15 PROF. LEMPert: Yes. All of this, but
16 what I'm saying is that --

17 COMMISSIONER BRACERAS: And the definition
18 of diversity.

19 CHAIRPERSON REYNOLDS: All I'm saying --

20 VICE CHAIRPERSON THERNSTROM: And the
21 definition of diversity.

22 PROF. LEMPert: -- is that it was not
23 unreasonable to thing -- I'm speaking as a social
24 scientist right now -- while it is not unreasonable to
25 think that diversity does contribute substantially to

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1 education, there is relatively little evidence one way
2 or the other on this issue.

3 Second, but I want to go into two other
4 reasons why the ABA --

5 CHAIRPERSON REYNOLDS: So what's the value
6 then? What's it all about?

7 PROF. LEMPert: There's two other reasons.
8 I'm going to actually side with some of you skeptics,
9 but you won't let me get there.

10 VICE CHAIRPERSON THERNSTROM: Well, I'm
11 concerned about Commissioner Yaki. Do you have other
12 questions that you need to get on the table?

13 COMMISSIONER YAKI: I do, but let's keep
14 on going.

15 PROF. LEMPert: The second reason why the
16 ABA may want to play a role in this is because they
17 have a stake in the diverse profession. The research
18 we've done, other research shows that there is this
19 tendency for minorities to serve minorities. There
20 are lots of other reasons why the ABA wants a diverse
21 legal profession.

22 If it were essential that every law school
23 in the country engage in affirmative action to create
24 a diverse profession, I think that it also a
25 legitimate reason.

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1 I do not think that is essential. I think
2 if law schools just have their way, if we didn't have
3 the first educational value, I think most of them
4 would choose, would opt for a diversity scheme, and
5 some would not.

6 The third reason I think is the one
7 Commissioner Yaki is talking about, which is anti-
8 racism. If there was a kind of racism in society
9 which required diversity in this way to counter, that
10 would be another legitimate reason.

11 So on balance, my own view and why I think
12 this change is, you know, a weaker change than the
13 overall case for affirmative action, is that there is
14 arguably a legitimate educational reason which like
15 books and libraries and like clinical programs schools
16 have to engage with, but I don't think that is proven.

17 I think there's another diverse -- in the profession
18 reason, but I don't think we need this role to
19 maintain a diverse legal profession, and I don't see
20 the anti-racism reason right now because they think
21 law schools are not being racist in their admissions
22 policies.

23 PROF. SANDER: Commissioner, I have to
24 catch a train in a few minutes. Can I just make one
25 statement on this issue?

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1 COMMISSIONER YAKI: Sure, sure.

2 PROF. SANDER: Thank you very much.

3 I think that the one issue that hasn't
4 been adequately discussed here is sort of the forest
5 issues, how this standard affects legal education as a
6 whole.

7 The ABA's motivation, I think many of the
8 zealous advocates are pushing for this sort of
9 enforced racial diversity because they believe that if
10 individual law schools do not aggressively use racial
11 double standards, then the overall racial diversity of
12 legal education will disappear. And that is a myth.

13 One of the most important things that I
14 try to show in systemic analysis is that what we're
15 really doing, what we're predominantly doing, 86
16 percent of what racial preference is doing is shifting
17 the law school at which blacks attend, and the
18 percentage for Hispanics is even higher.

19 So this fundamentally goes to the point
20 that Professor Bernstein is trying to make. He's
21 saying that individual schools need to make a judgment
22 about whether or not their particularly racial
23 strategies are productive both for the general
24 educational environment and for the individual black
25 student or Hispanic students.

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1 The ABA standard essentially precludes
2 that. It is essentially a reactive measure that's
3 saying, "Well, we can't have diversity, of levels of
4 diversity among schools. We can't find out what
5 happens if you lower preferences at one school and use
6 them more aggressively in other schools because maybe
7 we'll find out then that the schools taking different
8 definitions of diversity are having much better
9 outcomes for their minority students and they're still
10 having very healthy educational environments.

11 We've got to circle the wagons and force
12 everyone to do the same thing. That's producing the
13 striking uniformity that we see almost the exact same
14 proportion of blacks admitted in 90 percent of
15 American law schools, and the real issue here is that
16 the ABA is sending very clear messages that are even
17 clearer in oral communications with law school deans
18 that they'd better fall in line or face very serious
19 consequences.

20 And I think that is part of this scandal
21 that we're facing.

22 CHAIRPERSON REYNOLDS: Two quick
23 questions. How is this going to affect, say, Howard
24 University's law school?

25 And the second issue is moving to the

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1 employment piece, there are specific legal standards
2 for when a private actor can use racial preferences.
3 There are manifest imbalance and, you know, traced
4 back to historical actions, but your rule ignores a
5 law. It basically requires at least in the employment
6 context that at least arguable it ignores the law if
7 schools wind up looking at your new standard saying
8 that we have to use racial preferences to get our
9 numbers right in the employment context.

10 DEAN SMITH: The reference to racial
11 preferences that I have been addressing is entirely
12 related to admissions.

13 CHAIRPERSON REYNOLDS: Well, you have
14 something here about faculty.

15 DEAN SMITH: Yes, there has to be a
16 commitment to diverse faculty and staff, but the
17 specific references of authority under the standards
18 to use race conscious decisions in admissions.

19 PROF. BERNSTEIN: Look. I have to say
20 something here, which is everyone -- Professor Sander
21 said that everyone in legal academia knows that the
22 ABA has been going around for years, and especially
23 since Grutter, saying that we want certain results.
24 If we use pure race neutral standards, we're going to
25 put you on probation and threaten your accreditation,

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1 and it's going to get a lot of bad publicity for you.

2 It will never say it publicly. They would never put
3 it in writing. They would create a new standard to
4 replace the old standard. That was also very well
5 drafted, very loyally allowed these abuses but didn't
6 require them.

7 The radicals in January got together and
8 said, "We want it explicitly in the standards. We
9 don't want any law school to be able to even argue
10 that we don't have to do it."

11 They were able to smoke out the ABA a
12 little bit, and now we see in these interpretations
13 that they are at least more or less officially now
14 required in a way that preserves at a least a little
15 bit of deniability.

16 There's no question if you would bring in
17 any honest law school dean in the country who has ever
18 had ABA accreditation, that everyone knows what the
19 ABA is trying to do in this regard.

20 CHAIRPERSON REYNOLDS: Commissioner Yaki.

21 COMMISSIONER YAKI: Two things. One, I
22 just want to clarify because I was somewhat confused
23 by your confusion, that I was in no way defending
24 anti-Semitism on a campus from a professor as --

25 CHAIRPERSON REYNOLDS: I didn't think that

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1 you were defending.

