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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   General Counsel, Office of the General Counsel
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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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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
the Section on Legal Education and Admissions to the
Bar of the American Bar Association; and finally we
have David Bernstein, a professor at Georgetown
University School of Law.

MR. BERNSTEIN: George Mason.

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

MR. BERNSTEIN: Georgetown.

CHAIRPERSON REYNOLDS: Oh, okay.

MR. BERNSTEIN: Three Georges around here.

So --

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

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

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

Then President Smith and Professor
Bernstein will address the ABA issue.
I'm just going to provide a background on each of our panelists, and at that point we can start.

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

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

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

In 1995, he published a comparative evaluation of seven academic support programs used by the law schools to help academically struggling students. The studies sought determine why some
programs produced real academic benefits while others had no measurable effect.

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

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

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

Next we have Dean Smith who is President, Dean, and Professor of Law at California Western
School of Law in San Diego. He is also Dean and Professor of Law at the Cleveland Marshall College of Law of Cleveland State University.

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

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

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

Professor Bernstein is a professor at the George Mason School of Law in Arlington, Virginia, where he has been teaching since 1995. He was a visiting professor at Georgetown University -- maybe that's where I got it -- Law Center for spring 2003.
semester and is a visiting professor at the University of Michigan School of Law for the 2005-6 academic year.

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

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

Professor Sander.

II. Effects of Race-based Admissions

Policies on Law Schools

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

I think it's a very important subject, and
I'm very glad the Commission is focusing on this.

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

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

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

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

I'm only going to be able to cover some of the high points, but I hope and encourage members to follow up on various points that I mention, and in
particular, I hope that they will follow up and ask me about the points that Dr. Lempert mentions.

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

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

    This is a point that was missed by Justice O'Connor in her opinion, but many other members of the
Supreme Court noted it and commentators throughout the country noted this as well.

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

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

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

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

And if you think of law school as a series of tiers in which education and pedagogy proceeds in different ways and at different levels, the elite schools are pulling up people from the first three tiers, and the second tier schools then have a choice. They can either have a largely racially segregated student body or they can admit minority students who come from even lower tiers of the applicant pool.

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

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

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

And it's these disparities that cause African Americans, and to a lesser extent Latinos to perform poorly in law school. It has nothing to do
with their race. It has nothing to do with their level of effort in school. It is almost entirely caused by the preferences that are given to them, the position that they are put in, which essentially sets them up for failure.

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

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

If you do the regression analysis that tries to compare what weight grades have compared to school eliteness in determining who passes the Bar, grades totally swamp eliteness, and if you do the analysis in any number of other ways, you get the exact same result.
So the result of these preferences is to severely academically disadvantage minorities who are being admitted to more elite schools. It handicaps them, and it leads to these large disparities in graduation and bar passage rates.

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

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

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

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

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

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

It's also the case that African Americans
come into law school not realizing the tremendous
disadvantages under which they're admitted. I'll
elaborate on that in the question and answer period if
I'm asked about that.

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

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

I also think the Commission can support
very important, relevant research, including the
appointment of a panel of experts, expert social
scientists to provide some objective review to the
debate that we're discussing today. There has been a
lot of involvement of affirmative action partisans in
the debate, but neutrals who can really bring sobering
analysis need to be encouraged, need to be supported by a legitimate organization like this to enter the debate and weigh in. I think that would be critically important in providing additional impetus and balance to the discussion.

Thank you very much.

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

Professor Lempert.

PROF. LEMPERT: Thank you.

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

Just let me state at the outset my values.

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

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

PROF. LEMPERT: I'm sorry. Start my time again, if you could.

(Laughter.)

PROF. LEMPERT: Thank you.

I believe in equality. I believe in diversity, particularly in law schools. I was teaching evidence when O.J. Simpson was being tried,
and I was lucky enough to have about ten percent of my class black. So I had a number of people who thought O.J. might be innocent, and some who thought he was guilty.

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

And I believe in sound social science.

I and colleagues did a major study of Michigan's graduates, affirmative action graduates over a 27-year period. I might note that in the written testimony the Microsoft gremlins were at work. I wrote we took special care to check for non-response bias and found considerable evidence that this was not a serious concern. Microsoft put in and found considerable serious concern.

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

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

We also looked at what made for high
income, what made for service, what made for satisfaction with career. Minority status and being black had no role, nor did LSAT scores have any role in predicting who was earning what money or who was satisfied with their career.

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

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

Are the results that Rick Sander gave you reliable? We've debated this both orally and in
print. I'm not going to dwell on this issue today. I refer you to my written testimony and to the articles referred therein, but I will tell you that of the articles I know of in print or draft, the following people disagree with Rick's conclusions: Ian Ayres, who he cited favorably, and Richard Brooks, Yale professors with Ph.D.s in economics; Michelle Dauber, Stanford law professor, Ph.D. in sociology and law degree; Daniel Ho, government Ph.D., Stanford professor; Jesse Rothstein, Princeton economics professor; Albert Yoon, Economics J.D., I think, at Northwestern; Kathy Barnes, J.D., Ph.D. in statistics, and several others.

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

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

If we were to abolish affirmative action, though Rick predicted in print there would be a 7.1
percent increase in the number of black attorneys, we think there will be a much more substantial decrease.

The number of applicants accepted would range from about 14.1 percent in 2001, a drop of 14.1 percent, to a drop of about 32.3 percent in 2004, 29.4 percent in 2005.

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

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

The situation should, however, be better today. In 1991, 22 percent of black martriculants at law schools had index scores below 500, which is the true danger score for failing to pass the bar. In the
last three years, that figure below 500 has ranged
between four percent and eight percent. The bottom 15
percent of blacks are not in law schools anymore, but
the Bar may be tougher.

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

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

A second cause of black failure is greater
financial need. One reason why so few blacks fail to
graduate and pass the bar is they fail to graduate,
and the most common reason they fail to graduate is unmet financial need or a sense of financial difficulty or a sense their law degree will not pay off to the extent it is worth paying for law school.

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

What are the cures? In large measure the cures do not lie in law school or even in our universities. They lie in pre-K through 12 education. They lie in improving the skills of blacks at all levels from the time, even before the time their formal education begins.

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

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

Then finally, let me just conclude with
one factoid for you. If affirmative action is defined as securing admission to a school when one's LSAT and UGPA index predicts admissions denial, then in 1991 according to a model that Linda Wightman advanced, 2,748 black students secured law school admission through affirmative action. They would not have been there but for affirmative action.

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

Thank you.

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

PROF. SANDER: Yes, thank you very much.

Briefly --

COMMISSIONER YAKI: Point of order.

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER YAKI: Was that agreed upon?

I thought we were going to go through all four and then with questions. People will preserve their time or it's just going to be --
CHAIRPERSON REYNOLDS: We basically bifurcated it.

COMMISSIONER YAKI: Bifurcated it?

CHAIRPERSON REYNOLDS: Yeah.

COMMISSIONER YAKI: Okay.

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

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

Let me just give you a few examples. Dr. Lempert consistently cites Michigan Law School as an example of affirmative action working, and his evidence for that lies primarily on a study, well,
pretty much entirely lies on a study that he did in 1997-98, when he sent out surveys to Michigan alumni. He matched a survey of women alumni who generally under performed against minority alumni and then compared the results.

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

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

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

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

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

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

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

I think it's pretty obvious, but if you do
the regression analysis and you see how do people perform and you control for both their undergraduate institution and their LSAT and undergraduate GPA, race washes out. There may be some small negative effect of race. For example, I've done some research suggesting that blacks who join study groups in law school ten to have difficulty getting into groups that have sort of high achieving members, probably because the negative stereotyping arises only from racial preferences. And that has some small negative impact on their performance.

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

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

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

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

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

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

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

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

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

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

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

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

We both in a sense agree, I think, that
the skill levels of some blacks is responsible for
their failure to graduate or pass the Bar, but where
we really disagree is whether we'd be better off
without affirmative action, without the so-called
mismatch.

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

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

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

Do we say that is too much of a risk;
we're not going to admit you," or do we say that a risk which is up to you to decide whether or not to take?

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

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

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

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

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

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

CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER BRACERAS: Are we --

COMMISSIONER KIRSANOW: Are we questioning now?

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER YAKI: Oh, okay.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow.

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

PROF. SANDER: Well, yes, I do.

COMMISSIONER KIRSANOW: Let me back up.

PROF. SANDER: Okay.

COMMISSIONER KIRSANOW: If the suppositions made by Justice O'Connor are correct, that is, the suppositions she made that the University
of Michigan Law School race was only a flexible plus factor, just a feather on the scale, would you disagree with the outcome in *Grutter*.

PROF. SANDER: Thank you for rephrasing that.

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

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

It's the case now that blacks who graduate from college are more likely to apply to law school than whites are. So I think in changing attitudes and singling opportunity, affirmative action can play an important role, but as I think you're alluding to in your question, the problem with *Grutter* is that Justice O'Connor's empiricism was all wrong. She misunderstood how the Michigan law school program
worked, and she accepted at face value a lot of very
dubious assertions about the benefits of affirmative
action as it operated.

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

And what do you base that on?

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

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

So it's about an extra Senate.

The article that I mentioned by Ian Ayres
uses completely different methodologies but looks at
similar data and comes to exactly the same conclusions. He finds that the law school gave substantially more weight and did it in, if anything, a more mechanical way than the undergraduate college did.

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

CHAIRPERSON REYNOLDS: Commissioner Braceras.

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

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

So I would much rather have heard more of
a discussion about the data itself and why you believe it to be wrong than to hear a list of who's on who's side because that to me is an irrelevant question.

PROF. LEMPERT: May I respond?

COMMISSIONER BRACERAS: Sure.

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

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

Rick himself, if you read his reply in the Stanford Law Review, you will find he, in essence,
repudiates his original methodology. He develops a completely different methodology. He achieves the same outcome, but ironically it's an outcome and a method which is inapplicable, given what he had just told you today.

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

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

PROF. SANDER: Commissioner, I know you --

COMMISSIONER BRACERAS: Please.

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

But the large point is very well taken, I
think. When my article first came out, there was a substantial effort to buy a lot of stout defenders of affirmative action, to simply say this isn't even social science. Professor Dauber at Stanford said it was cold fusion, and Rick Lempert endorsed that.

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

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

I'd also like to point out that of the various critics that Rick mentions, there are enormous internal contradictions between their work. He mentions Jesse Rothstein of Princeton and Albert Yoon at Northwestern who did a very interesting analysis. They ignored what I think was the most relevant data.
to the point they wanted to ask, but they reanalyzed the data in my original article, and they found that there was substantial evidence for a mismatch effect, although they said that it was limited to the bottom 80 percent of all of blacks going in law school.

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

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

So I think the statements are wrong.

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

So the fact that you may be able to muster a certain number of experts to support your position at this moment in time doesn't prove the ultimate truth of your assertion in my view.
All that being said, I'd just like to ask you very specifically, Professor Lempert, how you believe African Americans would be worse off without affirmative action at elite law schools. In other words, how would -- if, for example, some of the minorities that currently attend Harvard and Yale were to instead attend Boston College and University of Virginia or Georgetown, how would that make them worse off in the long run?

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

COMMISSIONER BRACERAS: Wait, but that's --

PROF. LEMPERT: I'm just --

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

PROF. LEMPERT: I understand.

COMMISSIONER BRACERAS: -- because that, the answer to that goes to how you as a white professor feel about yourself. In other words, law schools often like to justify affirmative action by their own white guilds, I think, frankly, and they
often justify it by saying, "Well, we feel better about ourselves because we have these people here."

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

PROF. LEMPERT: I understand.

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

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

They'd be worse off in the same way that white students are worse off who go to Boston College instead of Harvard. They'd be less likely to have entry into law school teaching. They'd be less likely to get high paying jobs at the most coveted law firms. They'd be less likely to have careers that bring them to federal and other judgeships over their lifetime. In every way that white students who go to Harvard and Yale and Michigan and UCLA and Chicago go there because they know they will be better off if they went to other perfectly good schools.
COMMISSIONER BRACERAS: I mean, is there empirical data that demonstrate that? Because I mean, if you look, just to take one segment of the profession, if you look at partners at major national law firms, I'm not sure that partnership decisions were in any way based on where somebody went to law school.

