

The American Bar Association’s “Diversity” Agenda Endangers the Integrity of the Legal Profession

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KEY TAKEAWAYS

The American Bar Association and other institutions have moved away from promoting *equality* under the law to promoting “equity” under the law.

Rather than equalizing opportunities for students and staff, these proposals would make law schools more race-conscious and less intellectually diverse.

Our legal system must be open and accessible—regardless of any specific characteristics—to all who come before it.

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.¹

—Chief Justice John Roberts

Equality under the law is a bedrock principle of our nation’s legal system. Unfortunately, many leading legal institutions, including the American Bar Association (ABA), have shifted their focus away from promoting equality under the law to promoting the more nefarious and nebulous idea of “equity” under the law. This shift may seem subtle, but it is not. It is a shift from the ideal of a “color-blind” society and legal system to one that is consciously color and race obsessed—one that affirmatively discriminates on the basis of race, albeit to fix the supposed systemic racism of our society and our legal system that many on the Left believe still exists today.

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Whereas the term “equality” has focused on equality of *opportunity* for all, “equity” focuses on equality of *outcomes*, which can only be guaranteed by discriminating against some to ensure the equal outcomes of others.

The legal profession is not alone in experiencing this shift. On the whole, our nation’s institutions are growingly preoccupied with race. Commitment to “diversity” is now corporate America’s not-so-secret password: a signal of one’s “woke” social consciousness—the kind that turns the once-prohibited use of race into the foremost consideration for most decisions at nearly every major corporation. The NASDAQ exchange, for example, has proposed (and the Securities and Exchange Commission has approved) a diversity rule for the boards of recognized corporations trading on the exchange that requires them to have at least two “diverse” board members, or to file a statement explaining why they do not.² New corporate business models focus less on profitability and shareholder returns and more on non-financial factors advanced by the social justice movement: environmental, social, and other governance goals,³ which prioritize certain investments because of their political impacts—even if they do not maximize shareholder returns.

These efforts are emblematic of the new, skin-deep, equity-focused “antiracism”⁴ in which one’s race matters first and foremost. These efforts require an active identification of and opposition to supposed instances of racism, with the goal of changing policies, behaviors, and beliefs that are not “antiracist” enough. Its proponents demonstrate a kind of religious fervor, requiring adherents to apologize for past racial sins, to recognize their own supposed inherent racial privilege (if they are not minority individuals), and to prioritize people that the proponents of this new “antiracism” have deemed oppressed or marginalized. This kind of “diversity” turns the once cherished and constitutionally guaranteed notion of equality on its head.

Unfortunately, the legal profession and its self-appointed governing membership body are no exception. In a series of ambiguous, costly, and ill-conceived proposals, the nation’s leading voluntary legal association, the ABA, has proposed⁵ a series of modifications to the rules of its governing platform and its accrediting standards, all of which are geared toward promoting equity over equality under the guise of increasing diversity, equity, and inclusion efforts at America’s law schools and among the legal profession more broadly.

Far from equalizing admission and scholarship opportunities for students and staff, these proposals would—as some prominent legal scholars have noted—instead make law schools more race-conscious, more politically correct, and less intellectually diverse.⁶ At stake is the ABA’s highly

sought-after accreditation, which it has granted to 199 of the nation's 237 law schools.⁷ This matters because in many states, law school graduates cannot sit for the bar exam unless the ABA has accredited their law school. And since the federal Department of Education recognizes the ABA as the only law school accrediting agency, certain financial aid and other financial benefits can be withheld from both a school and its students unless the ABA has accredited it. This shows the coercive pressure the ABA can bring to bear against law schools to adopt its controversial and constitutionally incompatible standards.

Needless to say, the defeat of the ABA's wrongheaded initiatives would ensure that the law, lawyers, and the legal academy remain committed to *equality*—rather than *equity*—under the law and, in that way, protect the notion that, to paraphrase the late Supreme Court Justice Antonin Scalia,⁸ in this country we are all one race: We are Americans.

Origins of the ABA

Lawyers have played an outsized role in our nation's history, from drafting our Founding documents to serving in public office to representing average Americans in court cases across the country. Though many today might disagree with him, Alexis de Tocqueville observed, “[I]n America there are no nobles or men of letters... [L]awyers consequently form the highest political class, and the most cultivated circle of society.” He continued, “[I]f I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar.”⁹

In other words, lawyers should be bound together by their common commitment to equal application of our laws to all citizens and to accurate interpretations of the very Constitution they have sworn to uphold and defend.

Founded in 1878,¹⁰ the ABA is the nation's oldest voluntary membership organization dedicated to the legal profession. Two of its most high-profile activities involve the setting of academic standards for and accrediting of law schools, and the formulation of model ethics codes related to the legal profession. Unfortunately, the ABA has used these two high-profile functions, particularly its accrediting function, to pursue a radical left-wing agenda.

Mission. The ABA's stated mission is “[to] serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” To that end, the ABA supports a “Diversity and Inclusion Center” that “promotes collaboration,

coordination, and communication to advance ABA Goal III—to eliminate bias and enhance diversity and inclusion throughout the Association, legal profession, and justice system.”¹¹

Those sound like laudable goals. But they are not, because the ABA does not use those terms in their ordinary sense. Instead, it uses them to advance its radical equity-over-equality agenda. The Center and the policies it produces are some of the more visible representations of the ABA’s well-documented and long-standing liberal bias¹² on issues from abortion to gun rights.¹³ And its increasing efforts to achieve social justice and “diversity” are reaching even further and stretching into every accredited law school in the United States.

