Accreditation and Affirmative Action

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To the world outside the college campus or even the professor absorbed in her own field of study, the accreditation process would seem an unlikely battleground for the continuing conflict over how much affirmative action is enough. For one thing, most of those affiliated with any among the hundreds of accredited schools or programs take accreditation for granted, particularly at prestigious private institutions or at state colleges and universities. From time to time, the norm being every seven years, representatives of the accrediting agency may visit the campus site, but their focus most often involves such weighty but insular matters as tuition trends, facilities and tenure.

Also, there is the strong sense that questions regarding affirmative action have been resolved to the overwhelming satisfaction of academia in three momentous Supreme Court cases beginning with the 1978 *Bakke*[1] decision and ending with the *Grutter*[2] and *Gratz*[3] cases involving the University of Michigan undergraduate and law school admission programs, decided in 2003. In those three cases the Court held that while race preferences intended to compensate minorities for past or present societal discrimination are illegal under the constitution or statute, the state does have a compelling educational interest in campus diversity, leaving state schools free to adopt narrowly tailored admission procedures necessary to assure that a reasonable number of minority students – Michigan Law School used the term "critical mass"--are part of every class.[4] Under federal civil rights statutes, the same rule of law would apply to private institutions of higher learning.

But accreditation is too potent a political tool to lie dormant for very long. A school or program denied accreditation can face a disastrous loss of academic standing. Student applications are likely to dwindle. Federal scholarship support is denied. So is grant money, public and private. And if a law school loses its accreditation, many states deny its graduates the right to take the bar exam, effectively precluding them from entering their profession. Increasingly, legal education and related issues involving the value and practice of affirmative action became the critical stakes of the continuing dispute. And the battleground that drew the most public attention was the law school at George Mason University, whose refusal to apply race preferences in admissions triggered nearly a decade of "in your face" ABA oversight and finally, an ultimatum: improve your numbers or forget accreditation. Key players in the "great game" include:

[1] *Regents of the University of California v. Bakke*, 438 U.S. 265; 98 S. Ct. 2733 (1978).
[2] *Grutter v. Bollinger*, 539 U.S. 306; 123 S. Ct. 2325 (2003).
[3] *Gratz v. Bollinger*, 539 U.S. 244; 123 S. Ct. 2411 (2003).
[4] *Grutter*, 539 U.S. at 328-333.

- The American Bar Association. With 410,000 members it is the largest professional association on earth.[5] The organization's Section of Legal Education and Admission to the Bar—supervised by a governing Council whose key decisions must be ratified by the organization's House of Delegates—promulgates standards for legal education and oversees compliance. Its heavy-handed treatment of George Mason University Law School (GMU) over the latter's reluctance to change its admission criteria in order to enroll more African-American students led to a number of critical commentaries. At the same time, its efforts to impose new and tougher affirmative action requirements while emphasizing their applicability even to schools in states that have banned race preferences struck some critics as an invitation to flaunt the law.

- The Department of Education (DOE). DOE has no direct authority over accreditation, but it does have the power to appoint the hundreds that do. With assistance of the National Advisory Committee on Institutional Quality and Integrity (NACAQI), the Secretary chooses the accrediting institution and is thus in a strong position to serve as an advocate or opponent of key concepts and practices, such as those employed by the ABA in support of affirmative action. But in practice, DOE is very much a peace-loving agency with as much zest for combat as, say Ferdinand the bull. So, despite the fact that many senior DOE officials disapproved of the most radical ABA affirmative action policies, the issue soon became whether the agency would demand real change or instead settle for a face-saving, status quo-maintaining cosmetic deal.

- Professor Richard Sander of UCLA Law School. Professor Sander's 2004 Stanford Law Review article, *A Systemic Analysis of Affirmative Action in American Law Schools*, argued that the benefits of race preferences to African Americans were illusory, pushing blacks into untenable academic confrontation with better qualified whites.[6] The result, Sander argued, is a confidence-shattering "mismatch" for those attending schools to which they would not have been accepted but for affirmative action, with resulting low grades, relatively high drop-out rates and a far higher incidence of failure to pass bar exams than those blacks attending schools whose academic demands were more conversant with their skills. Indeed, claims his article, more blacks would wind up practicing law in a universe barren of affirmative action.[7]

- Professor Richard Lempert of the University of Michigan Law School. A stout critic of Sander's methodology, numbers and conclusions, and a savvy tactician who helped develop the "critical mass" approach to race preferences sanctified by the Supreme Court in *Grutter*, Lempert's own research has not always been greeted with universal acclaim.

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[5] American Bar Association News Release. *ABA Legal Education Section Publishes Proposed Interpretation of Bar Passage Standard for Approval of Law Schools* (June 19, 2007).
[6] Richard Sander, *A Systematic Analysis of Affirmative Action in Law Schools*, 57 STAN. L. REV. 367, 454 (2004).
[7] *Id.*

- The U.S. Commission on Civil Rights. A voice of national conscience on such issues as desegregation and voting rights at the time of its 1957 founding, the Commission has since become a highly politicized venue whose focus tends to reflect the vagaries of control over the Executive Branch.

  Still the Commission can be spunky, plunging into controversy with the uninhibited zest of the truly powerless, which is precisely what it did with Sander's work. The quality of the Commission's research and analysis can be quite good, as it was with respect to the inquiry on law school affirmative action and the ABA. And the Commission's two principle recommendations made sense. One would give the nation's law schools the freedom to formulate their own policies with respect to affirmative action-- even to the point of deciding against all forms of race preference-- a power the Supreme Court clearly seemed to have in mind in both *Bakke* and *Grutter* and which would remove the threat of an academic mugging at the hands of the ABA.[8]

  The other change would require schools to disclose the extent and mechanics of their own affirmative action programs as well as figures on grades, graduation rates, bar exam results and student loan repayments, all disaggregated by race. The Commission also called on the National Academy of Science and other grant-making institutes to fund studies of the impact of race preferences on the sorts of things Sander had been trying to assess. Clearly the strong hands of Vice Chairman Abigail Thernstrom and Commissioner Gail Heriot, both distinguished scholars with long experience dealing with affirmative action issues, were at work here. Neither carries much of a brief for race preferences, and both took offense at ABA high-handedness, with respect to both standards and accreditation. In its first test of political sentiment, however, the drive for openness took a hit as an amendment reflecting the Commission recommendation introduced March 30, 2006 by Rep. Steve King (R. Iowa), was defeated by an overwhelming House vote, 337-83. When queried about their aversion to facts and figures regarding this public problem falling into the public domain, most opponents of full disclosure suggest the numbers will further perpetuate stereotypical thinking regarding black academic aptitude. Better than shooting the messenger, of course, would be to improve dramatically that academic performance.

But the real world offers no such short-term policy option. Instead, with the prospect of equal academic credentials between the races remote, the ABA has three options: oppose race preferences; impose and enforce them to the extent necessary to ensure real diversity; or, leave the matter for each school to determine for itself. Clearly ABA has chosen the second course.

