Supreme Court of Texas
Misc. Docket No. 25-9018
Response to: Order Inviting Comments on the Law School Accreditation Component of Texas's Bar Admission Requirements
Submitted by Professor Josh Blackman (6/30/2025)

I submit this comment in my individual capacity, and not on behalf of my employer, the South Texas College of Law Houston. Admittedly, my views about the ABA are out of sync with those of most law professors and deans in Texas. I submit this minority report quite deliberately. The Supreme Court's order invited "comments on this topic from the Texas Board of Law Examiners, the Texas law school deans, the bar, and the public." With respect, I think this order lists the relevant constituencies backwards. The Supreme Court's authority to regulate the legal profession is premised on serving the public interest. And the interests of law school deans, in particular, are not always consonant with the public interest.

A simple example illustrates this point. Were the Supreme Court to end its reliance on the American Bar Association, the most immediate practical effect would be on portability: Students who graduate from Texas law schools that are not ABA accredited may not be eligible to sit for bar exams in other states. To law school deans, this outcome would be an anathema. How can elite law schools thrive without recruiting top students who will not stay in Texas? Of course, Texas could still allow students who graduate from law schools in other states to sit for the Texas Bar exam. And nothing would prevent elite law schools from voluntarily undergoing ABA accreditation. The theoretical problem is limited to students who graduate from non-elite Texas law schools who seek to leave our state.

I think the public would ask a reasonable question: Why should the state adopt rules to benefit people who have no interest in serving Texans? Herein lies the disconnect. Two decades ago, Justice Clarence Thomas lamented that the University of Michigan Law School was little more than "a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan." Thomas, as usual, was right. He questioned UM's "decision to be an elite institution [that] does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan." What is good for Texas is not necessarily good for the University of Texas, and vice versa.

In June, I helped to organize a symposium hosted by the Civitas Institute about Texas and the Future of Legal Education. This conversation advanced a range of criticisms about the ABA's role. I think each essay, which I've appended to this comment, is worth studying. But here, I urge the Court to consider the broader interest of the public, and not simply the concerns of entrenched regulated entities. There is no demonstrable connection between the ABA's onerous regulations and "promoting high-quality and cost-effective legal education." In the past decade, the Supreme Court of Texas erred by adopting the Uniform Bar Exam and joining the NextGen Bar Exam—decisions that were part of the conveyor belt towards nationwide portability. In that process, the Supreme Court has neglected the teaching of Texas law and flattened federalism. The time is now ripe for the Supreme Court to change course. If portability is so important, there are other ways to accomplish this end than through the ABA's byzantine regime.

I appreciate the Court's consideration.

Sincerely,

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(And to reiterate, my views *certainly* are not submitted on behalf of STCLH)

The Supreme Court of Texas Must Put Texas First, and Liberate Law Students from the ABA

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

In any polity, the most foundational question is “Who decides?” Generally, the executive and legislative branches determine what policy ought to govern, and the judiciary neutrally applies those laws. But in certain spheres, the courts hold regulatory power. For example, the Supreme Court of Texas (SCOTX) is charged with regulating law schools, the bar exam, and the legal profession. Here, the Justices act as a quasi-legislature. Admittedly, this role may be a bit unfamiliar. Generally, courts say what the law is, not what it ought to be. But when it comes to law schools, the Justices do the exact opposite, and make policy.

Over the past decade, SCOTX made two fateful decisions about legal education. First, in 2018, SCOTX replaced the venerable Texas bar exam with the so-called “Uniform Bar Exam” (UBE). As a result, the Texas bar would no longer test law specific to the state of Texas. Yes, you read that right. Texas law students do not need to learn topics such as oil and gas, Texas family law, or the rules of procedure in Texas courts. Rather, the National Conference of Bar Examiners (NCBE) would test students on the general, or uniform law, in all states.

Why did SCOTX go down this road? The answer is simple: portability. Deans at Texas law schools insisted that they wanted to cater to students who did not intend to practice in Texas. Did this decision serve the people of Texas? I am skeptical. At my law school, and others, enrollment in Texas-specific classes plummeted. Students who will almost certainly practice in Texas no longer see the need to be versed in Texas law. Regrettably, Texas

courts and Texas clients will be poorly served. Moreover, as I noted back in 2015, the UBE repudiates federalism and the essential principle that the law is different in every state.

Once SCOTX abandoned the local bar exam, Texas lost the institutional memory and ability to administer its own exam. Now, Texas lawyers were at the mercy of the NCBE. Indeed, only a few years later, the NCBE announced it would shift to the so-called "NextGen" bar exam. This test removed more topics from the exam and eliminated the need to memorize even the most basic principles of law. And there were concerns about the exam imposing DEI principles. Will this exam benefit the people of Texas? Who knows? Despite some controversy, in 2024, Texas announced it would adopt the NextGen bar exam. What choice did it have? Texas no longer has the ability to proctor its own exam, and the law deans insisted this test was necessary for students to practice in other states. Generally, Texas proudly stands apart from blue states like New York; however, when it comes to law schools, there is little difference between the Empire State and the Lone Star State.

