

**THE FEDERALIST SOCIETY
CIVIL RIGHTS PRACTICE GROUP
AND GEORGETOWN STUDENT CHAPTER**

present

**Mandated Racial Admissions in Hiring at Law
Schools? An Examination of the newly Proposed
ABA Standard**

PANELISTS:

Professor David Bernstein, George Mason University School of
Law

Mr. Roger Clegg, Center for Equal Opportunity

Professor Peter Edelman, Georgetown Law Center

Mr. James Freeman, The Advancement Project

Professor Tom Morgan, George Washington University Law
School (*moderator*)

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THE FEDERALIST SOCIETY**Mandated Racial Admissions in Hiring at
Law Schools? An Examination of the Newly
Proposed ABA Standard**

SPEAKER: On behalf of the Georgetown Federalist Society Chapter and the Federalist Society's Civil Rights Practice Group, I want to welcome you. Thanks for coming. I also, before we get started, wanted to mention that the Federalist Society student chapter will be hosting a lifetime service award next week for Judge Laurence Silberman, and you're all welcome to attend. There are fliers for it upstairs on the table.

Today's event on affirmative action and the ABA's proposed rule change is a salient topic. We have a great panel. Our moderator is Thomas Morgan, a professor at George Washington University Law School, who brings a wealth of experience in a variety of settings. Formerly, he was Dean at Emory University School of Law and a professor at several others. In 1990, he served as President of the Association of American Law Schools. So, we're very

1 | pleased to have him moderating this panel. He will
2 | be introducing the remaining speakers, setting up the
3 | topic, and just as a note, Professor Peter Edelman
4 | will be joining us as soon as class lets out.

5 | Thank you.

6 | PROFESSOR MORGAN: Thank you very much,
7 | Galen. It is a real pleasure for each of us to be
8 | here to talk about this topic. The speakers that you
9 | you will hear are all well-informed and, we hope,
10 | opinionated on the questions before us.

11 | Professor David Bernstein is a graduate of
12 | the Yale Law School, and since 1995 he's been a
13 | professor at George Mason's law school. In 2003, he
14 | was a Visitor here at Georgetown, and he is currently
15 | a Visitor at the University of Michigan Law School.
16 | It was his op-ed piece in the *Wall Street Journal*
17 | that focused interest of a lot of people on the
18 | question that we're talking about today, so he'll be
19 | our first speaker.

20 | Our second speaker will be Jim Freeman, a
21 | graduate of the Harvard Law School, who is with the
22 | Advancement Project, a non-profit civil rights

1 organization here in Washington, DC.

2 Our third speaker will be Roger Clegg who
3 is the General Counsel of the Center for Equal
4 Opportunity. He is a graduate of the Yale Law
5 School, and he was a former Deputy Assistant Attorney
6 General in the Reagan and Bush Administrations.

7 Finally, our fourth speaker will be
8 somebody who I expect most of you know, Professor
9 Peter Edelman, who will be joining us in just a few
10 minutes. He has been Associate Dean here at
11 Georgetown, Director of the New York State Division
12 of Youth, Vice President of the University of
13 Massachusetts, legislative assistant to Robert F.
14 Kennedy, and Issues Director for Senator Edward
15 Kennedy. In short, he's had a long and distinguished
16 career in political activity, as well as in legal
17 education.

18 I'm just going to try to describe very
19 briefly what the process is that we're talking about
20 today. As Galen indicated, I was President of the
21 Association of American Law Schools, and I've done
22 about 15 or 20 ABA site visits, so let me just try to

1 | set the context of the subject of this panel. As you
2 | know, in order to be admitted to the bar of almost
3 | any state in the country, a person must graduate from
4 | an ABA-accredited law school. States may accredit
5 | their own law schools, as California does, but ABA
6 | accreditation is essential to law school's ability to
7 | place its students all over the country, and it's
8 | essential for most law students to have that
9 | flexibility.

10 | The ABA process applies to initial
11 | accreditation, and then once every seven years, each
12 | law school is visited by an ABA team that goes
13 | through a checklist of what are called Standards and
14 | determines whether or not the individual school meets
15 | each of those Standards. I was the Chair of the team
16 | here at Georgetown a number of years ago, and you
17 | will be pleased to know that you passed. There are a
18 | wide variety of standards, including how many minutes
19 | you have to spend in class over the course of your
20 | education, whether the faculty has to have a tenure
21 | policy, and that the law school must offer
22 | instruction in professional responsibility. In

1 short, there are all sorts of things that the ABA
2 says go into making a quality education. The ABA
3 then has what's called an accreditation committee
4 that reads the reports of the site teams and
5 recommends to the Council of the ABA Legal Education
6 Section whether the school's accreditation should be
7 maintained. Finally, the ABA House of Delegates
8 ultimately has the authority to decide or not decide
9 whether or not a school will be reaccredited, put on
10 probation, or even lose accreditation and so on.

11 What we're looking at today is Standard
12 211, one of the standards that applies to every law
13 school that is subject to this accreditation process.
14 To better understand Standard 211, however, I think
15 it may be helpful to understand that Standard 210
16 says, "A law school shall foster and maintain
17 equality of opportunity in legal education without
18 discrimination or segregation on the basis of race,
19 color, religion, national origin, gender, sexual
20 orientation, age or disability." In short, no law
21 school can engage in overt discrimination.

22 Standard 211, then goes on to talk about

1 | diversity, and says, as you see on the screen, that
2 | consistent with sound educational policy and the
3 | other standards, including Standard 210, a law school
4 | must demonstrate a commitment to providing full
5 | opportunities for the study of law and entry into the
6 | profession by members of underrepresented groups,
7 | particularly racial and ethnic minorities, and a
8 | commitment to having a student body that is diverse
9 | with respect to gender, race, and ethnicity.

10 | There are a series of interpretations, as
11 | well, of both Standards. One of them, Interpretation
12 | 211-1, says that the requirement of a constitutional
13 | provision or statute that purports to prohibit
14 | consideration of gender, race, ethnicity, or national
15 | origin, admissions or employment decisions is not a
16 | justification for a school's failure to comply with
17 | Standard 211. Professor Bernstein and the other
18 | speakers will go into this in more detail. But the
19 | point for you to understand is that each law school
20 | in the country will now, every seven years, be
21 | examined under Standard 211 and Interpretation 211-1,
22 | and it is the wisdom of and justification for both of

1 | them, that our panel will address.

2 | David Bernstein is the first of our
3 | speakers.

4 | PROFESSOR BERNSTEIN: Thanks, Tom. Thank
5 | you to the Federalist Society of Georgetown and the
6 | Civil Rights Practice Group for inviting us to
7 | discuss this important issue. Everybody hopefully
8 | has seen the Standard by now. The Standard itself,
9 | which I think has been under consideration for quite
10 | some time, I don't find it especially objectionable,
11 | especially given that it starts off both (a) and (b)
12 | with the phrase "consistent with sound educational
13 | policy". And it does strike me that different law
14 | schools could have different views based on their own
15 | experiences on what sound educational policy would be
16 | and as written, I think it wouldn't be something that
17 | it could be interpreted that way, but as written, it
18 | would not be so objectionable. In fact, I had seen
19 | this several months ago and some of that's
20 | potentially problematic, but I don't see anything
21 | that's overly problematic.

22 | But it's the interpretations that have

1 | gone along with it that are not part of the original
2 | proposal but that were lobbied for and eventually
3 | changed in January at a meeting here in Washington,
4 | after heavy lobbying, and have even more stringent
5 | interpretations by some groups that I found out about
6 | later that led me to write my op-ed. Let me just say
7 | that my op-ed and this presentation are not really
8 | going to have anything to do with whether you're in
9 | favor of affirmative action or racial preferences in
10 | general; whether you're in favor of them in
11 | particular law schools under particular
12 | circumstances. What I want to focus on is, number
13 | one, are these standards asking law schools to do
14 | something illegal, which -- I think, regardless of
15 | how you feel about the policies in question, the ABA
16 | should not be asking law schools to choose between
17 | accreditation and violating the law or adhering to
18 | the law, and secondly, whether in this particular
19 | context of what we know about African-American
20 | students, in particular, and how they're doing in law
21 | school, whether it makes sense to try to encourage
22 | even further racial preferences on top with of what

1 | just about every law school is already engaging in.

2 | Let's look at the interpretations. As
3 | Professor Morgan mentioned, interpretation 211-1 --
4 | all these interpretations, I should mention, have
5 | equal weight with the actual standards, so it's not
6 | like these are just legislative history. The ABA's
7 | guidelines themselves say "equal weight" in the
8 | interpretation of the standard itself. So we see
9 | that Interpretation 211-1 says that a constitutional
10 | provision or statute that purports to prohibit
11 | consideration of gender, race, ethnicity, or national
12 | origin is not a justification for a school's
13 | noncompliance with Standard 211. obviously I've
14 | bolded and highlighted the word and italicized the
15 | word "purports". That's very odd language.