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

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

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

If you look at partners in major law firms, white partners, you'll find that overwhelmingly
they come from the top 20 law schools. Why do they come there? Because they're the ones who get the jobs.

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

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

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

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

PROF. LEMPERT: What I am saying is that the quality of law schools you go to, particularly going to elite law schools, has a tremendous effect on your career. It has a tremendous effect on lifetime
earnings. It has a tremendous --

CHAIRPERSON REYNOLDS: Okay. Here's a fix.

PROF. LEMPERT: -- effect on the niche that you enter practice in.

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

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

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

Whites and Asians have a different standard in terms of the commissions. Blacks and
Hispanics have lower standards. There are consequences that flow from this decision. The supporters of racial preference policies highlight the benefits, but there are costs.

I suppose I should give you a question.

(Laughter.)

PROF. SANDER: Commissioner, could I --

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

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

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

My hunch is there's a kind of dynamic in society that you can't engineer that kind of outcome, but also --
CHAIRPERSON REYNOLDS: So is --

PROF. LEMPERT: Let me -- let me -- let me also go --

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

PROF. LEMPERT: I think that a lot of --

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

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

Something I wanted to say about the point that Rick made about the Grutter case. Two dimensions of that. You know, there was a marvelous moment in the trial when our Dean of Admissions was trying to
describe how she settled on whether or not black applicants should be admitted, and she had a file in front of her, and she did not thing that it was this mechanical process that you've heard described, and she actually kind of lost herself kind of reading the file, almost lost track of where she was because the depth that she went into reading the file.

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

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

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

CHAIRPERSON REYNOLDS: Well, how does IQ play --

COMMISSIONER BRACERAS: Can I?
CHAIRPERSON REYNOLDS: I'm sorry. IQ, does that play a role? Does that have a correlation?

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

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

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

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

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

Now, I went to Harvard Law School. I'm the first person to admit that going to Harvard Law School opened some doors. However, I'm not sure that those doors would not have been opened to me anyway even if I had gone to Boston College or Boston University, and I want to separate out the question of careers in law teaching because that is an inherently
elitist career track. Professors making hiring decisions at Harvard and Yale like their own. They want to hire people from Harvard and Yale and University of Chicago, and it's inherently incestuous and elitist segment of the profession.

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

PROF. LEMPERT: Okay.

COMMISSIONER BRACERAS: I just don't see it.

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

COMMISSIONER BRACERAS: Okay.

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

If you took out the number of people that were partners in major law firms who had Harvard
degrees as a proportion of the Harvard class and the number who had Boston University degrees as a proportion of the Boston University class, you'd find a substantially higher proportion who had Harvard degrees, and any other --

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

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

CHAIRPERSON REYNOLDS: Jennifer, can I just in?

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

PARTICIPANTS: Okay.

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

COMMISSIONER BRACERAS: Right.

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

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

CHAIRPERSON REYNOLDS: And that's also --

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

But he's living in a world that disappeared 30 years ago. Elite law firms no longer hire from just the elite law schools. I just published an article in the North Carolina Law Review I can forward to the Commission that has the first systematic data looking at this question, and it finds
a dramatic increase in the range of law schools that are being recruited from in my law firms.

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

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

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

CHAIRPERSON REYNOLDS: So intellectual fire power, cognitive ability, those track closely with income. If that's the case, what do we say about the fact that the average 17 year old black male reads on the same level as his 13 year old white counterpart?
That has huge implications in terms of the pool from which law schools have to pick from. It has huge implications in terms of lifetime earnings. I don't think that this can be ignored. Assuming that our grades are a proxy for intellectual capacity, then there is a problem that starts as you pointed out, Professor Lempert. The problem doesn't start at the law school. The problem is a K through 12 problem and also a larger societal problem, and I think that this fix called racial preferences in the admission process, it's not a very good fix.

PROF. SANDER: Commissioner.

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

PROF. SANDER: I'd like to give you some data to strengthen the argument you just made, Commissioner. There's a new study by two scholars, one of them Steven Levitt, the author of *Freakonomics*, who used a new database that's really unparalleled in its comprehensiveness that looked at children in their first six years of life and found that if you controlled for just seven factors about their
upbringing, you totally eliminated the black-white gap in achievement. Okay?

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

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

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

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

PROF. LEMPERT: Can I just say one more? I mean, here I think we should emphasize and I think we're all agreed that this is an area of major social
problems. Anything this Commission can do to increase the quality of K-12 education and even pre-K is all to the good.

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

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

PROF. LEMPERT: What I said was -- I did not say law school were a hostile place per se. What I said is if one of the aspects of why blacks do poorly, in some schools there's some evidence it may be hostile environment. It's clearly race related
beyond the other facts that we're talking about.

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

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

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

COMMISSIONER KIRSANOW: Could it be affirmative action itself? I will tell you my experience at University of Michigan when I had a couple of debates there at the law school was when I made the point that at the University of Michigan Law School you're 174 times more likely to be admitted than your similarly situated white comparative, afterwards a number of black students came up to me in great despair not having realized that the advantage
was that great, but knowing that they were sitting
next to white comparatives who had stellar GPAs,
stellar SATs, and they felt as if "I don't belong
here."

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

CHAIRPERSON REYNOLDS: Okay. Vice Chair
Thernstrom.

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

But -- pardon me? A D? Okay.

COMMISSIONER YAKI: I gave Bakke an F. So
we're even.
VICE CHAIRPERSON THERNSTROM: Look. Let me start with the fact that Jennifer made a point that troubled me a lot, as well, Professor Lempert. I mean, you gave people's credentials. You talked about prizes. You talked about a prize for yourself, and I have to tell you I'm a total cynic about this kind of thing.

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

Of course, there's a certain --

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

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

CHAIRPERSON REYNOLDS: Commissioner Thernstrom.

COMMISSIONER BRACERAS: Let her go.

CHAIRPERSON REYNOLDS: We're bordering on being uncivil.

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

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

VICE CHAIRPERSON THERNSTROM: All right,
all right.

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

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

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

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

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

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

You walk in lunchrooms. You look at study groups.
What have you?

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

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

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

I'm a big spokesman as you must know for doing something about K through 12 education as the beginning of this entire problem. I do believe that we can deliver good education and in the K through 12
years, and we are not choosing to do so, and that is a political problem rather than educational problem because we know how to teach kids.

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

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

In fact, throw the applicants down the stairs, and pick, you know, the ones that land at the bottom of the stairs. I mean, if you want to say to students, "We've got high standards. We're admitting you with low qualifications," then say it to students across the board or do a random admission or something.
And you say, "Look. You are going to have" -- even if you got rid of preferential admissions, there'd still be disparities. There wouldn't be the same disparities, and that's really the point.

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

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

Anyway, I will stop there. Pick and choose.

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

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

VICE CHAIRPERSON THERNSTROM: I believe
that remark was uncivil on my part. I apologize.

PROF. LEMPERT: Thank you. I accept.

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

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

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

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

One of the methodological principles that I followed assiduously when I wrote this Michigan article was I did no, almost no exploratory analysis. I had hypotheses. I tested them, and I presented virtually every result that I came up with precisely because I knew that if I wanted to look to prove what I was doing, you know, you can always do that because
there's error in these data.

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

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

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

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

VICE CHAIRPERSON THERNSTROM: Your
standard was not met by Patricia Gurin or neither one. That was results driven work.

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

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

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

CHAIRPERSON REYNOLDS: Let's look at --

PROF. LEMPERT: -- each of them --

CHAIRPERSON REYNOLDS: That's the long term.

PROF. LEMPERT: But, again, in each case, one of the reasons why their successful careers is that other research supported their results.
CHAIRPERSON REYNOLDS: Over time --

PROF. LEMPERT: They did not contract itself.

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

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

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

PROF. LEMPERT: Monyihan was not doing quantitative work.

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

CHAIRPERSON REYNOLDS: And he's not the only one who left the field. People left that field after witnessing what happened to Coleman and Moynihan. They left the field, work that could have been done. Well, it took quite a bit of time for the
dust to settle and for men and women to have the confidence and the courage to go in and examine these difficult issues.

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

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

To go on though to some --

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

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

COMMISSIONER BRACERAS: Let me clarify that because --

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

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

COMMISSIONER YAKI: Oh, no, that was your point.
COMMISSIONER BRACERAS: Now, wait a
minute.

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

COMMISSIONER BRACERAS: No, that was not
my point.

COMMISSIONER YAKI: But it was.

COMMISSIONER BRACERAS: My point is --

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

VICE CHAIRPERSON THERNSTROM: Well, wait a
minute.

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

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

I could tell you, and I tell you in my
written testimony, for example, Professor Sander misinterpreted the meaning of significance tests, an error that someone taking Stat. 101 should not make.

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

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

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

CHAIRPERSON REYNOLDS: Okay.

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

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

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

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

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

PROF. LEMPERT: Can I respond to -- Professor Thernstrom gave a number of questions. I just want to respond to one more.

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

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

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

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


COMMISSIONER TAYLOR: Thank you.

Thank you all for coming.

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

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

(Laughter.)

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

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

And the second thing I'd like to do is I'd like to start all of the comments and start from a slightly different perspective. I joined this
Commission for the purposes, I hope of contributing
the public discourse as a way to improve the black
community among minority communities. So I come to
these debates from a single perspective, that is, if
you are the black student, I don't care about the
university, frankly. I don't care about society. I
want to talk about that black student you identified
as the -- internally you all know that that person has
a 50 percent chance of flunking out, all right, or not
doing well, washing out of the system.

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

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

I mean, I have a real concern about that.

So, please address the cost specifically and whether
or not you think it's in the best interest of the
black student and the black community when they're at
that critical decision making stage.
PROF. LEMPERT: Yeah, a couple. Let me deal with your second question first. First of all, with respect to the black students who attend the elite universities, the top 25, let us say, they don't pay any costs in terms of flunking out, not graduating, not passing the Bar any more than white students do. There are some who don't make it. Almost all do. Almost all go on to good careers.

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

PROF. LEMPERT: If there's a difference, it's very small indeed.

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

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

COMMISSIONER TAYLOR: Okay, all right.

PROF. SANDER: Can I comment on that briefly?

CHAIRPERSON REYNOLDS: Oh, what the hell.
Go ahead.

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

And we found generally that students who went to the most elite choice had dramatically better outcomes than those who went to the more elite choice. They were half as likely to fail the Bar. They were half as likely to not graduate. Those are really big differences when you're talking about a 40 percent flunk-out rate at the BAR.

Now, Rothstein and Yoon came back and they did an analysis that has a serious selection bias problem in which they said, "Well, we think that the problem Sander is talking about exists for the bottom 80 percent of black students, but not for the top 20 percent, which was exactly the point that you're inquiring about. Okay?
If you go back and do that first choice, second choice analysis and you split the sample and you look at the top 20 percent and the bottom 80 percent, you find essentially identical results. I actually prepared a slide showing these regressions to show you today.

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

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

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

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

CHAIRPERSON REYNOLDS: Same here.

PROF. LEMPERT: I'm just saying these people become lawyers.
PARTICIPANT: Pass the Bar in California.

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

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

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

But now to get back to your questions about cost to the community and cost to the students, first of all, I'll simply reiterate that the black students in the Michigan data and all of the data I
know of, including the data Rick is working with pay
no cost of that sort in terms of flunking out or
graduating or if they do, it's a very, very -- you
know, maybe seven percent don't pass the Bar as
opposed to four percent if they were white, and
there's no reason to believe they do better at a
lesser quality school.

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

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

Everybody from Michigan serves whites more
than anybody else, but there are lots of practices
which are predominantly black. So in terms of the
black community, the graduates from a school like
Michigan go out. They form sometimes all black law
firms or if they're in white firms, they serve blacks.
So in terms of community benefit, I think there's a huge benefit that it goes to the community.

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

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

The question becomes do we leave that to the people to decide. If we did, we get them more information, or do we say we're not going to have
affirmative action because if half pay the cost, half
may get tremendous benefits.

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

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

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

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

And when you look at how whites regard minorities, ethnic minorities, by the 1990s more than half the whites said that having ethnic minorities present at Michigan added on a seven point scale --
five to seven I call considerably -- considerably to the value of their classroom education, classroom education. Virtually none gave no value.