Accreditation. Since 1965, with the Higher Education Act,¹⁴ the U.S. Department of Education has recognized the ABA as the sole national accrediting agency for American law school programs, thereby cementing its influence in shaping legal education and granting it near-monopoly¹⁵ power over it, as graduating from an ABA accredited law school is required in almost every state for applicants seeking admission to the bar.¹⁶ Accreditation is performed by the council of the ABA Section of Legal Education and Admissions to the Bar, which is an independent arm of the ABA.¹⁷

In order to receive accreditation from the ABA, law schools must prove that they are in compliance with the ABA’s standards of a “sound legal education” that include, among other things, meeting its standards on curriculum, facilities, services, and faculty. The ABA’s outsized influence in setting legal education standards might help to explain the leftist bent of legal education since those policies are largely in line with the ABA’s own liberal focus.

Leftist Bias. In 2015, even the ABA itself was compelled to recognize the results of a comprehensive study¹⁸ on the left-wing bias of the legal profession as a whole:

Many conservative commentators have aired claims that trial lawyers appear more liberal than the rest of the population, and they overwhelmingly contribute to Democratic candidates. Is it true? And is the legal profession on the whole left-leaning? A study by professors from Harvard, Stanford and the University of Chicago Law School says the answer is yes. “American lawyers lean to the left of the ideological spectrum.”¹⁹

Another study in 2018 revealed that the ABA’s emphasis on hiring those with preferred liberal ideological leanings at law schools was driving the pedagogy of law schools further leftward, thus perpetuating the problem of leftist bias in the legal profession overall.²⁰

Despite the already blatant bias in the profession, which the ABA itself contributed to, in 2021 it proposed a revised diversity standard for accrediting law schools that garnered significant professional criticism as perpetuating—rather than solving—the leftward lean of the legal profession and legal scholarship. This revised standard sought to use “diversity” to forcibly interject racial preferences into law school admissions and faculty-hiring decisions. So impactful and problematic was this proposal and the subsequent iterations of it, that—if adopted—law schools would be faced with a Hobson’s choice: risk losing federal funding by engaging in blatantly discriminatory behavior²¹ or risk losing their ABA accreditation.²²

The First Revisions to the Diversity Accreditation Standard: May 2021

So, how did all of this begin? The ABA has long maintained standards that guide its law school accreditation decisions. The ABA publishes these standards, numbers them in a way similar to other rule-based codes, and provides commentary/interpretive guidance about each standard (Think the Model Rules of Professional Conduct, the Federal Rules of Evidence, etc.). As part of this, the ABA has maintained Standard 206, entitled “Diversity and Inclusion,” for many years.

But after an ABA Fall 2020 Roundtable on Diversity, Inclusion, and Equity, a revised Standard 206 on “Diversity, Inclusion, *and Equity*” was released in May 2021, with the additional suggestion that this proposed²³ Standard 206 be made a “core” standard,²⁴ making a law school’s failure to comply grounds for public notice—something that if not rectified could lead to the law school losing accreditation. This proposal elevated the revised standard to the same position as other important standards, such as one that requires a certain percentage of a law school’s graduates to pass the bar exam within a certain period of time after graduation.

The revised standard read:

Standard 206: Diversity, Inclusion, and Equity

(a) A law school shall provide: (1) Full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly those related to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status; and (2) An environment that is inclusive and equitable with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.

(b) A law school shall take effective actions that, in their totality, demonstrate progress in (1) Diversifying the students, faculty, and staff; and (2) Creating an inclusive and equitable environment for students, faculty, and staff.²⁵

But the truly shocking statements came in the ABA's formal "interpretations" of the proposed revisions to Standard 206. In these, the ABA boldly asserted:

The requirement of a constitutional provision or statute that purports to prohibit consideration of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status in admissions or employment decisions is not a justification for a school's noncompliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the effective actions and progress required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.²⁶

Let that sink in: With this revised standard, the ABA essentially told law schools that the ABA's own controversial policy must trump any constitutional or statutory provisions that conflict with it. Common sense says that, if anything, the reverse should be true. True, it said that schools facing a constitutional or statutory prohibition would have to "demonstrate effective action and progress" by means "other than those prohibited," but how is that supposed to work? It is an impossible task.

Furthermore, the ABA said that in order to satisfy the standard and show that progress has been made toward diversifying the student body and the faculty, law schools should:

- Set and publish goals related to diversity and inclusion;
- Collect data disaggregated on race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status;
- Use pipeline programs to facilitate the recruitment of underrepresented groups;
- Provide diversity scholarships to students; and

- Keep hiring pools open until they include a diverse group of qualified faculty candidates.²⁷

To establish proof of progress towards creating an inclusive and equitable environment, law schools were encouraged to:

- Support affinity groups;
- Provide diversity, equity, and inclusion training; and
- Describe their efforts toward creating an inclusive and equitable environment.²⁸

Under this revised standard, law schools were also required to make affirmative hiring and admissions decisions favoring certain classes of individuals, with a strong emphasis on race.