The Texas Supreme Court, and indeed most state courts, have been subject to regulatory capture. Law deans want to attract law students from across the country, even those who do not plan to stay in Texas. Two decades ago, Justice Clarence Thomas lamented that the University of Michigan Law School was little more than "a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan." Thomas, as usual, was right. He questioned UM's "decision to be an elite institution [that] does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan."

We can ask the same question about Texas. Why is it in the interest of the Texas Supreme Court to allow students to be educated here and practice elsewhere? President Trump is fond of saying that Americans should put America first. Why shouldn't Texans put Texas first? Certainly, the Texas legislature does not provide benefits to Texans who pledge to leave the state. Why should the Supreme Court of Texas, when acting as a legislative body, behave any differently?

Thankfully, SCOTX now has a chance to correct the course. In 1983, SCOTX delegated to the American Bar Association the authority to accredit law schools. For the past four decades, law students must graduate from an ABA-approved law school to sit for the Texas bar exam. But in April 2025, SCOTX solicited public comments on "whether to reduce or end the . . . reliance on the ABA." This request came on the heels of the Florida Supreme Court's similar request.

The problems with the American Bar Association's Section of Legal Education are well known. The ABA imposes an endless series of "standards" on law schools, without providing any evidence that these standards are actually effective. The organization imposes a one-size-fits-all all policy, without regard to how the missions of elite law schools differ from those of access law schools. And critically, the left-leaning ABA has dragooned all law schools to impose onerous DEI requirements — a step they have only temporarily suspended in response to action from the Trump Administration. Critically, the ABA does not consider the needs of the people of Texas.

Yet, as could be predicted, the Texas Law Deans have rallied in support of the American Bar Association. On May 12, a "conversation" on the ABA's role as accreditor was convened by all of the Texas law schools (including my own). There were eleven speakers, ten of whom wholeheartedly supported the ABA's role as accreditor. Only Professor Seth J. Chandler of the University of Houston offered some critical comments about the organization. However, such groupthink is emblematic of the broader lack of ideological diversity in the academy. Moreover, this monolithic thought is especially unhelpful when deciding whether to change the regulatory regime. (Indeed, this online symposium hosted by the Civitas Institute was occasioned by the glaring one-sided nature of the ABA defense rally.)

Why has the Texas Supreme Court delegated its authority to the ABA? The simple answer is that it is easier to let someone else do the hard work of governing. Texas and other states need to reclaim their authority from groups like the ABA and the NCBE. SCOTX should play a crucial role in ensuring that law schools adequately prepare students to be effective Texas lawyers. However, this can be achieved without the ABA's stringent and ineffective standards. Instead of measuring "inputs," SCOTX should instead measure "outputs." For example, accreditation would turn on bar passage over a three-year rolling average, combined with consideration of employment outcomes. Schools are then free to experiment with different ways to achieve this goal. SCOTX

could also require that law schools be accredited by other regional accrediting bodies, which can monitor that schools have adequate finances and other organizational standards. This other accreditation would ensure that students remain eligible for student loans.

And what about portability? Here, collaboration with the federal government would be feasible. The Trump Administration has shown some hostility to the ABA. I suspect the Department of Education would be ready, willing, and able to work with the Supreme Courts of Texas and other states. It would not be challenging to arrange interstate compacts to permit portability on neutral terms. Indeed, if Texas law firms want lawyers from other states to be able to join the Texas bar, SCOTX can permit that process without surrendering control of the Texas bar exam to outside groups.

Law school deans may think that the only way for portability to exist is under the current framework, but there are bold opportunities for new paradigms to emerge. And in the process, SCOTX can liberate law students from the ABA's grip, even over the objection of law deans. And law schools that wish to maintain their ABA accreditation voluntarily can do so on that basis.

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Accrediting for Tomorrow: Law School Metrics and Interstate Compacts

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

The American Bar Association's (ABA) monopoly over law-school accreditation once guaranteed national portability and a baseline of quality. However, this monopoly is increasingly facing political challenges and growing discomfort, particularly concerning its influence over curriculum, costs, and diversity standards. This essay sketches a complementary pathway—grounded in transparent metrics and stitched together by an interstate compact—that would enable willing states accredit on outcomes, not just prescriptive inputs, while preserving rigorous public protection.

The ABA's Strength—and Strain

Current ABA accreditation—with its exhaustive data collection, self-studies, multi-day site visits, and growing standards manual—has established a common floor for bar admissions and federal loan guarantees, creating a nationally portable credential. Yet that success has carried at least three significant costs.