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

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

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

But, yes, one has to recognize that there are costs, and there are costs to this very debate that we're having to divisiveness in society. Now, one of the cures, I think is to advertise the fact
that I think David Wilkins found that blacks who were 
out 20 years from Harvard averaged like $312,000 or 
something like that annual in income. We find hugely 
successful black alumni of all kinds at all levels. 

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

COMMISSIONER TAYLOR: One follow-up. You 
did not mention among your list of costs lower grades. 
You indicated that blacks tend to have I think in 
your earlier testimony lower grades on average. Is 
that not a cost? 

PROF. LEMPERT: I do not think that that 
is a great cost. The one area where I think there's 
some substance to the points that Rick makes, and it 
makes perfect sense, is if you have a black student 
who comes to school like Michigan with credentials 
that ordinarily would only suffice to get him into 
Wayne, let us say, or Boston College; it is very
likely that that student will do worse grade-wise in Michigan than he would have done in a Wayne or a BC or what have you.

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

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

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

And the underlying issue, I think, the
thing that's probably driving all of these findings is
the question of in which environment do you earn more.

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

That's totally borne out by the Bar data.

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

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

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

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

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

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

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

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

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

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

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

PROF. SANDER: Actually we do know that because there was a very careful study done by Steven Klein of graduates in the Texas Bar. He looked at that exact question and a ---
COMMISSIONER YAKI: Okay. Can we stop this study war going on?

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

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

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

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

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

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

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

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

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

CHAIRPERSON REYNOLDS: Commissioner Yaki, ask your question, please.
VICE CHAIRPERSON THERNSTROM: But he was in the middle of a sentence.

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

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

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

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

Thank you.

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

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

PROF. LEMPERT: I agree. We're one on this one.

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

COMMISSIONER YAKI: Yeah. I mean, as with my fellow Commissioner Taylor, I am not a social scientist. I have a deep aversion to math of all types, and as a former policy maker, I sort of subscribe to the theory or the old saw that there is lies, damned lies, and then there's statistics. Because when it comes right down to it, when it comes right down to here, I think we are now arguing not just missing the forest for the trees. We're now arguing individual species within an arboretum not of our own choosing. Let's go back to what this is all about and why this came about, why this controversy exists.
And that is the supposition that at the elite law schools, affirmative action is somehow detrimental to minority students such that the affirmative action should be done away with so as not to be detrimental to them. Because what is this all about? This is all about the number of slots available in the elite law schools, to whom it should go to and one size says it should be based on completely color blind criteria, and the other side says we must give due to consideration to the issues and factors of race and ethnicity.

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

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

But let me just say this. You're a good speaker, but in the tone of your language, I don't
know if it has always been this way or if it started. When you start saying things like, "Well, but for racial preferences, they wouldn't feel that way," or, "but for the fact that they were there, they wouldn't have this kind of hostility felt toward them," what have you.

I mean what part of the problem that I see here is that we create this stigmatization that's been talked about? When we talk about the fact that, oh, it must be that the African American or the native American or the Hispanic or the Asian, and I remember, I mean -- unfortunately I am now old enough to remember to remember when being a student when Bakke first came down and being old enough to remember that there are only two Asians at the Yale Law School when I was there and maybe a handful of African American. I had no concept of what affirmative action even meant at that time because I was too busy, quite frankly, doing other things at the University of California which I can't even talk about, but, you know, the idea is that, you know, we've lost in this discussion the basic route of why we're here, and that is -- and it goes back to Brown. It goes back to the very fact that diversity and racial -- seeing people from different racial and ethnic backgrounds in your peer
group is per se a benefit to this nation, and we've forgotten all about that. Instead we sit here and we talk about the fact it's really -- I mean to me, my belief is that it comes down to the fact that people are upset that they didn't get one of the 275 slots and Yale Law School and one of the 550 slots at Harvard Law School, one of the --

COMMISSIONER TAYLOR: Hundred and 20.

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

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

And I think that there are disagreements on this Commission. I respect them, and I understand where it comes from. I don't think it comes from a bad place, but I don't think that we should be sitting here talking about which study is better than the other without really attacking the real core issue, and that is: is it good? Is there a greater good served, as Justice O'Connor said in Grutter, to be
served by diversity in education, and how does affirmative action play a role in that?

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

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

I would urge you to keep the independent track of research and scholarship and not fall into being funded by some of the groups out there whom I'm sure want to lavish lots of money on you to continue your studies on this one or that one because all it does is just perpetuate this perpetual battle that we
have which at its heart is really a policy battle
camouflaged with these statistics, studies, one way or
another.

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

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

COMMISSIONER KIRSANOW: Thank you.

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

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

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

PROF. LEMPERT: In 1991. We really don't have the data today.

COMMISSIONER KIRSANOW: Okay. The most
recent data shows that, and that's 1991.


COMMISSIONER KIRSANOW: Okay.

    PROF. SANDER: Commissioner.

COMMISSIONER KIRSANOW: Yes.

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

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

    PROF. SANDER: Yes.

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

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

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

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

    COMMISSIONER KIRSANOW: Okay.

    PROF. SANDER: But that number has been
replicated by several people.

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

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

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

COMMISSIONER KIRSANOW: I appreciate that, and I would expect that --
PROF. LEMPERT: I just want to be clear.

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

PROF. LEMPERT: Exactly.

COMMISSIONER KIRSANOW: It would only make sense.

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

PROF. LEMPERT: I think that's right in the data that we have.

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

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

PROF. LEMPERT: Without doing what Dr.
Ternstrom talks about, which is really investing heavily in pre-K through 12, without increasing the equality more generally in our society, I'm sorry to say I'm a pessimist on that.

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

PROF. LEMPERT: You don't want to pay money in pre-K ---

COMMISSIONER KIRSANOW: I'll stipulate to that.

VICE CHAIRPERSON TERNSTROM: I don't think that money is the central problem.

PROF. LEMPERT: There are many kinds of investments.

VICE CHAIRPERSON TERNSTROM: Okay.

COMMISSIONER KIRSANOW: Mr. Sander.

PROF. SANDER: Yes.

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

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

PROF. SANDER: Yes, that's correct.

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

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

COMMISSIONER KIRSANOW: Then I guess one more question, and this is not a very specific question, but it begs the question. If there is extraordinary preferences exerted by colleges to get black students, extraordinary preferences exerted by law schools to get black students, and extraordinary preference exerted by employers to get black law graduates, then the underlying initial theses for affirmative action going back to when Hubert Humphrey debated it on the floor of the Senate in '64 and saying there weren't going to be preferences, to the
Philadelphia Plan and Lyndon Johnson, and that is that it was a form of making amends for the invidious, the pernicious racist history of the country toward blacks, seems to me that that has evaporated.

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

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

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

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

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

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

Up until around 1970, for example, federally insured loans, a black with the same income, the same earning prospects as a white could not buy a
house because he could not get a mortgage at least in
a desirable area.

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

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

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

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

With respect to the law school, I gave you
that example. You know, it stands out in my mind is I
came to Michigan Law School. I transferred out of
Harvard Law School, I should note, went to a better place. In 1965, we had approximately 1,100 schools, maybe 1,050 students in three classes. We had one black student across the entire three classes.

That's not America. That doesn't raise various issues. It doesn't put things in the forefront. We had obviously no black student organizations, issues. So issues were not discussed. You talked about police brutality. You didn't have a student to speak up. We could talk about what happened to a neighbor of theirs or about the crime of driving while black. This is the diversity imperative for law schools for education, and it's one that we've found over the years as our minority presence was built up. The white students as well as the black students increasingly came to recognize, particularly the white male students.

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

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

COMMISSIONER KIRSANOW: Sure.

PROF. SANDER: Because of the race norming that occurs in law school admissions, the focus of the admission is entirely on race, meaning color. Now,
Rick has talked about reasons why it's important to have diversity, which I very largely agree with, but you know, if you really cared about diversity, you would look at all characteristics of the person.

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

So I think the diversity is in many ways cosmetic.

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

So I'm not sure, but that being said, I can see at least the argument is more plausible in a law school setting, but that argument also feeds into stereotypes, that black students are going to have necessarily an experience with being arrested or racial profiling and things of that nature.
But that being said, given that there's not been tremendous disagreement that there are some disparities between black students and white students in terms of graduation rates and clustering toward the bottom of the grade point spectrum, do you think it may be useful simply from a standpoint of getting consumer information out there to have these statistics broadly known so that a consumer, someone who's going to apply to Michigan Law School would know that, well, your odds of flunking out of Michigan Law School if you're black aren't necessarily appreciably greater than a white student, but if you go to another law school it's 20 times greater. Would you think that that kind of information may be useful?

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

I would like to see it researched, and there are also some issues. I mean one issue is that all of these things about rates require certain numbers to get stability. If you don't have sufficient numbers, they go all over the ball park.
One year you tell people it's 100 percent pass you pass. The other year you tell people there will be a 25 percent chance that you pass.

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

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

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

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

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

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom.

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

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

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

COMMISSIONER YAKI: Commissioner,
VICE CHAIRPERSON THERNSTROM: Commissioner Yaki.

COMMISSIONER YAKI: Please.

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

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

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

VICE CHAIRPERSON THERNSTROM: Pardon me?

COMMISSIONER YAKI: Between Brown and Grutter, with the big detours along the way, Suanje, Mecklenburg, Hockey, all of these other kinds of things.

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

COMMISSIONER YAKI: Okay.

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

COMMISSIONER YAKI: O'Connor mentions Brown in --
VICE CHAIRPERSON THERNSTROM: That's not a recommendation.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: David Reisman, everybody knows.

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

VICE CHAIRPERSON THERNSTROM: David Reisman was --

COMMISSIONER BRACERAS: Everyone makes mistakes.

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

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

But in any case, one of the facts about the elite law schools is no one flunks out.
practically. It's hard to flunk out. You've got to work hard at flunking out, it seems to me, but if you disagree with me, you know, I'd like to hear that.

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

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

PROF. LEMPERT: You know, on Justice Thomas I was just listing prominent blacks, but I don't want to, you know, -- obviously I don't know the data. No one has ever revealed his, including himself, but if you do know the number of black students across the nation who the year he got into law school could have gotten into Yale without some
benefit of their race, it is extraordinarily, extraordinarily small.

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

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

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

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

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

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

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

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

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

   Over 6,000 whites were misplaced. They're
in schools at all levels. We don't see them. We
don't know who they are.

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

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

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

VICE CHAIRPERSON THERNSTROM: Exactly.

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

VICE CHAIRPERSON THERNSTROM: Exactly.

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

COMMISSIONER KIRSANOW: You know I asked for questions.

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

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

COMMISSIONER KIRSANOW: Let's keep it simple.
VICE CHAIRPERSON THERNSTROM: Well, why not the Reisman point, a lower tier school, but --

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

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

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

PROF. SANDER: I think that the predominantly minority law schools are probably complying. They have, you know, very diverse student bodies already. So they don't feel as compelled to use racial preferences to make distinctions among the students. So I think that they probably come pretty
There are a few law schools that have small preferences, there were sometimes -- after Proposition 209 was passed, although that's eroded over time. So there are a few examples, and there's much to be learned from those examples, but that's a tiny, tiny minority of schools.

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

COMMISSIONER MELENDEZ: May I have a question?

CHAIRPERSON REYNOLDS: Oh.

(Laughter.)

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

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

VICE CHAIRPERSON THERNSTROM: Well, not Asians certainly.

PROF. SANDER: It's hard to talk
statistically about Native Americans because the numbers are relatively small. The numbers of Hispanics are now large enough that you can do a lot of the similar types of analyses, and the short answer is that the preferences extended to Hispanics are about half as large as the preferences extended to blacks, which means they're still quite substantial.

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

CHAIRPERSON REYNOLDS: Additional questions, Commissioner Melendez?

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

So thank you both.

PROF. LEMPERT: And could I on behalf, I think, of Rick also thank this panel for giving us the time to really probe these issues which we've not had another forum and for the probing nature of the questions you asked that allowed, I think, each of us
to, you know, tell you what we believe.

CHAIRPERSON REYNOLDS: Okay.

PROF. SANDER: Thank you.

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

(Laughter.)

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

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

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

(Whereupon, the foregoing matter went off
the record at 12:05 p.m. and went back on
the record at 12:14 p.m.)