16 | We know there are such constitutional
17 | provisions and statutes that exist in California and
18 | Florida and a few other places. The word "purports"
19 | suggests that the ABA is implicitly adopting the, I
20 | think, somewhat wacky view that a constitutional
21 | provision or statute that prohibits racial
22 | preferences or consideration of race, gender, etc. in

1 | admissions is somehow unconstitutional itself, and
2 | there was some litigation over Proposition 209 in
3 | California in this regard. Not surprisingly, the
4 | Ninth Circuit said that's absurd. And I think that's
5 | what they're trying to get at here: You should
6 | ignore these things because they're really
7 | unconstitutional.

8 | But putting that aside, there's this
9 | language that it's not a justification if you have a
10 | law like this for schools' noncompliance with
11 | Standard 211. ABA officials have been quoted since
12 | then as saying, well, we're not really trying to
13 | force you to disobey the law; if the law says you
14 | can't take into account racial preferences, we're not
15 | going to force you to. And we just want to do other
16 | things that would help encourage minority students
17 | and women to come to your law school. I will get to
18 | those in a minute.

19 | But the question is do we believe this? I
20 | have two good reasons not to believe the ABA
21 | officials when they say this. The first is that from
22 | personal experience at my home school at George

1 | Mason, or at least hearsay from what I heard was
2 | going on there, and from talking to other schools
3 | around the country, ever since *Grutter v. Bollinger*
4 | came out in 2003, the ABA has been going around to
5 | law schools -- a lot of all schools are on probation.
6 | The ABA said you can get reaccredited -- Professor
7 | Morgan didn't mention this -- but still be on
8 | probation for basically an indefinite period of time,
9 | until the ABA decides you're off probation. So
10 | George Mason, among other schools, is on probation.

11 | After *Grutter* came out, various ABA
12 | officials started contacting the various law schools
13 | informally, in such a way where they didn't have a
14 | written record, as saying we're not satisfied with
15 | how many minority students you have; not necessarily
16 | with your efforts, but how many. And we want to see
17 | you further efforts. And by the way -- this was told
18 | explicitly to my former dean, from what he told us at
19 | the faculty meeting -- by the way, don't think you're
20 | going to satisfy the requirement just by admitting --
21 | you know, by using the same standards for African-
22 | American students you use for white students; that

1 | will not satisfy us. So, if that's not a requirement
2 | for racial preferences, I don't know what is. If
3 | they were doing that without written guidelines
4 | suggesting it, imagine what they'll do when they have
5 | a written guideline.

6 | Now the other reason I don't believe these
7 | are assurances is if you compare the original
8 | language that was deleted in January with the new
9 | language. The original language said that a law
10 | school must pursue diversity, so long as it does so
11 | in a lawful manner. Now contrast this with the
12 | language that's now up for a final vote this summer,
13 | which says, as we've seen, the requirements of the
14 | law basically are not a justification. Now a
15 | reasonable observer would say that if you replace
16 | language stating that you must obey the law with
17 | language stating obedience to the law is no excuse,
18 | you're being asked to disobey the law.

19 | Now, the other thing that's disturbing
20 | with these interpretations, or least one of the
21 | things that's disturbing, is interpretation to 211-2,
22 | which was also added in January. That says,

1 consistent with the U.S. Supreme Court's decision in
2 *Grutter*, a law school may use race and ethnicity in
3 its admissions process to promote equal opportunity
4 and diversity. Now again, if it's not asking you
5 specifically to use racial preferences, why do they
6 have to tell you, by the way, it's legal to do so
7 under Supreme Court precedent. But more important,
8 this language misstates the holding of *Grutter*, and
9 does so in a pretty obvious way to anyone who's
10 really familiar with the opinion. Let's look at the
11 actual language of *Grutter*. The actual language is,
12 "The law school's educational judgment that such
13 diversity is essential to its educational mission is
14 one to which we defer. Our holding today is in
15 keeping with our tradition of giving a degree of
16 deference to a university's academic decisions within
17 the constitutionally prescribed limits."

18 So what O'Connor held for the Court, for
19 the majority, and she basically reaffirmed the
20 holding of *Bakke*, is that affirmative action, and
21 racial preferences more specifically, for diversity
22 purposes, for educational purposes, deferring to

1 university's view of its own educational judgment, as
2 it says here, is something that we're going to defer
3 to. But what if a law school has decided that in its
4 educational judgment, affirmative action preferences
5 are not helping its educational mission, are not
6 contributing to whatever goals they have? Well, then
7 we'd have to go back to the idea of equal
8 opportunity, which the interpretation claims is
9 another justification for affirmative action
10 preferences in law schools. Now, that might in fact
11 be a much better justification, if anything, for
12 affirmative action in law schools. However, it is
13 the case that the Supreme Court has never held that
14 equal opportunity, in the absence of evidence of past
15 discrimination that you're trying to remediate, you
16 cannot pursue racial preferences -- in any field,
17 actually, much less education -- merely because you
18 want to pursue equal opportunity. That's
19 unconstitutional. That's a misstatement of the
20 holding, and it's telling law schools to disobey the
21 law; it's telling the dean of a law school, for
22 example, we don't care if your faculty has ever

1 | studied, as it's supposed to; under *Grutter*, whether
2 | in their educational judgment, diversity is going to
3 | help or not, we want you to do it anyway, and here's
4 | your justification, even if it's illegal.

5 | Finally, we have Interpretation 211-3,
6 | which is the last of the three interpretations of the
7 | Standard. It says if the Standard does not specify
8 | the forms of concrete actions a law school must take
9 | -- this is where the ABA is saying, no, we're not
10 | forcing you to engage in preferences, allegedly --
11 | but we will consider all your actions, the totality
12 | of your actions, and the results achieved. The
13 | result is certainly still relevant.

14 | So, after all this, I'm a bit skeptical
15 | after deleting the language saying you must obey the
16 | law, and replacing it with language suggesting that
17 | you shouldn't obey the law, with language that
18 | misstates the holding of *Grutter*, with language
19 | saying the results don't matter, and given -- well, I
20 | know that the ABA's been doing it even without these
21 | standards. I'm very skeptical they're not going to
22 | try to enforce racial preferences on all law schools,

1 | whether it's legal or not.

2 | But let's take the ABA at its word and
3 | assume they're not actually going to force all law
4 | schools to engage in racial preferences but want to
5 | see efforts while considering results. So what kind
6 | of efforts will the ABA ask for? Well, here, also
7 | from Standard 211-3, they suggest special recruitment
8 | efforts, programs that assist in meeting the academic
9 | and financial needs of many of these students, and so
10 | forth and so on. So you might want to satisfy the
11 | ABA requirements not by having preferences but by
12 | having special recruitment efforts and special
13 | scholarships and what not.

14 | What else can law schools do? Well,
15 | here's William Rakes, who's the Chair-elect of the
16 | relevant section of the ABA. He says that you can do
17 | such things as appointing diversity officer, hosting
18 | forums, or making diversity an integral part of
19 | recruitment. I think this was quoted in the
20 | *Chronicle of Higher Education*. It was either that or
21 | the *Virginia Cavalier*. This one was in the other
22 | paper. I didn't write down which one was which.

1 Here's Jon Sieberg [sp], who's widely -- I don't know
2 exactly what his role is in this but he's always
3 quoted on these issues, so presumably he's a damn
4 important guy. He says that you can have racial
5 preferences to satisfy us, but if not, you should
6 demonstrate specific steps such as recruiting at
7 historically black colleges, offering scholarships,
8 or holding summer programs.

9 So, let's say you're the dean of a law
10 school -- not Georgetown Law School, which has oodles
11 of money from what I could gather when I was a
12 visitor here -- but you're a relatively small law
13 school with a relatively small budget. The ABA says,
14 you know, you're on probation now; we don't like your
15 diversity efforts; we don't think you engage in
16 enough effort or have enough minority students. So
17 you have two choices basically at this point. You
18 can do all these things and maybe more than the ABA
19 has suggested. So, you can hire an extra diversity
20 officer. Okay, one less professor on the faculty;
21 one less person to help students get jobs, that sort
22 of thing. You can have special summer programs for

1 | minority students, again taking the resources from
2 | somewhere else. You can have special scholarships
3 | for minority students, which obviously will either
4 | come from some non-scholarship resources or take away
5 | scholarships from other students you'd like to
6 | recruit. You can spend a lot of money sending your
7 | recruitment staff to historically black colleges.
8 | You could have, also, a special lecture series to
9 | make minority students feel more comfortable.

10 | Basically, you could spend what might
11 | amount to ultimately hundreds of thousands of
12 | dollars. And then the ABA will still look not just
13 | at your efforts, but the results achieved. They may
14 | say, well, those efforts were pretty good, but they
15 | don't seem to be doing much in the end; you still
16 | have a very low percentage of students. Either spend
17 | been twice as much money, and then we'll see, or
18 | we'll still keep you on probation, and we're not
19 | going to take you off probation until we actually see
20 | results.

