



UNITED STATES COMMISSION ON CIVIL RIGHTS

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The Honorable Virginia Foxx
Chair, House Education and the Workforce Subcommittee on Higher Education
2350 Rayburn House Office Building
Washington, DC, 20515

May 20, 2015

Dear Representative Foxx:

We write as two members of the United States Commission on Civil Rights (the “Commission”), and not on behalf of the Commission as a whole, to ask Congress to include a short amendment in the re-promulgated Higher Education Act. Our proposed amendment – the full text of which appears in boldface in the next section – would make clear that each accredited college, university, or subpart thereof must be free to pursue the student body diversity policy of its choice without interference from accreditors. Accreditors should not be permitted to push an individual institution into engaging in larger (or smaller) racial preferences than that institution considers wise in order to reach a level of racial diversity that the accreditor deems desirable. Provided the institution does not act illegally, its academic judgment should be respected.¹

For the reasons discussed in the attached article, *The Sad Irony of Affirmative Action* (“*Sad Irony*”), we oppose race-preferential admissions policies, especially the very large preferences that are routinely granted today in higher education. The evidence reviewed in that article shows that as a result of these policies, the nation now has fewer minority students, not more, going on to high-prestige careers than it would have using race-neutral methods. Race-preferential admissions policies have thus backfired badly.²

At the same time, we recognize that most colleges and universities faculties have not yet come to appreciate fully the problems created by race-preferential admissions policies.

¹ Note that it is not our contention that an accreditor should not be concerned with the entering credentials of an institution’s students. If an institution is admitting students who for any reason are failing to thrive academically at the institution, that must remain a concern. This would be true whether the problem is caused by racial preferences, legacy preferences, athletic preferences or just lax admissions standards. Our point is simply that, in the absence of evidence that the institution is engaging in illegal discrimination, the racial composition of the institution’s student body should be left to the individual institution.

² For additional background about mismatch research, please see Richard Sander & Stuart Taylor, *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012). The Commission has issued two reports addressing the mismatch topic: in *Affirmative Action in American Law Schools*, the Commission examined research concluding that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a school where their entering academic credentials are like the average student’s. The second report, *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers* (2010), examined mismatch evidence indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class.

Moreover, the Supreme Court in *Grutter v. Bollinger*³ deferred to these individual colleges and universities on their need for the supposed pedagogical benefits of a racially diverse student body. As a consequence, the Court held that the Constitution does not forbid them, in the exercise of academic freedom, from discriminating on the basis of race in order to reap such benefits.

We are not seeking to overturn *Grutter*. We only seek to ensure that those colleges and universities that are concerned about racial preferences' backfire are not strong-armed by their accreditors into engaging in racial preferences against their will. As we will explain in this letter, our approach is not only consistent with *Grutter*, it is the only approach consistent with *Grutter*.

Because the proposal would grant each college or university, no matter what its view on the matter, the discretion to make its own policy choice, it may not generate strong opposition from those institutions. (We should note, however, that we have not discussed the proposal with representatives of any college or university.) Since our aim is simply to break the monopoly power of accreditors on this issue, not to impose any particular solution on all institutions, many in the higher education industry may see it as a friendly amendment (or at least not as hostile as one might otherwise expect).

Current Law and Our Proposed Change to It

Currently, 20 U.S.C. §1099b(a) provides that “No accrediting agency or association may be determined by the Secretary [of Education] to be a reliable authority as to the quality of education or training offered for the purposes of this chapter or for other Federal purposes, unless the agency or association meets criteria established by the Secretary pursuant to this section.” Subsequent provisions of 20 U.S.C. §1099b(a) set forth principles that the Secretary of Education must follow in so determining whether an accrediting agency is a reliable authority. We ask that these provisions be amended, via new language added to the Higher Education Act of 2015, to include a new (9) **“No accrediting agency or association may be determined to be a reliable authority as to the quality of education or training offered for the purposes of this chapter or for other federal purposes, if the accrediting agency or association imposes requirements concerning student body diversity; establishes student body diversity standards; conducts investigations into student body diversity; or makes recommendations regarding student body diversity. An accrediting agency or association may only be determined to be a reliable authority as to the quality of education or training offered for the purposes of this chapter or for other federal purposes if it permits each and every college and university that it accredits (and each and every component or subpart of the colleges and universities that it accredits) to adopt any lawful student body diversity policy, notwithstanding the particular mission of the particular college or university (or component or subpart thereof).”**

We fully understand that you may wish to tinker with this language, but we believe we have provided a good start.

Why This Change to Current Law Is Necessary

³ 539 U.S. 306 (2003).