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

Okay. I think we have everyone.

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

III. Appropriateness of Equal Opportunity and
Diversity Standard 211

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

You have my full written statement. So I
won't repeat all of it, and I'm dealing, at least,
with a very narrow slice of what you have been talking
about, which is the accreditation standards, and we
start really with what I think is the consensus in
legal education that all students benefit from
diversity, and that that was, indeed, recognized for
those who approve or those who don't approve in Greer
v. Bollinger.
But the point is that the accreditation standards that I'm talking about as the court recognized there, I think, legal educators would agree with, that classroom discussion is livelier, more spirited, and simply more enlightening and interesting, as the court said, when students have the greatest variety of backgrounds, and we have found that to be the case, as the court said, inside and outside of the classroom.

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

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

Standard 211, as it is revised, imposes an obligation for law school to demonstrate by concrete action a commitment to having a student body that is diverse. These standards allow law schools latitude to implement the commitment to diversity in a manner...
that takes into account each law school's individual
mission and circumstances and the laws under which
they operate.

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

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

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

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

CHAIRPERSON REYNOLDS: We have it.

DEAN SMITH: Okay. So let me talk about
what the proposals do not do. Number one, the
proposals do not impose significant new requirements
on law schools. Rather, they continue the requirements of the existing accreditation standards while providing greater clarity and more guidance. In fact, since 1980, the ABA standards have required law schools to demonstrate a commitment to providing full opportunities for the study of law and entry into the legal profession by members of minority groups.

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

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

Results, however, would be only part of the wide range of facts that would be considered, including facts concerning the efforts that a law school makes to achieve diversity. Thus, results are not dispositive of the question of it’s law school’s commitment to diversity, and it would be but one of a
number of factors.

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

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

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

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

Two, flexibility is appropriate. The
standards should and do allow law schools considerable flexibility in implementing a commitment to diversity. And, three, law schools consistent with Grutter are permitted but not required to use race as a factor in admissions decisions.

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

CHAIRPERSON REYNOLDS: I appreciate that.

COMMISSIONER BRACERAS: Thank you.

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

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

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

First, despite what Dean Smith said, it
requires law schools to act unlawfully.

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

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

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

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

So the devil is in the details. It's not understanding it itself in the interpretations. Any interpretations according to ABA rules are just as
important as the standards, not just legislative history. It's the standard itself.

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

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

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

Now, the interpretation has apparently been modified or suggested to be modified as we just
heard to specifically that you don't have to disobey the law. That law, we'll see how that works out, but nevertheless, I found it impossible to credit the denial that at least schools that are not subject to constitutional or statutory provisions will not have to engage in preferences.

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

Of course, if you're not accredited, your students can't take the Bar. They've made it clear that you'll be put on probation or even disaccredited if you don't use lower emission standards for minority students especially African American students, even if you believe as a law school that the students you'd have to admit under this lower standard are not qualified for admission.
So in other words, since Grutter, ABA accreditation officials, even without a new Standard 211, even in the absence of a rating authority to do so have been requiring law schools to use racial preferences. And, indeed, the relevant standard used to say that you're only allowed and required to admit qualified students, and they've been ignoring that.

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

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

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

There's further evidence that the ABA wants law schools to violate the law. You can find that in Interpretation 211-2, which is a couple of
slides ahead. That says consistent with the Supreme Court's decision in *Grutter* that a law school may use race and ethnicity in its admission processes to promote equal opportunity and diversity.

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

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

Now, not all law schools think it is essential to its educational mission to have diversity. Although some law school faculties think that, they've never sat around and discussed it. Such law schools are not allowed to engage in diversity
just because it's a popular thing to do, and certainly
you're not allowed to do it just because the ABA tells
them to.

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

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

Now, ABA officials, including Dean Smith,
will quote 211-3 to say, "See, we're not requiring
racial preferences." You can do all sorts of things.
If you look at the next slide you could have special
recruitment efforts, programs of special financial
aid, special programs that meet the needs of minority
students entering into law school. I have a couple of
other quotes in the next two slides from other ABA
officials of things that you could do.

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

There is no safe harbor here. Results
will still be considered whatever you do. There will
be no safe harbor. Any sensible Dean will just go for
the results. It would be a violation, I think, in
fact, of a dean's fiduciary duty to his constituency
in the law school and in the university to risk
spending hundreds of thousands of dollars and then not
come up with the results that the accreditation people
want and then have the law school be put on probation or even deaccredited.

    Obviously, the path of least resistance is to make sure you have the results that the ABA wants. Now, the ABA's determined to mandate racial preferences in law school admissions might at least be understandable if it were, in fact, wise, but already without additional diversity pressure from the ABA, approximately 42 percent of African American students who matriculated law school never become lawyers. They either fail out of law school or they failed the Bar, and I agree with Professor Lempert that the elite schools is much less of a problem. The vast majority of black law students, like the vast majority of law students in general, don't go to University of Michigan, don't go to Harvard, don't go to Georgetown. They go to schools like American or Catholic or D.C. College of Law or whatever, and they are more affected by this.

    I did some quick and dirty math in what you could find in the slides here as on Bok and Williamson who obviously supported affirmative action, and doing this quick and dearth math, we found out that 42 percent of black law school martriculants never become lawyers. It's also the case that the
bottom two thirds of law schools, 52 percent of black matriculants never become lawyers, and undoubtedly it's the case if you take sort of a Bell curve approach to this, that at 52 percent of students in the bottom two thirds of law schools never become lawyers. At the lower ranked law schools, lowest ranked law schools especially at the law schools in states with tough Bar exams, well more than 52 percent never become lawyers. You're talking I'm sure of 60, 70, maybe even 80 percent at some law schools, black matriculants never become lawyers.

Now, many law schools have a LSAT cutoff point. Professor Lempert suggests, I think that you never know whether someone is going to succeed or not. From discussions I've had with people who know the statistics, any law school that wants to try and look over its data and come up with an LSAT cutoff point where they know that students with an LSAT below a certain level have a rather poor chance of passing and ultimately passing the Bar as well, and most law schools, in fact, do have an informal or formal cutoff point under which they will not admit students, unless, of course, they are pursuing diversity in which case often these cutoffs are put aside.

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

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

CHAIRPERSON REYNOLDS: Okay. Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Three quick questions.

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

PROF. BERNSTEIN: Yes.

COMMISSIONER KIRSANOW: -- with respect to at least Professor Sander maintains that it is highly
unlikely that the vast majority of law schools could comply with the strict dictates of *Grutter v. Bollinger* in terms of diversity or race simply being a thumb on the scale in the admissions process, and that the vast majority of law schools, therefore are not complying with *Grutter*.

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

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

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

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

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

CHAIRPERSON REYNOLDS: Okay, and
Professors, Lempert and Sanders, please feel free to
jump in.

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

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

PROF. LEMPERT: The study had tremendous compounds of the quality of school with the degree of diversity, and I don't think that's reliable data. I don't know the more recent study. I did look, and you
know, I have not refreshed my memory, but they did not sort out a number of factors you want to control for before you reach that conclusion.

        CHAIRPERSON REYNOLDS: Thank you.
        I'm sorry. Go ahead.
        PROF. SANDER: Just to briefly, you know, I think impartial observers generally agree that all of the research in this area is weak, and that we need to do real controlled studies of diverse environments of different types and evaluate educational outcomes in some objective way to really get at this question.

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

        But he's also right that the study done by Professor Rothman suffered from the fact that Rothman controlled, arranged different schools that had different racial make-ups and asked people about, you know, different educational outcomes that they experienced, and there is a difficulty in controlling for different types of environments because you can end up sort of comparing community colleges which are very diverse but have, you know, resource limitations
versus elite schools that all have very similar racial make-ups, but have great educational resources.

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

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

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

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

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

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

CHAIRPERSON REYNOLDS: Dean Smith, may I jump in?

DEAN SMITH: Sure.

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

DEAN SMITH: Yeah.

VICE CHAIRPERSON THERNSTROM: Narrow range.

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

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

So if you hit your target early in the
admission season, I suspect that the admissions committee is not going to provide the same level of preferences.

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

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

CHAIRPERSON REYNOLDS: Sure, sure.

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

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

COMMISSIONER YAKI: Can I break in for a second?

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

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

PROF. BERNSTEIN: Well, I think what you're getting at is most law schools do not do a holistic -- it is not a Harvard College trying to find out a one poly player to fill out a polo team. Most law schools especially outside, again, the top few who have their pick of the cream of the crop, have a
formula, a GPA and LSAT. They take the vast majority of students with that formula. They do look at other criteria for a certain fraction of their students, but a small fraction, and then for the most part African American students and to a lesser extent but still significant extent, a few students won't meet that.

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

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

We do; we have in the past in the years when we had a race blind policy, we used to have a good reputation for being more or less race blind. Then we would get a few black students who wanted to go to a law school where they knew that no one would
question why they got in and how they did, and the ABA
informally and formally tells us we don't want you to
have any such policy. They tell all law schools that.

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

PROF. BERNSTEIN: Absolutely.

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

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

However, it is the case that advocates of
affirmative action who have argued made substantial
academic freedom arguments which I think have some
weight and which I think help to persuade Justice
O'Connor, and as soon as the decision came out, the
first thing the advocates of affirmative action did
within the ABA is say, "Oh, now that we have the
academic freedom to have affirmative action if we want
to, we're going to force everyone to have racial
preferences even if they don't want to.

CHAIRPERSON REYNOLDS: Dean Smith, what
happened?

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

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

So if nothing else works, where are they?

DEAN SMITH: I think that we can learn a
lot. I think that's not universally true. It may be
true for some law schools. It may be not true, but we
should look at our colleagues from California.

CHAIRPERSON REYNOLDS: The outliers don't
matter.

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

CHAIRPERSON REYNOLDS: But you're not --

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

CHAIRPERSON REYNOLDS: Dean Smith.

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

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

COMMISSIONER KIRSANOW: The fact of the
matter is that the last data that we have available,
the median GPA and LSAT for students at the elite law
schools was 3.8 and 98 respectively. Only 20 black
undergraduate students in the entire country meet
that, which means that at Michigan where you have
approximately 30 black entrants every year, Michigan
would eat up that entire cohort and there would still
be ten spaces left over. You can't fill it without
huge preferences.

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

I mean, what happened to academic freedom?

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

CHAIRPERSON REYNOLDS: So the mission
is --

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

CHAIRPERSON REYNOLDS: -- that diversity
isn't important at this particular university, that at
least racial diversity. So if the entering class is
all black, that's okay. If it's all white, that's
okay so long as we have an admission process that does not discriminate on the basis of race.

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

DEAN SMITH: I think when --

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

CHAIRPERSON REYNOLDS: I agree.

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

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

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

CHAIRPERSON REYNOLDS: Why?

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

COMMISSIONER BRACERAS: Why?

CHAIRPERSON REYNOLDS: Yeah, but why?

DEAN SMITH: Because -- I'm sorry.

CHAIRPERSON REYNOLDS: The mission of the
university, if it says that a nondiscrimination principle is good enough, that what this institution values is diversity of viewpoint and that this university also believes that looking at the history of the United States, the use of racial preferences, distributing benefits and burdens on the basis of race is toxic and we don't want to do it.

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

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

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

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

COMMISSIONER BRACERAS: No, no.

VICE CHAIRPERSON THERNSTROM: Defined by
race.

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

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

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

CHAIRPERSON REYNOLDS: Commissioner Braceras.

COMMISSIONER BRACERAS: Yeah, I want to piggyback on the point the Chairman has raised about academic freedom, but I think that part of the issue here has to do with your underlying assumption that
there is, in fact, a consensus as you put it that all students benefit from diversity, and then, again, an assumption about what the term "diversity" means and what the definition of "diversity" is.

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

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

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

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

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

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

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

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

COMMISSIONER BRACERAS: But that brings me
back to my difference between equal opportunity and
diversity. If you have to show a commitment to
diversity, you are showing a commitment to an outcome,
and if you don't produce the outcome, then all the
trying in the world isn't going to necessarily get you accredited by the ABA if your class lacks a certain number of racial and ethnic minorities.