21 | So you're the dean of the law school, and
22 | you're basically fiduciary for the trustees of the

1 | students in the community. So what do you do? Do
2 | you spend \$2- or \$3- or \$400,000 on these various
3 | things that may or may not satisfy the ABA, may or
4 | may not result in more minority students attending?
5 | Or, do you just take the easy way out and recruit
6 | more minority students through racial preferences? I
7 | think that in the absence of a law to the contrary,
8 | where you're afraid you might get sued, the answer to
9 | anyone who's actually looking out for the interests
10 | of their particular school is pretty obvious, which
11 | is you're going to just take the path of least
12 | resistance. You know the ABA wants to be satisfied
13 | if you engage in racial preferences. You don't know
14 | if they'll be satisfied if you spend hundreds of
15 | thousands of extra dollars. So you do the former
16 | rather than the latter.

17 | Now on the other hand, a law school might
18 | face a problem which is that, as we'll see in a
19 | minute, African-American students recruited through
20 | racial preferences, especially at lower ranked
21 | schools, have a --

22 | PROFESSOR MORGAN: Wrap it up.

1 PROFESSOR BERNSTEIN: -- all right, I'm
2 going to wrap it up.

3 We have a standard that says that law
4 schools aren't supposed to admit students who don't
5 appear capable of satisfactorily completing its
6 educational program and being admitted to the Bar,
7 which might be a barrier to admitting African-
8 American students. I just want go through these
9 statistics quickly, since I'm out of time, but I'll
10 be happy to talk about these in the question-and-
11 answer period. Here are the basic statistics for
12 graduation rates overall for black students and white
13 students. Here are the statistics at selective law
14 schools.

15 Anyway, here are the results. At all law
16 schools, 42.28% of black matriculants never become
17 lawyers. If you look at the top schools, it's
18 23.56%. Making some pretty conservative assumptions,
19 it turns out that approximately 52% of black
20 matriculants never become lawyers. This will vary
21 from law school to law school depending on the
22 difficulty of the bar in any state, how high the

1 | preferences are, how successful the schools are in
2 | retaining students and helping them. But I think
3 | it's fair to say that quite a few law schools, more
4 | than 60% of black matriculants, never become
5 | attorneys, especially in the lower ranked schools.

6 | So remember, ABA standard 501(B), that a
7 | law school is not supposed to admit students that do
8 | not appear capable of satisfactorily completing the
9 | program and being admitted to the Bar. Well, if
10 | these schools have 60- to 70-percent failure rates
11 | for African-American students, you'd think that they
12 | could pretty much predict that at least some of those
13 | students are going to have a really hard time and
14 | shouldn't be admitted.

15 | So, you'd think that 501(b) would argue
16 | that they cannot engage in racial preferences, but
17 | you'd be wrong, going along with Standard 211, we
18 | will soon have a new interpretation of 501, 501-2,
19 | which says that a law school's policies shall be
20 | consistent with Standards 210 and 211. In other
21 | words, you should only admit qualified students who
22 | have a good chance of graduating or passing the Bar,

1 unless they're black students. If they're black
2 students, you should take them in anyway. If they
3 don't get through, who cares?

4 Now I ask in the end -- and as I said,
5 this is not an issue of whether you're for
6 affirmative action or against affirmative action --
7 if the ABA was composed of hard-core racists, could
8 they come up with a more pernicious policy than
9 saying that for white students, you should only take
10 in people you think are actually going to become
11 lawyers, book for black students, just so we can have
12 the right numbers and be able to brag about how we
13 have a growing percentage of black lawyers in the
14 country, it's fine to take in, say, will 10 black law
15 students, assume that seven or eight are going to
16 fail, but we'll have those two extras to put in our
17 statistics. Now, if that's social justice, then the
18 concept really eludes me.

19 Thank you.

20 MR. FREEMAN: Good afternoon, everyone.
21 First of all, I'd very much like to thank the
22 Federalist Society for inviting me to participate

1 | here today. It truly is an honor to be here. And
2 | I'd also like to thank them for apparently practicing
3 | affirmative action with regard to new members of the
4 | Bar in putting together their panels because -- I
5 | guess that's why I'm here. I appreciate it. I would
6 | also be remiss if I didn't point out that there are
7 | five white males up here talking about this issue and
8 | what that means for what we're talking about.

9 | I should say that when I was invited to
10 | participate last week, all I'd actually read on the
11 | subject was Professor Bernstein's op-ed in the *Wall*
12 | *Street Journal* and Mr. Clegg's letter to the
13 | Department of Education regarding these proposed
14 | changes. I hadn't read the old Standard or the
15 | proposed Standard at all, and once I accepted the
16 | invitation and read them, I have to say that I was
17 | surprised that we were going to be in here talking
18 | about this because I find them to be wholly
19 | unremarkable. In fact, the changes that have been
20 | made are relatively minor, and what has been in place
21 | for the last 16 years is substantially similar to
22 | what is being proposed now.

1 But I don't expect you to take my word for
2 it, so maybe we should take a look at the language.
3 I'm sorry if this seems a little bit like a law
4 school class, but I think the words are important
5 here. Professor Bernstein concedes that the actual
6 standard itself is relatively unproblematic, so I
7 won't discuss that. But I will move to the
8 Interpretations. If we start with 211-2, which as he
9 said, basically restates the holding of *Grutter*, I
10 don't find anything particularly noteworthy. He
11 takes issue with the use of the term "equal
12 opportunity". And while I agree that it might not be
13 the most artful drafting, I can't think of a more
14 innocuous concept than equal opportunity. So I'm not
15 exactly sure why it is problematic.

16 And then revised Interpretation 211-3
17 says, "This Standard does not specify the forms of
18 concrete actions a law school must take to satisfy
19 its equal opportunity and diversity obligations. The
20 determination of a law school's satisfaction of such
21 obligations is based on the totality of the law
22 school's actions and the results achieved." The

1 | second sentence is emphasized by Professor Bernstein
2 | and Mr. Clegg in his letter to the DOE. I will say
3 | that this gives the regulation -- I was going to say
4 | more teeth, but I think that would probably be
5 | overstating it; I would say it gives it another
6 | tooth.

7 | But it's interesting to note that the ABA
8 | has communicated with all the deans of law schools,
9 | and it said the "results are not necessarily
10 | dispositive in evaluating effort and commitment."
11 | And from what I understand from the ABA, the
12 | accreditation committee was already considering
13 | results in its reviews, as Professor Bernstein
14 | mentions, so this really is just formalizing the
15 | current practice.

16 | I notice also that the first sentence
17 | there gives law schools vast discretion to determine
18 | the best ways to comply with the Standard. Also,
19 | notice the third sentence which says, "The commitment
20 | to providing full educational opportunities for
21 | members of underrepresented groups typically includes
22 | a special concern for determining the potential of

1 | these applicants," et cetera. And notice that
2 | nowhere does it say that law schools must practice
3 | some form of affirmative action. The ABA even says
4 | in its communication to law schools, "This change
5 | recognizes and encourages flexibility and innovation
6 | on the part of law schools in meeting this
7 | requirement." While they do say that "such a
8 | commitment typically includes a special concern for
9 | determining the potential of these applicants during
10 | the admissions process," I take that to be more of a
11 | descriptive statement than anything else because the
12 | majority of law schools do practice some form of
13 | affirmative action.

14 | Returning to revised Interpretation 211-1,
15 | which Professor Bernstein mentioned and finds to be
16 | problematic, again I'm not sure why because, as I've
17 | said, "a commitment to diversity" need not mean
18 | affirmative action necessarily. There are any number
19 | of ways that a school could comply, and I, too, take
20 | the ABA at its word on this. It could be outreach
21 | efforts, scholarship assistance; it could include
22 | implementing some derivation of the Texas 10% plan,

1 | which many of you are probably familiar with. So
2 | again, I find nothing remarkable about these changes
3 | at all.

4 | I mentioned Professor Bernstein's op-ed,
5 | and I'm not sure how many people have read that, but
6 | what he says is that "the ABA has ordered law schools
7 | to violate the law" and is "resorting to blackmail to
8 | achieve its end." And he also says, "Any law school
9 | that seeks to maintain or acquire ABA accreditation
10 | will be required to engage in racial preferences in
11 | hiring and admissions." I simply see no support for
12 | these statements in the text of the standard.

13 | In fact, I find these changes to be rather
14 | tame attempts to fix some very serious problems.
15 | Since 1994-95, the number of African-American,
16 | Mexican-American, and Native American students in law
17 | schools has declined. That is in spite of the fact
18 | that the numbers of applicants from those groups have
19 | increased, as well as the average GPAs and LSAT
20 | scores from those groups. So in recognition of this
21 | fact, the ABA could have gone much further. They
22 | could have implemented a pure results test. Or, to

1 | borrow language from *Grutter*, they could have
2 | insisted on a critical mass of students of color to
3 | comply with this standard. In fact, I'm told by the
4 | ABA that they received hundreds of comments on these
5 | proposed changes, and 98 percent of them were pushing
6 | for a more robust approach. But they didn't.