Blowback. After its introduction in May 2021,²⁹ the proposed revision to Standard 206 resulted in significant blowback³⁰ from legal scholars and professionals who claimed the ABA was attempting to substantially restructure law schools by promoting racial preferences in law school admissions. These scholars and professionals said that doing so would lead to the kind of sameness in thinking about “diversity” and “inclusion” that would divest law schools of the very intellectual and professional diversity that is critical to the study of law.³¹

Unfortunately, this was only one of a series of problematic proposals put forward by the ABA.³² And more importantly, it ran afoul of settled legal principles that promote equality rather than equity under the law. To understand why this proposed revision and the subsequent iterations of it are so problematic, a brief overview of those legal principles is necessary.

Legally Flawed

Constitutional Implications of the Use of Racial Preferences in Higher Education. The Fourteenth Amendment to the U.S. Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”³³ The “central purpose” of the Equal Protection Clause “is to prevent the States from purposefully discriminating between individuals on the basis of race.”³⁴ This equal protection principle reflects our Nation’s understanding that racial classifications ultimately harm the individual and our society.³⁵ As a result, the U.S.

Supreme Court has recognized that “[c]lassifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’”³⁶ Therefore, “the Equal Protection Clause demands that racial classifications...be subjected to the ‘most rigid scrutiny.’”³⁷ Considerations of race must, to satisfy this standard of “strict scrutiny,” be narrowly tailored to further a compelling governmental interest.³⁸ This “strict scrutiny” analysis is required whether the use of a racial classification stems from state, federal, or local government action.³⁹

Because of the suspect nature of racial classifications, the Supreme Court has recognized only two instances in which the use of race is permissible: remedying the effects of past intentional discrimination and achieving diversity in higher education.⁴⁰ Yet even these are controversial. And the Supreme Court is currently reconsidering whether such race-based college admissions policies are even legal.⁴¹

To date, the Supreme Court’s seminal statement on the use of race in higher education came in 2003. In *Grutter v. Bollinger*, Justice Sandra Day O’Connor wrote for a 5–4 majority that the University of Michigan Law School’s consideration of race in admissions did “not unduly harm nonminority applicants.”⁴² The Court ruled that the law school had both a compelling interest in attaining a diverse student body and that its admissions program was narrowly tailored to serve its compelling interest in obtaining the kind of educational benefits that flow from that diversity.

In determining that there had been no violation of the Equal Protection Clause in the law school’s use of race in admissions, the Court noted that the school was still constrained by a requirement that the means chosen to accomplish the government’s asserted purpose must be specifically and narrowly framed to accomplish that purpose. Justice O’Connor wrote:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.... Instead, a university may consider race or ethnicity only as a ‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.”... In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”⁴³

Statutory Implications of the Use of Racial Preferences in Higher Education. An analysis of racial classifications within higher education requires not only a constitutional analysis but a statutory one, as the applicable provisions go hand-in-hand.⁴⁴ Title VI of the 1964 Civil Rights Act prohibits racial discrimination at any institution receiving federal funding, specifying: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁴⁵ Title VI bans all discrimination that would simultaneously violate the Equal Protection Clause.⁴⁶ Prior to approving or extending any federal financial assistance to educational institutions, the U.S. Department of Education requires that assurances be given that the program that is to be funded will comply with all anti-discrimination provisions enforced by the Department of Education, including Title VI.⁴⁷

Statutory Implications of the Use of Racial Preferences in Faculty Hiring Decisions. The ABA’s revisions aimed at diversifying law school faculty are just as problematic as its mandates to diversify law school admissions. When making personnel decisions, law schools must comply with Title VII⁴⁸ of the Civil Rights Act,⁴⁹ which prohibits employers, employment agencies, and labor unions from discriminating against workers or denying them employment opportunities based on race, color, religion, sex, or national origin. Under current case law, in terms of “diversity” efforts, law schools can only act to remedy harms caused directly by past discrimination—and any such efforts must be limited in time and only undertaken once a school has determined (and can demonstrate) that it cannot achieve its goals through any race-neutral alternative.⁵⁰

The ABA’s proposed revision to Standard 206 conflicts with all of these principles. It makes no concession for the individual analysis of candidates or the composition of each ABA-accredited law school’s student body. Its blanket standard on racial admissions aimed at “diversity” appears more like the type of quota that *Grutter* explicitly prohibits. The revised standard, if adopted by law schools in receipt of federal funding, would violate Title VI of the Civil Rights Act prohibition against racial discrimination, and would therefore put their educational funding in jeopardy. And they would likely run afoul of Title VII’s prohibited employment practices.

Conflict with Other Legal Principles. But do not forget that the ABA also made the breathtaking statement: “The requirement of a constitutional provision or statute that purports to prohibit consideration of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status in admissions or

employment decisions is not a justification for a school's noncompliance with Standard 206."⁵¹ The ABA, which should encourage upholding duly enacted laws, essentially threatened the accreditation of law schools if those schools did not place following the ABA's own misguided standard ahead of following their other legal obligations. The ABA casually dismissed the obligations of accredited law schools to comply with long-standing constitutional and statutory provisions on equality, including the Equal Protection Clause of the Constitution and Titles VI and VII of the Civil Rights Act—a shocking thing for an organization whose main mission ought to be encouraging respect for the rule of law.