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

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

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

DEAN SMITH: May I answer very briefly? I don't agree with that. I think the efforts that the
school has made, what it has tried, whether when
something doesn't work it tries something else was
another kind of results or anything; if something is
not working that does try something else, the
commitment, the efforts that the school have made are
very relevant to determining diversity, without it
having achieved a specific result.

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

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

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

I'm sorry to argue with that premise, but it just
doesn't exist. The school would not necessarily be in
trouble. It depends because it didn't have achieved a particular result.

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

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

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

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

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

COMMISSIONER YAKI: Yeah, just a quick procedural question. Are we going to be -- how does
the King bill fit into this discussion? Are we going
to talk about it at all?

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

COMMISSIONER KIRSANOW: I have a few
questions on it.

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

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

CHAIRPERSON REYNOLDS: Would you like to
ask some questions?

PROF. BERNSTEIN: I would be happy to --

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

DEAN SMITH: Since 1980.

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

DEAN SMITH: No.

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

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

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

Number two --

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

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

COMMISSIONER BRACERAS: Right.

CHAIRPERSON REYNOLDS: -- if there is no
change?

PROF. LEMPERT: Can I interject a point
here, please?

CHAIRPERSON REYNOLDS: You've just got to
throw some sharp elbows to get in.
PROF. LEMPERT: Yeah, I will use them. You know, it's obvious to you all that I'm a strong supporter of affirmative action. I'm quite agnostic about the particular change that's being proposed, but in response, let me just make a couple of observations.

It seems to me there are several legitimate reasons for the new language. One is the diversity as education, and it doesn't matter where you are. I think it is the case that people do not have viewpoints at least on many issues that can be separated from their identity, particularly their racial identity.

When I have a black student who says he thinks that O.J. is guilty, that has a different impact on all students black and white than when I have a white student who says the same thing.

But as Rick told you a while back, the research on that issue is very weak. I mean I cited some research I have done, but I don't dispute the fact that there's very little research on this particular value, and we could use a lot more research.

So secondly --

CHAIRPERSON REYNOLDS: Shouldn't you be
agnostic? Because first you say that the data is weak over here, and then I assume that you believe that academic freedom is important. I assume that you --

PROF. LEMPERT: I'm going to answer this.

CHAIRPERSON REYNOLDS: -- that institutions should be free to craft its own vision.

COMMISSIONER YAKI: Mr. Chairman, I think there's a difference between academic freedom and the hypotheticals that you're talking about, whether it's -- in other words, we can talk all we want about academic freedom, which is important, but then, again, this body later on in the agenda is going to be talking about involving the Department of Education on Title 6 grounds on anti-Semitism issues, which could be argued on the other side as an academic freedom type of issue.

CHAIRPERSON REYNOLDS: No.

COMMISSIONER YAKI: The idea that they -- I'm not arguing for it.

COMMISSIONER BRACERAS: For them to discriminate?

COMMISSIONER YAKI: I'm not arguing. I'm saying that people who -- I am sure that the professors who are making the statements, and I don't defend them. I'm just saying I don't think the word
"academic freedom" is as cut and dry as you would think it to be.

CHAIRPERSON REYNOLDS: I would disagree wholeheartedly. The anti-Semitism issue in no way relates to what we're talking about in my view. I don't think that someone arguing that discriminating against Jews is somehow protected by --

COMMISSIONER YAKI: No. I'm just saying that the argument that we made is that it doesn't constitute academic freedom. I subscribe to that. That is something that I agree with.

However, I am saying that I would then allow the dollars. The other side would raise that as an --

CHAIRPERSON REYNOLDS: But why do we want to impose our views? Why can't we allow universal --

COMMISSIONER YAKI: Well, first of all, I don't think --

CHAIRPERSON REYNOLDS: Hold it, hold it. And we can talk about this, you know, the two of us one on one, but I don't have these gentlemen here too often so I want to direct my questions to the panelists.

VICE CHAIRPERSON THERNSTROM: But wait a minute. I think with Commissioner Yaki about to leave

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he needs to finish his --

COMMISSIONER YAKI: I was asking questions and responding to the debate that was going on.

CHAIRPERSON REYNOLDS: Okay. My memory, I was the one who was talking and you said that you'd respond.

VICE CHAIRPERSON THERNSTROM: I know, but you did interrupt his line of questioning.

PROF. LEMPERT: Well, I could directly respond to this. If nothing else, *Grutter* is premised on the notion that we are to find to the law school's, University of Michigan's specifically, choice because Michigan has determined that in their exercise of academic freedom, diversity is crucial to the education their students are getting.

Not all law schools would either have or even would if they thought about it agree that this sort of diversity at least is crucial to the academic mission. Therefore, not only is the ABA violating academic freedom. They're also asking law schools to violate *Grutter*.

COMMISSIONER YAKI: but my point is that it's not a point of academic freedom whatsoever. Under Title 6 for universities, they are not allowed to take certain kinds of action, such as eliminating
all African Americans from their pool.

COMMISSIONER YAKI: That's illegal.

COMMISSIONER BRACERAS: But, again --

COMMISSIONER YAKI: In other words, we're talking about a situation that's not going to exist. They're under an obligation to insure equal opportunity. The ABA standard is about that obligation, and also --

COMMISSIONER BRACERAS: That goes right to my question. That goes right to my question which is is there a difference between diversity and equal opportunity.

You are equating the two. Commissioner Yaki is equating the two. I do not happen to believe that adherence to the diversity principle is the same thing as equal opportunity. People can reject the diversity principle without being discriminators.

PROF. LEMPERT: You know, academic freedom does not allow a law school to get accredited if it gets rid of all of its library books because it's cheap. Academic freedom does not allow a law school to get accredited if it gives no clinical opportunities to its students.

So part of the issue here is what is the educational value of diversity. If we could
hypothesize --

CHAIRPERSON REYNOLDS: And you say it's weak?

PROF. LEMPERT: If we could hypothesize -- yeah, but there's very little evidence.

CHAIRPERSON REYNOLDS: And so we --

PROF. LEMPERT: I'm not debating. Let me just say if we can hypothesize that there was strong evidence that diversity contributed to quality education, academic freedom would not be an argument that should bear much weight.

VICE CHAIRPERSON THERNSTROM: Wait a minute. And we have to agree on the definition of quality.

PROF. LEMPERT: Yes. All of this, but what I'm saying is that --

COMMISSIONER BRACERAS: And the definition of diversity.

CHAIRPERSON REYNOLDS: All I'm saying --

VICE CHAIRPERSON THERNSTROM: And the definition of diversity.

PROF. LEMPERT: -- is that it was not unreasonable to think -- I'm speaking as a social scientist right now -- while it is not unreasonable to think that diversity does contribute substantially to
education, there is relatively little evidence one way or the other on this issue.

Second, but I want to go into two other reasons why the ABA --

CHAIRPERSON REYNOLDS: So what's the value then? What's it all about?

PROF. LEMPERT: There's two other reasons. I'm going to actually side with some of you skeptics, but you won't let me get there.

VICE CHAIRPERSON THERNSTROM: Well, I'm concerned about Commissioner Yaki. Do you have other questions that you need to get on the table?

COMMISSIONER YAKI: I do, but let's keep on going.

PROF. LEMPERT: The second reason why the ABA may want to play a role in this is because they have a stake in the diverse profession. The research we've done, other research shows that there is this tendency for minorities to serve minorities. There are lots of other reasons why the ABA wants a diverse legal profession.

If it were essential that every law school in the country engage in affirmative action to create a diverse profession, I think that it also a legitimate reason.
I do not think that is essential. I think if law schools just have their way, if we didn't have the first educational value, I think most of them would choose, would opt for a diversity scheme, and some would not.

The third reason I think is the one Commissioner Yaki is talking about, which is anti-racism. If there was a kind of racism in society which required diversity in this way to counter, that would be another legitimate reason.

So on balance, my own view and why I think this change is, you know, a weaker change than the overall case for affirmative action, is that there is arguably a legitimate educational reason which like books and libraries and like clinical programs schools have to engage with, but I don't think that is proven.

I think there's another diverse -- in the profession reason, but I don't think we need this role to maintain a diverse legal profession, and I don't see the anti-racism reason right now because they think law schools are not being racist in their admissions policies.

PROF. SANDER: Commissioner, I have to catch a train in a few minutes. Can I just make one statement on this issue?
COMMISSIONER YAKI: Sure, sure.

PROF. SANDER: Thank you very much.

I think that the one issue that hasn't been adequately discussed here is sort of the forest issues, how this standard affects legal education as a whole.

The ABA's motivation, I think many of the zealous advocates are pushing for this sort of enforced racial diversity because they believe that if individual law schools do not aggressively use racial double standards, then the overall racial diversity of legal education will disappear. And that is a myth.

One of the most important things that I try to show in systemic analysis is that what we're really doing, what we're predominantly doing, 86 percent of what racial preference is doing is shifting the law school at which blacks attend, and the percentage for Hispanics is even higher.

So this fundamentally goes to the point that Professor Bernstein is trying to make. He's saying that individual schools need to make a judgment about whether or not their particularly racial strategies are productive both for the general educational environment and for the individual black student or Hispanic students.
The ABA standard essentially precludes that. It is essentially a reactive measure that's saying, "Well, we can't have diversity, of levels of diversity among schools. We can't find out what happens if you lower preferences at one school and use them more aggressively in other schools because maybe we'll find out then that the schools taking different definitions of diversity are having much better outcomes for their minority students and they're still having very healthy educational environments.

We've got to circle the wagons and force everyone to do the same thing. That's producing the striking uniformity that we see almost the exact same proportion of blacks admitted in 90 percent of American law schools, and the real issue here is that the ABA is sending very clear messages that are even clearer in oral communications with law school deans that they'd better fall in line or face very serious consequences.

And I think that is part of this scandal that we're facing.

CHAIRPERSON REYNOLDS: Two quick questions. How is this going to affect, say, Howard University's law school?

And the second issue is moving to the
employment piece, there are specific legal standards for when a private actor can use racial preferences. There are manifest imbalance and, you know, traced back to historical actions, but your rule ignores a law. It basically requires at least in the employment context that at least arguable it ignores the law if schools wind up looking at your new standard saying that we have to use racial preferences to get our numbers right in the employment context.

DEAN SMITH: The reference to racial preferences that I have been addressing is entirely related to admissions.

CHAIRPERSON REYNOLDS: Well, you have something here about faculty.

DEAN SMITH: Yes, there has to be a commitment to diverse faculty and staff, but the specific references of authority under the standards to use race conscious decisions in admissions.

PROF. BERNSTEIN: Look. I have to say something here, which is everyone -- Professor Sander said that everyone in legal academia knows that the ABA has been going around for years, and especially since Grutter, saying that we want certain results. If we use pure race neutral standards, we're going to put you on probation and threaten your accreditation,
and it's going to get a lot of bad publicity for you. It will never say it publicly. They would never put it in writing. They would create a new standard to replace the old standard. That was also very well drafted, very loyally allowed these abuses but didn't require them.

The radicals in January got together and said, "We want it explicitly in the standards. We don't want any law school to be able to even argue that we don't have to do it."

They were able to smoke out the ABA a little bit, and now we see in these interpretations that they are at least more or less officially now required in a way that preserves at least a little bit of deniability.

There's no question if you would bring in any honest law school dean in the country who has ever had ABA accreditation, that everyone knows what the ABA is trying to do in this regard.

CHAIRPERSON REYNOLDS: Commissioner Yaki.

COMMISSIONER YAKI: Two things. One, I just want to clarify because I was somewhat confused by your confusion, that I was in no way defending anti-Semitism on a campus from a professor as --

CHAIRPERSON REYNOLDS: I didn't think that
you were defending.

COMMISSIONER YAKI: Okay, but number two, you know, all of this -- none of this occurs in a vacuum, and sometimes, you know, we -- not we, but I just think that debates like this kind of suck the life out of what the issue is really all about.

I don't believe that -- I believe as Professor Lempert said, there is a value in having a diverse Bar. Historically and I think through to today, the need for representation of minorities by minority lawyers with whom they feel more comfortable is very important, very much a factual premise that we need to deal with.

I don't think that Section 211, seeing that it has been around for 26 years and is one of about 500 other criteria by which you accredit a law school, including whether they tear up all of their law books or not, is a seminal decision in the work of the ABA in terms of attempting to address, I think, concerns of schools since Grutter about how to proceed, but also how to proceed with creating a diverse Bar through the use of admissions that has diversity.