7 | So again, I take Professor Bernstein at his
8 | word that he's more concerned about the
9 | interpretation than the text. I would mention again
10 | that this standard has been largely the same for the
11 | last 16 years, and during that time no law school has
12 | ever had its accreditation revoked or been sanctioned
13 | because of these standards. So all of this is to say
14 | I'm not really sure why we're debating this at this
15 | point in time. I can understand if at some point in
16 | the future the ABA goes beyond the text in its
17 | enforcement. But at this point, the debate seems
18 | rather premature.

19 | What it does, of course, is open up the subject
20 | of affirmative action. For example, in his letter to
21 | the Department of Education that was dealing with
22 | these changes, Mr. Clegg, who will be speaking after

1 | me, refers to the victims of affirmative action --
2 | "those who might have succeeded at a law school had
3 | they been admitted but were not because of their
4 | race, ethnicity, and sex". So, one thing we can say
5 | with regard to this is the lack of historical
6 | consideration in this analysis. But for present
7 | purposes, I'd rather talk about what's going on
8 | currently.

9 | It's difficult for me to imagine,
10 | actually, using the language of victimhood when
11 | considering what's going on in this country with
12 | regard to the educational system. And I would be
13 | remiss if I didn't say the effects of race and
14 | poverty are not things of the past, but are still in
15 | fact very real. For example, there is a mountain of
16 | evidence that people of color are still discriminated
17 | against at shockingly high rates, and I'm not just
18 | talking about overt discrimination or conscious
19 | discrimination, but rather unconscious discrimination
20 | that results from the cognitive biases that all or
21 | most of us possess and that cause decision-makers,
22 | including admissions officers, to consistently

1 | undervalue the credentials and accomplishments of
2 | people of color. But we rarely, if ever, hear these
3 | individuals portrayed as victims.

4 | How these white students can be considered
5 | victims and how blacks can be portrayed as being
6 | unqualified or underqualified has much to do with
7 | one's conception about how admissions processes
8 | should be structured and the qualities that
9 | admissions officers should be looking at. Many would
10 | have us focus more on so-called objective measures
11 | like the LSAT, never mind the fact that a good score
12 | on the LSAT is indicative of little more than that
13 | the test taker probably comes from an upper middle-
14 | class background. We should also keep in mind that
15 | we're talking here about selective institutions,
16 | where the number of qualified applicants, those who
17 | can do the work and contribute to the profession,
18 | outnumber the number of seats available. With that
19 | in mind, as a policy matter there is nothing about an
20 | admissions process using affirmative action that is
21 | any less valid as a selection device than a process
22 | that focuses on GPA and LSAT scores.

1 So it's unfortunate that far too often
2 students with high GPAs and LSAT scores acquire a
3 sense of entitlement because, in addition to their
4 educational purposes, law schools have democratic
5 purposes. As they say in their mission statements,
6 they are training leaders to serve their communities;
7 they are shaping institutions, businesses, and
8 governments; and they are providing stability and
9 legitimacy to our democracy. Yet, in their frenzy to
10 improve their rankings in *U.S. News & World Report*,
11 law schools have gotten away from these public
12 purposes and have failed to train a group of lawyers
13 that is representative of all communities that should
14 be served by the Bar. We also must remember that
15 affirmative action is actually a very limited remedy,
16 a very limited step toward achieving broader racial
17 and social justice, and that the number of
18 individuals actually benefited by these policies is
19 actually very low.

20 So if we return to the ABA standard that
21 is the subject of our discussion, all we're really
22 talking about today is that law schools should

1 perhaps reconsider their historical patterns of
2 recruitment at places like Georgetown, and maybe
3 consider going to Howard, for example, or recognizing
4 that their financial aid offerings are not meeting
5 the needs of all their students, or coming to the
6 realization that arbitrary cut-off scores on LSATs
7 are having harmful effects on the makeup of their
8 class. Given the situation facing the legal
9 profession, I actually think that's the least that
10 they could do.

11 Thank you.

12 MR. CLEGG: Thank you very much to the
13 Federalist Society for putting on this program and
14 for inviting me. I think it's an important issue,
15 and I really don't have a whole lot to add to
16 Professor Bernstein's very good presentation. So let
17 me just make a few points, because I think it's
18 important to have plenty of time for questions and
19 answers. That's usually the most interesting part of
20 the program.

21 I do have problems with the actual
22 language of the new Standard, but I think that

1 Professor Bernstein is right that it's not just the
2 language of the standard. It's also the language of
3 the interpretation and the whole context that makes
4 it clear that what's going on here is that the ABA
5 wants to put even more pressure than it's already
6 putting on law schools to use racial, ethnic, and
7 gender preferences in their admissions policies and
8 in their faculty hiring and promotion policies.
9 There's just no reason why it would have done any of
10 this if that hadn't been its aim. There's already a
11 provision in there that makes it illegal to
12 discriminate. Clearly, this other provision is in
13 there to put pressure on law schools to engage in
14 discrimination.

15 I think that there is some inconsistency
16 in the defense of this that we've heard today. On
17 the one hand, we were told, "Oh, well, no, it's not
18 doing that." But then we're also told that this kind
19 of discrimination would be justified anyhow.

20 I should point out that the justifications
21 that Mr. Freeman just gave are a variety of arguments
22 that there's a lot of discrimination out there in

1 | society. I don't deny there is, but that is the
2 | justification for racial preferences that the courts
3 | have never acknowledged and, indeed, that the Supreme
4 | Court has rejected.

5 | There are other problems in what the ABA
6 | has done here. It says that law schools are going to
7 | be held to having a diverse student body and a
8 | diverse faculty, but it never defines how diverse is
9 | diverse. What is the percentage that the ABA
10 | committee is going to be looking at? I think this
11 | question is being unanswered because it gives it more
12 | leeway to engage in the kind of coercion that it
13 | wants to engage in and indeed are already engaging
14 | in.

15 | Let me just make a couple of addenda to
16 | what Professor Bernstein already said. It's not just
17 | state laws that would have to be ignored. It's also
18 | federal laws and statutes that would have to be
19 | ignored. The provision of the ABA's that says that a
20 | provision of a law to the contrary is no excuse is
21 | not limited to state laws. It's any federal
22 | "constitutional provisions or statute" as well.

1 I also agree with Professor Bernstein,
2 that this really does not have to be a debate about
3 affirmative action. Now, I'm perfectly happy to
4 debate affirmative action. In fact, I do it all the
5 time, and I've done it here at Georgetown. But this
6 is really a question about who decides. And it seems
7 to me pretty clear assuming that we're going to allow
8 this kind of discrimination at all -- that it makes
9 more sense, and the Supreme Court has said that it's
10 going, to defer to the judgments of law schools.
11 It's not going to defer to the judgments of trade
12 associations like the American Bar Association.

13 I want to just say also that the letter
14 that I sent to the Department of Education is on our
15 website, which is www.ceousa.org. I urge you all to
16 read it. This is the little bit of a difficult issue
17 to talk about in a forum like this because it is very
18 text-intensive. But I think if you go through the
19 text and you look at it and what's being said,
20 there's no question that what the ABA is trying to do
21 is ratchet up the amount of pressure that it's going
22 to put on law schools to take race and ethnicity and

1 | sex into account in student admissions and in faculty
2 | hiring.

3 | This is not something that the ABA should
4 | be doing, or that the ABA even needs to do. Law
5 | school faculties are the most politically correct
6 | institutions in the world. They don't need to be
7 | pressured not to engage in non-discrimination against
8 | minorities, and they don't even need pressure to
9 | engage in giving preferences to underrepresented
10 | groups. They are already doing that.

11 | And so, what the Department of Education
12 | has to decide is what role it is going to allow to
13 | the ABA. Unfortunately, there is a long history of
14 | federal bureaucracies conniving with people in the
15 | private sector that think that racial and ethnic
16 | preferences are a good idea. If the Department of
17 | Education decides to okay the ABA's continued role in
18 | this area, it will be writing another sad chapter in
19 | that history.

20 | Thank you.

21 | PROFESSOR EDELMAN: I gather I was
22 | introduced in absentia.

1 PROFESSOR MORGAN: Yes.

2 PROFESSOR EDELMAN: So I don't have to
3 tell you who I am. That's good because I'm never
4 sure. I apologize for being late.

5 Jim Freeman has said much of what I would
6 say about the specific topic of today's panel. Like
7 him, I had not read the texts that are in question
8 here until I was invited to be on this panel. Most
9 of us, I think, who are not in the business of being
10 a dean or an accreditor don't read these things.
11 That's not to say that they couldn't be significant,
12 but I didn't see much going on there that was very
13 different from previous versions that I did read.
14 When I was a Dean, I did read these things, and I
15 participated in teams that looked at the
16 accreditation of law schools. So I, too, am not
17 quite sure what we're doing here.