We base our recommendation in part on a 2007 Commission report, *Affirmative Action in American Law Schools*, which discussed the American Bar Association (“ABA”) accreditation standards for diversity in law schools.⁴ The Commission’s briefing and report focused on law school accreditation, and therefore this letter will as well. But it is important to note that other accreditation bodies have similar diversity requirements, which are similarly problematic.⁵

⁴ Full text of that report is available at <http://www.usccr.gov/pubs/AALSreport.pdf> and at <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/04/AffirmativeActioninLawSchools.pdf>.

⁵ See, e.g., “Margaret Jackson, University of Colorado Medical School Heals Diversity Gap, Denver Post, Apr. 21, 2012 (“The university has made a concerted effort to improve diversity among its students since its accrediting body—the Liaison Committee on Medical Education—cited the school for ‘noncompliance’ in 2010, when just 106 of 614 students were minorities.”)

At the Commission’s briefing, witness Steven Smith cited the Association to Advance Collegiate Schools of Business, the Accrediting Council on Education in Journalism and Mass Communications, the American Library Association, the American Psychological Association, the Liaison Committee on Medical Education, and the Planning Accreditation Board as other accreditation bodies with requirements similar (though not identical) to those of law schools. *Affirmative Action in American Law Schools* at 87. For example, the AMA’s Liaison Committee on Medical Education’s standards for medical schools include the following:

3.3 Diversity/Pipeline Programs and Partnerships

A medical school has effective policies and practices in place, and engages in ongoing, systematic, and focused recruitment and retention activities, to achieve mission-appropriate diversity outcomes among its students, faculty, senior administrative staff, and other relevant members of its academic community. These activities include the use of programs and/or partnerships aimed at achieving diversity among qualified applicants for medical school admission and the evaluation of program and partnership outcomes.

AMA Liaison Committee on Medical Education, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* (March 2014).

Similarly, the Accrediting Journalism and Mass Communications has the following standard for accreditation:

Commitment to diversity and inclusiveness

To inform and enlighten, the professions of journalism and mass communications should understand and reflect the diversity and complexity of people, perspectives and beliefs in a global society and in the multicultural communities they serve.

Programs seeking accreditation should develop curricula and instruction that educate faculty and prepare students with the multicultural knowledge, values and skills essential for professional practice.

Programs should document their efforts to ensure the representation of women and people of diverse racial and ethnic identity in the student body and faculty and to expand these students' opportunities for entry into the communications professions.

In addition, in informal conversations with former college and university faculty administrators, we have been told that some accreditors that do not have written standards on diversity nevertheless conduct themselves as if they do and cite schools for non-compliance with their unwritten standards (or, alternatively, for non-compliance with the school’s own mission statement). While unwritten standards are forbidden by federal regulation (see 34 C.F.R. 602.18(a)), they nonetheless exist.

The ABA has had diversity standards for decades, and law schools have long felt pressure to comply with them. In the 1990s, fully 31% of law schools admitted to political scientists Susan Welch and John Gruhl that they “felt pressure” “to take race into account in making admissions decisions” from “accreditation agencies.”⁶

Law schools must take the ABA seriously. As the U.S. Department of Education’s designated law school accreditation agency, the ABA, through its Council of the Section on Legal Education and Admissions to the Bar, has the power to decide whether a law school will be eligible for federal funding. Unless the ABA approves, for example, a law school’s students will be ineligible for student loans. And that is just the beginning. Most states do not allow the graduates of non-ABA accredited law schools even to sit for the bar examination.

The ABA ramped up its requirements for diversity in 2006, apparently in response to what it perceived as a green light given to preferential treatment by the Supreme Court’s *Grutter v. Bollinger* decision.⁷ These changes were a major focus of discussion in *Affirmative Action in American Law Schools*. The Commission found that these Standards and the Interpretations

⁶ Susan Welch & John Gruhl, *Affirmative Action in Minority Enrollments in Medical School and Law School* 80 (1998). Respondents were asked if they had felt pressure from groups other than the federal and state governments. If they answered “yes,” they were then asked to specify which groups, and 24 percent of medical school respondents and 31 percent of law school respondents volunteered that accreditation agencies had done so.

⁷ In 2006, the Standard was changed in the following ways:

- a. The title of the standard on student diversity was changed from “Equal Opportunity Effort” to “Equal Opportunity and Diversity,” making it clear that the emphasis would no longer be on effort. Compare old Standard 211 to new Standard 212. Numerical results will matter. This theme was made even more concrete in the official interpretations that accompany the standards. The original version stated that “[t]he satisfaction of [each law school’s] obligation is based on the totality of *its actions*.” The new version expands the basis on which law schools will be judged to add “and the results achieved.” Compare old Interpretation 211-1 to new Interpretation 212-3 (emphasis supplied).
- b. The new interpretations inform law schools for the first time that they “may use race and ethnicity” in their admissions decisions. See new Interpretation 212-2. A clause in the original text of the standards that states “a law school is not obligated to apply standards for the award of financial assistance from those applied to other students” for diversity purposes was deleted. See old Standard 211. The implication was that law schools may well be obligated to do so.
- c. One of the more jarring changes was the deletion of the word “qualified.” Previously, the standards had required law schools to provide opportunities for the study of law to “qualified members” of minority groups. The new version required them to provide opportunity to “members” of those groups. Compare old Standard 211 to new Standards 212.