And then the last thing I want to say is that in a way it doesn't occur in a vacuum when, you
know, Professor Bernstein starts talking about the radicals of the ABA get together to put all of this together. Well, you know, we can start talking about the Council of Economic Opportunity and those other people who are busy sending letters to every university that they want to target saying that they're not complying with Grutter and trying to have a Department of Education investigation into their admission policies.

So you know, maybe this is a way of balancing things out. I don't know.

CHAIRPERSON REYNOLDS: Well, the department is obligated to investigate all complaints.

In any event, Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: I'm by the way not even sure why these ABA standards are necessary, since there's not a single law school in the country that's going to give up its racial preferences.

PROF. BERNSTEIN: I disagree with that.

VICE CHAIRPERSON THERNSTROM: Really?

PROF. BERNSTEIN: Not only are there at least a few law schools where the faculty is uncomfortable an ideological matter with preferences, but I've spoken over the years and especially recently
since my op-ed in the *Wall Street Journal* where the subject came out, with people who are at especially lower ranked law schools who are liberal, who are in favor of affirmative action in general, and who tell me that they are distressed and appalled by the fact that every year they admit X number of African American students because of pressure from the ABA or from internal faculty politics or in terms of both, and they see them fail out. They see them struggling.

They see them coming out in the bottom five or ten percent of the class and not passing the Bar, and they would prefer not on an ideological basis, but on the basis of a pragmatic matter of how these preferences work out to either mitigate them or get rid of them entirely.

VICE CHAIRPERSON THERNSTROM: Go on. You just made my day.

DEAN SMITH: Well, we keep sliding back to the thought that these standards require preferences. They do not.

(Simultaneous conversation.)

COMMISSIONER BRACERAS: But it says right here --

VICE CHAIRPERSON THERNSTROM: Can I continue?
COMMISSIONER BRACERAS: But you use the word "result," that they will be judged on the basis of results. "And results," not "or results," "and results."

CHAIRPERSON REYNOLDS: Anybody who knows how the game is played understands perfectly how this actually works out, and its use of racial preferences in admission policy. That's what this is about.

VICE CHAIRPERSON THERNSTROM: And it's a binary decision, as Michael Kinsley once said, no conservative either, and there's no mathematical way of the role of race as opposed to other considerations.

Put race in the mix and it makes all the difference or you take it out and it makes no difference. It's not -- I mean, it just seems to me I've never understood why law school deans and others who believe in racial preferences, who believe in racial double standards won't get up and say, "I believe in racial double standards."

This goes all the way back to Georgetown when Timothy McGuire, you know, outed the admissions process. The dean should -- I forget her name. Judith something or other --

CHAIRPERSON REYNOLDS: Areen.
VICE CHAIRPERSON THERNSTROM: -- Areen should have said, "Hey, I believe in this."

And you know, it would have changed the conversation. The fact is that for years and years and years, the law schools have tried to spin this in a way that is deceptive, and you know, Alan Dershowitz years ago at a Harvard Law School debate on this whole question, Alan Dershowitz, no conservative, said to a bunch of students, "Look. You don't believe in diversity. You believe in everybody" -- this was on actually faculty diversity -- "you believe in everybody having the same point of view, but some people wearing skirts and some people having skin color that's a little darker than the average white. That's not a belief in diversity."

I mean, you can't merge, it seems to me, or confuse the two issues of intellectual diversity and, by the way, political diversity and racial and ethnic preferences.

Now, I do have a question here. During the Michigan litigation many law schools submitted briefs saying that race neutral admissions would be insufficient to achieve meaningful diversity. You've got states where racial preferences are prohibited. How does the ABA expect such schools to achieve
diversity, given the fact that the law schools say race neutral methods don't work?

DEAN SMITH: Well, I assume that law schools obey the law, including the law in those states that prohibit racial preferences. Those law schools are finding ways, and in my prepared statement that I kind of skipped over in the interest of time, on page 6, I think it is, it has a short list of examples of other things that law schools can do that are not racial preferences.

VICE CHAIRPERSON THERNSTROM: Well, what does the ABA do behind those?

DEAN SMITH: I'm giving them only as examples. I think law schools can and should be more creative and will be more creative in how to attract student bodies that are diverse without giving racial preferences, and as I say, I assume that's occurring in the states where those preferences are prohibited.

PROF. BERNSTEIN: There's no safe harbor in these interpretations. There's nothing that you could do under these interpretations.

You could do everything that's listed in Interpretation 211-3. You could do all of the things I quoted from other ABA officials that they say you might want to do to try to achieve the diverse class,
and there's no guarantee that if you spend half a million dollars, $800,000 on these efforts and don't achieve the results that the ABA will take you off probation or agree to your re-accreditation. There's nothing.

So if you're a law school dean, obviously what is your alternative but to make sure you have the results?

COMMISIONER BRACERAS: That's right.

DEAN SMITH: Well, there's no guarantee in most of accreditation. There's no guarantee if you spend a half a million dollars on the library that that's sufficient.

VICE CHAIRPERSON THERNSTROM: It's not the same thing.

DEAN SMITH: Well, it is the same thing that there's no guarantee. There's no safe harbor because in most of the accreditation standards you don't have a numerical guarantee.

VICE CHAIRPERSON THERNSTROM: Buying books, more books, is not the same thing as expanding the use of racial double standards. It just isn't.

DEAN SMITH: My point was that there are no guarantees in most of accreditation.

CHAIRPERSON REYNOLDS: Commissioner
COMMISSIONER KIRSANOW: Dean Smith, we've been focused a little bit in terms of these standards on incoming students to the student body, and I'm concerned also about the outgoing student body, that is, in terms of graduation and passage of the Bar. Does the ABA take a position or would the ABA favor standards that would, for example, require schools to disclose Bar passage rates, graduation rates, even GPA statistics related to the diversity of the population? In other words, just aggregate by race, graduation rates, student loan default rates, Bar passage rates for that particular school so that we know exactly; we have a better idea when a student is going in and he may be black, Hispanic, Asian, well, my at least ethnic cohort has had this kind of experience at this school.

Do you think that's something that may be a salutary approach to rule making for the ABA?

DEAN SMITH: It's a good question and it deserves the look of our questionnaire committee. Some of those data would be very hard to gather. The Bar passage data, we've actually asked for additional help from the National Conference of Bar Examiners to get on a continuing basis better data from that.
And loan default rates have a long lag time. So some of those are difficult to achieve. But graduate rates -- so let me take graduation rates. What I think would be interesting, you can get a rough sense of that, a rough sense of that from the one publication that the ABA puts out now, the 509 publication, which gives me a chance to show my book.

But it's not precise, and it's worth looking at whether those would be data of interest and whether you could gather them in a meaningful way or not.

One of the problems is you have little things like transfers in and transfers out and things like that of people who leave in good standing. What that means is hard. So you don't want to provide data that are so limited.

But that's worth looking at.

COMMISSIONER KIRSANOW: I want to address this to Professor Bernstein also, but what about the weight that a particular school accords in the admissions process to race or ethnicity? Is that helpful at all?

DEAN SMITH: I don't think it is. I think most schools would say we can't provide the specific weight to it.
COMMISSIONER KIRSANOW: Maybe they can't, but it strikes me that there have been some stories, and I think Professor Lempert at least deals with them, that I started to cite the statistic that there are only 20 law students, black law students or graduates in the entire country out of hundreds of thousands or tens of thousands that would even meet the median for most elite schools.

So it seems to me that there could be a repression analysis done or a way to weight the probability of that someone would matriculate to a certain school, all things being equal, if they were black or white.

DEAN SMITH: That would be solely on LSAT and undergraduate grade point average.

COMMISSIONER KIRSANOW: yes, or some extracurriculars to the extent that they are considered.

DEAN SMITH: Well, you know, employment is usually considered. Economic handicaps. I mean, I actually don't think it's accurate that schools are only looking at those factors, that the schools don't look at those factors. I think most schools do. My school certainly -- now speaking only as a dean -- my school certainly does.
VICE CHAIRPERSON THERNSTROM: I don't understand that. I just don't because you've got such disparities in skills coming in. And LSAT scores, the pool is so small. It is, again, the point I made before. If race is a consideration, then race is decisive. I mean, it's just a fact.

DEAN SMITH: With all respect, I don't think that's true, and speaking again as a dean, I don't think that's true at many law schools. It's probably true at some from what you say. I mean I don't know.

COMMISSIONER KIRSANOW: Can Professor Bernstein have an opportunity to address the question of whether or not disclosure of certain types of aid or related to graduation? These Bar rates may be something that have a salutary effect on --

CHAIRPERSON REYNOLDS: Why is that important?

COMMISSIONER KIRSANOW: -- law school population, and whether he has any comments related to the King bill.

PROF. BERNSTEIN: Sure. Well, as I mentioned, I am not a hard core, consistent opponent of all affirmative action or even if you want to call it racial preference measures depending on the exact
circumstances. But what got me involved in this issue and particularly disturbed by the issue is these data showing that in order for the ABA to be able to proclaim that we're interested in a diverse profession, in order for law schools get to play and we admitted diversity in body, that people who are suffering for the most part are these large percentage of African American martriculants, particularly at the lower end schools, who are wasting time, energy, money, et cetera, and never becoming lawyers, never graduating.

That's not -- when we talk about a 50 percent chance of becoming a lawyer or not, it's true some of those people will succeed, but all, of those people would have almost certain succeeded at something. It's not that the person is being admitted to law school. It could have been a sales person or any accountant or an engineer or who knows what else. They've been distracted for several years of their life from whatever other ventures they might have pursued, and moreover, I do think it has to be demoralizing.

I fortunately never have been in the bottom ten percent of my class, but I can't imagine it being a very happy situation that it wouldn't affect...
me somewhat psychologically. Every law professor knows that participation and interest in class goes down between first semester of law school and second semester because everyone thinks that they're going into law school and they're going to be in the top ten percent of their class, and when 90 percent of the class realizes that they're not, they get a lot less interested.

So I assume people who are getting even poorer grades than the median are even less happy.

DEAN SMITH: And only 20 percent are in the top ten percent.

PROF. BERNSTEIN: Right, right.

(Laughter.)

PROF. BERNSTEIN: And one issue that really has disturbed me because when I've discussed this with people I often get the response of, well, the beneficiaries are from -- oh, well, they're beneficiaries. So we shouldn't feel sorry for them if they didn't do well. There shouldn't have been any sympathy. They knew they were getting a preference, and these are supporters of affirmative action generally who say this, and if they knew it, then they could sink or swim and that's that.

My anecdotal impression confirmed by other
people's anecdotal impression, although I don't have data, suggest that most beneficiaries of these preferences are not aware. They may be aware there are preferences, but they are not aware of the extent of the preferences. They're told by admissions people, by everybody else, as Dr. Thernstrom was saying, that they're only being used as a plus factor, and they're basically equally qualified.

I wanted to read a statement. You know, we often hear from black professors or elite black lawyers who are in favor of these policies, but they have seceded from them. I don't think I've ever heard until now, that one statement I have, from someone who entered law school, struggled and maybe failed out, and wasted all of his time and money.

So I found on the Internet a student at the University of Colorado who had a 2.5 GPA and had to repeat a year of law school, and she sent a letter that she then circulated to a listserv and it found its way on the Internet to the dean.

She said it's true that students from all races who have disadvantaged backgrounds with relatively low academic credentials have performed exceptionally well inside and outside the classroom. Nevertheless, this does not abolish the university's
equitable duty to give under qualified students information that's particularly relevant to their situation. Without this information, it is difficult for them to make an informed decision about whether to attend a top law school. "In my opinion, the minimum amount of data that Colorado should give to under qualified students prior to admittance is the correlation between outside scores and first year grades. Had I been properly warned as described above, I would be at a Tier 3 school facing the joy of graduation in 2006. I do not feel it is an honor to have a law degree from the University of Colorado. If it were possible to do so, I would gladly exchange my CU law degree for one from a Tier 3 school. Unfortunately, I'm stuck here until spring 2007 trying to deal with the hurt and anger CU has recklessly inflicted upon me."

So that's another perspective that we don't hear very often, and I think people like this deserve to have some idea of what their incoming credentials are compared to other people's incoming credentials and how students with their income and credentials have failure in law school and on the Bars.