18 Why did they do it? The point is that
19 between the time of *Hopwood* and *Grutter* -- this is
20 what the ABA says, and I have no reason to doubt it -
21 - the law was in flux, they were waiting for the
22 other shoe to drop in the Supreme Court, and so there

1 | was no occasion to rewrite the language. And that's
2 | why they took it on at this time. It's as simple as
3 | that.

4 | Pressure to engage in discrimination,
5 | racial preferences - these things are just not in the
6 | language. They are just not there. All of the
7 | language talks about concrete action to recruit more
8 | members and admit more members of underrepresented
9 | groups in law schools. It doesn't ever use the word
10 | "preferences". It doesn't ever talk about pressure
11 | to engage in discrimination. Sorry; it's just not
12 | there. And the idea that the schools are being told
13 | to ignore laws, it doesn't say that either. Indeed,
14 | if it did, I think we should all be up in arms,
15 | whether we call ourselves liberals or conservatives
16 | or progressives or libertarians or whatever our label
17 | is, including maybe having no label.

18 | What it says is that if there is a
19 | requirement, thinking about the state of California
20 | or the state of Washington, in particular, if there
21 | is a law that -- I'm not sure I would have said
22 | "purports to prohibit consideration" -- prohibits

1 | consideration of these matters, it doesn't justify
2 | noncompliance with Standard 211. What does that
3 | mean? It means that compliance with Standard 211
4 | doesn't require having the kind of policy that the
5 | Supreme Court said in *Grutter* is constitutional.
6 | *Grutter* is permissive, and the ABA could not say to
7 | every body you have to do this, even if a state law
8 | outlaws it, as the state law, Prop 209 in California,
9 | does. The Ninth Circuit said Prop 209 is valid, and
10 | the Supreme Court didn't take the case. So there's
11 | just nothing here.

12 | The question of there being no specific
13 | numbers here is interesting because it seems we'd
14 | have an attack on that either way. If there were
15 | specific percentages, it would be a quota. None of
16 | us, across the board, would agree with there being a
17 | quota, or at least most of us wouldn't agree with
18 | that. But lacking numbers, apparently that's subject
19 | to attack as well.

20 | As to the question of who decides, well,
21 | why have an accreditation process at all? The
22 | question of who decides goes to the whole body of

1 standards that governs what law schools or, indeed,
2 what any educational institution or hospital or any
3 institution that's subject to accreditation does.
4 That's what accreditation is about. There are
5 guidelines that are set out by an accrediting body in
6 order to maintain a certain level of quality or a
7 certain level of compliance with some basic criteria.

8 So there is nothing going on here that
9 should trouble people. Of course I see some people
10 are troubled. I can't help that, but to me, there's
11 nothing going on that should trouble people. It does
12 bother me to read in the *Wall Street Journal* some
13 things, and Jim Freeman read you some quotes, that
14 simply, in my view, are not true.

15 What I want to talk about is something
16 else. I want to talk about the pipeline. The
17 critics are actually winning I'm sorry to say. The
18 number of African-American first-year students in law
19 schools around the country has gone down from 3,500
20 to 2,900 over the last 10 years. That's what's going
21 on in the real world. It's going on at the same time
22 as, over that same 10-year period, there was a 10.2-

1 | percent increase in the number of law students being
2 | admitted, from 43,600 to 48,100. Lord knows why we
3 | need that many lawyers, but I make my living off it
4 | so I suppose I shouldn't complain. So you had an
5 | increase in the number of law students being
6 | admitted, and an increase in the number of minorities
7 | overall, because there's been a very substantial
8 | increase in the number of Asian-American students,
9 | and the number of Hispanic, other than Mexican,
10 | students. But African-American representation has
11 | actually gone down from 8 percent of the total to 6
12 | percent of the total. And the Mexican-American total
13 | has gone down, too, from 436 to 397.

14 | What that tells me is that we're sitting
15 | here having this argument, and as far as I'm
16 | concerned, it's fiddling around when we have a much
17 | more specific problem.

18 | Whether one agrees or disagrees with
19 | *Grutter*, and there are some here, I'm sure, who
20 | disagree with it, Justice O'Connor said in her
21 | opinion that it should take 25 years to remediate
22 | problems that the Court was allowing to be addressed

1 | by the diversity principle in its majority opinion.
2 | So, as the Supreme Court has defined it, there is a
3 | 25-year time clock that is ticking on whatever
4 | efforts are being made permissibly to take race into
5 | account in admissions policy. And that goes back to
6 | birth.

7 | There are some aspects of this diminution
8 | of African-American students that have to do with the
9 | pressure that law schools have felt on admission
10 | policies in exactly the opposite direction from
11 | what's being alleged by the speakers here today. But
12 | some of it has to do with some things that are
13 | happening in the larger society.

14 | I think we all should be very deeply
15 | concerned about gaps widening in our society between
16 | rich and poor; gaps that are widening in terms of
17 | inclusion of some minorities in our society; gaps
18 | that begin with birth; gaps that continue with
19 | children not being ready for school at age five; gaps
20 | that continue terrible education that is received by
21 | some students as they go K-12 and finally get to the
22 | point where more African-American young men are

1 | ending up in prison than are ending up in college.
2 | I'll be the first one to say that there are a lot of
3 | factors at work here, that involve questions of
4 | family responsibility, personal responsibility,
5 | community responsibility. I, for one, do not walk
6 | away from those issues, but there are also some
7 | serious gaps in terms of the responsibility of public
8 | policy and the responsibility of the broader
9 | community to address these problems. And I want to
10 | tell you, I think that that's what we should be
11 | talking about here today.

12 | Thank you.

13 | PROFESSOR MORGAN: Thanks to each of our
14 | speakers for their initial presentations. I promised
15 | them that they would have an opportunity to rebut
16 | each other or make comments, additional comments, if
17 | they are so inclined before we move to questions
18 | generally.

19 | PROFESSOR BERNSTEIN: I'll try to be
20 | extremely brief, but that's always difficult for me.

21 | You know, you could either be persuaded by
22 | my presentation or not, but what I take the two other

1 | speakers to be saying is let's all pretend that the
2 | ABA isn't going to be pressuring everybody to engage
3 | in something illegal because that will lead to the
4 | policies we like. And you know, if the policy was
5 | actually a policy that was working at had good
6 | consequences, a certain amount civil disobedience, if
7 | not admirable from an organization supposedly devoted
8 | to the rule of law, as its mission statement of the
9 | ABA states, it would at least be understandable. But
10 | what neither of the speakers who disagreed with
11 | myself mentioned is that they're only looking at
12 | inputs --

13 | PROFESSOR EDELMAN: I disagreed; he
14 | disagreed; we both disagreed --

15 | PROFESSOR BERNSTEIN: -- right. I said
16 | you both disagreed. The two speakers who disagreed
17 | with me are only looking at inputs.

18 | First of all, I should mention it's a
19 | little bit misleading to use 1994 as your baseline
20 | because from 1986 to 1994, the number of African-
21 | American students in law schools doubled. But put
22 | that aside and question why you want to look at

1 | inputs only. Isn't it more important to ask how
2 | successful are the law schools in graduating the
3 | students they bring in and having them pass the Bar.

4 | Roger asked, why do we even need these
5 | standards? Law schools are very politically correct,
6 | and they want to engage in preferences. And I think
7 | that's generally true. Most of the people I know in
8 | legal education, law professors, are liberal, and a
9 | lot of them are very disturbed by the ABA standard or
10 | related pressures not because they're not liberal,
11 | not because they're against affirmative action, not
12 | because they're against racial preferences, not
13 | because they'd even be against quotas if it came down
14 | to that, but because they see year after year they're
15 | admitting students, African-American students --
16 | because of a pools of applicants, it's inevitable --
17 | with significantly lower scores than the white
18 | students, and the students are failing out in large
19 | numbers -- I have the statistics -- and they're not
20 | passing the bar in large numbers. And as I
21 | mentioned, at the bottom two-thirds -- I'll have to
22 | go through this pretty quickly, but I'll reiterate it

1 -- at the bottom two-thirds of law schools, which is
2 most of the law schools in the country, obviously,
3 over half of the black students in law schools either
4 fail out or never pass the bar, no matter how many
5 times they tried. I think states go up to five
6 times.

7 If you go to lower-ranked schools or
8 schools that aren't that large, and you may get up to
9 60, 70, or 80 percent of the African-American
10 students. They have no choice but to admit these
11 students because the ABA, among other organizations,
12 they AALS, will not accredit them or put them on
13 probation if they don't need the numbers. But
14 they're not doing any people any favors, and they're
15 actually harming people in a very meaningful way by
16 taking them away from potentially successful careers
17 in accounting or sales or whatever else they might be
18 doing, and taking them into law school, not telling
19 them we think you're going to be allowed because we
20 know statistically that people with your LSATs either
21 fail out or don't pass the Bar, trying to push them
22 through, and they never become lawyers.