2 COMMISSIONER YAKI: Okay, but number two,
3 you know, all of this -- none of this occurs in a
4 vacuum, and sometimes, you know, we -- not we, but I
5 just think that debates like this kind of suck the
6 life out of what the issue is really all about.

7 I don't believe that -- I believe as
8 Professor Lempert said, there is a value in having a
9 diverse Bar. Historically and I think through to
10 today, the need for representation of minorities by
11 minority lawyers with whom they feel more comfortable
12 is very important, very much a factual premise that we
13 need to deal with.

14 I don't think that Section 211, seeing
15 that it has been around for 26 years and is one of
16 about 500 other criteria by which you accredit a law
17 school, including whether they tear up all of their
18 law books or not, is a seminal decision in the work of
19 the ABA in terms of attempting to address, I think,
20 concerns of schools since Grutter about how to
21 proceed, but also how to proceed with creating a
22 diverse Bar through the use of admissions that has
23 diversity.

24 And then the last thing I want to say is
25 that in a way it doesn't occur in a vacuum when, you

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1 know, Professor Bernstein starts talking about the
2 radicals of the ABA get together to put all of this
3 together. Well, you know, we can start talking about
4 the Council of Economic Opportunity and those other
5 people who are busy sending letters to every
6 university that they want to target saying that
7 they're not complying with Grutter and trying to have
8 a Department of Education investigation into their
9 admission policies.

10 So you know, maybe this is a way of
11 balancing things out. I don't know.

12 CHAIRPERSON REYNOLDS: Well, the
13 department is obligated to investigate all complaints.

14 In any event, Vice Chair Thernstrom.

15 VICE CHAIRPERSON THERNSTROM: I'm by the
16 way not even sure why these ABA standards are
17 necessary, since there's not a single law school in
18 the country that's going to give up its racial
19 preferences.

20 PROF. BERNSTEIN: I disagree with that.

21 VICE CHAIRPERSON THERNSTROM: Really?

22 PROF. BERNSTEIN: Not only are there at
23 least a few law schools where the faculty is
24 uncomfortable an ideological matter with preferences,
25 but I've spoken over the years and especially recently

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1 since my op-ed in the Wall Street Journal where the
2 subject came out, with people who are at especially
3 lower ranked law schools who are liberal, who are in
4 favor of affirmative action in general, and who tell
5 me that they are distressed and appalled by the fact
6 that every year they admit X number of African
7 American students because of pressure from the ABA or
8 from internal faculty politics or in terms of both,
9 and they see them fail out. They see them struggling.

10 They see them coming out in the bottom five or ten
11 percent of the class and not passing the Bar, and they
12 would prefer not on an ideological basis, but on the
13 basis of a pragmatic matter of how these preferences
14 work out to either mitigate them or get rid of them
15 entirely.

16 VICE CHAIRPERSON THERNSTROM: Go on. You
17 just made my day.

18 DEAN SMITH: Well, we keep sliding back to
19 the thought that these standards require preferences.
20 They do not.

21 (Simultaneous conversation.)

22 COMMISSIONER BRACERAS: But it says right
23 here --

24 VICE CHAIRPERSON THERNSTROM: Can I
25 continue?

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1 COMMISSIONER BRACERAS: But you use the
2 word "result," that they will be judged on the basis
3 of results. "And results," not "or results," "and
4 results."

5 CHAIRPERSON REYNOLDS: Anybody who knows
6 how the game is played understands perfectly how this
7 actually works out, and its use of racial preferences
8 in admission policy. That's what this is about.

9 VICE CHAIRPERSON THERNSTROM: And it's a
10 binary decision, as Michael Kinsley once said, no
11 conservative either, and there's no mathematical way
12 of the role of race as opposed to other
13 considerations.

14 Put race in the mix and it makes all the
15 difference or you take it out and it makes no
16 difference. It's not -- I mean, it just seems to me
17 I've never understood why law school deans and others
18 who believe in racial preferences, who believe in
19 racial double standards won't get up and say, "I
20 believe in racial double standards."

21 This goes all the way back to Georgetown
22 when Timothy McGuire, you know, outed the admissions
23 process. The dean should -- I forget her name.
24 Judith something or other --

25 CHAIRPERSON REYNOLDS: Areen.

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1 VICE CHAIRPERSON THERNSTROM: -- Areen
2 should have said, "Hey, I believe in this."

3 And you know, it would have changed the
4 conversation. The fact is that for years and years
5 and years, the law schools have tried to spin this in
6 a way that is deceptive, and you know, Alan Dershowitz
7 years ago at a Harvard Law School debate on this whole
8 question, Alan Dershowitz, no conservative, said to a
9 bunch of students, "Look. You don't believe in
10 diversity. You believe in everybody" -- this was on
11 actually faculty diversity -- "you believe in
12 everybody having the same point of view, but some
13 people wearing skirts and some people having skin
14 color that's a little darker than the average white.
15 That's not a belief in diversity."

16 I mean, you can't merge, it seems to me,
17 or confuse the two issues of intellectual diversity
18 and, by the way, political diversity and racial and
19 ethnic preferences.

20 Now, I do have a question here. During
21 the Michigan litigation many law schools submitted
22 briefs saying that race neutral admissions would be
23 insufficient to achieve meaningful diversity. You've
24 got states where racial preferences are prohibited.
25 How does the ABA expect such schools to achieve

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1 diversity, given the fact that the law schools say
2 race neutral methods don't work?

3 DEAN SMITH: Well, I assume that law
4 schools obey the law, including the law in those
5 states that prohibit racial preferences. Those law
6 schools are finding ways, and in my prepared statement
7 that I kind of skipped over in the interest of time,
8 on page 6, I think it is, it has a short list of
9 examples of other things that law schools can do that
10 are not racial preferences.

11 VICE CHAIRPERSON THERNSTROM: Well, what
12 does the ABA do behind those?

13 DEAN SMITH: I'm giving them only as
14 examples. I think law schools can and should be more
15 creative and will be more creative in how to attract
16 student bodies that are diverse without giving racial
17 preferences, and as I say, I assume that's occurring
18 in the states where those preferences are prohibited.

19 PROF. BERNSTEIN: There's no safe harbor
20 in these interpretations. There's nothing that you
21 could do under these interpretations.