ABA AFFIRMATIVE ACTION STANDARDS

[8] U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools*, Briefing Report (April 2007).

In February 2006 the ABA Council introduced a standard requiring law schools seeking accreditation or re-accreditation to demonstrate their commitment to diversity by "concrete action."[9] Going further, the Council proposed Interpretation 211-1 of this standard which stated: "A constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin is not a justification for a school's noncompliance with the standard."[10] This proposed interpretation angered opponents of race preferences who treated it as an invitation for law schools in a "Prop. 209" type jurisdictions—California, Washington State, Texas, Florida and Michigan—to defy the law. That may be overstating it. From the very onset of the debate, both proponents and opponents of affirmative action have tried to develop alternatives that might produce the right kind of numbers but without the constitutional and political baggage that could invite adverse legal scrutiny. Hence, experimentation with "percentage plans," guaranteeing places at top state universities for any high school student finishing in the top 4%, 10% or 20% of his or her high school class.

Others have urged a shift to affirmative action for the economically needy configured in such a way as to capture enough traditional minorities so as not to disfigure the face of the program.

In his brief in *Grutter*, Solicitor General Theodore Olsen listed several considerations which could help an admissions committee keep minority numbers high while ending race preferences: They included "a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high schools, volunteer work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected in essays."[11] The plan, reminiscent of "freedom of choice" plans and other southern contrivances designed to thwart public school integration during the civil rights era, does nothing to address the "mismatch" problem if it works nor the problem of dwindling black law school enrollment if it fails.

Perhaps the Council simply wanted admissions officials to bring into play these various proxies for race to cushion the numerical impact of the Prop. 209 type laws. Or, perhaps Council members had in mind creating situations where jurisdictions choose to invoke the "bail out" provisions of such laws, waiving their application in situations where compliance could cost an opportunity to compete for a lucrative government contract or to incur the imposition of substantial fines or penalties. Whatever spin one

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[9] ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007), Standard 212. Equal Opportunity and Diversity. This Standard was originally Standard 211 Equal Opportunity and Diversity Effort. Standards 21-212 were amended (August 2006) and approved by the American Bar Association House of Delegates.

[10] Old Interpretation 211-1, ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007). This Standard was amended in August 2006 and is now new Interpretation 212-1.

[11] Brief for the United States as Amicus Curiae Supporting Petitioner at 109, *Grutter v. Bollinger*, 539 U.S. 306; 123 S. Ct. 2325 (2003) (No. 02-241).

may wish to put on the provision, it clearly involved a bit of role reversal between school administrators and the ABA. Instead of top school officials using their leading case authority to determine whether affirmative action was necessary, the ABA now effectively dictated the results to be sought and the means to achieve them.

By the time the revised standards were approved by the Delegates, Interpretation 211-1[12] had been modified to make it clear that no clash with the laws of several states was envisioned. Still, a Prop. 209 law was no ticket to non-compliance with ABA mandates. But now the ABA declared that the school involved would have to *"demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provisions."*[13]

Consistent with *Grutter,* Interpretation 212-2 provides that "*a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity."*[14] Interpretation 212-3 declares that it will not specify the precise steps a law school must take to pass muster, saying judgment will be based "*on the totality of the law school's actions and the results achieved."*[15] Leaving nothing to chance, however, the ABA goes on to list several tried and true initiatives including, "*a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for these students from underrepresented groups."*[16]. When read carefully, the ABA's treatment of the issue has a charming rather Orwellian tinge to it: race preferences are merely an option. And here are some tricky surrogates if you need them. But one way or the other, you had better get the numbers right.

And that goes for faculty too. No Supreme Court decision has ever considered race preferences as regards college faculty and, given the overwhelmingly liberal political orientation of today's academia and the commitment by many to affirmative action for students, the divergent positions seem at first a bit strange. Not so. In the view of many faculty, taking an under-qualified student may deny a place to a more qualified one or affect the level of discourse in a few classes. Still, it is a mistake that tends to self-correct after two or three years when the student transfers to an easier school or flunks out, not the optimum situation, but arguably one of the risks inherent in a dynamic process. But unlike the student, a faculty member up for tenure seeks a relationship likely to endure for 30-40 years. Having a colleague for that period chosen because of race while a candidate with better research and publication credentials is passed over compromises the value of the education being offered to students, and harms the school's reputation in the community at large. Also, both *Bakke* and *Grutter* included strong references to the

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[12] *See* ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES (2006). *Compare* old Interpretation 211-1 to new Interpretation 212-1.
[13] New Interpretation 212-2. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007), http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%202.pdf.
[14] Interpretation 212-2 as amended in 2006.
[15] Interpretation 212-3.
[16] *Id.*

historic First Amendment rights of university leaders to determine what is taught, how it is taught, who teaches and who may become students. Despite what should be a major caveat, ABA Standard 212 requires a law school to "demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity."[17] Dean Steven R. Smith of San Diego University Law School, Chairman of the ABA Council, argued to the Civil Rights Commission that the rationale for a diverse faculty and staff was identical to the case for student diversity: livelier classroom discussions, a more complete educational experience inside and outside the classroom, and better adaptation to the workforce and the society to be experienced later in life.[18]

Empirical support for these propositions is about as thin as any that have ever been employed as the foundation for an undertaking of this importance, but one suspects that diversity became the vehicle of necessity for proponents of race preferences without ever becoming the vehicle of choice. As the only door left ajar by the Supreme Court for the consideration of race in higher education, diversity receives a good deal of lip service. But its affect—as with any system permitting race to trump academic potential--is to cluster those admitted via traditional measures of academic –the LSAT for law applicants—into one more or less homogeneous grouping and, far below, those lifted over the threshold by affirmative action. Why would the beneficiary of an affirmative action program knowingly choose to enter this arena where the odds of true success are often remote? Many of those advocating "full disclosure" by law schools believe the current regimes thrives on fantasy, not fact.

On the other side are many who see affirmative action as a form of continuing reimbursement for those still subject to societal discrimination. According to the Civil Rights Commission report, when confronted with the justification for race preferences today Professor Lempert of the University of Michigan Law School responded that "there is still a moral imperative for racial preferences, as invidious discrimination continues today as evidenced by the wealth gap between African-Americans and whites and audit studies of car purchases, rentals, or employment of African-Americans relative to whites."[19]

Such claims of racial entitlements based on general societal discrimination, are, in the words of Justice Lewis F. Powell, "ageless in their reach into the past and timeless in their ability to affect the future." They provide no entitlement to special compensation for the "victim," let alone support a legal superstructure for special racial rights.