As Northwestern University School of Law Professor John O. McGinnis has noted, many states prohibit institutions of higher education from using race or sex in their hiring or admissions, and yet the ABA is encouraging a system in which institutions would be forced to consider both or risk their accreditation—thereby inviting lawlessness.⁵² Following this path could land law schools in court. University of California Berkley School of Law Professor Steven Davidoff Solomon has argued, for example, that the proposed revisions to Standard 206 would amount to unlawful viewpoint discrimination⁵³ by violating the principles of free speech.⁵⁴ By placing an undue emphasis on “diversity” (and stressing race as the most critical factor to achieve that diversity in admissions and hiring), the ABA was ultimately encouraging law schools to silence dissent. No individualized judgments on, for example, what “diversity” might look like, or what an “equitable” environment might be were permitted under the revised standard.

Similarly, Antonin Scalia Law School Professor David Bernstein argues that institutions that base racially preferential admissions decisions on the ABA's determinations of what constitutes sufficient diversity, rather than exercising their own judgment based on governing law, might also find themselves in hot water:

I would add that under the *Grutter* opinion, law schools may only engage in racial and ethnic preferences if the law school faculty and others involved in the school's academic mission have determined that such preferences would add diversity to the school in a way that would be educationally beneficial. By seeming to mandate such preferences, the ABA would be taking the decision out of the hands of the individual schools, and instead making it a requirement of accreditation. If a particular law school disagreed with the ABA's views on diversity, the ABA would still require that school to act illegally lest its accreditation be threatened.⁵⁵

The Second Proposed Revisions to Diversity Accreditation Standard: November 2021

The significant blowback received by the ABA on its first set of proposed revisions to Standard 206 caused the ABA to chart a “new” course. The cumulative negative attention resulted in the ABA’s release of a modified diversity, equity, and inclusion proposal. On November 4, 2021,⁵⁶ the ABA standards committee released a memorandum to its membership announcing a reconsideration of the earlier revisions to Standard 206.⁵⁷ The new proposed revisions to Standard 206, among other things, defined “underrepresented groups,” explained the “effective use of educational diversity,” and clarified that law schools in jurisdictions prohibiting the consideration of race or ethnicity in employment and admissions are not compelled to consider them in those decisions, despite the ABA standard.

While eliminating the provision in the earlier rule that claimed to preempt other relevant laws on the use of race and other suspect classifications to advance diversity,⁵⁸ the ABA’s second revision to Standard 206 still struggled with vagaries and legal inconsistencies that rendered it fatal. It read:

Standard 206. Diversity, Equity, and Inclusion

A law school must ensure the effective educational use of diversity by providing: (1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity; (2) A faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity; and (3) An inclusive and equitable environment for students, faculty, and staff with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.⁵⁹

In its interpretive guidance on the second revision to Standard 206, the ABA clarified that “underrepresented groups” are those related to race, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status underrepresented in the legal profession in the United States when compared to their representation in the general population of the United States. It clarified that “[t]o ensure the effective educational use of diversity, a law school should include among its faculty, staff, and student members of all underrepresented groups, but should be particularly focused on those groups that historically have been underrepresented in the legal profession because of race or ethnicity.”⁶⁰

As a rationale for its revision of the standard, the ABA noted:

Revised Standard 206 aims to achieve the effective educational use of diversity, the compelling state interest recognized in *Grutter v. Bollinger*... *Fisher v. University of Texas*...(Fisher I) and *Fisher v. University of Texas*... (Fisher II)...Subsection (a)(1) requires a school to provide full access to the study of law and membership in the profession to all persons but **focuses particularly on underrepresented groups related to race and ethnicity. This focus acknowledges the unique historical injustices and contemporary challenges faced by those groups.** Subsection (a)(2) requires a school to include members of **underrepresented groups in its faculty and staff, but again requires a particular focus on underrepresented groups related to race and ethnicity.** Subsection (a)(3) requires an inclusive and equitable environment for a larger list of groups.... Subsection (c) focuses on the enforcement of Subsection (a)(3) by requiring an annual assessment of the inclusivity and equity of a law school's educational environment. The law school is required to provide the results of this assessment...to the faculty and to the Council upon request and is required to **take concrete actions to address any deficiencies.**⁶¹

Unsurprisingly, much of the current legal academy has responded favorably to the revised standard. Carla Pratt, the dean of Washburn University School of Law (and an ABA council member), has assured the ABA's members that such a revised standard "does not mean the council is going to be requiring data collection on all of those groups. It means that schools need to think about those groups when creating an equitable and inclusive environment."⁶² How law school administrators may show proof of "thinking about" such groups is unclear, especially if the school's accreditation is at risk if, in the ABA's eyes, their "thinking" is wrong.

Likewise, some have argued that the element of "underrepresentation" is discriminatory in and of itself. For example, some have commented that the definition of "underrepresented groups" would exclude Jewish Americans or Asian Americans, as well as other groups that have been limited by a history of discrimination but have still achieved a higher-than-proportionate degree of success in admissions or employment.⁶³

This second revision of Standard 206 also addressed diversity in hiring, as did the previous iteration, simply providing that "a law school shall... provid[e] a faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity."