And I don't think it has to be broken down
on race. There are law schools, if anyone works at the state law school, knows that they have had occasional calls from the House or Senate Majority Leader in the state saying, "Why don't you admit my nephew?" And there are 40 other people who get admitted who don't necessarily have the same scores, but I think it would be worthwhile if we're going to have these policies to begin with and it may even mitigate their harm to a large extent, in my eyes, if you inform them that, "Look. We're admitting you with a 148 LSAT. The average student at our law school has a 158 LSAT, and in our experience students with LSATs in the range of 145 to 150 fail out at a rate of 40 percent and don't pass the Bar at a rate of 40 percent."

And you can make then the informed choice, or whatever it happens to be, and you can then make the informed choice as to whether you want to attend this law school or perhaps find another law school that the students with your grades and credentials succeed better with.

CHAIRPERSON REYNOLDS: Any thoughts? It sounds like a reasonable approach to me. The regime would stay in place, but what you would have here is information. People would be able to make well
informed decisions based on the data.

DEAN SMITH: The data essentially being here LSAT and undergrad grade point average, essentially index. Is that what you were using?

PROF. BERNSTEIN: Well, you know, I find we've done lots of regressions over at George Mason with our economists. GPA is only relevant to the extent that you consider also the undergraduate institution without LSAT.

LSAT scores from data I've seen are pretty highly correlated with Bar exam rates and failure out of law school, obviously not perfectly correlated, but much better than you would think from the discussion that the public usually has about them.

PROF. LEMPERT: I mean they're far from perfectly correlated, explaining maybe a third of the variance.

CHAIRPERSON REYNOLDS: But the overall approach, what do you think of the overall approach? Disclosure is better than, information is better than less information.

PROF. LEMPERT: That's my bias, and I think if it is done on the basis of LSAT scores and GPAs -- I'll note in the Michigan data, don't know if it's true all over, the Michigan data by the 1990s,
undergraduate grade point average had lost all value of predicting white student success. It still had value in predicting minority student success. I don't know if that would be true if you broke that down at George Mason, but for whites, the great inflation at graduate level just washes everything else out. Minorities are still diverse enough that it has some value.

But my own belief is that if law schools were to publish their regression results just so you could look at where your LSAT and undergraduate grade point -- what grade it predicts in that school, doesn't stigmatize any group because it doesn't say blacks do this; I think that's good.

I'm a consumerist. I think consumers need information.

DEAN SMITH: I think that how you would do in law school is a doable calculation, and this is, but how predicting what it will do on the Bar exam is a completely different matter because it depends what state you go into.

There would be dramatically different results if somebody is taking the bar in California than taking the Bar in South Carolina, dramatically different results.
VICE CHAIRPERSON THERNSTROM: But that can be said, too --

DEAN SMITH: But you have to predict where somebody is going to take the Bar in order to give them the data.

CHAIRPERSON REYNOLDS: It's just a matter of collecting the data.

PROF. LEMPERT: Dean Smith may disagree with me on this. However, my impression backed up by asking a few deals what they thought of this is that if the proposal we're tossing around was to be implements by a law school and the law schools decided we're going to aggressively not only recruit minorities students, but given the preference, warn them that their chance of success might not be as high as they expect, and that the ABA accreditation officials will consider this contrary to the pursuit of diversity because we are not discouraging these students from attending, based on their knowledge that they may not do so well, and this would lead to actually to not being --

CHAIRPERSON REYNOLDS: I'm sure Dean Smith is going to straighten out these misconceptions.

DEAN SMITH: Yeah, I appreciate that introduction.
In fact, that wasn't the proposal you gave me. You said that all students would be --

CHAIRPERSON REYNOLDS: Right, but the clearly --

DEAN SMITH: Well, I think that's an interesting proposal that deserves to be looked at. I think the Bar exam part of it is not practical. It's just not practical. It varies too much depending on what mix of states a student is going to take the Bar exam.

CHAIRPERSON REYNOLDS: Fifty states plus the District of Columbia if your graduates would provide the state or provide authorization for the school to collect the data no matter where they take the Bar, you have it.

PROF. LEMPERT: No, the Bar exam becomes much more complicated statistically because a lot of people who won't pass the Bar won't pass the Bar because they don't graduate, some of whom may flunk out for poor grades, others of whom have financial problems, illnesses, and the like.

So once you look at the population taking the Bar, you have a selection effect which has -- you probably don't want to go there.

CHAIRPERSON REYNOLDS: You'll make the
adjustment. It may be difficult, but I have confidence in you.

VICE CHAIRPERSON THERNSTROM: I'm not convinced.

PROF. LEMPERT: There's so much error. You see, part of the problem is any judgment, including the grade judgment has a lot of error around it. So if you can predict a third of the variance, that's doing very good statistically.

But in terms of predicting someone's fate, someone you think is going to flunk out within Law Review --

(Simultaneous conversation.)

PROF. BERNSTEIN: I'm not a statistician, but it explains a third of the variance. But my understanding is from, again, talking people at law school, that most law schools or I shouldn't say "most." Some law schools have run the data and a lot of law schools are aware that there's a cutoff point of LSAT where if we admit students with below this level, they're just very unlikely to succeed.

COMMISSIONER TAYLOR: Let me get in here, if I may.

CHAIRPERSON REYNOLDS: Can Commissioner Taylor jump in?
COMMISSIONER TAYLOR: Because this is an important point, and I don't want it to be lost, I think, on us. You have, and I can't argue with you on this; I'm going to concede the point that you simply can't gather certain information. A lot of that information relates to the outcome of data that Commissioner Kirsanow discussed earlier.

If you can't collect it, what bothers me is that this proposal seems to violate the do no harm first principle. That is, you are encouraging diversity because you highlight the importance of diversity while not being able to gather the data relative to possible negative outcomes of those diversity policies, and that's particularly important if you look at the results of your 52 percent of the blacks who matriculate to the lower tier law schools.

I don't understand how you can embark on a process to advance the cause of diversity without knowing the possible negative outcomes and conceding that we can't gather the data. I mean, I don't understand how you can embark on the process in that situation.

I mean, I appreciate that fact that you want diversity, but if you don't know the negative outcomes for the black students, how can you push the
policy?

VICE CHAIRPERSON THERNSTROM: And of course --

COMMISSIONER BRACERAS: Because it's not about the black student.

COMMISSIONER TAYLOR: That's my point.

VICE CHAIRPERSON THERNSTROM: And it's not about the white students. It's about aesthetics.

COMMISSIONER TAYLOR: If I'm wrong, you tell me. If I'm wrong -- you've said you can't gather that negative data. That concerns me greatly. That was a part of the discussion from the beginning, that someone didn't say, "Wait a minute. Shouldn't we determine that on balance what we're doing is good for black student"?

DEAN SMITH: There are any number of accreditation standards that are written without data supporting what the benefits or the disadvantages are. That is a common part of educational decision making.

The sense of -- in fact, most accreditation standards are based on a judgment of what will be beneficial and that the benefits outweigh the cost.

COMMISSIONER TAYLOR: Well, I agree with that, but in this case I thought we were saying that
DEAN SMITH: Well, I think it said that there were not studies that had demonstrated the cost.

VICE CHAIRPERSON THERNSTROM: Every law school assume that there's a correlation between the LSAT scores, college grades and performance in law school. Otherwise they would be simply randomly picking their admittees.

So to say there's no data at all, they're making data assumptions.

COMMISSIONER TAYLOR: If I'm off base, tell me.

DEAN SMITH: I'm sorry. Perhaps I misunderstood the question. I thought you were saying that there are no data showing the cost or benefits in a statistical manner of diversity.

COMMISSIONER BRACERAS: To the student.

PROF. LEMPERT: The problem is that not that there's no data. The problem is it has to do with error around the data. If the data were perfect, we could have a perfect world in which we could tell any student white or black, "Don't go to law school because you'll flunk out," or, "go to law school because you'll succeed famously."

We have data which has substantial error
around it, and one of the issues is how much error justifies abolishment of policy. How much justifies notification?

So with respect to black students, I don't think does anybody any good; it doesn't do the student any good, it doesn't do the student any good. It doesn't do the school any good. It doesn't do the ABA any good to bring in a student, white or black, who is going to flunk out.

They're always worse off or almost 90 percent of the time. Maybe some people gain something, but they're worse off.

The question becomes: how well can we predict that at the outset?

CHAIRPERSON REYNOLDS: Should we try to predict? Should we make the effort?

PROF. LEMPERT: We've been trying. We've been trying for --

PROF. BERNSTEIN: Some law schools have people like Professor Lempert and Professor Sander on their faculties that could probably give pretty good idea at least for particular states. It's hard in a school like Michigan where students take Bars all over the country; easier for a school like George Mason where almost everyone takes the Virginia Bar.
1. But I want to point out ABA Standard 501(b) used to just say a law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the Bar.

2. So at least until recently if a law school determined that, hey, if we take in someone with a 143, we know they just have a 95 percent chance of never making it. We could be willing to make them whatever our diversity goals are.

3. However, the new interpretation of 501 now says a law school's admissions policy shall be consistent with Standards 210 and 211. In other words, you can't admit unqualified white and Asian students who you know are going to fail. You must admit unqualified Latino and black students you know are going to fail.

4. CHAIRPERSON REYNOLDS: Commissioner Braceras.

5. COMMISSIONER TAYLOR: I don't want to leave this point. I'm still confused because what you have said, whether it is the inability to gather the data, to process it proper or get at something we can rely upon, at the end of the day that's acknowledged, and then you place on the table the benefits of
diversity and say while we can't quantify the cost, we're nevertheless going to push the policy.

I want to -- what I'm struggling with here is why is that so acceptable in the context of what benefits the black student. That seems to me to be a threshold question that folks should be grappling with much more than I hear anyone ever discussing. That's my concern. I don't want to leave this.

I don't understand why we are grappling with that.

PROF. LEMPERT: It's a terrific issue. I think it's absolutely fundamental. My point, I mean, there's the benefit side. I say I think we might be able to quantify, but we don't have the research that's needed to really put any kind of numbers on that. It's faith plus a few studies.

The cost side, we can identify a probability that people with certain credentials are not going to succeed. The problem is that there's irreducible, at least for the 30 years of work we've done, error around that.

And then one can say as I said that in a certain sense, we should not be paternalistic. We should let the student judge for themselves if they want to take that risk.
But as has been pointed out here, for the student to judge that, they have to get some kind of sense of what is that risk that I'll be confronting. And at some point things may be so up in the air you can't say what that risk is.

My sense -- and this is not based on research -- my sense is that despite the problems with using LSAT scores and undergraduate grade point averages, we can give students some valuable information by saying that students who have come to this school with an LSAT/UGPA index of X tend to get grades of Y.

I would not do that by race. I'd just do it by the scores, and we could also point out what the range is. We can do this. We can say, however, 20 percent of them actually get above Z and another 20 percent get below Q.

I think that's information students should have.

COMMISSIONER TAYLOR: If that's information students should have, I guess, Dean Smith, I turn to you and ask: why is that not found or reflected anywhere in this?

I see the benefits emphasized. I see the requirement that you have an effort in I'll use your
term "diversity," and not even output, but I don't see the similar emphasis on gathering that other information to the extent it is gatherable. To me it seems absent.

DEAN SMITH: Yes. I think one of the questions, to the extent it's really gatherable, and able to do that in a meaningful way. The ABA has increased the data supplied to students over the last five or six years. It's a process I expect to continue.

COMMISSIONER TAYLOR: But I didn't hear it discussed --

DEAN SMITH: No, in part it's a different standard. Not to be too technical, it was Standard 509 concerning the consumer information, really is what you're talking about, and I think it's an interesting suggestion.

There may be problems with it that I haven't thought through, but I will ask our questionnaire committee to look at whether that can be done as a standard part of consumer information.

One of the things that has to be done in any consumer information is it has to be provided in a consistent way, and so --

COMMISSIONER TAYLOR: I want the same
standard applied to the outcomes that you apply to --

DEAN SMITH: That's what I'm saying.

COMMISSIONER TAYLOR: I agree with that.

COMMISSIONER BRACERAS: And I think one of the things Commissioner Taylor is getting at is he's trying as am I to understand the rationale for the change, the edits to Section 211. Because if there isn't good data that explains positive outcomes and how they outweigh the cost, then what is the rationale for making the alteration.