1 Since we have a little roundtable, explain
2 to me why it's a good policy for a law school that
3 knows that 70% of the applicants that it takes in who
4 are African-American are not becoming lawyers, and
5 they've tried everything they can to help them --
6 assuming that's true, why it's a good policy to take
7 even more students with even lower qualifications.

8 PROFESSOR EDELMAN: We've been arguing
9 about this for, I don't know, 30 or more years. And
10 it's certainly true that we have a continuing
11 controversy and that we have some results that are
12 not satisfying those of us who want to see greater
13 inclusion of especially African-American and Latino
14 students, and others from national origins who are
15 likely to have had lousy schooling and lousy
16 preparation for college and law school. What is
17 going on here is really the consequence of the fact
18 that we keep trying to make up all the way along for
19 the horrible mistakes that we've made from the
20 beginning and the horrible lack of effort as a
21 society that we've made from the beginning.

22 Jim said to you, and was challenged, but I

1 | would say again that I don't think that there's
2 | anything particularly magic about LSATs and GPAs as
3 | the only way to make a judgment about whether
4 | somebody should go to law school. And so, law
5 | schools have tried to develop broader criteria. As
6 | far as this business of more pressure from the ABA,
7 | let's agree to meet here five years from now and see
8 | whether there's been more pressure from the ABA, and
9 | I'll make you a bet and put a pretty substantial
10 | amount of money on the table that I would win that
11 | bet.

12 | There's no question that if you don't
13 | start from birth and get everybody a good education,
14 | and you continue to try to pick up the pieces along
15 | the way, and you have a broad set of criteria to
16 | determine where you take some risks, you end up with
17 | some differential numbers. I dislike that as much as
18 | you do. I think that's very, very disappointing and
19 | very, very unfortunate. But the difference between
20 | us is that I would continue to do that at the same
21 | time that I would start from the time a child comes
22 | on this earth, and that's what we're not doing as a

1 | country.

2 | PROFESSOR MORGAN: We have two microphones
3 | here, and I will invite you to come to the
4 | microphones. I think there are probably a number of
5 | comments and questions at this stage. We'll start
6 | over here.

7 | AUDIENCE PARTICIPANT: It's a question
8 | for Mr. Freeman, but it relates to -- you raised, we
9 | should take some risks and the question of
10 | quantifying it; are we going to quotas or by
11 | diversity or by critical masses? A number of
12 | formulas have been thrown out there, but Mr. Freeman,
13 | you threw out there, the formula of
14 | representativeness. As integral to the function of
15 | what law schools are doing in society, and that's
16 | quite distinct from diversity or any of the others.

17 | I mean, do you think it's a problem if
18 | there are overrepresentations of other minorities to
19 | reduce the number of Jews or the number of Asians
20 | because of their own unrepresentativeness? I doubt
21 | that you would, but -- there's the paradox. I think
22 | you see it, but I'll let you answer.

1 MR. FREEMAN: I don't think that what I
2 intended it was as broad as maybe you interpreted it.
3 I didn't mean to say that the number of students of
4 any particular category should be proportional, only
5 that there are certainly some categories that we've
6 talked about today that are most definitely
7 underrepresented, and we could also talk about
8 undergraduate schools that are underrepresented
9 regardless of the student's race or gender. So
10 that's all I meant to say is that we should be
11 focusing on certain categories of students that
12 historically have been underrepresented and that
13 continue to face substantial discrimination.

14 AUDIENCE PARTICIPANT: You don't mean law
15 schools that look like America?

16 MR. FREEMAN: No, no, not at all. Although it
17 would help if they look a little more like America.

18 Mr. CLEGG: But, you know, you're absolutely
19 right. If you're talking about some groups
20 underrepresented, then that means there must be some
21 groups that are overrepresented. You can't have it
22 both ways. I mean, it's not even the opposite sides

1 | of the same coin; it's the same side of the same
2 | coin. And this is why I think it's a bad idea as a
3 | matter of law, and also a bad idea as a matter of
4 | policy, for law schools to be trying to achieve a
5 | predetermined racial and ethnic mix because it means
6 | they're going to end up discriminating against some
7 | groups in favor of others on the basis of race and
8 | ethnicity, and that's a bad thing.

9 | PROFESSOR EDELMAN: I want to emphasize
10 | that having a predetermined mix is not legal, and
11 | it's certainly not the policy in this institution to
12 | have any predetermined percentage of anybody.

13 | MR. CLEGG: Well, you know, you have
14 | goals and you have critical masses and you have, you
15 | know, a certain degree of diversity, and we've heard
16 | that, well, you know, I'm not saying that they should
17 | look like America, but they should look more like
18 | America. You can say it anyway you like, but it
19 | boils down to a predetermined racial and ethnic mix.
20 | There may be some leeway. It may not be 5.2 percent;
21 | it may be anywhere between 3 percent and 7 percent,
22 | but it's still a quota, and it's still wrong.

1 PROFESSOR EDELMAN: There are 4,500 more
2 entering seats than were 10 years ago, so there's
3 plenty of room for the people who are being said to
4 be overrepresented to continue to be overrepresented,
5 if that's the formulation.

6 PROFESSOR MORGAN: Question over here.

7 AUDIENCE PARTICIPANT: Gentlemen, I can't
8 help but comment from a prospective I don't think any
9 of you have. I teach at a third-tier law school out
10 in the middle of the country, and we're pouring
11 resources into all these things that the ABA is
12 asking us to consider in alternatives. And what
13 we're doing is a hell of a good job in recruiting law
14 students for you because we get all these students
15 geared up to go to law school, and then the wealthier
16 schools from tier-one and two come in and throw
17 around superior resources and take them away from us.
18 And so, at the end of the day we don't have the
19 results, and we're forced to expend all those
20 resources and end up doing exactly what Professor
21 Bernstein says, which is to get those numbers and by
22 bringing in people who I don't think we're serving

1 | justice by bringing them in.

2 | Thank you.

3 | MR. FREEMAN: What I would say with
4 | respect to the ABA standards at issue today, is that
5 | as the text says, they look at both efforts and
6 | results. So the fact that you're not getting the
7 | results that you desire out of your efforts does not
8 | mean that you're going to fail under the Standard.

9 | PROFESSOR MORGAN: Question over there.

10 | AUDIENCE PARTICIPANT: Yes, hi. I'm Dane
11 | von Breichenruk, and I'm with the Bill of Rights
12 | Foundation. So that you won't think my question is
13 | completely uninformed, let me say this. I do
14 | understand and I appreciate why there is the
15 | necessity to try to have programs to encourage and
16 | bring in minorities. I mean, it's not that I'm
17 | totally unaware of the necessity of that and the
18 | basic fairness of that.

19 | But going back to what Justice O'Connor
20 | said when she said, maybe in 25 years we won't have
21 | to make these pointed specific outlets, well, you
22 | maybe could have said that back in the '60s. You

1 | could have said, well, 25 years, and maybe when we
2 | get the 25-year mark that Justice O'Connor had in
3 | mind, maybe we'll say 25 more years. And I guess my
4 | question kind of -- I'm going to ask it in the vein
5 | of the constituency that we represent, the guy in the
6 | street who would ask, for instance -- and understand
7 | that there's not a rhetorical element in this; I
8 | mean, I just don't know -- in these rules, for
9 | instance, if you take a university like Howard Law
10 | School. Now --

11 | (End side A; continued on side B.)

12 | AUDIENCE PARTICIPANT: (in progress) --
13 | that's predominantly a minority school, and they
14 | don't have the onus on them to make things more
15 | equal. I mean, they're under a different set of
16 | circumstances. I understand that. But there are
17 | other minorities, and I was wondering would
18 | predominantly black universities, law schools, have
19 | this same sort of standard that they would have to
20 | meet in their own way, as these rules call for, or is
21 | this just limited to predominantly white-oriented law
22 | schools?

1 I guess going back to your point, Mr.
2 Edelman, it's true that, you know, I feel exactly the
3 same way that you do, that you get up in the morning
4 and you just know things aren't fair. They're just
5 not fair. But a whole lot of that just sort of comes
6 out of the soul of people. It takes years for people
7 to finally mature enough to recognize that it really
8 is just foolishness that we have any prejudice
9 whatsoever towards anyone for any reason, it would be
10 a wonderful thing if we could but you can't
11 micromanage every aspect, I mean as hard as we try to
12 make things right. And we put the onus on the
13 institutions that we have to try to make them make it
14 more right when it's really all our jobs, every day,
15 to try to make things right and take the pressure off
16 of these institutions because you do have reverse
17 discrimination.

18 There are people who would have ended up
19 being great attorneys and good judges and got pushed
20 out because of racial references, and then the person
21 who is allowed in maybe was a little substandard,
22 didn't become an attorney, you know, ended up going

1 | and doing something else, good, with his life, he
2 | used his education. But it just seems like an
3 | ultimately would be better -- when does it end? When
4 | can we say, look, things are not perfect, but we've
5 | done all we can do. We've passed the laws, we've
6 | given everybody an equal opportunity. Let's just
7 | back off and let society mature in its own right and
8 | take the responsibility for that maturation away from
9 | institutions that are struggling along, like this man
10 | who just spoke over here.