22 You could do everything that's listed in
23 Interpretation 211-3. You could do all of the things
24 I quoted from other ABA officials that they say you
25 might want to do to try to achieve the diverse class,

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1 and there's no guarantee that if you spend half a
2 million dollars, \$800,000 on these efforts and don't
3 achieve the results that the ABA will take you off
4 probation or agree to your re-accreditation. There's
5 nothing.

6 So if you're a law school dean, obviously
7 what is your alternative but to make sure you have the
8 results?

9 COMMISSIONER BRACERAS: That's right.

10 DEAN SMITH: Well, there's no guarantee in
11 most of accreditation. There's no guarantee if you
12 spend a half a million dollars on the library that
13 that's sufficient.

14 VICE CHAIRPERSON THERNSTROM: It's not the
15 same thing.

16 DEAN SMITH: Well, it is the same thing
17 that there's no guarantee. There's no safe harbor
18 because in most of the accreditation standards you
19 don't have a numerical guarantee.

20 VICE CHAIRPERSON THERNSTROM: Buying
21 books, more books, is not the same thing as expanding
22 the use of racial double standards. It just isn't.

23 DEAN SMITH: My point was that there are
24 no guarantees in most of accreditation.

25 CHAIRPERSON REYNOLDS: Commissioner

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1 Kirsanow.

2 COMMISSIONER KIRSANOW: Dean Smith, we've
3 been focused a little bit in terms of these standards
4 on incoming students to the student body, and I'm
5 concerned also about the outgoing student body, that
6 is, in terms of graduation and passage of the Bar.
7 Does the ABA take a position or would the ABA favor
8 standards that would, for example, require schools to
9 disclose Bar passage rates, graduation rates, even GPA
10 statistics related to the diversity of the population?

11 In other words, just aggregate by race, graduation
12 rates, student loan default rates, Bar passage rates
13 for that particular school so that we know exactly; we
14 have a better idea when a student is going in and he
15 may be black, Hispanic, Asian, well, my at least
16 ethnic cohort has had this kind of experience at this
17 school.

18 Do you think that's something that may be
19 a salutary approach to rule making for the ABA?

20 DEAN SMITH: It's a good question and it
21 deserves the look of our questionnaire committee.
22 Some of those data would be very hard to gather. The
23 Bar passage data, we've actually asked for additional
24 help from the National Conference of Bar Examiners to
25 get on a continuing basis better data from that.

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1 And loan default rates have a long lag
2 time. So some of those are difficult to achieve. But
3 graduate rates -- so let me take graduation rates.
4 What I think would be interesting, you can get a rough
5 sense of that, a rough sense of that from the one
6 publication that the ABA puts out now, the 509
7 publication, which gives me a chance to show my book.

8 But it's not precise, and it's worth
9 looking at whether those would be data of interest and
10 whether you could gather them in a meaningful way or
11 not.

12 One of the problems is you have little
13 things like transfers in and transfers out and things
14 like that of people who leave in good standing. What
15 that means is hard. So you don't want to provide data
16 that are so limited.

17 But that's worth looking at.

18 COMMISSIONER KIRSANOW: I want to address
19 this to Professor Bernstein also, but what about the
20 weight that a particular school accords in the
21 admissions process to race or ethnicity? Is that
22 helpful at all?

23 DEAN SMITH: I don't think it is. I think
24 most schools would say we can't provide the specific
25 weight to it.

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1 COMMISSIONER KIRSANOW: Maybe they can't,
2 but it strikes me that there have been some stories,
3 and I think Professor Lempert at least deals with
4 them, that I started to cite the statistic that there
5 are only 20 law students, black law students or
6 graduates in the entire country out of hundreds of
7 thousands or tens of thousands that would even meet
8 the median for most elite schools.

9 So it seems to me that there could be a
10 repression analysis done or a way to weight the
11 probability of that someone would matriculate to a
12 certain school, all things being equal, if they were
13 black or white.

14 DEAN SMITH: That would be solely on LSAT
15 and undergraduate grade point average.

16 COMMISSIONER KIRSANOW: yes, or some
17 extracurriculars to the extent that they are
18 considered.

19 DEAN SMITH: Well, you know, employment is
20 usually considered. Economic handicaps. I mean, I
21 actually don't think it's accurate that schools are
22 only looking at those factors, that the schools don't
23 look at those factors. I think most schools do. My
24 school certainly -- now speaking only as a dean -- my
25 school certainly does.

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1 VICE CHAIRPERSON THERNSTROM: I don't
2 understand that. I just don't because you've got such
3 disparities in skills coming in. And LSAT scores, the
4 pool is so small. It is, again, the point I made
5 before. If race is a consideration, then race is
6 decisive. I mean, it's just a fact.

7 DEAN SMITH: With all respect, I don't
8 think that's true, and speaking again as a dean, I
9 don't think that's true at many law schools. It's
10 probably true at some from what you say. I mean I
11 don't know.

12 COMMISSIONER KIRSANOW: Can Professor
13 Bernstein have an opportunity to address the question
14 of whether or not disclosure of certain types of aid
15 or related to graduation? These Bar rates may be
16 something that have a salutary effect on --

17 CHAIRPERSON REYNOLDS: Why is that
18 important?

19 COMMISSIONER KIRSANOW: -- law school
20 population, and whether he has any comments related to
21 the King bill.

22 PROF. BERNSTEIN: Sure. Well, as I
23 mentioned, I am not a hard core, consistent opponent
24 of all affirmative action or even if you want to call
25 it racial preference measures depending on the exact

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1 circumstances. But what got me involved in this issue
2 and particularly disturbed by the issue is these data
3 showing that in order for the ABA to be able to
4 proclaim that we're interested in a diverse
5 profession, in order for law schools get to play and
6 we admitted diversity in body, that people who are
7 suffering for the most part are these large percentage
8 of African American martriculants, particularly at the
9 lower end schools, who are wasting time, energy,
10 money, et cetera, and never becoming lawyers, never
11 graduating.

12 That's not -- when we talk about a 50
13 percent chance of becoming a lawyer or not, it's true
14 some of those people will succeed, but all, of those
15 people would have almost certain succeeded at
16 something. It's not that the person is being admitted
17 to law school. It could have been a sales person or
18 any accountant or an engineer or who knows what else.

19 They've been distracted for several years of their
20 life from whatever other ventures they might have
21 pursued, and moreover, I do think it has to be
22 demoralizing.

23 I fortunately never have been in the
24 bottom ten percent of my class, but I can't imagine it
25 being a very happy situation that it wouldn't affect

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1 me somewhat psychologically. Every law professor
2 knows that participation and interest in class goes
3 down between first semester of law school and second
4 semester because everyone thinks that they're going
5 into law school and they're going to be in the top ten
6 percent of their class, and when 90 percent of the
7 class realizes that they're not, they get a lot less
8 interested.