Smith did his best in his testimony to the Civil Rights Commission to defend the proposed new provisions while denying that they reflected a change of any consequence, noting that as far back as 1980, ABA Standards have required law schools to demonstrate "a commitment to providing full opportunities for the study of law and entry into the

[17] Standard 212. Equal Opportunity and Diversity.
[18] Opening Statement of Dean Steven R. Smith before the US Commission on Civil Rights (June 16, 2006)
[19] U.S. COMM'N ON CIVIL RIGHTS, BRIEFING REPORT: AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS TESTIMONY OF RICHARD O. LEMPERT WITH WILLIAM KIDDER, at 51 (April 2007).

legal profession by members of minority groups."[20] That is quite true, but the 1980 Standard suggests a regime of non-discrimination rather than race preference and was, in any event, a far cry from 2006 where such preferences were made mandatory and carry the implied threat of dis-accreditation.

Smith said the proposed new language had been greeted with overwhelming support by the membership, not a single dissenting voice having been raised in opposition. He next presented a standard list of measures a law school might undertake to boost the presence of minority students including selective outreach to undergraduate campuses, so-called "pipeline programs," designed to attract students representing targeted groups to careers in the law, and summer academic programs designed to get matriculating 1Ls off to a more promising start. Of course, had these devices, either singularly or in concert, been able to produce the sort of numbers of minorities the schools or ABA were looking for, no one would be talking about mandatory race preferences in admissions. As was noted by several commissioners during discussion sessions, the imposition of an outcome-driven standard like diversity sustained by racial preferences in admissions is a function of the failure of such historic concepts of fairness as objectivity, shared standards and nondiscrimination to do the job.

Commissioners with strong convictions against race preferences could not be mollified. Prior to conclusion of the Commission's work, a total of five commissioners signed letters to the Department of Education taking issue with Standard 211 and urging rejection of the Council's petition for its re-recognition as an accrediting agency, or its retention only on condition that the Council withdraw support for Standard 211. The Commission would (in its formal report) recommend that the decision as to whether to invoke race preferences as a means of achieving diversity be left to the judgment of individual schools rather than to the coercive process of accreditation.

ACCREDITATION AND GEORGE MASON UNIVERSITY SCHOOL OF LAW

The institutional interest of the ABA requires an ever improving professional establishment with the prestige to attract students from selecting other professions and the community standing to survive relentless attacks against attorneys as beneficiaries of such legal bonanzas as class action lawsuits, contingency fees and punitive damages. This means improving the profession by steady increases in the academic credentials of students and faculty, making the courses more challenging and making the final hurdle—passage of the bar exam—sufficiently difficult so as to prevent those practicing law from leading clients into a series of legal train wrecks through ignorance, stupidity or sloth. The problem is that raising academic standards n and of itself decreases the number of minority acceptances. The "cure" for the problem, advocated by minority activists and embraced by the legal establishment, is affirmative action or racial preferences now enforced by the threatened whip of lost accreditation.

[20] U.S. COMM'N ON CIVIL RIGHTS, BRIEFING REPORT: AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, OPENING STATEMENT OF DEAN STEVEN R. SMITH, at 84 (April 2007).

A number of schools have faced the threat of dis-accreditation from the Council, but by far the most prominent case involved the George Mason Law School, located in northern Virginia, whose cause has been articulated in *Wall Street Journal* columns by Commissioner Gail Heriot and by David E. Bernstein, a distinguished member of the George Mason Law School faculty. The two have painted the school as a proud little institution bravely battling to uphold its academic integrity against a Council obsessed by numbers alone.

The law school was founded by the Virginia State legislature in 1979 and quickly came to specialize in the relationship between economics, statistics and the law. In other words, for one seeking to practice patent law, or serve as counsel to a trade delegation, and willing to put up with such minor indignities as mediocre academic status and a strangely designed library, it was not a bad place to go to school. But for those seeking a prestigious clerkship, a stint as assistant U.S. attorney or a life with Sullivan & Cromwell, there were far better choices.

At the time an ABA Council conducted its February 2000 site inspection of George Mason-- the first in seven years-- the school was trying to bolster its *U.S. News and World Report* ranking, in part by showing greater admission selectivity and by seeking to recruit more blue chip scholars for its full-time faculty, then standing at 32 tenure track professors, including two African-Americans.

A more competitive admissions process took its toll on minorities. They constituted 11.1 percent of full-time first-year students in 1997, 10.4 percent in 1998 and 6.5 percent in 1999.[21] In the fall 2000 entering class there were 11 minority students, but only three blacks.[22] In its own self-assessment prepared for the site-visit, school officials described an active and extensive effort to recruit minority applicants, including extensive visits to historically black colleges and universities. The school also ran a three-week "testing in" summer admission program open to applicants who showed potential as a student but who had come up short in at least one area of consequence, usually the LSAT. The program offered an alternative route to admission for minority students, but at the time of the site visit the results were far from electric.

What accounted for the low number of minority students winding up at a law school which-- for all of its toughening standards-- remained easier to get into than such other area schools as Georgetown, George Washington and the University of Virginia? The self-assessment offered three plausible explanations:

- First, the failure to offer need-based scholarship money, obviously due to the great competition for available resources at a young university still in the process of self-definition. With even the neediest students limited to federal loans, George Mason was at a grave disadvantage in the competition for minority

[21] ABA George Mason University School of Law Site Report (Feb 27-March 1, 2000).
[22] Action of the ABA Accreditation Committee (June, 2001)

students, many of whom enjoy scholarship awards administered as a form of affirmative action.

- Second, George Mason was unwilling to compromise its admission criteria for purposes of admitting blacks or other minorities into the program. This stemmed in part from the school's quest to improve its *U.S. News* profile and also from the fact that until 2003 when *Grutter* was decided, a number of law school academics had concluded that race preferences were illegal. After all, a Supreme Court which had struck down state and federal set-asides and whose "swing" Justice, Sandra Day O'Connor, had likened race-motivated congressional redistricting to *apartheid*, seemed poised to deal a death blow to race preferences.

- Third, Site Committee members also encountered the view that the school's emphasis on economic analysis and its reputation as a "conservative" university further eroded its attraction to minority students.