The Third Proposed Revisions to Diversity Accreditation Standard: February 2022

Because of continued objections to even the second set of proposed revisions to Standard 206, on February 10, 2022, the ABA released a memo containing a third set of revisions to Standard 206.⁶⁴ The ABA noted in that memo that it had received 10 public comments on the second revised proposal and said among the several “consistent concerns expressed by multiple commentators” was the idea that this proposal was not narrowly tailored and that it still “raises legal concerns such as [a] potential violation of the Equal Protection Clause, [and the] use of racial balancing or quota[s],” among others. While supposedly addressing these concerns, the third proposed set of revisions reads as follows:

Standard 206. Diversity, Equity, and Inclusion

(a) A law school shall ensure the effective education use of diversity by providing:

- (1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity;
- (2) A faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity; and
- (3) An inclusive and equitable environment for students, faculty, and staff with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.⁶⁵

Needless to say, these revisions do not adequately address the concerns, and still suffer from the same defects as earlier iterations of the proposed revision. While recognizing that earlier iterations of the proposal received objections because they were not narrowly tailored and potentially violated the Equal Protection Clause, the ABA simply made a “few revisions for clarification purposes” with this third attempt—without addressing the substantive concerns. Essentially, the ABA tried to hide the fatal flaws to their policies by changing the window dressing. That will not work.

This latest standard will go before the ABA’s governing body, its House of Delegates, in August 2022 for a final vote on whether it should be adopted.⁶⁶ Obviously, it should not.

Conclusion

Justice Felix Frankfurter, writing in the 1950s, said that “part of ‘the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation.’”⁶⁷

Such an environment is most likely to occur when a great degree of intellectual diversity exists within an institution. The ABA’s new standard does not promote intellectual diversity, but instead focuses exclusively on legally questionable, surface-level diversity of admitting and hiring “underrepresented groups, particularly those related to race and ethnicity.” The American Council of Trustees and Alumni rightly observes: “The fact remains that in the world of higher education, diversity has come to mean a preference for a diversity of *backgrounds*, but not a diversity of *views*.”⁶⁸

Our legal system must be open and accessible—regardless of any specific characteristics—to all who come before it. As Justice John Marshall Harlan said in his lone dissent in *Plessy v. Ferguson* over 125 years ago, “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁶⁹ Justice Harlan’s views were eventually vindicated, but are steadily losing ground under a new, leftist legal theory promoting a woke, race-centric “diversity” that prioritizes equity, rather than equality, under the law.

In his concurrence in *Grutter*, Supreme Court Justice Clarence Thomas reminded us that “[t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”⁷⁰

Through its proposed “diversity, equity, and inclusion” standard, combined with its other efforts to establish racial preferences across the entire legal profession, the ABA seeks to return the study and practice of law to an era in which Americans placed a shameful emphasis on skin color and race. As the nation’s self-appointed governing legal authority, the ABA should know—and must do—better.

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Endnotes

1. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007).
2. David R. Burton, *Nasdaq's Proposed Board Diversity Rule Is Immoral and Has No Basis in Economics*, HERITAGE FOUND. BACKGROUNDER, Mar. 9, 2021, https://www.heritage.org/sites/default/files/2021-03/BG3591_0.pdf.
3. Charles Gasparino, *Blackrock's No. 1 Goal in Woke Investing: Huge ESG Funds*, N.Y. POST, June 5, 2021, <https://nypost.com/2021/06/05/blackrocks-no-1-goal-in-woke-investing-huge-esg-funds-haul/>.
4. See, e.g., IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (New York: One World, 2019).
5. The ABA's amended Standard 303 on "anti-bias" law school curriculum, discussed in footnote 31, *infra*, was adopted during the February 2022 mid-year meeting of the ABA. As of the date of this *Legal Memorandum*, however, amended Standard 206—the primary subject of this *Memorandum*, and which addresses Diversity, Equity, and Inclusion efforts in law school student body solicitation, acceptance, and retention—has not yet been formally adopted. See Christine Charnosky, *A 'Must-Have' or 'Forced Wokeness'? Mixed Reaction to ABA's Newly Adopted Diversity Training Mandate for Law Students*, LAW.COM (Feb. 16, 2022), <https://www.law.com/2022/02/16/a-must-have-or-forced-woke-mixed-reaction-to-abas-newly-adopted-diversity-training-mandate-for-law-students/>.
6. John O. McGinnis, "Why the Lawyers Cartel Is Pushing for Woke Law Schools," WALL STREET J., July 15, 2021.
7. American Bar Association, *ABA Approved Law Schools*, https://www.americanbar.org/content/aba-cms-dotorg/en/groups/legal_education/resources/aba_approved_law_schools/ (last accessed Mar. 22, 2022).
8. "[I]n the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).
9. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 514 (1840); cf. WILLIAM SHAKESPEARE, *KING HENRY THE SIXTH*, act 4, sc. 2 ("The first thing we do, let's kill all the lawyers").
10. For a historical overview see John A. Matzko, "*The Best Men of the Bar: The Founding of the American Bar Association*," in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerard W. Gawalt, ed., 1984), at 75–96.
11. American Bar Association, *Diversity and Inclusion Center*, <https://www.americanbar.org/groups/diversity/> (last accessed Jan. 18, 2022).
12. See Editorial Board, *An ABA Hit Job*, WALL STREET J., July 26, 2006; Susan Navarro Smelcer, Amy Steigerwalt and Richard L. Vining, Jr., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RSCH Q., No. 4 (Dec. 2012).
13. See Thomas Jipping, *Judicial Appointments in the 116th Congress*, HERITAGE FOUND. LEGAL MEMO. No. 281, Feb. 18, 2001, at 7–8 (The ABA endorsed the Equal Rights Amendment, Uniform Abortion Act, decriminalizing homosexual conduct, racial quotas for the death penalty, the United Nations' Women's Conference agendas, allowing health care workers to ask patients about gun ownership and civil suits against gun manufacturers, and legalizing marijuana.).
14. 20 U.S.C. § 1099b *et seq.* as Amended Through P.L. 117–81, Enacted December 27, 2021. Some law schools have tried and failed to invalidate the Department of Education's delegation of authority over law school accreditation to the ABA. See, e.g., *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 142 F.3d 26, 33 (5th Cir. 1998) ("Accreditation serves an important national function because once an institution of higher education becomes accredited by the DOE or its designated accrediting agency, the institution becomes eligible for federal student loan monies.... The Higher Education Act and the DOE's implementing regulations spin a sophisticated regulatory web that governs the relationship between accrediting agencies and accreditation applicants.... The grant of federal jurisdiction over matters involving accreditation is reasonably related to the efficient operation of that system.") (internal citations omitted).
15. Indeed, the ABA has been the target of anti-monopoly enforcement by the federal government. In 1995, the ABA submitted to a consent decree demanding reforms of its uncompetitive practices. See Competitive Impact Statement of plaintiff United States in *United States v. American Bar Association*, D.C. Cir., June 27, 1995, civil action No. 95–1211(CR), <https://www.justice.gov/atr/case-document/competitive-impact-statement-23>. In 2006, however, it admitted that it had been violating the terms of that agreement and paid a \$185,000 fine. See Statement of United States Department of Justice, "Justice Department Asks Court to Hold American Bar Association in Civil Contempt; ABA Acknowledges Consent Decree Violations and Agrees to Pay \$185,000," June 23, 2006, https://www.justice.gov/archive/atr/public/press_releases/2006/216804.htm.
16. American Bar Association, *Frequently Asked Questions*, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/ (last accessed Mar. 22, 2022). See also Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L. J. 429, 435 nn.16–17 (2001).
17. In 1992, Congress amended the Higher Education Act to require that a DOE-recognized accrediting agency be "separate and independent" from an affiliated trade association. See 20 U.S.C. § 1099b(a)(3), (b) (2000).
18. Adam Bonica, Adam S. Chilton, and Maya Seny, *The Political Ideologies of American Lawyers*, 8 J. OF L. ANALYSIS 277 (Winter 2016), <https://scholar.harvard.edu/files/msen/files/lawyers-ideologies.pdf>.
19. Debra Cassens Weiss, *Lawyers 'Lean to the Left,' Study Says; Which Schools, Firms and Practice Areas Are Most Liberal?* ABA J. (Sept. 2, 2015), https://www.abajournal.com/news/article/lawyers_lean_to_the_left_study_says_which_law_schools_firms_are_practice_ar.