Since the publication of *Affirmative Action in American Law Schools*, the ABA has made modest changes to its Standards concerning diversity. It has re-numbered them, so that the standard discussed in *Affirmative Action in American Law Schools* as Standard 212 has now become Standard 206. The ABA has also retitled the Standard “Diversity and Inclusion” and required law schools to demonstrate a commitment to “diversity and inclusion” instead of merely a commitment to diversity. It also has deleted a sentence about *Grutter v. Bollinger* from 212-2 (now 206-2). Unfortunately, these changes do not address the serious criticisms made by *Affirmative Action in American Law Schools* and elsewhere.

We have also attached copies of the current Standards and some of its recent predecessors to this letter. Full text of the current Standards may also be found online at the ABA’s website at http://www.americanbar.org/groups/legal_education/resources/standards.html.

following them essentially required law schools to use racial preferences to ensure that they have adequate numbers (in the ABA's eyes) of racial and ethnic minority students.⁸ Indeed, one Interpretation goes so far as to provide that "The requirement of a constitutional provision or statute that purports⁹ to prohibit consideration of gender, race or ethnicity in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206."¹⁰ Or, in other words, the ABA appears to be urging law schools to ignore applicable state constitutional provisions and other laws and use racial preferences anyway. Needless to say, such exhortations to lawlessness are extremely troubling.

The ABA is forcing some law school faculties to admit students against their better academic judgment. These law schools may be concerned that when preferential treatment must be accorded to African-American and Hispanic students in order to enroll a racially diverse class, the advantages of such diversity will be outweighed by the disadvantages of a student body in which the beneficiaries of preferential treatment get left behind academically. Alternatively, these law schools may be willing to give *some* preferential treatment to African-American and Hispanic students, but are reluctant to grant the very large preferences that are necessary to reach and maintain the level of racial diversity that the ABA has insisted upon for them. In either case, their experience may have taught them that some of the so-called beneficiaries of racial preferences fail to thrive and would have been more successful attending a less competitive institution. But the ABA holds all the cards. Its monopoly position allows it to impose its will on law schools everywhere. One size is forced to fit all on one of the most delicate and controversial issues facing the nation today.

⁸ See Finding 6 at p. 141 of *Affirmative Action in American Law Schools*. See also Statement of David Bernstein, *Affirmative Action in American Law Schools* at 124-6 and David Bernstein, "Affirmative Blackmail," *The Wall Street Journal*, February 11, 2006, available at <http://www.wsj.com/articles/SB113962366620071496>.

⁹ As was noted by both briefing witness David Bernstein and one of us (Heriot) in the Commission's report, the ABA's use of "purport" in this context is odd. It suggests that such constitutional provisions and statutes must somehow be illegitimate or invalid. See *Affirmative Action in American Law Schools* at 124. If the ABA had been concerned in 2006 that such state non-discrimination requirements are invalid because they conflict with the federal Constitution's equal protection clause, this concern would have been somewhat strange in light of circuit court precedent stating that there is no such conflict. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997): "As a matter of 'conventional' equal protection analysis, there is simply no doubt that Prop 209 [the California ballot proposition amending the state constitution to prohibit state governmental institutions from considering race, sex, or ethnicity] is constitutional." Since the ABA first promulgated a version of this Interpretation, however, the Supreme Court has upheld 6-2 a Michigan law nearly identical to Proposition 209, putting to rest any lingering doubts about the constitutionality of such non-discrimination laws. See *Schuette v. BAMN*, 134 S. Ct. 1623, 572 U.S. – (2014). We are baffled that the ABA continues to use this language even post-*Schuette*.

¹⁰ Although some ABA officials have publicly denied that the current standards require law schools to engage in racial preferences, we do not accept these denials. First, the ABA's amicus curiae brief in *Grutter* argued that racial diversity in law schools can only be achieved through racial preferences. Brief for the ABA as Amicus Curiae, *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 18-21. Nine years later, it took the same position in its amicus curiae brief in a different Supreme Court affirmative action case. Brief for the ABA as Amicus Curiae, *Fisher v. Texas*, 133 S. Ct. 2411 (2013) at 20-29. Second, as David Bernstein testified at the Commission's briefing, the ABA's diversity standards give law schools a false choice. "Essentially... a law school has the choice of just engaging in racial preferences... or spending hundreds of thousands of dollars every year [on minority recruitment]." Bernstein noted that not all law schools could afford such a choice. U.S. Commission on Civil Rights, Transcript of June 15, 2006 Business Meeting at 134.