In its summary, the Committee reported that "there are serious concerns about the opportunities offered to minorities, both in faculty recruitment and in student enrollment, as those numbers have been declining, and there appears to be no plan of how to address that situation other than to expand outreach to student applicants."[23]

In contemplating how to address the problem, George Mason had another difficult issue: the performance of its recent alumni on area bar exams. Rates in both Maryland and Virginia had fallen below statewide average. An influx of low-scoring minorities could play havoc with efforts to rescue that situation, gravely affecting its national standing. But without more blacks there would be no accreditation, period. The school resolved this Hobson's choice by easing admission standards for minorities, winding up with 10.98 percent in 2001 and 16.16 percent the following year. Still the ABA Council summoned the university president and law school dean, informing them there would be no accreditation without a big increase in black enrollment. The school responded quickly by stepping up its minority recruitment efforts, tampering again with admissions standards and naming an assistant dean to coordinate the program. As recounted by Commissioner Heriot in a *Wall Street Journal* column, this produced a 17.3 percent minority enrollment in the 2003 entering class and 19 percent in 2004. Even this failed to satisfy the ABA as only 23 of the 99 minority students entering in 2003 were African-American while the following year the figures were 23 out of 111. Not mentioned by the Council was the fact that many more African-Americans had received letters of acceptance but had chosen to attend other law schools. In 2004, for example 67 blacks were offered places in the freshman class, while 23 enrolled.[24]

It would not be until 2006 that GMU Law received word of its re-accreditation. The affair has left a bitter taste in the mouths of those who believe such strong-arm tactics, appropriate perhaps to an earlier era of massive southern resistance to

[23] ABA Site Committee Report on George Mason University School of Law, February 27-March 1, 2000, at 52.
[24] Gail Heriot, Op-Ed., *The ABA's 'Diversity Diktat,'* The WALL STREET JOURNAL, April 28, 2008, at A19.

desegregation, have no place in the more nuanced debates over affirmative action. Academicians like Sander, Heriot and the Thernstroms (Steven, a historian, and Abigail) suggest that it hinders rather than helps black law students by mismatching them with whites and Asian-Americans better equipped to meet the challenges of an education at one law school or another. They note that only 45 percent of matriculating black law students will pass a state bar exam on their first try while only 57 percent will ever pass one. And, as we shall later explore, while recognizing that *Bakke* and *Grutter* establish the right of colleges and universities to take race into consideration for purposes of achieving diversity of thought and experience, they are equally free to conclude that academic merit trumps race as a virtue for admissions purposes. Under the law, the conservatives argue, the schools have no obligation to impose race preferences; nor can such an obligation be imposed upon them by a group like the ABA. As one of its key recommendations, the Commission urged the Department of Education to end the ABA role in accrediting law schools. Instead, DOE limited its renewal to 18 months rather than the customary five years. Then it postponed a verdict for another six months. That bell will toll during the waning days of the Bush Administration. A definitive policy decision awaits his successor.

THE COUNTERACTING FORCE OF ACCREDITATION

If the Council, as well as its parent ABA can be considered comfortably liberal, most of the heat it takes originates even further to the left. Take the case of Thomas M. Cooley Law School. Located on three widely separated campuses in the state of Michigan, the school boasts more than 2,900 students, making it the largest law school in the country.

No one will ever call Cooley the Harvard of the mid-west. Prior to each admission cycle it publishes its minimum acceptable LSAT score, usually in days past, just a point or two above the 141 fail score below which applicants face a presumption of non-suitability for the study of law. The next step involves a formula merging of LSAT and GPA with anyone achieving the published number eligible to enroll. Admission is then presented on a first-come, first-served basis until the available places are filled. A brief character-check confirms the admission. No essays on the application telling admissions officers how I coped with Dad's cancer, or racism in Grand Rapids. Everything is race-neutral. Once enrolled, a well-organized academic booster program helps most students graduate. School officials say that all but about a percent or two of student loans are eventually repaid. Bar exam passage rates exceed 80 percent. Until recently roughly 22 percent of the students were black, the highest in the country excluding historically black colleges and universities.[25]

[25] Phone interview with John Nussbaumer, Professor and Associate Dean, Thomas M. Cooley Law School (July 2008).

The ABA found Cooley's low LSAT scores intolerable. One recent chairman had described even a 147 LSAT standard as "very, very short of the mark."[26] Threat followed threat until the ABA presented Cooley with a "Show Cause Order," to explain why it should not lose its accreditation.[27] At a New York symposium, one senior ABA official said such a step was necessary "to maintain quality and prevent consumer fraud."[28] The school decided the risk of an accreditation loss was too great and immediately raised the standard. Virtually overnight, black enrollment went from 22 percent down to 10 percent.

John Nussbaumer, Professor and Associate Dean at Cooley, a passionate critic of current ABA practice, published a study in the Winter 2006 *St. John's Law Review* in which he reviewed the experience of 84 law schools located coast to coast and border to border during the 2002-2004 period. He was looking for any correlation between rising standards and falling African-American attendance. He reported:

- First, 82% (69/84) of the schools studied raised their 25th percentile LSAT scores during the two-year period;

- Second, 62% (43/69) of the schools that raised their 25th percentile score saw their African-American student enrollment decrease by an average of 19%;

- Third, while total student enrollment at all schools increased from 70, 803 to 74, 857 students (+5.7%) total African-American enrollment decreased from 5277 to 5074 students (-3.8%), a net difference of 9.5%;

- Lastly, the percentage of African-American students enrolled decreased from 7.6% to 7.0 %. [29]

Nussbaumer argues that in their yen to improve their *U.S. News and World Report* ranking, a large number of law schools have come to place far too much emphasis on LSAT scores. This in the face of warnings by the Law School Admissions Council—which writes the exam—that it "should be used only as one of several criteria for evaluation and should not be given undue weight solely because it is convenient."[30] The same organization strongly discourages using cut-off LSAT scores because they "may have a greater adverse impact upon applicants from minority groups than upon the general applicant population."[31] By ignoring this advice, both the law schools and the

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[26] *Id.*
[27] Phone interview with David E. Bernstein (August 2008)
[28] John Nussbaumer, *Symposium: The Ronald H. Brown Center for Civil Rights and Economic Development Presents: The LSAT, U.S. News & World Report, and Minority Admissions: Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession,* 80 ST. JOHN'S L/ REV. 167 at 176.
[29] John Nussbaumer, *Symposium: The Ronald H. Brown Center for Civil Rights and Economic Development Presents: The LSAT, U.S. News & World Report, and Minority Admissions: Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession,* 80 ST. JOHN'S L/ REV. 167 at 174.
[30] LAW SCH. ADMISSIONS COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (1999), available at http://www.lsacnet.org/lsac/publications/CAUTIONARYpolicies2003.pdf.
[31] *Id.*

ABA Council "remain responsible for creating a de facto and racially discriminatory quota system that effectively restricts African-American access to the legal profession." Nussbaumer and many of his colleagues on the left endorse a "multiple outcomes" test for accreditation. If a law school specializes in navigating minorities toward good bar passage rates, who cares if their median LSAT score was 135? If a school steers its students toward community service law and they end up leading battles for tenant rights and more community policing, is this place not serving the public interest as well as a more prestigious shop offering its graduates a ticket to Wall Street, Scarsdale and the Old Oaks Country Club?

The purpose in presenting Nussbaumer's argument is to depict some of the countervailing pressures to which the ABA Council is subjected, not to exalt his argument. To the contrary, the LSAT, in concert with college GPA, is widely accepted by law school admissions officers as a good predictor of first-year performance. And, in the view of this observer, the cure for the disparate impact on black students of a 141 LSAT cut-off is to focus on improving black performance rather than accepting that because we as a society are unhappy with the results we elect to ignore them. The more difficult question occurs when a school like Cooley comes along that breaks all the rules but seems to come out all right. And here the late Pat Moynihan's "benign neglect" formula may be the best medicine.