20. Adam Bonica *et al.*, “The Legal Academy’s Ideological Uniformity,” 47 J. OF LEGAL STUDIES (Jan. 2018), <https://scholar.harvard.edu/files/msen/files/law-prof-ideology.pdf>.
21. In order to receive federal funding from the U.S. Department of Education, institutions must certify their compliance with applicable civil rights laws, including Title VI of the Civil Rights Act of 1964, which prevents discrimination on the basis of race, ethnicity, or national origin. See U.S. Department of Education, Office for Civil Rights, *Assurance of Compliance-Civil Rights Certificate*, <https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf>.
22. Of course, the Biden Department of Education might very happily go along with the ABA’s problematic standards.
23. The ABA “Standards and Rules of Procedure for Approval of Law Schools” had previously included Standard 206 on “Diversity and Inclusion.” See American Bar Association, *2021–2022 ABA Standards and Rules of Procedure for Approval of Law Schools*, at 14, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-2.pdf (last accessed Feb. 28, 2022). However, the previous language was significantly simpler and less problematic:
Standard 206. DIVERSITY AND INCLUSION
(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.
24. See AMERICAN BAR ASSOCIATION, *STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022* (Erin Winters, ed., 2020).
25. *Memo of American Bar Association Legal Education and Admissions to the Bar Standards Committee, to the Council*, May 7, 2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf.
26. *Id.* (emphasis added), interpretation for proposed revisions to Standard 206–1.
27. *Id.* See interpretations for proposed revisions to Standards 206–3 and 206–4.
28. *Id.* See interpretation for proposed revisions to Standard 206–5.
29. Stephanie Francis Ward, *Law School Noncompliance With Diversity Standard Should Require Public Notice, ABA Legal Ed Section Says*, ABA J. (May 17, 2021), <https://www.abajournal.com/news/article/law-school-noncompliance-with-diversity-standard-should-require-public-notice-says-aba-legal-ed-section>.
30. See, e.g., Peter Wood, *NAS Opposes the ABA’s Woke Standards for Law Schools*, NAT’L ASSN. OF SCHOLARS (2021), <https://www.nas.org/blogs/article/nas-opposes-the-abas-woke-standards-for-law-schools>; Brian Leiter, *Call by ABA for Comments on Significant Proposed Changes to Standards Pertaining to “Non-Discrimination and Equal Opportunity” and “Curriculum”* (2021), <https://leiterlawschool.typepad.com/leiter/2021/06/call-by-aba-for-comments-on-significant-proposal-changes-to-standards-pertaining-to-non-discrimination-a.html> (“If a very diverse law school becomes slightly less diverse after a few years (but is still extremely diverse), does that mean it is in violation of the standard? That would seem bizarre.... The proposal suggests making the new ‘diversity, equity and inclusion’ standard a ‘core’ standard, such that failure to comply with it would be grounds for public shaming of schools and ultimately loss of accreditation. Given the uncertainties about what constitutes satisfaction of this standard, and the subjective judgments that will be necessary, it seems risky in the extreme to make it a ‘core’ standard.”); *Comment of Professors of Law at Yale University*, June 23, 2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-yale-law-school.pdf (“The recommended goals are unspecified, and may be a euphemism for quotas, about the appropriateness of which there is considerable controversy.”); *Comment of Professor William Jacobson*, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-william-jacobson.pdf (“Standard 206 adds the word ‘Equity’ to the title and substance, without definition. ‘Equity’ is a relatively recent buzzword associated with various Critical Race Theory offshoots, particularly that espoused by Prof. Ibram X. Kendi. It is hotly contested whether equality of results, rather than equality of opportunity, is an appropriate goal, particularly where discrimination is used to achieve equal results. Regardless, by injecting ‘equity’ as a concept into [the] accreditation process, the ABA uses its accreditation power to make what will be understood to be an ideological point and will take ‘equity’ off the table for debate. That is not the role of ABA accreditation, and it is an abuse of power.”)