While this letter tends to focus on law schools, the same is true for colleges and universities generally. Contrary to what some assume, faculty members are hardly of one mind on the issue of race-preferential admissions.¹¹ It is over-zealous accreditors that can sometimes make it appear that way.

*George Mason University: A Case Study in Undue Pressure*¹²

The ABA has not hesitated to enforce its diversity standards aggressively. In 2006, for example, Charleston School of Law unexpectedly failed to win accreditation from the ABA after a favorable recommendation from its Accreditation Committee. According to news reports, the ABA's concerns focused in part on race.¹³ Final accreditation was not awarded until the dean had declared that "[w]hatever we have to do [to win accreditation], we'll do it" and a new "director of diversity" was publicly announced.¹⁴

George Mason University School of Law faced a more prolonged struggle with the ABA. Its misadventures with the accreditation process began with the ABA's site evaluation team visit in early 2000. The site evaluation report that was submitted thereafter stated:

The Law School has not been very successful in recruiting minority students and the number has actually declined recently. In the full time division[,] 15 (11.1 percent of class) minority students started at George Mason in 1997. In 1998, 12 (10.4 percent) started and in 1999, 7 (6.5 percent) started. In the part-time division 10 (12.8 percent) minority students started in 1997. In 1988 [sic],

¹¹ There is even some empirical data on this. See, e.g., Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 *Minn. L. Rev.* 1233 (1988); Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 *Academic Questions* 31 (Spring 2001).

We do not contend that pressure from accreditors is the only reason that more colleges and universities do not swim against the tide of race-preferential admissions policies. Rather, complex webs of state and federal oversight and grant-making authority combined with outside funding sources, all of which heavily promote race-preferential admissions policies, make resistance difficult. Nevertheless, accreditors are perhaps the most powerful of these. If an institution of higher learning is not accredited, its very existence is jeopardized. If all these pressures were removed and individual institutions were permitted to make their own decisions based on the academic rather than financial and regulatory concerns, we believe that the very large racial preferences that characterize higher education today would begin to fade away.

¹² Commissioner Heriot served as Associate Dean for Academic Affairs and Professor of Law at George Mason University from 1998-99 while on leave from the University of San Diego. She was not involved with the issues discussed in this section of the letter.

¹³ See James T. Hammond, *Charleston School of Law: Fails to Win Accreditation so Students Can Take Bar*, *The State* (Columbia, S.C.) (July 12, 2006).

¹⁴ *Id.*; *College Notes: Charleston Law Taps Diversity Director*, *The State* (Columbia, S.C.) B3 (August 13, 2006). See also David Barnhizer, *A Chilling Discourse*, 50 *St. Louis L. J.* 361 (2006) (describing ABA influence on faculty diversity-hiring). As of this writing, it appears that Charleston Law may cease operations once its current class graduates. See Ashley Heffernan, "Law schools officials might discontinue admissions," *The Charleston Business-Journal*, May 8, 2015, available at <http://www.charlestonbusiness.com/news/54429-law-school-officials-might-discontinue-admissions>.

there were 18 (19.1 percent) and in 1999, 10 (9.5 percent) started.¹⁵

Significantly for the ABA's contention that it does not require law schools to engage in racially preferential admissions, George Mason's problem was not lack of outreach, as the site evaluation report indicated:

At first blush, one is struck by these relatively low numbers of minority students for a school in a large metropolitan area like the District of Columbia. Yet the Self-Study report describes a very active effort to recruit minorities in the past three years and this was confirmed in interviews with the Admissions Office staff. Specifically, George Mason has sent representatives to all of the national forums sponsored by the LSAC. They have also attended several regional and individual recruiting fairs, including many events at historically black colleges in the D.C. and Virginia areas. Current minority students often participate in these visits. The office also engages in targeted mailings to qualified minority applicants and minority pre-law advisors throughout the country and advertises in publications that are likely to be consulted by minority candidates. George Mason supports the CLEO program and will reconsider an applicant who was denied admission but then successfully completes a CLEO program. Finally, George Mason has its own three week "testing in" summer admissions program called the PAST program. In this program, the school invites applicants who have generally good admission credentials but for one weakness, often the LSAT score, to participate in a special three-week pre-law program. At the end of the intensive program, the students are evaluated and may be offered admission. For example, in 1999, 135 applicants were invited to participate in PAST, of whom 27 percent were minorities. Of the 135, 31 attended, of whom 19 percent were minorities. Of the 31, 26 were admitted, of whom 12 percent (3) were minorities.¹⁶