ADMINISTRATION OVERSIGHT

The tone of the administration's stance on questions of affirmative action was established in the *Grutter* and *Gratz* cases when Solicitor General Olson argued that the admissions procedures followed by the University of Michigan Law School and undergraduate program respectively were not narrowly enough tailored to satisfy the law and were thus not protected by the Court's 1978 decision in *Bakke*. "[T]his case requires this Court to break no new ground," he told the justices comfortingly.[32] Now, in the waning days of the Bush presidency, the administration still has yet to find an affirmative action model it likes or a constitutional basis for opposing the concept. Further, the Supreme Court had spoken so recently on the subject-- Justice O'Connor proposing a Rip Van Winkle-like 25-year period of dormancy-- that a basic respect for *stare decisis* cautions against an attack on diversity-inspired affirmative action on the nation's campuses any time soon. But there should have been nothing inhibiting the Department of Education from battling on some important though less than momentous battles. To date their record is mixed.

As 2008 dawned it became clear that DOE lacked the stomach for a decisive battle over compulsory affirmative action mandated by the ABA and backed by the express or implied threat of dis-accreditation. Nor would it embrace the other principal recommendation of the Civil Right Commission-- full disclosure of the extent of race preferences, the results of affirmative action on its intended beneficiaries and the reasonable expectations, both academically and professionally, of a student

[32] Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Grutter v. Bollinger*, 123 S. Ct 2325 (2003) (No. 02-241).

contemplating her affirmative action options. Instead it came up with the idea of linking accreditation to bar exam passage rates, a matter that had been discussed with NACIQI, its in-house think tank, as early as 2006. The plan links bar exam passage rates relative to other test takers and penalizes failing schools with dis-accreditation. Schools can pass muster in one of three ways. First, they may show that in 3 of the previous 5 years, the average of first-time bar passage rates fell no more that 15 percentage points below the average in that jurisdiction; second they may show that at least 75% of the school's graduates eventually pass the bar over a five-year calendar; finally, they may show that, in three of the past five years, 75% of the school's graduates passed the bar regardless of what happened the other two years.[33]

The rule forces on the super-liberal and ethnic advocacy groups an objective standard with consequences. But it has several disadvantages too. First, many of the best law schools have relatively few required courses, preferring to provide clinical opportunities for their students that may have little applicability to the exam. Many schools known to "teach the exam" are far from among the nation's best. Second, bar exams differ from state to state, as do passing grades. A lot is at stake, given the absence of uniformity. Third, a large number of candidates take a crash bar review course, sometimes taught and administered by a law school and sometimes not. Penalizing a school, even by adverse publicity, for what may have been deficiencies in the preparation and presentation of material by, say the Practicing Law Institute, hardly seems wise. Finally the degree of transparency of the process is likely to prove troublesome. For example, the process does not call for the dis-aggregation of minority test results. Nor is it clear that schools will receive results from jurisdictions where only a handful of alumni take the exam.

The strong sense here is that the Department of Education was searching for a political rather than a pedagogical solution to the issues raised first by Sander and later by the Civil Rights Commission. But the bar passage approach was too weak to fully satisfy the reformers. And the political left and minority advocates would not accept as a lasting fixture a mechanical numerical formula of no proven validity which left no discretion to the Council or its Accreditation Committee and which they felt was likely to perpetuate existing stereotypes regarding black academic performance. Still, when the Council and House of Delegates gathered in February 2008 to consider the new rule, more of these left-wing voices were raised in at least equivocal support for the proposal than opposition to it. This appeared at least in part a positive response to what delegates believed were DOE assurances that the process of review was on-going and could produce additional changes. It also reflected what many thought was a backstage deal by virtue of which the ABA would swallow the new rule and the Department of Education would deep six any effort to replace the ABA as accrediting agent. Jose Garcia-Pedrosa, the Council's delegate to the House of delegates, was blunt in advising adoption of the new rule: "The risk that we run if we do not take action in adopting…this proposed new interpretation, the risk is that the United States Department of Education will not grant the ABA's currently pending application for re-designation as the accrediting agency for law schools

[33] Transcript of ABA House of Delegates Mid-Year Meeting (Feb 11, 2008).

in America."[34] The new rule would also satisfy the requirement that Council rules on accreditation be "transparent, measurable and consistent."[35]

The minority caucus endorsed the new rule with the understanding that it would be closely monitored. And when the Puerto Rican caucus announced it would vote 'no' because of its potentially disproportionate affect upon Puerto Rican and African-American candidates, Chris Johnson, the general counsel for General Motors, replied that based on recent bar results, had the proposed rule been in effect, only six law schools in the nation would have been affected.[36]

The proposal passed overwhelmingly by voice vote. One delegate quipped that the vote had saved the group from being taken over by the Federalist Society, a conservative lawyers' organization.[37]

One ABA delegate was not terribly pleased by the proceeding. Wallace D. Riley runs his own small practice in Grosse Pointe Farms, Michigan. Just over half century ago he was an assistant council to Joseph Nye Welch during the Army-McCarthy hearings. Later he served as President of the American Bar Association. Wallace sees the Council as "out of control."[38] He says it should not be courting dismissal by threatening law schools with dis-accreditation over affirmative action. In a letter to the Department of Education dated April 1, 2008, Riley noted charges of secrecy and a lack of candor with respect to the performance of law schools, saying they raised questions as to "whether it has sufficient respect for the Department's regulatory process that it can be trusted to abide by the Department's regulations. The letter concluded: "I would urge you to seriously consider whether the Council has met its burden of demonstrating that its application for renewed recognition should be granted." [39]

THE CASE FOR THE ABA

Any full and fair assessment of the ABA's reign over law school accreditation must begin by acknowledging the daunting task it has set for itself in terms of bringing representative numbers of African-Americans into the profession. With all the controversy over race preferences and the mismatch factor, the most stunning fact is the failure of the nation's educational system to produce enough blacks qualified to study the law to simply take their places alongside those of other races and ethnicities. According to data provided by the Congressional Black Caucus, between 2002 and 2006, out of 50,320 total African American law school applicants, only 18,700 were admitted to at least one school—a shut-out rate of 63%.[40] The comparable rate for white applicants was 35%. And the most recent data, from 2007, shows the numbers are getting worse, not better. That year, not only was the total number of African American applicants down by

[34] *Id*.
[35] *Id*.
[36] *Id.*
[37] *Id.* Carroll Pope, Delegate from National Bar Association.
[38] Telephone Interview with Wallace D. Riley (August, 2008).
[39] Letter from Wallace D. Riley to Department of Education (April 1, 2008).
[40] Data from LSACNet.org. (See Data Volume Summaries by Ethnic and Gender Group).