9 So I assume people who are getting even
10 poorer grades than the median are even less happy.

11 DEAN SMITH: And only 20 percent are in
12 the top ten percent.

13 PROF. BERNSTEIN: Right, right.

14 (Laughter.)

15 PROF. BERNSTEIN: And one issue that
16 really has disturbed me because when I've discussed
17 this with people I often get the response of, well,
18 the beneficiaries are from -- oh, well, they're
19 beneficiaries. So we shouldn't feel sorry for them if
20 they didn't do well. There shouldn't have been any
21 sympathy. They knew they were getting a preference,
22 and these are supporters of affirmative action
23 generally who say this, and if they knew it, then they
24 could sink or swim and that's that.

25 My anecdotal impression confirmed by other

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1 people's anecdotal impression, although I don't have
2 data, suggest that most beneficiaries of these
3 preferences are not aware. They may be aware there
4 are preferences, but they are not aware of the extent
5 of the preferences. They're told by admissions
6 people, by everybody else, as Dr. Thernstrom was
7 saying, that they're only being used as a plus factor,
8 and they're basically equally qualified.

9 I wanted to read a statement. You know,
10 we often hear from black professors or elite black
11 lawyers who are in favor of these policies, but they
12 have seceded from them. I don't think I've ever heard
13 until now, that one statement I have, from someone who
14 entered law school, struggled and maybe failed out,
15 and wasted all of his time and money.

16 So I found on the Internet a student at
17 the University of Colorado who had a 2.5 GPA and had
18 to repeat a year of law school, and she sent a letter
19 that she then circulated to a listserve and it found
20 its way on the Internet to the dean.

21 She said it's true that students from all
22 races who have disadvantaged backgrounds with
23 relatively low academic credentials have performed
24 exceptionally well inside and outside the classroom.
25 Nevertheless, this does not abolish the university's

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1 equitable duty to give under qualified students
2 information that's particularly relevant to their
3 situation. Without this information, it is difficult
4 for them to make an informed decision about whether to
5 attend a top law school. "In my opinion, the minimum
6 amount of data that Colorado should give to under
7 qualified students prior to admittance is the
8 correlation between outside scores and first year
9 grades. Had I been properly warned as described
10 above, I would be at a Tier 3 school facing the joy of
11 graduation in 2006. I do not feel it is an honor to
12 have a law degree from the University of Colorado. If
13 it were possible to do so, I would gladly exchange my
14 CU law degree for one from a Tier 3 school.
15 Unfortunately, I'm stuck here until spring 2007 trying
16 to deal with the hurt and anger CU has recklessly
17 inflicted upon me."

18 So that's another perspective that we
19 don't hear very often, and I think people like this
20 deserve to have some idea of what their incoming
21 credentials are compared to other people's incoming
22 credentials and how students with their income and
23 credentials have failure in law school and on the
24 Bars.

25 And I don't think it has to be broken down

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1 on race. There are law schools, if anyone works at
2 the state law school, knows that they have had
3 occasional calls from the House or Senate Majority
4 Leader in the state saying, "Why don't you admit my
5 nephew?" And there are 40 other people who get
6 admitted who don't necessarily have the same scores,
7 but I think it would be worthwhile if we're going to
8 have these policies to begin with and it may even
9 mitigate their harm to a large extent, in my eyes, if
10 you inform them that, "Look. We're admitting you with
11 a 148 LSAT. The average student at our law school has
12 a 158 LSAT, and in our experience students with LSATs
13 in the range of 145 to 150 fail out at a rate of 40
14 percent and don't pass the Bar at a rate of 40
15 percent."

16 And you can make then the informed choice,
17 or whatever it happens to be, and you can then make
18 the informed choice as to whether you want to attend
19 this law school or perhaps find another law school
20 that the students with your grades and credentials
21 succeed better with.

22 CHAIRPERSON REYNOLDS: Any thoughts? It
23 sounds like a reasonable approach to me. The regime
24 would stay in place, but what you would have here is
25 information. People would be able to make well

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1 informed decisions based on the data.

2 DEAN SMITH: The data essentially being
3 here LSAT and undergrad grade point average,
4 essentially index. Is that what you were using?

5 PROF. BERNSTEIN: Well, you know, I find
6 we've done lots of regressions over at George Mason
7 with our economists. GPA is only relevant to the
8 extent that you consider also the undergraduate
9 institution without LSAT.

10 LSAT scores from data I've seen are pretty
11 highly correlated with Bar exam rates and failure out
12 of law school, obviously not perfectly correlated, but
13 much better than you would think from the discussion
14 that the public usually has about them.

15 PROF. LEMPert: I mean they're far from
16 perfectly correlated, explaining maybe a third of the
17 variance.

18 CHAIRPERSON REYNOLDS: But the overall
19 approach, what do you think of the overall approach?
20 Disclosure is better than, information is better than
21 less information.

22 PROF. LEMPert: That's my bias, and I
23 think if it is done on the basis of LSAT scores and
24 GPAs -- I'll note in the Michigan data, don't know if
25 it's true all over, the Michigan data by the 1990s,

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1 undergraduate grade point average had lost all value
2 of predicting white student success. It still had
3 value in predicting minority student success. I don't
4 know if that would be true if you broke that down at
5 George Mason, but for whites, the great inflation at
6 graduate level just washes everything else out.
7 Minorities are still diverse enough that it has some
8 value.

9 But my own belief is that if law schools
10 were to publish their regression results just so you
11 could look at where your LSAT and undergraduate grade
12 point -- what grade it predicts in that school,
13 doesn't stigmatize any group because it doesn't say
14 blacks do this; I think that's good.

15 I'm a consumerist. I think consumers need
16 information.

17 DEAN SMITH: I think that how you would do
18 in law school is a doable calculation, and this is,
19 but how predicting what it will do on the Bar exam is
20 a completely different matter because it depends what
21 state you go into.

22 There would be dramatically different
23 results if somebody is taking the bar in California
24 than taking the Bar in South Carolina, dramatically
25 different results.