This report gave the following explanation for why these extensive outreach efforts were not more successful:

There appear to be several possible reasons why, despite these efforts, the Law School has not been more successful in recruiting minority students. (1) George Mason makes virtually no need-based scholarship grants, to minority or any other applicants;

¹⁵ Dean May Kay Kane, Professor Jim Meeks, Professor Joyce Saltalamachia, Dean Thomas F. Guernsey, Justice Fred L. Banks Jr., Dr. Robert Glidden, Associate Dean Peter A. Winograd, Office of the Consultant on Legal Education to the ABA, Report on George Mason University School of Law dated February 27-March 1, 2000 at 32. Cited in *Affirmative Action in American Law Schools* at 181.

¹⁶ Id. at 32-33. Cited in *Affirmative Action in American Law Schools* at 181-2.

essentially, only federal loan money is available. In the current market for recruiting minority students, this obviously puts George Mason at a significant disadvantage. (2) George Mason has been unwilling to engage in any significant preferential affirmative action admissions program. There are doubts, according to one member of the Law School administration, regarding the legality, at least in the Fourth Circuit, of such a policy. The reluctance to compromise normal admission quality standards appears to be particularly present regarding the full-time program. There appears to be slightly more flexibility regarding the part-time program.... (3) Finally, the view was expressed that the program at George Mason with its emphasis on economic analysis, and its general reputation as a conservative law school, probably hurts its recruitment efforts among minority candidates.¹⁷

The end of the site evaluation report nevertheless reported that there were “serious concerns about the opportunities offered to minorities, both in faculty recruitment and in student enrollment.” It complained that “there appears to be no concrete plan of how to address the situation, other than to expand outreach to student applicants.”¹⁸

Site evaluation teams do not make official findings and conclusions in their report. That is the province of the Accreditation Committee and the ABA Council.¹⁹ But the team’s view could not have been clearer if the report had said it outright: The team didn’t think that efforts that include only outreach without preferential admissions standards are good enough. Why else would it claim that there was “no concrete plan”? Why was a plan to expand outreach not considered concrete?

Over the next few years, the Accreditation Committee issued repeated “action letters” to the Law School requiring that certain action be undertaken before the school would be re-accredited. Each letter had the same theme. Some stated that the Committee had “reason to believe” that the law school “has not established that it is in compliance with the [diversity] standards,” despite the extensive outreach efforts catalogued by the site evaluation team. All the letters declined to renew the school’s accreditation until its diversity issues were resolved to the Committee’s satisfaction. It seemed clear that the committee members agreed with the site evaluation team that no amount of outreach would be enough unless it produced the racial results that they favored.

The first of these annual letters complained that George Mason has “*not engaged in any significant preferential affirmative action program*” and that it “*makes virtually no need-based scholarship grants to minority or any other applicants.*”²⁰ (Emphasis added.) This letter and the

¹⁷ Id. at 33.

¹⁸ Id. at 52.

¹⁹ Id. at 1.

²⁰ Action of the Accreditation Committee, dated June 2000 at 4, cited in Affirmative Action in American Law Schools at 183.

two that followed it demanded reports and data “regarding actions taken to bring the school into compliance” with diversity standards.

In an apparent effort to satisfy the ABA, the law school reported back that its entering class minority enrollment had climbed from 10.98 percent in 2001 to 16.16 percent in 2002. George Mason had increased its scholarship money awarded to minority students to \$94,404 in academic year 2001-02, which represented approximately 50 percent of the total of scholarship funds available. The next year, it upped the amount to \$95,416 and was able to “offer[] employment” to an African-American student, amounting to a “subvention of \$50,000 per year.” The school had increased the number of minority recruiting events in which it participated and the number of targeted mailings in which it was engaged. It also increased the involvement of minority students and alumni in recruiting.

Yet none of this was enough. A few weeks after the Supreme Court decided *Grutter*, the ABA issued its fourth and most aggressive action letter – the one that threatened to recommend revocation of accreditation. It stated: “The Committee requests that the President of George Mason University and the Dean of the School of Law appear at a hearing before the Committee, in accordance with Rule 11(b), on April 23, 2004 at 9:30 a.m., at the Committee’s meeting in Baltimore, Maryland, to show cause why the School should not be placed on probation or removed from the list of approved law schools. If the Law School and University do not present a reliable plan for bringing the Law School into compliance with Standard 211, the Committee, at its April 2004 meeting, will recommend to the Council that the Law School be placed on probation or be removed from the list of approved law schools.”²¹

George Mason, its leaders probably frantic at this point, reported back that its entering class of 2003 had reached 17.3 percent minority and its entering class of 2004 was 19 percent minority. In the meantime, it had appointed an assistant dean to serve as the school’s first minority coordinator and established an outside “Minority Recruitment Council, which ha[d] met with a newly-constituted faculty committee to explore and implement efforts to increase the number of minority students.