2.7% to 9,090, but the number of African American applicants who were actually admitted to a single law school was also down 0.7% to 3,890 students.[41]

Numbers alone are not always meaningful and are not always regarded as such by the courts. In the *Croson* case involving substantial minority set-asides in municipal contracts, Justice O'Connor was unmoved by evidence that prior to the set-asides minority shares of municipal contracts had been in the low single digits, rejecting "an assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." [42] But here the arithmetic is compelling.

The numbers show that African-American law student enrollment peaked in the 1995-96 academic year with 9,779 students enrolling out of total of 129,397 students, reflecting a 7.6% African-American enrollment. In the 2006-07 academic year black enrollment dwindled to 9,529 students out of a total student enrollment of 141,031, a mere 6.8%. And the decline occurred during a period in which the ABA fully or provisionally approved 19 new law schools, overall enrollment increased by 9%, and overall *minority* enrollment-- including both Hispanic and Asian-Americans-- increased by 53%.[43] Most recently, in the 2007-2008 academic year, African American enrollment was down again, this time to an enrollment of only 9,483 students out of a total of 150,031 students.[44]

Of the dwindling number of African-American students who do enroll, fewer still will graduate, and the chances of an African-American student's successful completion of the J.D. degree are barely over 50%.[45] The number of J.D. degrees awarded to African-Americans peaked in 1998 with 2,943 degrees awarded. Since then, while the total number of J.D. degrees awarded has increased by about 1.4%, the number of degrees awarded to African-Americans has dropped by 7.6%.[46]

The trends are not surprising when one also takes into account the fact that fewer African-Americans are even entering the law school application process. While the total number of applicants for the fall 2005 entering class fell by 4.8%, according to the Law School Admissions Council, the number of African-American applicants fell by 6.3%. Only the number of Chicano/Mexican-American and Asian/Pacific Islander applicants fell at greater rates, 10.4% and 7.3% respectively.[47] In 2006, the number of African American applicants fell again by 6.6% and while the decrease was less drastic in 2007, down only 2.7%, the numbers remain discouraging.

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[41] *Id.*
[42] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).
[43] *See* American Bar Association, Legal Education Statistics. Available at: http://www.abanet.org/legaled/statistics/stats.html
[44] *See Id*.
[45] *See* Nussbaumer, 80 ST. JOHNS L. REV. at 169. (Statistics regarding the graduation rates of African American law students are no longer available on the ABA website).
[46] *See* Nussbaumer 80 ST. JOHNS. L. REV. at 169.
[47] Law Sch. Admission Council, Current Volume Summary (2005), *available at* http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=%2fPrivate%2fMainPage2.aspx.

In light of numbers which would seem to underline concerns regarding a broader estrangement of blacks from the law, it is easy to see why supporters of the ABA's new Standards and Interpretations hold them out as a necessary reaffirmation of the ABA's commitment to diversity. Critics may see the new Standards as usurping the lawful power of individual schools to set their own diversity policies while, for good measure, coercing them into working around any Prop. 209-type impediments, if not outright breaking the law. However, ABA defenders point to the "crystal clear" language in the Standards to prove otherwise.[48] In their sharply worded critique of the Civil Rights Commission recommendations, Commissioners Arlen D. Melendez and Michael J. Yaki argue that in demonstrating their commitment to diversity, schools can be as eclectic as their individual circumstances suggest, lawfully taking race into account as permitted by the Supreme Court. The ABA language is permissive, perhaps even suggestive, but certainly not mandatory. What's more, it is the bare minimum necessary to staunch the flow of African Americans away from the study of law.

Melendez and Yaki also shrug off critics' argument that the ABA is "pressuring" the use of racial preferences insofar as they are the "easiest" way of establishing a diverse student body. They point to the many methods of diversity recruiting besides racial preferences already widely utilized by law schools throughout the country. Such methods include: admissions recruitment and outreach at undergraduate schools with high minority populations; "pipeline" efforts to encourage minorities at early ages to consider the legal profession; and consideration of the familiar litany of strengths and achievements beyond LSAT scores and GPAs. [49]

In response to what critics see as the Affirmative Action numbers game offered by Sander, Yaki and Melendez offer one of their own showing the phenomenal growth in the number of African-American lawyers since the approximate end of the segregation era in 1970. Tracing that growth, the U.S. Census estimates that by May, 2007 there were approximately 44,800 black lawyers in the U.S., compared to 24,700 in 1990, 15,700 in 1980 and just 4,000 in 1970.[50] Many among those crops of ground-breakers were beneficiaries of affirmative action.

Whether or not one is a proponent of affirmative action, Yaki and Melendez maintain that without it, "…even today many African American, Native American and Hispanic students would never become lawyers."[51] Moreover, most would never attend elite schools-- the nation's breeding ground for so many of its future leaders. They point to a critique of Sander's study published in the Stanford Law Review that found that 60%

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[48] *See* U.S. COMM'N ON CIVIL RIGHTS, BRIEFING REPORT: AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, JOINT DISSENT OF COMMISSIONER ARLAN D. MELENDEZ AND COMMISSIONER MICHAEL YAKI AT 196 (April 2007).
[49] *See Id.*
[50] *See Id.* (citing United States Census Bureau data *available* at http://111.census.gov/Press-Release/www/release/archives/fact_for_features_special_editions/006088.html (last visited May 23, 2007)).
[51] *Id*. at 188.

of black law professors at ABA accredited schools graduated from the top 20 law schools, among whom 48% graduated from top ten schools.[52]

While the statistics on the successes affirmative action are not always congruous, and while at least one critic has coined the ABA's diversity mandate, "affirmative blackmail,"[53] many believe eliminating the requirement from the accreditation process would surely be the "poison pill" for affirmative action in the law school drink and perhaps beyond. Those schools that chose to abandon affirmative action entirely would have a marked advantage over those retaining their programs. They would be relieved of the financial burdens associated with minority recruitment, retention and scholarship programs. They would substantially increase their median GPA and LSAT scores which would likely increase their profile in the rankings. Affirmative action schools would not be able to compete and would eventually be forced to abandon the sinking ship. In a difficult economic period, how many schools would join this "race to the bottom," this crusade of indifference? No one can predict this with certainty.

Defenders of the ABA Council further maintain that its devotion to affirmative action, embodied in its new Standards, is within the spirit and the letter of the law and mirrors recognition of the importance of diversity articulated by the Supreme Court in *Grutter*.