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1 VICE CHAIRPERSON THERNSTROM: But that can
2 be said, too --

3 DEAN SMITH: But you have to predict where
4 somebody is going to take the Bar in order to give
5 them the data.

6 CHAIRPERSON REYNOLDS: It's just a matter
7 of collecting the data.

8 PROF. LEMPert: Dean Smith may disagree
9 with me on this. However, my impression backed up by
10 asking a few deals what they thought of this is that
11 if the proposal we're tossing around was to be
12 implements by a law school and the law schools decided
13 we're going to aggressively not only recruit
14 minorities students, but given the preference, warn
15 them that their chance of success might not be as high
16 as they expect, and that the ABA accreditation
17 officials will consider this contrary to the pursuit
18 of diversity because we are not discouraging these
19 students from attending, based on their knowledge that
20 they may not do so well, and this would lead to
21 actually to not being --

22 CHAIRPERSON REYNOLDS: I'm sure Dean Smith
23 is going to straighten out these misconceptions.

24 DEAN SMITH: Yeah, I appreciate that
25 introduction.

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1 In fact, that wasn't the proposal you gave
2 me. You said that all students would be --

3 CHAIRPERSON REYNOLDS: Right, but the
4 clearly --

5 DEAN SMITH: Well, I think that's an
6 interesting proposal that deserves to be looked at. I
7 think the Bar exam part of it is not practical. It's
8 just not practical. It varies too much depending on
9 what mix of states a student is going to take the Bar
10 exam.

11 CHAIRPERSON REYNOLDS: Fifty states plus
12 the District of Columbia if your graduates would
13 provide the state or provide authorization for the
14 school to collect the data no matter where they take
15 the Bar, you have it.

16 PROF. LEMPert: No, the Bar exam becomes
17 much more complicated statistically because a lot of
18 people who won't pass the Bar won't pass the Bar
19 because they don't graduate, some of whom may flunk
20 out for poor grades, others of whom have financial
21 problems, illnesses, and the like.

22 So once you look at the population taking
23 the Bar, you have a selection effect which has -- you
24 probably don't want to go there.

25 CHAIRPERSON REYNOLDS: You'll make the

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1 adjustment. It may be difficult, but I have
2 confidence in you.

3 VICE CHAIRPERSON THERNSTROM: I'm not
4 convinced.

5 PROF. LEMPert: There's so much error.
6 You see, part of the problem is any judgment,
7 including the grade judgment has a lot of error around
8 it. So if you can predict a third of the variance,
9 that's doing very good statistically.

10 But in terms of predicting someone's fate,
11 someone you think is going to flunk out within Law
12 Review --

13 (Simultaneous conversation.)

14 PROF. BERNSTEIN: I'm not a statistician,
15 but it explains a third of the variance. But my
16 understanding is from, again, talking people at law
17 school, that most law schools or I shouldn't say
18 "most." Some law schools have run the data and a lot
19 of law schools are aware that there's a cutoff point
20 of LSAT where if we admit students with below this
21 level, they're just very unlikely to succeed.

22 COMMISSIONER TAYLOR: Let me get in here,
23 if I may.

24 CHAIRPERSON REYNOLDS: Can Commissioner
25 Taylor jump in?

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1 COMMISSIONER TAYLOR: Because this is an
2 important point, and I don't want it to be lost, I
3 think, on us. You have, and I can't argue with you on
4 this; I'm going to concede the point that you simply
5 can't gather certain information. A lot of that
6 information relates to the outcome of data that
7 Commissioner Kirsanow discussed earlier.

8 If you can't collect it, what bothers me
9 is that this proposal seems to violate the do no harm
10 first principle. That is, you are encouraging
11 diversity because you highlight the importance of
12 diversity while not being able to gather the data
13 relative to possible negative outcomes of those
14 diversity policies, and that's particularly important
15 if you look at the results of your 52 percent of the
16 blacks who matriculate to the lower tier law schools.

17 I don't understand how you can embark on a
18 process to advance the cause of diversity without
19 knowing the possible negative outcomes and conceding
20 that we can't gather the data. I mean, I don't
21 understand how you can embark on the process in that
22 situation.

23 I mean, I appreciate that fact that you
24 want diversity, but if you don't know the negative
25 outcomes for the black students, how can you push the

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1 policy?

2 VICE CHAIRPERSON THERNSTROM: And of
3 course --

4 COMMISSIONER BRACERAS: Because it's not
5 about the black student.

6 COMMISSIONER TAYLOR: That's my point.

7 VICE CHAIRPERSON THERNSTROM: And it's not
8 about the white students. It's about aesthetics.

9 COMMISSIONER TAYLOR: If I'm wrong, you
10 tell me. If I'm wrong -- you've said you can't gather
11 that negative data. That concerns me greatly. That
12 was a part of the discussion from the beginning, that
13 someone didn't say, "Wait a minute. Shouldn't we
14 determine that on balance what we're doing is good for
15 black student"?

16 DEAN SMITH: There are any number of
17 accreditation standards that are written without data
18 supporting what the benefits or the disadvantages are.
19 That is a common part of educational decision making.

20 The sense of -- in fact, most
21 accreditation standards are based on a judgment of
22 what will be beneficial and that the benefits outweigh
23 the cost.

24 COMMISSIONER TAYLOR: Well, I agree with
25 that, but in this case I thought we were saying that

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1 we don't know the cost to the black student.

2 DEAN SMITH: Well, I think it said that
3 there were not studies that had demonstrated the cost.

4 VICE CHAIRPERSON THERNSTROM: Every law
5 school assume that there's a correlation between the
6 LSAT scores, college grades and performance in law
7 school. Otherwise they would be simply randomly
8 picking their admittees.

9 So to say there's no data at all, they're
10 making data assumptions.

11 COMMISSIONER TAYLOR: If I'm off base,
12 tell me.

13 DEAN SMITH: I'm sorry. Perhaps I
14 misunderstood the question. I thought you were saying
15 that there are no data showing the cost or benefits in
16 a statistical manner of diversity.

17 COMMISSIONER BRACERAS: To the student.

18 PROF. LEMPert: The problem is that not
19 that there's no data. The problem is it has to do
20 with error around the data. If the data were perfect,
21 we could have a perfect world in which we could tell
22 any student white or black, "Don't go to law school
23 because you'll flunk out," or, "go to law school
24 because you'll succeed famously."

25 We have data which has substantial error

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1 around it, and one of the issues is how much error
2 justifies abolishment of policy. How much justifies
3 notification?

4 So with respect to black students, I don't
5 think does anybody any good; it doesn't do the student
6 any good, it doesn't do the student any good. It
7 doesn't do the school any good. It doesn't do the ABA
8 any good to bring in a student, white or black, who is
9 going to flunk out.

10 They're always worse off or almost 90
11 percent of the time. Maybe some people gain
12 something, but they're worse off.

