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Bad Standards

The ABA goes to the *Grutter*.

By Abigail Thernstrom & Roger Clegg

Racial preferences thrive shrouded in secrecy. From the very outset — that is, since the early 1970s — the radical redefinition of equality (stressing outcomes rather than opportunity) has largely taken place behind closed doors. The American public has never countenanced race-conscious strategies. But preference supporters never give up. And in settings largely hidden from sight, they work away, undaunted, inventing new ways to impose racial double standards on employers, contractors, and institutions of higher education.

The latest example of this surreptitious activity is the effort by the American Bar Association to persuade the U.S. Department of Education that it should sanction a newly proposed ABA policy which would make racial preferences in admissions and hiring a precondition for law-school accreditation.

The ABA (or, more precisely, its Council of the Section of Legal Education and Admissions to the Bar) is recognized by the U.S. Department of Education as the accrediting agency for law schools. It is the council that adopted the new diversity "Standards" at its February 26 meeting. Those standards are released with "interpretations," all of which are binding. They have yet to be sanctioned by the ABA House of Delegates, which will be meeting in August, but the federal Department of Education can — and should — stop the ABA in its tracks by making renewal of its accreditation authority dependent on a rejection of its pernicious "equal opportunity and diversity" policy.

The ABA (on its website) describes itself as "concerned with improving the quality of legal education." The standards it sets, its says, are those which are minimal for a legal education. The law school-accreditation process, it goes on, "is designed to provide a careful and comprehensive evaluation of a law school and its compliance with the Standards…[with a] focus on matters that are central to quality legal education."

For ABA watchers, it's long been apparent that the organization is deeply committed to race-conscious admissions. That commitment was fully on display in its amicus curiae brief in *Grutter* v. *Bollinger*, which argued that preferential admissions to the University of Michigan's law school were "essential to increasing minority representation in the legal system." But, as the National Association of Scholars has pointed out, since the Supreme Court's decision in that landmark case, the ABA has become emboldened — which the newly minted policy makes plain.

And thus what the organization calls "minimum standards… central to quality legal education" have come to include a forthright embrace of racial preferences. Law schools, its revised Standards 211(a) and (b) state, are required to:

> demonstrate by concrete action … a commitment to having a student body that is diverse with respect to gender, race, and ethnicity,"…[and to] "having a faculty and staff that are diverse," as well.

The accompanying Interpretation 211-1 states:

> The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Interpretation 211-3 adds:

> that "the totality of the law school's actions *and the results achieved*" determine compliance (emphasis added).

Much (needless to say) is wrong with the ABA's new diversity standards.

First, their emphasis on "results achieved" (getting the numbers right) seems to require law schools to disregard federal constitutional and statutory requirements that are inconsistent with ABA policy. Can the Department of Education really sign on to such a directive? Any action that, in effect, forces schools to violate students' Fourteenth Amendment, Title VI, and other rights would be tantamount to a violation of those rights on the part of the department itself.

Moreover, not only do the standards suggest antidiscrimination laws — including federal and state constitutions as well as statutes — can be ignored, but Interpretation 211-1 says explicitly that such laws are no excuse for failure to meet the standard. In other words, if the ABA's policy is approved, public law schools in California will be put in the impossible position of having to choose between state constitutional requirements and ABA accreditation. And every law school in the country will have to choose between complying with U.S. Department of Education's civil-rights regulations (upon which the receipt of federal funds depends) and adhering to the ABA Standards and Interpretations.

None of this coercion is justified by the Supreme Court's decision in *Grutter*, which gave *law schools* permission to give some limited weight to race in order to achieve some greater degree of diversity if they thought there were compelling educational reasons to do so. The ABA is not a law school fashioning its own policy, but an external body that is dictating race-conscious admissions and hiring rules; the belief in deference to institutional judgment that was critical to the Court's opinion in *Grutter* is simply irrelevant to the question of ABA accreditation standards.

Finally, while diversity borders on a religious conviction in the ABA and institutions of higher education, including law schools, there is mounting evidence that preferences don't work as their supporters imagine. Racial double standards in law schools set preferentially admitted students up for failure. It's a familiar point to which UCLA law professor Richard H. Sander has brought new and stunning data, leading him (a lifelong liberal Democrat and erstwhile supporter of preferences) to conclude that such affirmative action has actually resulted in *fewer* African=American lawyers.

The secrecy in which racial preferences have thrived has frequently been fostered by federal bureaucracies. The Bush administration can break with this practice — or add another ugly example of it.

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