11 | I mean, we're trying to micromanage things
12 | so much that I think we're stumbling over our own
13 | feet. And when does it end?

14 | PROFESSOR MORGAN: I'll take that as
15 | largely a rhetorical question, but do you want to
16 | address it quickly, Peter?

17 | PROFESSOR EDELMAN: I share the same
18 | concern, when does it end? I have a differing view.
19 | I think that the particular institutions that we are
20 | talking about, law schools, would be better off in
21 | their efforts if the rest of the society took on the
22 | kind of responsibility that I'm talking about, and

1 | protect perhaps you are saying that, too. Justice
2 | Marshall in the *Dowell* case, which had to do with
3 | ending the desegregation requirement for the schools
4 | of Oklahoma City, dissented, and he said we're not
5 | ready yet; we haven't finished the job of school
6 | desegregation. And indeed, in rapidfire order after
7 | that, the courts got largely out of the business of
8 | enforcing desegregation decrees; DeKalb County in
9 | Georgia, Charlotte, Mecklenburg, and so on. Since
10 | then we've seen a massive resegregation in American
11 | urban schools that had been -- not the largest cities
12 | that had been effectively segregated basically
13 | forever -- but in places where there had been
14 | substantial desegregation.

15 | So, I think the hearts and minds aren't
16 | fully there yet. I'm sorry to report that. In one
17 | way or another, I think we still need various public
18 | policies to help move that along.

19 | AUDIENCE PARTICIPANT: And just one
20 | thing, don't forget the Howard Law School model.

21 | PROFESSOR EDELMAN: The Howard Law School
22 | model, Tom might be able to answer that better than

1 I.

2 PROFESSOR MORGAN: Yes, I think it is
3 important to mention that Howard is subject to this
4 same requirement. Obviously they don't have the same
5 issues in terms of affirmative action with respect to
6 African-Americans, but they do with respect to women,
7 with respect to Hispanics, and with respect to other
8 minority groups. This is not a rule that applies
9 only to some law schools and not others.

10 MR. CLEGG: Could I ask, though, is it
11 conceivable that under these guidelines that Howard
12 would be told, you know, you're not diverse enough?

13 PROFESSOR MORGAN: It is possible. The
14 rule talks about underrepresented groups, so I don't
15 think they be criticized for not having enough white
16 students. But they might well be criticized for not
17 having enough women students or not having enough
18 Hispanics or other groups that are thought to be
19 underrepresented.

20 MR. CLEGG: So it's under
21 underrepresented in terms of society at large, not in
22 terms of the law school?

1 PROFESSOR MORGAN: Yes, and it talks about
2 underrepresented groups, particularly racial and
3 ethnic minorities.

4 AUDIENCE PARTICIPANT: Julian Bryant, a
5 first-year student here at Georgetown. Excepting
6 Professor Bernstein's critique on the disconnect
7 between inputs and outputs of law schools, perhaps
8 exacerbated by the standard, my question is why is it
9 that the corrective to that is an attack on the input
10 standard that would supposedly, I guess, free up
11 these law students to do other things rather than an
12 emphasis on an output standard that would increase
13 their bar passage rates and graduation rates,
14 enabling the students to have better careers?

15 PROFESSOR BERNSTEIN: That's a very fair
16 question. The main reason for the attack on this in
17 particular is again because I think they're asking
18 the law schools to do something illegal, and the
19 standard doesn't say anything about output. And it
20 couldn't, I think, because there are differing
21 strategies on this. But I think it's the case that
22 many law schools have tried to invest resources in

1 | helping at-risk students, as you might call them,
2 | students who got in under special admissions
3 | criteria, even if they were never told they were, to
4 | graduate and pass the Bar. And so far, they haven't
5 | come up with the so-called magic bullet that would
6 | actually do that. So if they had an input and an
7 | output standard, that standard would undermine the
8 | input standard, which they don't want to do.

9 | Now, I'm perfectly willing to consider and
10 | even support all sorts of other students that I think
11 | the ABA could do that would increase the number of
12 | minority attorneys in the country. But I think the
13 | ABA, we have to understand, is fundamentally a cartel
14 | of lawyers. They want to keep out other people from
15 | being lawyers, and they're not interested in doing
16 | these things. For example, I'd be fine -- the
17 | passage rate of getting through law school is one
18 | thing, but the Bar passage rate is another. Why do
19 | you have to pass sort of a relatively arbitrary test
20 | of legal skills that only test certain kinds of
21 | skills, not others, to be a member of the bar.

22 | I would be perfectly happy with making the

1 | Bar voluntary, and if the market decides that lawyers
2 | can't be competent unless they pass this particularly
3 | silly test, that would be fine. And if people have
4 | other skills -- look, you don't have to be a great
5 | student to be a great lawyer. Some people are great
6 | negotiators, even if they're not great students, and
7 | if you're going to be a criminal attorney, most of
8 | what you do to do is plea bargain, and you can be a
9 | great criminal attorney if you have those particular
10 | skills. So I'll be fine with that. I'll be fine
11 | with not requiring law schools to be a seven-year
12 | program, college first, which would help people who
13 | have fewer resources be able to get through it. I'll
14 | be happy with the ABA changing the rules the law
15 | schools so that law schools don't have to be three or
16 | four years. If students are struggling, you can let
17 | them stay for five or six years and take the classes
18 | over a longer period of time so they can adjust.

19 | But all these things would conflict with
20 | the ABA's final purpose of being a cartel. They have
21 | a strong purpose of wanting to encourage racial
22 | diversity, but only if they maintain their cartel,

1 | which is the most important purpose.

2 | PROFESSOR EDELMAN: We might get a deal on
3 | some of that.

4 | PROFESSOR MORGAN: Question.

5 | AUDIENCE PARTICIPANT: Hi, my name is
6 | Jasmine Christian. I'm a second-year here at
7 | Georgetown. First, I'd like to thank you gentlemen
8 | for your perspective and your comments. However, I
9 | do have a couple of concerns.

10 | First, the bar passage studies that Mr.
11 | Bernstein cites, it seemed from the citation, it was
12 | from the Boston bar, and I have information from a
13 | recent article published by Professor Cheryl Harris
14 | that bar passage -- the difference between bar
15 | passage fail and pass status nationally among all
16 | races can only be explained by LSAT in GPA by only a
17 | 10th of a percent. So therefore, 90% of bar passage
18 | in bar fail status amongst all races is only
19 | explained by LSAT -- is explained by other things,
20 | and that LSAT in GPA explains only about a 10th of a
21 | percent difference.

22 | Additionally, when looking at those

1 | figures in regards to LSAT, GPA, and ABA standards
2 | regarding LSAT and GPA standards, how do you
3 | distinguish between ABA standards that require
4 | specific GPA standards, class hours that students
5 | must take, and the ABA interest in diversity. It
6 | seems that the words describing ABA's actions as
7 | "coercive" and the adjectives describing ABA as a
8 | "cartel" or "conniving" will reflect some kind of
9 | conspiracy theory. Is there a conspiracy theory with
10 | regard to the ABA's interest in diversity, and if so,
11 | what is it?

12 | And my final question is, do you have any
13 | figures reflecting the number of minority professors
14 | within law schools nationally, and specifically
15 | African-American professors within law schools
16 | nationally, and would the ABA standard conflict with
17 | the Court's holding in *United Steelworkers v. Weber*,
18 | which would allow affirmative-action programs when
19 | they remedy a manifest imbalance? Is there a
20 | manifest imbalance amongst African-American law
21 | professors in law schools? And if so, would the ABA
22 | standards purporting to increase diversity and

1 | valuing diversity conflict with the Court's holding
2 | in Weber or actually be aligned with it?

3 | PROFESSOR BERNSTEIN: Okay, that's a lot
4 | of questions. Let's see if I can answer them
5 | briefly. The Bowen and Bach study that I quoted was
6 | published -- it was on Westlaw, so it's easy to
7 | access. It was published in the proceedings of the
8 | Boston Bar. But I believe -- actually, I'm sure --
9 | the underlying statistics actually come from their
10 | very much pro affirmative-action, but the shape of
11 | the river [?]. And their statistic was that African-
12 | Americans have, I think, a 74 percent eventual bar
13 | passage rate. A recent study by Richard Sander,
14 | which I think was just relying on a different year's
15 | statistics, said 78 percent. So it seems to be
16 | somewhere in that range.

17 | As far as the conspiracy theory goes, some
18 | conspiracies are true, and the ABA is in fact a
19 | conspiracy against the public interest on behalf of
20 | lawyers, just as much as the AARP is a conspiracy of
21 | older people against younger people, and every
22 | lobbying group is basically a conspiracy it against

1 | the rest of the public to get their own interests. I
2 | mean, those aren't wacky conspiracy theories. We
3 | have to assume that Fidel Castro had a poison cigar
4 | that somehow gave to Lee Harvey Oswald, or something
5 | like that. These are just your everyday conspiracies
6 | that go on in life.