13 The question becomes: how well can we
14 predict that at the outset?

15 CHAIRPERSON REYNOLDS: Should we try to
16 predict? Should we make the effort?

17 PROF. LEMPert: We've been trying. We've
18 been trying for --

19 PROF. BERNSTEIN: Some law schools have
20 people like Professor Lempert and Professor Sander on
21 their faculties that could probably give pretty good
22 idea at least for particular states. It's hard in a
23 school like Michigan where students take Bars all over
24 the country; easier for a school like George Mason
25 where almost everyone takes the Virginia Bar.

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1 But I want to point out ABA Standard
2 501(b) used to just say a law school shall not admit
3 applicants who do not appear capable of satisfactorily
4 completing its educational program and being admitted
5 to the Bar.

6 So at least until recently if a law school
7 determined that, hey, if we take in someone with a
8 143, we know they just have a 95 percent chance of
9 never making it. We could be willing to make them
10 whatever our diversity goals are.

11 However, the new interpretation of 501 now
12 says a law school's admissions policy shall be
13 consistent with Standards 210 and 211. In other
14 words, you can't admit unqualified white and Asian
15 students who you know are going to fail. You must
16 admit unqualified Latino and black students you know
17 are going to fail.

18 CHAIRPERSON REYNOLDS: Commissioner
19 Braceras.

20 COMMISSIONER TAYLOR: I don't want to
21 leave this point. I'm still confused because what you
22 have said, whether it is the inability to gather the
23 data, to process it proper or get at something we can
24 rely upon, at the end of the day that's acknowledged,
25 and then you place on the table the benefits of

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1 diversity and say while we can't quantify the cost,
2 we're nevertheless going to push the policy.

3 I want to -- what I'm struggling with here
4 is why is that so acceptable in the context of what
5 benefits the black student. That seems to me to be a
6 threshold question that folks should be grappling with
7 much more than I hear anyone ever discussing. That's
8 my concern. I don't want to leave this.

9 I don't understand why we are grappling
10 with that.

11 PROF. LEMPert: It's a terrific issue. I
12 think it's absolutely fundamental. My point, I mean,
13 there's the benefit side. I say I think we might be
14 able to quantify, but we don't have the research
15 that's needed to really put any kind of numbers on
16 that. It's faith plus a few studies.

17 The cost side, we can identify a
18 probability that people with certain credentials are
19 not going to succeed. The problem is that there's
20 irreducible, at least for the 30 years of work we've
21 done, error around that.

22 And then one can say as I said that in a
23 certain sense, we should not be paternalistic. We
24 should let the student judge for themselves if they
25 want to take that risk.

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1 But as has been pointed out here, for the
2 student to judge that, they have to get some kind of
3 sense of what is that risk that I'll be confronting.
4 And at some point things may be so up in the air you
5 can't say what that risk is.

6 My sense -- and this is not based on
7 research -- my sense is that despite the problems with
8 using LSAT scores and undergraduate grade point
9 averages, we can give students some valuable
10 information by saying that students who have come to
11 this school with an LSAT/UGPA index of X tend to get
12 grades of Y.

13 I would not do that by race. I'd just do
14 it by the scores, and we could also point out what the
15 range is. We can do this. We can say, however, 20
16 percent of them actually get above Z and another 20
17 percent get below Q.

18 I think that's information students should
19 have.

20 COMMISSIONER TAYLOR: If that's
21 information students should have, I guess, Dean Smith,
22 I turn to you and ask: why is that not found or
23 reflected anywhere in this?

24 I see the benefits emphasized. I see the
25 requirement that you have an effort in I'll use your

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1 term "diversity," and not even output, but I don't see
2 the similar emphasis on gathering that other
3 information to the extent it is gatherable. To me it
4 seems absent.

5 DEAN SMITH: Yes. I think one of the
6 questions, to the extent it's really gatherable, and
7 able to do that in a meaningful way. The ABA has
8 increased the data supplied to students over the last
9 five or six years. It's a process I expect to
10 continue.

11 COMMISSIONER TAYLOR: But I didn't hear it
12 discussed --

13 DEAN SMITH: No, in part it's a different
14 standard. Not to be too technical, it was Standard
15 509 concerning the consumer information, really is
16 what you're talking about, and I think it's an
17 interesting suggestion.

18 There may be problems with it that I
19 haven't thought through, but I will ask our
20 questionnaire committee to look at whether that can be
21 done as a standard part of consumer information.

22 One of the things that has to be done in
23 any consumer information is it has to be provided in a
24 consistent way, and so --

25 COMMISSIONER TAYLOR: I want the same

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1 standard applied to the outcomes that you apply to --

2 DEAN SMITH: That's what I'm saying.

3 COMMISSIONER TAYLOR: I agree with that.

4 COMMISSIONER BRACERAS: And I think one of
5 the things Commissioner Taylor is getting at is he's
6 trying as am I to understand the rationale for the
7 change, the edits to Section 211. Because if there
8 isn't good data that explains positive outcomes and
9 how they outweigh the cost, then what is the rationale
10 for making the alteration.

11 Now, as Commissioner Yaki says, on the one
12 hand the standard has been around for a long time, and
13 if that's the case, I don't see any reason to tinker
14 with it.

15 I mean, on the one hand, if diversity and
16 equal opportunity mean the same thing in the minds of
17 the ABA, then I don't see the reason for the change in
18 the standard. If diversity means something
19 substantially different from equal opportunity, if it
20 means results oriented outcomes, if it means that a
21 student body looks a certain way, then it is a
22 departure from the original 211, in which case I
23 oppose it dramatically because I think there isn't
24 evidence, as Commissioner Taylor said, that there's a
25 good reason for that standard. There isn't a

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1 rationale.

2 DEAN SMITH: The basis for adding
3 diversity to it, and as someone mentioned earlier,
4 there has been a change over the last 15 years or so
5 toward understanding the importance of diversity. I
6 think there is within legal education, as I said at
7 the very beginning, a consensus, but not unanimity,
8 that diversity in the classroom is enormously
9 important.

10 The diversity among the student body is
11 enormously important inside and outside the classroom.

12 That's why the standard says that. I think what we
13 have been saying is there are not empirical data or
14 empirical studies that are strong that demonstrate the
15 value of it.

16 COMMISSIONER BRACERAS: But the edited
17 version of the standard, the new recommendation that
18 the ABA is putting forward focuses on results. I mean
19 you can say that it doesn't, but it's right there that
20 the schools will be judged based on the totality of
21 the law school's actions and the results achieved.
22 That's undebatable.