In holding that the University of Michigan's Law School has a compelling interest in attaining a diverse student body, and that the school's admissions program is narrowly tailored to serve that interest, Justice Sandra Day O'Connor stated that the Court's conclusion was "informed by [the] view that attaining a diverse student body is at the heart of the Law School's proper institutional mission…"[54] Further, the Court agreed that the benefits of the law school's admission's policy, which seeks to achieve diversity through the enrollment of a 'critical mass' of minority students,[55] are substantial since it promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables students to better understand persons of different races."[56] It follows that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when students are exposed to "the greatest possible variety of backgrounds."[57]

The benefits of diversity far transcend those derived by the students while they are in school. With a nod to Justice Powell's opinion in *Bakke*, one *amici* opined that, "it is not too much to say that the nation's future depends upon leaders trained through wide

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[52] *Id.* (citing David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1896 n. 145 (2005)(analyzing data on 604 African American professors in the 2003-04 AALS Directory of Law Teachers).

[53] David Bernstein *Affirmative Blackmail: The ABA Orders Laws Schools to Practice Racial Preference-Even If They Have to Break the Law*, WALL ST. J., Feb 11, 2006, at A9.

[54] *Grutter*, 539 U.S. at 330.

[55] Brief for Respondents Bollinger et al. 13.

[56] *Grutter*, 539 U.S. at 330 (quoting App. To Pet. for Cert. 246a).

[57] *Id.* (quoting App. to Pet. For Cert. at 246a, 244a.).

exposure to the ideas and mores of students as diverse as this Nation of many peoples."[58] Moreover, the Court eloquently espoused the critical importance of diversity in law schools specifically:

> Universities, and in particular law schools, represent the training ground for a large number of our nation's leaders… In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.' Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members or our heterogeneous society may participate in the education necessary to succeed in America.[59]

Those sentiments were reverberated in one *amici's* eloquent articulation of the importance of infusing the American workforce with lawyers well-versed in diversity:

> Well-educated employees with diverse backgrounds, who are emerging as the business leaders of the twenty-first century, are essential to maintain America's competitiveness in an increasingly diverse global economy. A diverse workforce not only generates varied perspectives, which improve decision-making, increase productivity, and help companies understand the different environments in which business is conducted today, but also contributes to a positive work environment and decreasing incidents of discrimination. It is therefore critical for American businesses to be able to continue to foster a climate that encourages and facilitates further development of diversity in their workforces and throughout the country.[60]

While Justice O'Connor's opinion in *Grutter* was legally faithful to Justice Powell's opinion in *Bakke*, there was less lyrical embrace of Idaho farm boys, talented musicians and basketball mates striking lasting friendships and more of the student who has internalized his appreciation of different people and carries that appreciation into a globalized world, or an Army where more than a fifth of the soldiers are black.

Enforcing a policy of affirmative action endorsed overwhelmingly by its House of Delegates was, in a very real sense, the least the ABA could do. And the overwhelming acceptance by the country's law schools of the ABA Council accreditation program and participation in related activities, belie the picture of arbitrary rule painted by outside foes of affirmative action. Four hundred and ten thousand lawyers can't be wrong. The symbiotic relationship between the ABA and the nation's law schools is worthy of national acclaim as the ultimate in self government.

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[58] *Grutter v. Bollinger*, 2002 U.S. Briefs 241, 4-5 (U.S. Feb. 24, 2003).
[59] *Grutter*, 539 U.S. at 332-333 (internal citations omitted).
[60] *Id*. at 8-9.

Similarly, the ABA site committee visits are normally viewed as more of a crutch than a whip. A site visit is, in the overwhelming majority of cases, part of a collaborative process that facilitates the exchange of information and insight on everything from governance to library facilities and yes, to affirmative action. GMU, widely portrayed by ABA opponents as poor, beleaguered and administratively harassed, might well be a case in point. After a 1993 accreditation inspection the ABA warned GMU that it was concerned about the lack of a "presence of a demonstrable commitment to providing full opportunities for entry by qualified members of groups which have been victims of discrimination, given declining enrollment of African American students and the lack of minority faculty."[61] The law school made assurances to remedy the deficiencies and was left to its own devices for the next seven years. During that period, "virtually all unrestricted fellowship funds were committed to support minority students."[62] The school substantially increased its recruitment budget and fellowship funds in 1996, and by 1997 the school enrolled 11.7% minority students. And yet, by 2000 GMU wound up with only 3 African American students in its entering class.[63]

You don't have to be Warren Buffet to see how that investment was failing to yield dividends. It was only after some well-deserved prodding by the ABA that the school made any significant and tangible headway by offering more scholarship money, an academic help program, a dean for minority affairs and some race preferences. And presto! Results. Of course, the case can be made that the ABA's objections to GMU's admissions process was nothing more than an unbridled assault on the prerogatives of an institution that simply did not believe in basing admissions on race. Yet, others fail to see how great principles were ever at stake in a school whose calculated incompetence made it seem determined to become a Caucasian academic fortress on the Potomac.

THE CASE AGAINST ABA

ABA defenders are wrong in a deep and fundamental way. Their unequivocal embrace of the ABA's policies generally, and affirmative action specifically are misguided at best and pernicious at worst. The ABA Council and its supporters are the latest in a long line of social activists in this country who are corrupting the problem-solving process in the area of racial justice by mistaking symptoms as the disease and then treating the symptoms incompetently, or worse. Without turning this into a sociology paper, it is fair to report that virtually every qualified sociologist who has spent time examining centers of urban black life has come away talking about single parenthood, delinquent dads, the disappearance of community role models, failing schools, academic disengagement, the drug culture and similar afflictions.[64] It takes the

[61] ABA George Mason Site Report, Feb 27- March 1, 2000.
[62] *Id.*
[63] Action of the Accreditation Committee, June, 2001.
[64] *See for e.g.*, William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy*, University of Chicago Press (1990); Nathan Glazer, *The Limits of Social Policy*, Harvard University Press (1988); John U. Ugbu, *Black American Students in an Affluent Suburb: A Study of Academic Disengagement*, Lawrence Erlbaum Associates (2003).

mobilization of human resources in entire communities to fight these problems. It takes time. It takes money. It takes candor.

By contrast the minority activist groups both inside and outside the ABA see the minority problem in terms of numbers, and they set their sites on those devices that inform us about the numbers, much as the resident of a northern state distressed over cold winters, might spend his time destroying thermometers. African-Americans make up nearly 13% of the U.S. population but only about 4% of its lawyers. So, if too many are being rejected from law school because of poor performance on the LSAT, discredit that test and dispense with it or downgrade its significance. And if the numbers still are not right, let's start applying new admissions criteria, by giving credit for overcoming personal tragedy or race discrimination, or any other quality which can somehow be manipulated to minority applicant advantage.