Even so, the fifth ABA action letter continued to insist that the ABA had “reason to believe that the School has not established compliance”²² with diversity standards for students. This letter complained in particular of what the ABA regarded as low numbers of African-American students: “Of the 99 minority students in 2003, only 23 were African-American; of 111 minority students in 2004, the number of African-Americans held at 23.”²³ It should be noted that this was not because few offers of admission were made to African-American students. In 2004, for example, 63 African-Americans had been offered admission.

In response, George Mason pointed out that it had increased the number of minority students by 60 percent in the past five years. From 1999 to 2005, scholarship aid had been increased from \$234,049 to \$700,000 with more than 25 percent of that amount going to minority students. “The Admissions Office spends 65 percent of its travel budget on minority

²¹ Cited in *Affirmative Action in American Law Schools* at 183.

²² Cited in *Id.* at 184.

²³ *Id.*

recruiting events” and “[t]he Career Development Office offers, sponsors, and/or participates in dozens of minority placement events.” The school continued initiatives like “LSAT fee waivers, CLEO support, and academic support programs.” “Student organizations with a focus on diversity have been encouraged, and have increased in number.”²⁴

Finally, the ABA relented and renewed its accreditation – just in time for the next round of the seven-year re-accreditation process. But it concluded its sixth action letter with this admonishment: “The Committee directs the attention of the President of the University and the Dean of the School of Law, to the need to continue efforts to increase the diversity of the Law School student body and faculty. In addition, the Committee requests that the regular site evaluation team that is scheduled to visit the School direct particular attention to the School’s efforts with respect to these issues.”²⁵

Sure enough, the ABA’s 2007 site evaluation team report raised concerns that George Mason was not in compliance with ABA diversity standards. This time, part of the focus was on the need for more minority role models on the faculty. The report theorized that George Mason’s lack of success in attracting minority students despite what the report admits were extensive efforts may be attributable to a “lack of diversity on the faculty” (p.50) and “the lack of a critical mass of minorities in the school preventing new applicants from feeling compatible in a population largely devoid of their minority peers” (p. 63). The process of pressuring George Mason into lowering its standards to satisfy the ABA was beginning anew.

Meanwhile, an important question was not being asked: What happened to the minority students who were admitted in the first round against the George Mason’s faculty’s better judgment? The ABA was apparently not so interested in that. But George Mason’s dean, Daniel D. Polsby, was very interested. In a letter dated January 3, 2008 to Hulet H. Askew, the ABA Consultant on Legal Education (the “Polsby Letter”), responding to the ABA’s 2007 site evaluation report, Dean Polsby patiently explained the damage inflicted by the ABA’s enforcement of diversity standards.

Dean Polsby wrote: “*We admit virtually every African-American applicant whose academic record is anywhere near the level normally required for admission to George Mason. This policy entails a substantial lowering of our normal admission requirements*” Polsby Letter at 8 (emphasis in original). He presented statistics that showed that almost all the African-American admittees had LSAT scores below the median for admittees of other races, and that the vast majority had scores remarkably below that median.²⁶ The same was true of actual African-American enrollees measured against actual enrollees of other races.²⁷ Polsby also noted large gaps in Undergraduate GPA between African-American enrollees and enrollees of other races. While the median Undergraduate GPA of other races was 3.5, almost all African-American enrollees had an average well below that with some enrollees with averages as low as 2.1 or 2.2.

²⁴ Action of Accreditation Committee, October 2005, cited in *Affirmative Action in American Law Schools* at 184.

²⁵ Id. at 2 (citations to ABA Standards omitted.)

²⁶ According to the letter, while the median LSAT score for admitted students of other races was 165, African American students with scores as low as 147 were admitted. See Polsby Letter at 9, Chart 1.

²⁷ See Polsby Letter at 10, Chart 3.