23 And once you start judging law schools on
24 the basis of results, which inevitably means
25 statistics and proportional representation, then you

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1 are in a completely different realm from equal
2 opportunity.

3 DEAN SMITH: It doesn't inevitably mean
4 statistical equivalence. I'm sorry. You used a
5 different term.

6 I think the whole sentence is important.
7 It's judged not solely on results. In fact we
8 specifically reject --

9 COMMISSIONER BRACERAS: The end result.
10 The result is a critical component.

11 DEAN SMITH: It is a component of it in
12 the same way if someone says, "I'm committed to going
13 to one movie a week." I'm just making -- all I'm
14 trying to say I'm going to demonstrate that I think
15 whenever we say we're committed to something, one of
16 the ways just as human beings we naturally determine
17 whether somebody was committed to something is what
18 the results were after they had the commitment.

19 So leaving the movie out, but it just
20 seems to me a natural human way of judging commitment
21 is to consider among other things the results.

22 COMMISSIONER BRACERAS: But if you're
23 accrediting law school is based on the results, --

24 CHAIRPERSON REYNOLDS: There are not
25 enough highly qualified blacks to go around. It's not

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1 the law school's fault. These are the legacies of our
2 history of oppression.

3 Now, if you think you're going to fix it
4 through this, you're wrong. You're putting a Bandaid
5 over a very serious problem. I think that there's an
6 argument to be made that we would be better off if the
7 ugliness were revealed in its full glory. Then maybe
8 we would have more incentive to do something about the
9 underlying problem, but --

10 PROF. LEMPert: You know, like many
11 standards, you know, a lot of it depends on good faith
12 interpretation. Clearly and maybe with good reason,
13 David does not expect good faith interpretation.
14 Maybe some of you don't. I think Steven probably
15 does.

16 So, for example, let me just tell you how
17 I would react if I were an ABA accreditor. I went to
18 a school and they told me that they made some special
19 recruitment efforts in minority schools. They visited
20 historically black schools. They advertised they
21 wanted to have a diverse student body, and then they
22 showed me the applications and showed me that they
23 didn't have anybody who applied who had a better than
24 five percent chance of staying in school.

25 The result would be very disappointing,

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1 but I would accredit them without blinking an eye
2 because they had taken concrete steps. They had acted
3 in good faith, and it's not their fault. They acted
4 very wisely not admitting anybody.

5 CHAIRPERSON REYNOLDS: But most schools
6 won't be able to get the numbers if they apply --

7 PROF. LEMPert: But what I'm saying is
8 that if the accreditation is done in good faith, as I
9 would see it, that should not matter if they've taken
10 concrete steps. A good faith creditor will not say
11 this is ten percent, so they are accredited. This is
12 five, so they're not.

13 CHAIRPERSON REYNOLDS: Do you agree with
14 me that most schools without the use of a two tier
15 admissions process, they're out of compliance? They
16 can't get -- it's sort of like asking my dead
17 grandmother to dunk a basketball. They can't do it.

18 PROF. LEMPert: For most schools I think
19 that is likely to be true.

20 CHAIRPERSON REYNOLDS: Is it fair to ask
21 schools to do something that we know at the outset
22 they can't do without lowering their standards for
23 either the black and Hispanic students or just to
24 lower their standards all around?

25 PROF. LEMPert: Well, you know, that

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1 depends. That depends. At least my own personal
2 belief and based on the data I've collected is that,
3 for example, to ask Michigan to do that is fair. Why?

4 Because when we've done it historically we've found
5 that we admit students who graduate who pass the bar
6 and go on and have successful careers.

7 But if there's any education of adding
8 diversity, I think that's fair. To ask a different
9 school in which 80 percent of the black students
10 admitted flunk out may not be fair.

11 COMMISSIONER TAYLOR: Mr. Chairman, let me
12 add one point because I'm going to assume good faith
13 on the accrediting team as it visits the campus and
14 applies its standard. My concern would be that they
15 don't ask the question related to those students who
16 are not performing well and are washing out.

17 That's my concern, that they could act in
18 good faith under this current standard and ignore
19 that.

20 PROF. BERNSTEIN: There's nothing in the
21 standards or their interpretations that require any of
22 the students admitted to actually succeed.

23 COMMISSIONER TAYLOR: That's my point.

24 DEAN SMITH: I take issue with that
25 because in fact, the Standard 501 to which you've made

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1 reference, Standard 501 requires that the school not
2 admit students who do not appear capable of succeeding
3 with the academic program and being admitted to the
4 Bar.

5 COMMISSIONER TAYLOR: That's a different
6 question in this sense. Once you determine that there
7 is a large bandwidth of folks who are, quote,
8 qualified for your institution, that addresses your
9 issue, but it doesn't address the issue of the 52
10 percent of the blacks who don't make it at a school
11 where if you're white you have a much higher chance of
12 making it.

13 And if you in good faith can apply this
14 standard as part of an accreditation team and are
15 never forced in evaluating the school to ask that
16 question, that's like saying in my practice if you're
17 a large law firm, how many blacks do you have, and
18 then I say, "Well, tell me how many blacks you have
19 after three years," and you just keep recycling people
20 through the first year associate class. It doesn't
21 mean anything.

22 DEAN SMITH: The teams do look at that as
23 a matter of fact, at attrition rate. They look at
24 academic support programs. They look at Bar passage
25 rate, although Bar passage is the more difficult of

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1 that. It's really not what you're talking about.

2 But the teams do look at whether there are
3 academic support programs for all students who meet --

4 PROF. BERNSTEIN: I know I'm not the
5 questioner here, but someone might want to ask Dean
6 Smith --

7 COMMISSIONER TAYLOR: I'm not having any
8 trouble coming up with questions out there.

9 PROF. BERNSTEIN: The question, I mean,
10 there are many schools over time that have been put on
11 probation by the ABA for not meeting what used to be
12 the equal opportunity, would now be the equal
13 opportunity and diversity standard. They're
14 essentially put on probation for not engaging
15 aggressively enough, if at all, in racial preferences.

16 I would be interested to know whether
17 there's any school that's ever been put on probation
18 for having half or more of its black matriculants not
19 become lawyers.

20 DEAN SMITH: Well, first of all, that's
21 just an inaccurate statement. There is no law school
22 that I know of --

23 PROF. BERNSTEIN: I know of several.

24 DEAN SMITH: -- who has ever been on
25 probation for the diversity standards.

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1 PROF. BERNSTEIN: George Mason University
2 School of Law.