Now, as Commissioner Yaki says, on the one hand the standard has been around for a long time, and if that's the case, I don't see any reason to tinker with it.

I mean, on the one hand, if diversity and equal opportunity mean the same thing in the minds of the ABA, then I don't see the reason for the change in the standard. If diversity means something substantially different from equal opportunity, if it means results oriented outcomes, if it means that a student body looks a certain way, then it is a departure from the original 211, in which case I oppose it dramatically because I think there isn't evidence, as Commissioner Taylor said, that there's a good reason for that standard. There isn't a
rationale.

DEAN SMITH: The basis for adding diversity to it, and as someone mentioned earlier, there has been a change over the last 15 years or so toward understanding the importance of diversity. I think there is within legal education, as I said at the very beginning, a consensus, but not unanimity, that diversity in the classroom is enormously important.

The diversity among the student body is enormously important inside and outside the classroom. That's why the standard says that. I think what we have been saying is there are not empirical data or empirical studies that are strong that demonstrate the value of it.

COMMISSIONER BRACERAS: But the edited version of the standard, the new recommendation that the ABA is putting forward focuses on results. I mean you can say that it doesn't, but it's right there that the schools will be judged based on the totality of the law school's actions and the results achieved. That's undebatable.

And once you start judging law schools on the basis of results, which inevitably means statistics and proportional representation, then you
are in a completely different realm from equal opportunity.

DEAN SMITH: It doesn't inevitably mean statistical equivalence. I'm sorry. You used a different term.

I think the whole sentence is important. It's judged not solely on results. In fact we specifically reject --

COMMISSIONER BRACERAS: The end result.

The result is a critical component.

DEAN SMITH: It is a component of it in the same way if someone says, "I'm committed to going to one movie a week." I'm just making -- all I'm trying to say I'm going to demonstrate that I think whenever we say we're committed to something, one of the ways just as human beings we naturally determine whether somebody was committed to something is what the results were after they had the commitment.

So leaving the movie out, but it just seems to me a natural human way of judging commitment is to consider among other things the results.

COMMISSIONER BRACERAS: But if you're accrediting law school is based on the results, --

CHAIRPERSON REYNOLDS: There are not enough highly qualified blacks to go around. It's not
the law school's fault. These are the legacies of our history of oppression.

    Now, if you think you're going to fix it through this, you're wrong. You're putting a Bandaid over a very serious problem. I think that there's an argument to be made that we would be better off if the ugliness were revealed in its full glory. Then maybe we would have more incentive to do something about the underlying problem, but --

    PROF. LEMPERT: You know, like many standards, you know, a lot of it depends on good faith interpretation. Clearly and maybe with good reason, David does not expect good faith interpretation. Maybe some of you don't. I think Steven probably does.

    So, for example, let me just tell you how I would react if I were an ABA accreditor. I went to a school and they told me that they made some special recruitment efforts in minority schools. They visited historically black schools. They advertised they wanted to have a diverse student body, and then they showed me the applications and showed me that they didn't have anybody who applied who had a better than five percent chance of staying in school.

    The result would be very disappointing,
but I would accredit them without blinking an eye because they had taken concrete steps. They had acted in good faith, and it's not their fault. They acted very wisely not admitting anybody.

CHAIRPERSON REYNOLDS: But most schools won't be able to get the numbers if they apply --

PROF. LEMPERT: But what I'm saying is that if the accreditation is done in good faith, as I would see it, that should not matter if they've taken concrete steps. A good faith creditor will not say this is ten percent, so they are accredited. This is five, so they're not.

CHAIRPERSON REYNOLDS: Do you agree with me that most schools without the use of a two tier admissions process, they're out of compliance? They can't get -- it's sort of like asking my dead grandmother to dunk a basketball. They can't do it.

PROF. LEMPERT: For most schools I think that is likely to be true.

CHAIRPERSON REYNOLDS: Is it fair to ask schools to do something that we know at the outset they can't do without lowering their standards for either the black and Hispanic students or just to lower their standards all around?

PROF. LEMPERT: Well, you know, that
depends. That depends. At least my own personal belief and based on the data I've collected is that, for example, to ask Michigan to do that is fair. Why? Because when we've done it historically we've found that we admit students who graduate who pass the bar and go on and have successful careers.

But if there's any education of adding diversity, I think that's fair. To ask a different school in which 80 percent of the black students admitted flunk out may not be fair.

COMMISSIONER TAYLOR: Mr. Chairman, let me add one point because I'm going to assume good faith on the accrediting team as it visits the campus and applies its standard. My concern would be that they don't ask the question related to those students who are not performing well and are washing out.

That's my concern, that they could act in good faith under this current standard and ignore that.

PROF. BERNSTEIN: There's nothing in the standards or their interpretations that require any of the students admitted to actually succeed.

COMMISSIONER TAYLOR: That's my point.

DEAN SMITH: I take issue with that because in fact, the Standard 501 to which you've made
reference, Standard 501 requires that the school not admit students who do not appear capable of succeeding with the academic program and being admitted to the Bar.

COMMISSIONER TAYLOR: That's a different question in this sense. Once you determine that there is a large bandwidth of folks who are, quote, qualified for your institution, that addresses your issue, but it doesn't address the issue of the 52 percent of the blacks who don't make it at a school where if you're white you have a much higher chance of making it.

And if you in good faith can apply this standard as part of an accreditation team and are never forced in evaluating the school to ask that question, that's like saying in my practice if you're a large law firm, how many blacks do you have, and then I say, "Well, tell me how many blacks you have after three years," and you just keep recycling people through the first year associate class. It doesn't mean anything.

DEAN SMITH: The teams do look at that as a matter of fact, at attrition rate. They look at academic support programs. They look at Bar passage rate, although Bar passage is the more difficult of
that. It's really not what you're talking about.

But the teams do look at whether there are academic support programs for all students who meet --

PROF. BERNSTEIN: I know I'm not the questioner here, but someone might want to ask Dean Smith --

COMMISSIONER TAYLOR: I'm not having any trouble coming up with questions out there.

PROF. BERNSTEIN: The question, I mean, there are many schools over time that have been put on probation by the ABA for not meeting what used to be the equal opportunity, would now be the equal opportunity and diversity standard. They're essentially put on probation for not engaging aggressively enough, if at all, in racial preferences.

I would be interested to know whether there's any school that's ever been put on probation for having half or more of its black matriculants not become lawyers.

DEAN SMITH: Well, first of all, that's just an inaccurate statement. There is no law school that I know of --

PROF. BERNSTEIN: I know of several.

DEAN SMITH: -- who has ever been on probation for the diversity standards.
PROF. BERNSTEIN: George Mason University School of Law.

DEAN SMITH: it is not on probation.

PROF. BERNSTEIN: It was on probation until last year.

DEAN SMITH: The dean will be surprised to learn that it ever has been put on probation. It is not.

COMMISSIONER KIRSANOW: The second component of this question is an interesting one. Has any law school ever been put on probation? Because it seems to me most of these law schools fail to graduate their black students. Half of them; that is astonishing and it seems to me in any other business if you had that kind of success rate, the accrediting agency --

COMMISSIONER TAYLOR: It would be a class action lawsuit.

COMMISSIONER KIRSANOW: -- the guild or whomever would wipe you out. Has anyone ever said, "Stop this right now"?

DEAN SMITH: The answer to the question is very few law schools have ever been put on probation. So I think in part you're asked to report back on what they're doing, and so in part what you are
talking about is the terminology.

CHAIRPERSON REYNOLDS: Well, should be placed on probation.

DEAN SMITH: As a matter of fact, two things. I should say, number one, I think law schools are sometimes asked to report back under the current standards on their commitment to diversity. Law schools have been asked to report back on the success rate of their students both in completing the academic program and in Bar passage, for that matter, and I don't have the data because I didn't look at this. I bet that the latter group is much larger than the former.

COMMISSIONER KIRSANOW: I concede you guys are well intended in promulgating something that would create diversity if you believe that diversity has some kind of great benefit, and there's still a question about that, but the question to me is it seems to me that would be extraordinarily valuable for an accrediting agency to kick in the pants those schools that aren't performing, and it seems that most law schools are doing a horrendous job with respect to performance when it comes to educating black law students.

Do you think it might be valuable for a
standard that says -- and it doesn't have to be
defined by race -- that says if you guys don't
graduate, you know, X number of students or a certain
percentage, then we're going to be taking a hard look
at you guys?

DEAN SMITH: Two things. Number one, I
don't agree that the majority of minority law students
don't graduate. I just don't agree with that.

PROF. BERNSTEIN: Either they don't
graduate or they don't pass the Bar.

COMMISSIONER KIRSANOW: I don't agree with
that either.

PROF. BERNSTEIN: Fifty-two percent of the
bottom two-thirds approximately.

COMMISSIONER KIRSANOW: And then 42
percent.

PROF. BERNSTEIN: Overall 42 percent.

DEAN SMITH: So number two, yes, I do
think that there should be standards required that law
schools prepare students to be admitted to the Bar and
accept and create programs that insure they get
through law school.

We have those standards. The question is
should we also then have a bright line standard that
says there has to be a specific percentage that meets
There has been great resistance to that. I think it would be difficult to have a specific standard in the accreditation requirements in part because there's enormous variability in the states, the Bar passage rate. Again, in looking at California and South Carolina, we would have dramatically different standards based on the state's Bar passage rate.

COMMISSIONER KIRSANOW: I understand that.

You know, I hate to compare. This is kind of cheap to do so, but if you look at Consumer Reports, they would clearly give an F to any kind of industry that produced the product that was only half successful, and maybe you don't necessarily suspend or do anything like that, but it would be nice to see some type of an evaluation, A through F, whatever you want to do, that would give the consumer some indication as to what the probability was of success at that particular law school.

If I was going to send my son, for example, to XYZ Law School and I knew based on his GPA, LSATs, a host of other factors that the probability of him graduating was just 40 percent, guess what. He's not going there. He's going to go
somewhere else, and it would be a very valuable service to the gatekeepers to the Bar to do just that.

In fact, I think that's one of the services that the Bar should be providing.

DEAN SMITH: And that's what Standard 501 is actually intended to do. The question is whether it should go farther or not, is also a good one. We've been struggling with Standard 501 and what it means and how to interpret it. I think mathematic -- this is one that mathematics would be difficult on, but I agree that we should expect success of the students we admit to law school.

COMMISSIONER TAYLOR: You all gather information pursuant to 501 broken down by race?

DEAN SMITH: Five, oh, nine.

COMMISSIONER TAYLOR: Five, oh, nine broken down?

DEAN SMITH: I'm sorry. Standard 501, in part we have some of the data broken down by race, but not all of it.

COMMISSIONER TAYLOR: Okay.

CHAIRPERSON REYNOLDS: Okay. It's clear that we can spend quite a lot of time talking about this issue and, quite frankly, if the opportunity presents itself, I would like to invite the panelists
that we heard today back to continue this conversation. I think that these discussions have been quite helpful.

There's a debate around this interpretation, this rule, and there's a greater debate about the ABA's role as a gatekeeper, and I think that we continue to have that conversation. I think that somebody needs to be -- well, the gatekeeper needs someone looking over its shoulder, too, to keep the ABA honest, and I hope that today we have taken a step in that direction.

COMMISSIONER TAYLOR: Chair, Arlan.

CHAIRPERSON REYNOLDS: Commissioner Melendez, are you still there?

(No response.)

CHAIRPERSON REYNOLDS: On that note, thank you.

PROF. BERNSTEIN: Thank you for having us.

DEAN SMITH: Thank you, Mr. Chairman. I really appreciate the time you've taken with us. It is important. We always send our standards out for comment and so forth, and as I told David, I really welcome comments as these standards are going through because there have been two or three good ideas that just didn't surface from the other comments we've
received, and I would welcome those from any members.

COMMISSIONER TAYLOR: You point to diversity. It's important.

DEAN SMITH: It is important.

CHAIRPERSON REYNOLDS: Okay, and for the record, the business meeting is not going to take place due to a lack of a quorum. So that's the end of the meeting.

(Whereupon, at 1:58 p.m., the meeting in the above-entitled matter was concluded.)