As Dean Polsby recognized, when students attend a school at which their entering academic credentials are well below those of their peers, they will usually earn grades to match. Those who insist otherwise are engaging in wishful thinking. During the period from 2003 to 2005, while George Mason was under pressure to increase its racial diversity, African-American students experience dramatically higher rates of academic failure (defined in George Mason's academic rules as a GPA below 2.15). Indeed, the figures were stunning: **Fully 45% of African-American law students at George Mason experienced academic failure as opposed to only 4% of students of other races.** George Mason had been forced to lower its standards for admission in order to please the ABA and against the better academic judgment of its faculty. The results were not pretty for anyone, not for George Mason, not for its dean and faculty, and most of all not for its African-American students. As Dean Polsby put it:

We have an obligation to refrain from victimizing applicants, regardless of race or color, by admitting them to an educational program in which they appear likely to fail. This obligation is recognized in Standard 501(b) but we believe it exists independently of any ABA regulations. Adhering to this principle is the greatest obstacle to our efforts to increase the diversity of the George Mason student body.²⁸

This was understatement. In another part of the letter, he referenced the great cost “in terms of time, money and emotional distress” incurred by those minority students “who later failed out of the law school.”²⁹ Part of the tragedy is that the empirical evidence indicates that many of these students would have been succeeded in their ambition to become lawyers if they had attended a law school at which their entering academic credentials had been more like the median student's.

This proposal is consistent with Grutter; allowing accreditors to pressure institutions to require discrimination in admissions is not.

The majority opinion in *Grutter v. Bollinger* declared that deference to the academic judgment of individual colleges and universities within constitutional limits is sometimes desirable. But it never said anything about deference to the academic judgment of accreditors. Stating that “universities occupy a special niche in our constitutional tradition,”³⁰ it cited a number of cases in which individual colleges and universities had been accorded the right to make academic judgments free from outside pressure on issues over which they were thought to have special expertise free from outside pressure. Among the cases cited was *Regents of the University of Michigan v. Ewing*³¹, in which the Court explicitly recognized institutional academic freedom, stating that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students,” but also “on autonomous decisionmaking by the academy itself.”

²⁸ Polsby Letter at 14.

²⁹ Polsby Letter at 2.

³⁰ *Grutter* at 329.

³¹ 474 U.S. 214 (1985)

The core of the *Grutter* decision was the extension of the principle of institutional academic freedom to racially discriminatory admissions policies, which would otherwise have been subject to the least deferential legal standard in Constitutional law—the strict scrutiny test. *Fisher* re-affirmed this extension and added, “A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision.”³²

How do we know that the Court intended academic freedom to apply at the institutional level rather than at the level of the federal accreditor? It said so: “Our holding today is in keeping with our tradition of giving a degree of deference to *a university’s academic decisions*, within constitutionally prescribed limits.” *Id.* at 16 (emphasis added). The Court did not defer to the higher education industry generally or to accreditors, but rather to “a” university, making decisions on academic issues.

There is every reason to believe it meant what it said. In *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957), which was cited prominently in *Grutter*, Justice Frankfurter made his justly famous concurring statement about the “the four essential freedoms of *a university*,” which he identified as the freedom “to determine for *itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”³³ (Frankfurter, J., concurring)(emphasis added). The *Ewing* Court re-affirmed that “[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of *a university*.” The reason for this focus on individual institutions is clear. As discussed below, education, particularly higher education, is prone to lemming-like fads. The best way to combat this is to enable institutions, to the extent practicable, to make their own way. Institutional diversity ensures that somebody, somewhere will be getting a good education, and their example will eventually be emulated by institutions that have left the path of sound pedagogy.

Far from being entitled to academic deference, the ABA, like other federal accreditors and like the Department of Education, is precisely the kind of institution that academic freedom is supposed to protect colleges and universities *from*. If law schools are to have the academic freedom accorded to them in *Grutter* and *Fisher*, they ought to have the academic freedom to choose not to employ race-based admissions policies. It is each individual law school and not the ABA that has been accorded “the right to select those students who will contribute most to the ‘robust exchange of ideas.’”³⁴ Uniformity of approach is both unnecessary and undesirable.³⁵

³² *Fisher* at 2419.

³³ *Id.* at 255, 263 (emphasis added.)

³⁴ *Id.*

³⁵ That is why the Commission recommended in *Affirmative Action in American Law Schools* that issues of diversity be left to individual law schools. See Recommendation 6, “The Council should revise the recently adopted Standard 212 to delete the requirement that law schools seeking accreditation demonstrate a commitment to diversity. The standard should instead be revised to permit law schools, consistent with *Grutter v. Bollinger*, the freedom to determine whether diversity is essential to their academic mission. Accordingly, the Council should repeal Interpretation 212-2 so as to most clearly preserve law schools’ academic freedom in the accreditation process.” *Affirmative Action in American Law Schools* at 144.

Higher Education is Prone to Ill-Considered Fads; Accreditors Should Not Be Permitted to Impose Those Fads on Every College and University in the Nation.³⁶

Education—particularly higher education—differs from more typical enterprises in at least two important ways. First, the quality of its services is difficult to measure. Second, in part because its benefits are believed to extend beyond students, it is heavily subsidized by government and charitable foundations. This makes it somewhat insulated from both competition and criticism and vulnerable to demands for various kinds of patronage.