3 DEAN SMITH: it is not on probation.

4 PROF. BERNSTEIN: It was on probation
5 until last year.

6 DEAN SMITH: The dean will be surprised to
7 learn that it ever has been put on probation. It is
8 not.

9 COMMISSIONER KIRSANOW: The second
10 component of this question is an interesting one. Has
11 any law school ever been put on probation? Because it
12 seems to me most of these law schools fail to graduate
13 their black students. Half of them; that is
14 astonishing and it seems to me in any other business
15 if you had that kind of success rate, the accrediting
16 agency --

17 COMMISSIONER TAYLOR: It would be a class
18 action lawsuit.

19 COMMISSIONER KIRSANOW: -- the guild or
20 whomever would wipe you out. Has anyone ever said,
21 "Stop this right now"?

22 DEAN SMITH: The answer to the question is
23 very few law schools have ever been put on probation.
24 So I think in part you're asked to report back on
25 what they're doing, and so in part what you are

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1 talking about is the terminology.

2 CHAIRPERSON REYNOLDS: Well, should be
3 placed on probation.

4 DEAN SMITH: As a matter of fact, two
5 things. I should say, number one, I think law schools
6 are sometimes asked to report back under the current
7 standards on their commitment to diversity. Law
8 schools have been asked to report back on the success
9 rate of their students both in completing the academic
10 program and in Bar passage, for that matter, and I
11 don't have the data because I didn't look at this. I
12 bet that the latter group is much larger than the
13 former.

14 COMMISSIONER KIRSANOW: I concede you guys
15 are well intended in promulgating something that would
16 create diversity if you believe that diversity has
17 some kind of great benefit, and there's still a
18 question about that, but the question to me is it
19 seems to me that would be extraordinarily valuable for
20 an accrediting agency to kick in the pants those
21 schools that aren't performing, and it seems that most
22 law schools are doing a horrendous job with respect to
23 performance when it comes to educating black law
24 students.

25 Do you think it might be valuable for a

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1 standard that says -- and it doesn't have to be
2 defined by race -- that says if you guys don't
3 graduate, you know, X number of students or a certain
4 percentage, then we're going to be taking a hard look
5 at you guys?

6 DEAN SMITH: Two things. Number one, I
7 don't agree that the majority of minority law students
8 don't graduate. I just don't agree with that.

9 PROF. BERNSTEIN: Either they don't
10 graduate or they don't pass the Bar.

11 COMMISSIONER KIRSANOW: I don't agree with
12 that either.

13 PROF. BERNSTEIN: Fifty-two percent of the
14 bottom two-thirds approximately.

15 COMMISSIONER KIRSANOW: And then 42
16 percent.

17 PROF. BERNSTEIN: Overall 42 percent.

18 DEAN SMITH: So number two, yes, I do
19 think that there should be standards required that law
20 schools prepare students to be admitted to the Bar and
21 accept and create programs that insure they get
22 through law school.

23 We have those standards. The question is
24 should we also then have a bright line standard that
25 says there has to be a specific percentage that meets

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1 that.

2 There has been great resistance to that.
3 I think it would be difficult to have a specific
4 standard in the accreditation requirements in part
5 because there's enormous variability in the states,
6 the Bar passage rate. Again, in looking at California
7 and South Carolina, we would have dramatically
8 different standards based on the state's Bar passage
9 rate.

10 COMMISSIONER KIRSANOW: I understand that.

11 You know, I hate to compare. This is kind of cheap
12 to do so, but if you look at Consumer Reports, they
13 would clearly give an F to any kind of industry that
14 produced the product that was only half successful,
15 and maybe you don't necessarily suspend or do anything
16 like that, but it would be nice to see some type of an
17 evaluation, A through F, whatever you want to do, that
18 would give the consumer some indication as to what the
19 probability was of success at that particular law
20 school.

21 If I was going to send my son, for
22 example, to XYZ Law School and I knew based on his
23 GPA, LSATs, a host of other factors that the
24 probability of him graduating was just 40 percent,
25 guess what. He's not going there. He's going to go

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1 somewhere else, and it would be a very valuable
2 service to the gatekeepers to the Bar to do just that.

3 In fact, I think that's one of the
4 services that the Bar should be providing.

5 DEAN SMITH: And that's what Standard 501
6 is actually intended to do. The question is whether
7 it should go farther or not, is also a good one.
8 We've been struggling with Standard 501 and what it
9 means and how to interpret it. I think mathematic --
10 this is one that mathematics would be difficult on,
11 but I agree that we should expect success of the
12 students we admit to law school.

13 COMMISSIONER TAYLOR: You all gather
14 information pursuant to 501 broken down by race?

15 DEAN SMITH: Five, oh, nine.

16 COMMISSIONER TAYLOR: Five, oh, nine
17 broken down?

18 DEAN SMITH: I'm sorry. Standard 501, in
19 part we have some of the data broken down by race, but
20 not all of it.

21 COMMISSIONER TAYLOR: Okay.

22 CHAIRPERSON REYNOLDS: Okay. It's clear
23 that we can spend quite a lot of time talking about
24 this issue and, quite frankly, if the opportunity
25 presents itself, I would like to invite the panelists

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1 that we heard today back to continue this
2 conversation. I think that these discussions have
3 been quite helpful.

4 There's a debate around this
5 interpretation, this rule, and there's a greater
6 debate about the ABA's role as a gatekeeper, and I
7 think that we continue to have that conversation. I
8 think that somebody needs to be -- well, the
9 gatekeeper needs someone looking over its shoulder,
10 too, to keep the ABA honest, and I hope that today we
11 have taken a step in that direction.

12 COMMISSIONER TAYLOR: Chair, Arlan.

13 CHAIRPERSON REYNOLDS: Commissioner
14 Melendez, are you still there?

15 (No response.)

16 CHAIRPERSON REYNOLDS: On that note, thank
17 you.

18 PROF. BERNSTEIN: Thank you for having us.

19 DEAN SMITH: Thank you, Mr. Chairman. I
20 really appreciate the time you've taken with us. It
21 is important. We always send our standards out for
22 comment and so forth, and as I told David, I really
23 welcome comments as these standards are going through
24 because there have been two or three good ideas that
25 just didn't surface from the other comments we've

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1 received, and I would welcome those from any members.

2 COMMISSIONER TAYLOR: You point to
3 diversity. It's important.

4 DEAN SMITH: It is important.

5 CHAIRPERSON REYNOLDS: Okay, and for the
6 record, the business meeting is not going to take
7 place due to a lack of a quorum. So that's the end of
8 the meeting.

9 (Whereupon, at 1:58 p.m., the meeting in
10 the above-entitled matter was concluded.)

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