When the numbers still look bad, suppress them with the claim that one particular test or another tends to perpetuate negative stereotypes about black people, that it has a discriminatory impact on African-American test takers and that it "lacks validity," an argument that seems never to falter in the face of overwhelming contrary evidence. And in the end, the cure for failed affirmative action is more affirmative action in the one area—campus diversity—where race preferences remain legal. But the ABA-imposed Standards, worded to appear permissive but backed by the lash of dis-accreditation probably are not. Again, consider George Mason. Yes, GMU ran an incoherent affirmative action program. But the question of whether the ABA Council had the right to impose race preferences on a recalcitrant program, must be answered in the negative**.**

While the razor-thin majority in *Grutter* held that student body diversity is a compelling state interest, and that the University of Michigan Law School could constitutionally discriminate against whites and Asians to achieve this interest because its particular program was narrowly tailored, its decision was also restricted by another important premise:

> [The United States Supreme Court] [has] long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . The freedom of a university to make its own judgments as to education includes the selection of its student body. . . By claiming the right to select those students who will contribute the most to the robust exchange of ideas, a university seeks to achieve a goal that is if paramount importance in the fulfillment of its mission.[65]

The ABA's action with regard to GMU Law runs afoul of the Court's opinion and thus of the constitution for two key reasons. First, the *Grutter* Court specifically states that freedom of speech, guaranteed by the First Amendment, also guarantees universities the freedom to *select its own student body.* The ABA denied GMU Law this constitutionally mandated right when it forced the university to completely abandon its

[65] *Grutter*, 539 U.S. at 332-33 (internal citations omitted).

longstanding race-neutral admission policy, in favor of one that met the specifications of the ABA's own diversity blueprint. Put another way, if *Grutter* gives universities the right to discriminate in the interest of diversity, it also gives them the right *not* to discriminate. [66] In doing so it "tak[es] into account complex educational judgments in an area that lies primarily within the expertise of the university," and gives "a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[67] The ABA does not leave schools vying for accreditation that same option.

Second, the unique academic deference afforded to universities under the *Grutter* decision means that they are not subject to the same equal protection standards as other government entities. "Whatever the merit of this reasoning, the ABA is not a university, and its Council of the Section of Legal Education and Admissions to the Bar is not entitled to academic deference."[68]

Moreover, while the *Grutter* opinion leaves the door open to universities who choose to utilize racial preferences to obtain diversity in their student bodies, it also recognizes Michigan Law School's appreciation for the "broad range of qualities and experiences that may be considered valuable contributions to student body diversity."[69] Michigan Law School's policy makes clear that, in addition to minority status, students may make contributions to the diversity of the student body if they have lived or traveled widely abroad, are fluent in several foreign languages, have overcome personal adversity or hardship, have performed community service, or have had successful careers in other fields.[70] The Law School's broader concept of diversity is one of the characteristics that distinguished it, it the Court's eyes, from the U.C. Davis Medical School's admissions policy declared unconstitutional in *Bakke.*

But a student body rich with French speakers and poor white farmers from Idaho won't get you far with ABA come accreditation time. The ABA will monitor your "commitment" to diversity, or to "underrepresented groups, particularly racial and ethnic minorities,"[71] by the "results achieved."[72] And by "results" the ABA means numbers… just ask GMU.

As evident in the GMU debacle, the legal problem with the ABA's "results" driven approach is that it looks like a mandated quasi-quota system that appears to force law schools to implement programs to achieve unstated but very real percentages of minority students in order to maintain their accreditation. And that sounds a lot like the programs banned in *Bakke* and *Gratz.*

No one urges the muzzling of ABA. If the organization wishes to endorse race preferences it is certainly free to do. It can publish the results of studies suggesting good

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[66] Gail Heriot, *The ABA's 'Diversity' Diktat,* The Wall Street Journal, Aprol 28, 2008; Page A19.
[67] *Grutter*, 539 U.S. at 328.
[68] Gail Heriot, *The ABA's 'Diversity' Diktat,* The Wall Street Journal, April 28, 2008; Page A19.
[69] *Grutter*, 539 U.S. at 338.
[70] *Id*.
[71] Standard 212.
[72] Interpretation 212-3.

results from affirmative action or challenging the conclusions or methodology of those on the other side. It can conduct seminars for those university deans and administrators who wish to remain current with the latest developments in the field—what seems to be working well and what does not. What it cannot do is to use its coercive power to force obedience against schools who have concluded that substantial race preferences simply don't work.

As an accreditation agency, the ABA is certainly entitled to stop GMU from breaking the law by discriminating against African-American or any other ethnic group, but it can't pressure schools to break the laws of their respective states or violate the constitution. In the GMU case, the ABA was not satisfied when GMU's efforts raised its minority enrollment in its entering class from 6.5% to 10.98% in 2001 and 16.1% in 2003. Nor was it satisfied when those numbers were up to 17.3% in 2003 and 19% in 2004.[73] In order to achieve the *ABA's* desired results, GMU was forced to lower its admissions standards, or institute preferential standards for minority students and to do so significantly.

The only characteristic of these students that was important to the ABA's notion of diversity was the fact that they were minorities, and specifically blacks. Both *Bakke* and *Gratz* found such programs unconstitutional. As Justice Powell declared in *Bakke*, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[74] While Justice Powell explained that it would be permissible for a university to employ an admissions program that contemplated one's race or ethnic background as a "plus" in a particular applicant's file, in such a program race would not be the determining factor in that student's admission. Instead the program would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[75]

CONCLUSION

The admissions program mandated by the ABA in the GMU Law case was about as flexible as Guantanamo jurisprudence. Its concept of diversity is far narrower than the one declared a compelling government interest in *Grutter*, and the pressure asserted on GMU Law violated the school's constitutional right to academic deference and freedom of speech guaranteed by the First Amendment.

And while we have been addressing the situation at GMU Law specifically and law schools generally, one should be aware that the scope of the accreditation issue extends to nearly every university in the country and to many schools within universities and departments within schools. Nearly all have to wrestle with affirmative action requirements written into the standards set by the prevailing accreditation authority. At any given point in time, universities, schools and departments are being threatened with the denial of accreditation or placed on "provisional status" whereby their accreditation

[73] Heriot at A19.
[74] *Bakke*, 438 U.S. at 307.
[75] *Id.* at 317.

hangs in the balance while they attempt to meet the demands of their accrediting authority. This is no way to run a railroad, nor is it a way to run an educational system. Rather it is a daily insult to academic integrity, to the independence of university decision making, and to the spirit and the letter of Supreme Court decisions.

One suspects that had GMU Law been left to its own devices it would gradually have moved toward adoption of a modest affirmative action program rather than triggering a stampede in the other direction. The policy has its deepest roots at the nation's elite schools and probably its relative success at these institutions is due to better academic support programs, more generous financial aide and a robust network of alumni ready to hire minority candidates, at least for that first job. So long as these elite schools remain committed, most of the others would likely follow the flag until at some point the Supreme Court declares that the institutionalization of race preferences has run its course.

Very little in our documented experience with affirmative action would suggest that such a day should be lamented. Rather, when the complete record is laid bare scholars and policy-makers alike will conclude that you do not erase inequality by pitting students separated by 150 SAT or 25 LSAT points against each other. Rather that confirms inequality at a terrible psychic cost. You cannot proclaim diversity while your policies encourage insularity and self-segregation. And you cannot define reality by keeping relevant records under lock and key.