31. At the same time the ABA proposed its revised Standard 206 in May 2021, it also introduced revised Standard 303, which was adopted by a vote of 348–17 on February 14, 2022. The previous July, the deans of 176 law schools had petitioned the ABA to require that “every law school provide training and education around bias, cultural competence, and anti-racism.” See *Letter of Law School Deans to Council of the ABA Section of Legal Education and Admissions to the Bar*, July 30, 2020, <https://taxprof.typepad.com/files/aba-bias-cultural-awareness-and-anti-racist-practices-education-and-training-letter-7.30.20-final.pdf>. The revised standard addresses law school curriculum as part of its ongoing emphasis on what it describes as the special obligation lawyers have to their clients and society. Modifications of Standard 303 include a requirement that students receive broad anti-bias education on cross-cultural competency and racism at least twice during their legal education: both at the beginning of and before graduation from law school. See *Memorandum from the Standards Committee*, May 7, 2021, Standard 303 (c), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf. Like proposed Standard 206, revised Standard 303 has been heavily criticized. Charges were levied that the ABA was seriously overreaching by attempting to dictate specific course content for the offerings on bias and racism, was mandating curricular uniformity, and that it was institutionalizing dogma by forcing instruction on issues that were altogether irrelevant to any particular legal skill. See, e.g., *Comment of Yale Law Professors*: “Mandating the content of such courses misconstrues the accreditation function and what a successful institution of higher learning seeks to inculcate in its students: to teach them skills, but not to require students to adopt a specific world view. Institutions of higher education challenge students intellectually and provide them with the analytical capacities to think for themselves and reach their own conclusions.” The ABA itself has expressed a seeming preference for “social justice” efforts in the classroom, especially those involving race, as evidenced by a recent *ABA Journal* article. See Alyx Mark, *Solving Civil Justice Issues in the Classroom*, *ABA J.* (July 7, 2021) (“The renowned access-to-justice scholar Rebecca Sandefur explains that judges and lawyers ‘work at the top of an enormous iceberg of civil justice activity’—many of which threaten the basic human needs of the poor and of racial minorities. When we reorient ourselves to appreciate what’s above and below the waterline, we gain a better appreciation of the scope of the research needed to understand and address the access-to-justice crisis. Sandefur further argues that this new perspective allows us to look outside of the law for solutions—thus encouraging the profession’s collaboration with new voices.”) The pitfalls and shortcomings inherent in rule 303, which purports to mandate curricula on diversity, anti-bias, and racism as a pre-condition to accreditation are obvious. However, this *Legal Memorandum* is singularly focused on the ABA’s proposed revisions of Standard 206.
32. The proposed revisions to Standard 206 are not the first of the ABA’s proposals to be criticized; some have even been successfully challenged in courts of law. Its highly controversial 2016 proposal of Model Rule 8.4 (g) on professional misconduct, often referred to as its “anti-bias” rule, prohibits in part “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law,” and was clarified by the House of Delegates or the Board of Governors of the ABA to specify that “discrimination” includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” ABA Standing Committee on Ethics And Professional Responsibility, *House of Delegates Revised Resolution 2016*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf (emphasis added). Five years after its introduction in 2016, at least 13 states had abandoned ABA Model Rule 8.4(g), or a variant, as unconstitutional or unworkable—and even Pennsylvania’s narrower adoption of the 8.4(g) rule was ruled unconstitutional as impermissible viewpoint discrimination in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 29–30 (E.D. Pa. 2020) (“The dangers associated with content-based regulations of speech are also present in the context of professional speech.... As with other kinds of speech, regulating the content of professionals’ speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.... Rule 8.4(g) does not regulate the specific types of attorney speech or professional speech that the Supreme Court has identified as warranting a deferential review. The speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”) (internal citations omitted). Proposed Rule 8.4 has yet to be adopted by the ABA’s House of Delegates.
33. U.S. CONST. amend. XIV, § 1.1.
34. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Of course, it has been expanded to prevent unequal treatment based on other protected characteristics, too.
35. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (Thomas, J., concurring).
36. *Shaw*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”).
37. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310 (2013) (Fisher I) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).
38. See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (Fisher II).
39. *Adarand*, 515 U.S. at 227. Of course, in order for a constitutional violation to occur, state action must be present.
40. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722 (2007) (noting that in evaluating the use of racial classifications the Court has recognized two interests that qualify as compelling: remedying past, intentional discrimination and diversifying higher educational formats).
41. See *infra* footnote 506.
42. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).
43. *Grutter*, 539 U.S. at 334 (citing *Regents of University of California v. Bakke* 438 U.S. 265, 315, 317 (1978) (opinion of Powell, J.)).
44. Any institution in receipt of federal funding, and therefore subject to Title VI, must comply with the principles of the Equal Protection Clause. See *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”).