7 | I don't know the data for African-American
8 | law professors offhand, but I do want to point out
9 | that in general, I think African-American law
10 | professors do tend to be very much supportive of
11 | things like Standard 211. But I think one problem
12 | with debating these standards is that the people who
13 | can debate them, who are African-American, are the
14 | people who benefited from them. We don't ever hear -
15 | - I personally have never heard from one of the 42
16 | percent of African-American matriculants who didn't
17 | graduate or didn't pass the bar, but I do hear from
18 | African-American law professors got into whatever
19 | school they got into and obviously had very
20 | successful careers. They're biased, not an unfair
21 | way, but from their own experience they think these
22 | things work and because they worked for them, which

1 | is something we have all experienced.

2 | There was one more thing that I want to --
3 | oh, I don't know the exact -- I haven't seen
4 | Professor Harris' study, and I don't know the exact
5 | correlation between bar exam passage and LSATs. I
6 | know at my own school, we can predict with pretty
7 | good certainty whatever race you are, if you have a
8 | LSAT below 150, the odds of you ultimately graduating
9 | and passing the bar can be pretty low, and we've
10 | heard similar stories at other law schools. I think
11 | especially at the lower ranked schools, the real
12 | problem is that regardless of the general
13 | relationship, once you get the lowest score -- and
14 | look, the LSAT is a standardized multiple-choice
15 | tests. The Bar exam, at least half of it, is a
16 | standardized multiple-choice test. If you're not
17 | doing well with these kinds of tests that require
18 | certain kinds of abilities, you're not going to do
19 | well at the other one either. And ultimately, if you
20 | get below that score, a law school would be ill-
21 | advised to take you in if they expect you to
22 | ultimately pass the Bar. But again, they're required

1 | to do it anyway. So I think I covered the gamut
2 | there.

3 | AUDIENCE PARTICIPANT: Thank you.

4 | MR. CLEGG: Let me just say that, in the
5 | *Weber* case, it's true that the Court there talked
6 | about a "manifest imbalance." But it talked about
7 | manifest imbalance in a "traditionally segregated job
8 | category" and also talked about a narrow tailoring
9 | requirement that had to be met too. I think it would
10 | be very difficult for law schools, which have been
11 | cheerfully discriminating in favor of African-
12 | Americans for a long time, to claim *Weber* as a
13 | precedent. After all, what we had in *Weber* was labor
14 | unions that had been discriminating against African-
15 | Americans for a long time.

16 | AUDIENCE PARTICIPANT: So is your
17 | argument then that there is a tradition of law
18 | schools discriminating against white males? And
19 | therefore, the traditional --

20 | MR. CLEGG: Well, my point is that I don't
21 | think that the remedial predicate that has to be met
22 | in the Title VII lawsuit can be met by most law

1 | schools in 2006. I mean, I think it is true that,
2 | you know, for some time now, in my view most law
3 | schools -- it is a disadvantage when you apply, if
4 | you're a male or if you're a non-minority. But even
5 | if you don't agree with that, I think it's certainly
6 | true that it's certainly not a disadvantage to be a
7 | woman or to be a minority when you apply, and that's
8 | what you really would have to show in order to invoke
9 | *Weber*.

10 | PROFESSOR EDELMAN: I don't think *Weber*
11 | would apply here. But I would say -- and Roger, I
12 | think you implied to the contrary and I don't want to
13 | put words in your mouth -- there's a whole different
14 | set of issues that are not what we're here to talk
15 | about today when it comes to hiring for positions
16 | that are unique. So, if you're admitting law
17 | students, then we have a discussion about whether
18 | you're going to use basically LSATs and grades only,
19 | whether you're going to take other factors into
20 | account, and so on.

21 | When you're hiring for faculty, there are
22 | all kinds of things to take into account, and

1 | certainly I don't know of a law school that has ever
2 | thought in terms of having some kind of quota or some
3 | kind of set of criteria that aren't just looking at
4 | an individual and looking at the relationship of that
5 | individual to the learning community.

6 | I don't think *Weber* is the right place to
7 | go to talk about why it is that we should be hiring
8 | more African-Americans, more Latinos, more
9 | minorities, more women, on our law faculties. You
10 | know, we here at Georgetown think we've done pretty
11 | well at that and we have some fabulous people of all
12 | backgrounds.

13 | MR. CLEGG: But you know, when Congress
14 | wrote Title VII, they had an exception in there for
15 | bona fide occupational so that for some positions you
16 | can take sex or national origin into account.
17 | Congress quite deliberately said there was no BFOQ
18 | for race, however. Besides, I think the kind of
19 | justification that you're talking about would be too
20 | amorphous to justify discrimination on the basis of
21 | race or on the basis of ethnicity or sex when it
22 | comes to law school hiring.

1 PROFESSOR MORGAN: Yes, and I wouldn't use
2 the word discrimination, and that probably would be a
3 difference between us. Question over here.

4 AUDIENCE PARTICIPANT: Yes, thank you.
5 I'm John Montgomery, an alumnus here at Georgetown
6 Law Center, 1988.

7 Professor Edelman, I see that a lot of the
8 younger people here are students here now. I'd like
9 to go over, just a moment to speak about law schools
10 generally about the history of this place
11 specifically, which you and I both know about and
12 some of them may not, and then get your comments on
13 that. Being here, as I was, from 1985 to 1988, those
14 were the years, some of them anyway, that Georgetown
15 had a hard quota for admissions of black students.
16 The rule then was that exactly 60, or perhaps 59 or
17 61, but anyway, 60 of the 500 new students each year
18 had to be African-Americans, and that's a rule that
19 was observed here for a number of years in a row.

20 Then in the early 1990s, the school
21 abandoned that rule, partly, so I understand, because
22 of the fear of a lawsuit that they would lose but

1 | also because after some years of having the quota in
2 | place, it became apparent to the faculty and
3 | administration here that of the 60 students that they
4 | were accepting regardless of their qualifications
5 | each year, many of them were simply flunking out,
6 | getting very low grades, not passing the Bar, and
7 | otherwise turning out to be an embarrassment to the
8 | school. After that, they reduced the number of
9 | African-American students coming in, which they did
10 | by raising the required qualifications, and some of
11 | the problems went away. So my question for you is --
12 | well, first, will you concede that these things are
13 | true?

14 | PROFESSOR EDELMAN: No.

15 | AUDIENCE PARTICIPANT: I put it to you,
16 | Professor, that if this were a --

17 | PROFESSOR EDELMAN: I was here. There was
18 | no policy of that kind.

19 | AUDIENCE PARTICIPANT: Well, Professor, I
20 | suggest that you go back and look at the face books
21 | for those years and count out how many --

22 | PROFESSOR EDELMAN: I know what was in the

1 | face books. Those were people who were admitted into
2 | the school, of course. There was not a numerical
3 | quota.

4 | AUDIENCE PARTICIPANT: Will you tell me
5 | that the numbers are different than 60 a year?

6 | PROFESSOR EDELMAN: They varied. They
7 | were --

8 | AUDIENCE PARTICIPANT: From what? From
9 | 59 to 61? I counted them up --

10 | PROFESSOR EDELMAN: Don't get into that
11 | kind of argument. I disagree with you. We have
12 | never had a quota in this law school, and I've been
13 | here since 1982. I don't know where you get your
14 | facts, sir.

15 | AUDIENCE PARTICIPANT: Very well then.
16 | But you will agree with me that sometime in the
17 | 1990s, the number of African-American students who
18 | were being admitted here went down from where they
19 | had been?

20 | PROFESSOR EDELMAN: No. There were a
21 | couple years when the number went down a little bit.
22 | There are also some years when it went up above that

1 | historical average that you're talking about.

2 | My recollection is that it's been, over
3 | the course of the 20 plus years that I've been here,
4 | once or twice as low as nine, sometimes as high as 15
5 | or 16 percent. And maybe during the time that you
6 | were here, it was pretty evenly at around 11 or 12
7 | percent. That has been about the average over the
8 | years. But there is no quota. There never was a
9 | quota.

10 | AUDIENCE PARTICIPANT: All right --

11 | PROFESSOR EDELMAN: I'm sorry to disagree.
12 | I am especially familiar with all of this because I
13 | sat on the admissions committee for years.

14 | AUDIENCE PARTICIPANT: Actually I did so
15 | you'd been on the admissions committee, or I would've
16 | avoided treating any of this to you personally. But
17 | --

18 | PROFESSOR EDELMAN: I didn't take it
19 | personally.

20 | PROFESSOR MORGAN: If you have an
21 | additional specific question, I'll let you ask it.
22 | But we are getting close to the end.

1 AUDIENCE PARTICIPANT: Just one more
2 brief thing -- no, actually in the interest of time
3 I'll give way to this other gentleman. Thanks very
4 much.

5 PROFESSOR MORGAN: I will thank all of you
6 for coming and thank our panel for the presentation
7 this afternoon.

8 (Panel concluded.)