As a consequence of these structural factors, education is prone to fads—some of which can become deeply rooted. Some are relatively harmless. See William R. Daggett, et al., *Color in an Optimum Learning Environment* (2008)(recommending that mathematics classrooms be painted indigo or blue and that social studies classrooms be painted orange, green or brown). Sometimes, however, they can have seriously harmful effects. See Paul A. Kirschner, et al., *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and Inquiry-Based Teaching*, 41 *Educ. Psychologist* 75 (2006)(recounting the extreme popularity over the last half century of pedagogical methods that emphasize unguided or minimally guided student learning and discussing the evidence that, at least for students without considerable prior knowledge, these methods are less effective than more guided learning).

Over their history, colleges and universities have often fallen prey to fashionable race discrimination. See *McLaurin v. Oklahoma State Regents*³⁷; *Sipuel v. Board of Regents*.³⁸ Consequently, it would be a mistake to allow these fashions to be imposed by accreditors, even when those accreditors have the most sterling of academic credentials (which the ABA assuredly does not).³⁹

Consider, for example, the Jewish quotas that swept the Ivy League beginning in the 1920s. Harvard's president at the time was A. Lawrence Lowell, also the vice president of the Immigration Restriction League, an organization steeped in that era's new scientific racism. He was determined to do something about what he called "the Hebrew problem," and argued it affected both student recruiting and alumni fundraising.⁴⁰ As he put it:

The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and

³⁶ This section of this letter is derived from the Brief Amicus Curiae of the California Association of Scholars in *Fisher v. University of Texas*, 133 S. Ct. 2411, which was authored in part by one of us (Heriot).

³⁷ 339 U.S. 637 (1950).

³⁸ 332 U.S. 631 (1948)(per curiam).

³⁹ Cf. Gary Becker, *The Economics of Discrimination* (1971)(arguing that institutions that are protected from competition, like government and government-protected monopolies, are more likely to engage in racial discrimination than institutions that are subject to direct market pressure).

⁴⁰ Lowell originally wanted to deal with the issue by publicly adopting a ceiling on Jewish enrollment. But when the faculty initially balked, he put forth a subtler plan. "To prevent a dangerous increase in the proportion of Jews," he insisted that future admissions should be based on a "personal estimate of character on the part of the Admission authorities." Marcia Graham Synott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970* at 108 (1979).

then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.⁴¹

At Lowell's behest, Harvard adopted a new exclusionary admissions process in 1926. Shortly thereafter, Yale dean Clarence Mendell paid a visit to Harvard's admissions director. He reported that Harvard was "now going to limit the Freshman Class to 1,000 They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation. They are giving no details to any candidate any longer."⁴² Other Ivy League and other elite colleges and universities followed suit.

But not every American university fell for this ugly practice. One of the best examples of a university willing to buck the trend was the University of Chicago, which was then a relatively young institution, having been founded in 1890. At the time, few would have regarded the University of Chicago as the leading university it is today. It did not have the warm patina of age that Harvard (founded 1636) or Yale (founded 1701) had by the 1920s. It rejected the notion that a university can have "too many Jews" and refused to impose quotas. It wanted the best students it could get. Eighty-nine Nobel prizes later, it is now regarded as one of the finest universities on the planet.

What if accreditors had been able to impose Lowell's vision on all accredited colleges and universities? All we can say is that we are relieved he never had the opportunity to squelch upstart universities like Chicago from competing on that basis.

Conclusion

In *Grutter* the Court stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary"⁴³ But preferences are unlikely to fade away on their own. To the contrary, as described in *Sad Irony*, they have been expanding, as institutions like George Mason Law School have been forced to march to the ABA's pro-preference tune. It is now up to Congress to bring the ABA and other accreditation agencies and associations to heel and to find permanent solutions to the problems of accreditation abuse. Foremost on Congress's list should be to get accreditors out of the diversity business. It is one thing for a law school to adopt its own discriminatory admissions policies; it is quite another for accreditors to force it to do so on pain of losing federal funding.

Thank you for your consideration of our proposal. We would like to meet with you or members of your professional staff to discuss it further or to respond to questions if that is possible. Gail Heriot may be reached at gheriot@usccr.gov, and Peter Kirsanow may be reached at pkirsanow@usccr.gov.

⁴¹ Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* 88 (2005)(quoting May 19, 1922 letter to William Hocking).

⁴² See *Id.* at 109.

⁴³ *Id.* at 342.

Sincerely,

Handwritten signature of Gail Heriot in black ink.

Gail Heriot
Member

Handwritten signature of Peter Kirsanow in black ink.

Peter Kirsanow
Member