45. 42 U.S.C. § 2000d.
46. See *Gratz*, 539 U.S. at 276 n.23.
47. The U.S. Department of Education's Office for Civil Rights ensures equal access to education through the enforcement of six antidiscrimination laws: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; Title IX of the Education Amendments of 1972, 16 U.S.C. § 1681, *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*; Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.*; the Age Discrimination Act of 1975, 42 U.S.C. § 6101, *et seq.*; and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905.
48. 42 U.S.C. § 2000e, *et seq.*
49. *Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189–190 (1990): “When Title VII was enacted originally in 1964, it exempted an ‘educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.’ § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress’ considered response to the widespread and compelling problem of invidious discrimination in educational institutions.”
50. See, e.g., *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 917 F. Supp. 2d 668 (N.D. Ohio 2013); *United States v. City of New York*, 308 F.R.D. 53 (E.D.N.Y. 2015); see also *Gray v. Bd. of Higher Educ., City of New York*, 692 F.2d 901 (2d Cir. 1982); *Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990).
51. *Memo of American Bar Association Legal Education and Admissions to the Bar Standards Committee, to the Council*, Nov. 4, 2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov21/21-nov-std-206-notice-and-comment-w-appendix.pdf.
52. John O. McGinnis, *Why the Lawyers Cartel Is Pushing for Woke Law Schools*, WALL STREET J. (July 15, 2021), <https://www.wsj.com/articles/anticompetitive-woke-law-schools-aba-identity-politics-affirmative-action-11626364370>, accessed 1/31/22.
53. Viewpoint discrimination has been held by the Supreme Court to be presumptively unconstitutional. *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 828–829 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.... These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”) (internal citations omitted). For a modern analysis of the evolution of viewpoint discrimination, see Kelso, R. Randall, *Clarifying Viewpoint Discrimination In Free Speech Doctrine*, 52 IND. L. REV. 355 (2019).
54. *Comment of Professor Steven Davidoff Solomon*, June 2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-steven-solomon.pdf.
55. *Comment of Professor David Bernstein*, June 3, 2021, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-bernstein-and-leiter.pdf.
56. The ABA's release of a revised diversity standard just happened to coincide with the Supreme Court's grant of review in *Students for Fair Admissions v. President and Fellows of Harvard*, No. 20–1199 (2021), and *Students for Fair Admissions v. University of North Carolina et al.*, No. 21–707 (2022), cases which involve a challenge to the legality of the very same race-conscious admissions policies being advanced by the ABA's diversity standard.
57. See *supra* footnote 51.
58. While charitable, the elimination of the “preemption” clause is not in the least practicable. Under the Equal Protection Clause, Title VI, and Title VII (prohibiting race and other forms of discrimination within employment), every jurisdiction in the United States *plainly* prohibits the allocation of benefits and burdens on the basis of race and ethnicity, presenting an unresolvable conflict between ABA accreditation and federal law.
59. See *supra* footnote 51.
60. *Id.*
61. *Id.* (internal citations omitted) (emphasis added).
62. Stephanie Francis Ward, *For Second Time, ABA Legal Education Section Seeks Public Comment on Diversity Accreditation Standard*, ABA J. (Nov. 22, 2021), <https://www.abajournal.com/news/article/for-the-second-time-aba-seeks-public-comment-on-law-school-diversity-accreditation-standard>.
63. See *Comment of Kenneth L. Marcus on Revised ABA Standard 206*, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2022/jan/22-jan-comment-ken-marcus.pdf.
64. *Memo of American Bar Association Legal Education and Admissions to the Bar Standards Committee, to the Council*, Feb. 10, 2022 https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/feb22/22-feb-council-final-recs-with-exhibit.pdf.
65. *Id.*

66. Christine Charnosky, *Following More Public Comment, ABA Revises Diversity and Inclusion Proposal a Third Time*, NAT'L L. J. (Feb. 28, 2022), https://www.law.com/nationallawjournal/2022/02/28/following-more-public-comment-aba-revises-diversity-and-inclusion-proposal-a-third-time/?kw=Following%20More%20Public%20Comment%2C%20ABA%20Revises%20Diversity%20and%20Inclusion%20Proposal%20a%20Third%20Time&utm_source=email&utm_medium=en&utm_campaign=newsroomupdate&utm_content=20220228&utm_term=nlj.
67. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308 (2013); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment).
68. Amn. Council of Trustees and Alumni, *Intellectual Diversity: Time for Action 1* (Dec. 1, 2005).
69. *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J. dissenting).
70. *Grutter*, 539 U.S. at 353 (Thomas, J. concurring in part and dissenting in part).