First, latency. Because comprehensive visits are expensive and thus occur only once every ten years, problems that emerge in year two may lie fallow until year eight, when frantic remediation begins. The ABA's interim

questionnaires supply information, not nimble oversight: the Council seldom intervenes unless disaster is already visible.

Second, mission drift and questionable return on investment (ROI) on standards. Recent standards have, at times, reached beyond core academic and professional competence, pressing schools toward particular ideological commitments or specific visions of social policy, raising concerns about politicization and insufficient attention to intellectual diversity. Moreover, there is a notable absence of published studies linking ABA accreditation or satisfaction of many individual ABA standards—say, the mandate for "programmatic learning-outcome review every five years" (Standard 315(b))—to improved bar passage, employment, or civic engagement once incoming student credentials and resources are controlled for. Would eliminating such a standard truly result in worse attorneys when outdated curricula would likely be captured by other, more outcome-focused metrics, such as bar passage or employment?

Third, there is a profound lack of transparency. The detailed findings, site evaluation reports, and even the specific reasoning behind certain accreditation decisions—documents that critically determine a law school's standing, its graduates' eligibility for the bar, and student access to federal loans—are not made available to the public or even to the broader faculty of the institution under review. It's thus hard for the public to insist on reforms or to assess the biases of site visit teams.

None of this counsels immediate abolition. It does counsel choice.

An Outcome-Based Safe Harbor

Suppose the regulatory authorities of State A were to accredit a law school annually if transparent, publicly verifiable data showed that (a) at least 75 percent of first-time takers passed the bar over a rolling three-year window, (b) a super-majority of graduates secured JD-required or JD-advantage positions within ten months, and (c) graduates' median debt-to-income ratio two years out did not exceed a specified ceiling. To blunt curriculum-narrowing, the state might also require proof that most students have completed a minimum menu of non-bar courses—tax, immigration, intellectual property, or bankruptcy, for example, with the regulatory authority potentially setting numeric thresholds for such course completion.

Schools clearing every threshold could offer their graduates eligibility for the State A bar even if they declined the ABA's process. Far from forcing anyone's hand, the safe harbor would run parallel to the traditional route: a school satisfied with ABA accreditation remains free to stick with it, and a risk-averse applicant need only choose such a school.

Goodhart's Law—and How to Survive It

The gravest objection to metric-driven oversight is Goodhart's Law: when a measure becomes a target, it ceases to be a good measure. A school could, in theory, strip its elective curriculum to the bone, teach nothing but bar topics, and march graduates through commercial prep courses. Yet several considerations soften that worry.

First, markets are multi-dimensional. Employers who rely on new associates for tax, IP, or immigration advice will likely shun graduates who are steeped solely in evidence law. Market feedback can act as a natural corrective.

Second, the feared distortion is incremental, not novel. The ABA system already privileges bar passage indirectly through Standard 316. The U.S. News & World Report ranking incentives, which dominate admissions marketing, already induce many schools to place a heavy emphasis on bar passage.

Third, a portfolio of metrics disciplines can lead to tunnel vision. Pairing bar success with employment outcomes, debt-to-income ratios, and curricular-breadth requirements (such as minimums for diverse non-bar course completions) turns bar-only optimization from a vice into a virtue. An intelligently designed algorithmic system could proactively address this.

In short, Goodhart bites hardest when regulators choose a solitary number and stare at it. A balanced dashboard turns the maxim into design guidance rather than a fatal flaw.

Why a Compact Is Indispensable

But wouldn't a state-based algorithmic accreditation system both trap students in their own states, just as was the case before the ABA emerged as a monopoly accreditor? Not necessarily. A legal education compact could cure the problem.

A legal-education compact entered into by a group of states would specify: (1) the minimal reliability and core principles of educational quality required of any member's algorithm; (2) a verification protocol, including random third-party audits of underlying data to ensure integrity and prevent manipulation; and (3) automatic reciprocity once verification is confirmed—so that a graduate of an algorithmically accredited school in State B may sit for State A's bar without additional hurdles (and vice-versa). Governance could rest in a small commission comprising deans, judges, and public members, whose reports are published in full, ensuring independence and expertise.

Such a structure marries local experimentation to interstate mobility: any state may pioneer a metric it deems valuable, yet no state needs to accept another's algorithm until it passes the common test of transparency and validity.

Likely Benefits and Predictable Objections

A. Benefits

An outcome-based pathway compresses the feedback loop from a decade to a year, allowing regulators to detect slippage early and students to vote with their feet. It lowers fixed costs—particularly for innovative providers like distance-learning programs whose facilities might never satisfy the bricks-and-mortar emphasis of current site visits—potentially leading to more affordable legal education models. Furthermore, such a system could be more flexible in recognizing programs that cultivate evolving competencies needed in a legal profession being reshaped by technologies such as AI. Indeed, much of the expensive faculty required by ABA accreditation standards could likely be replaced by AI soon.

B. Objections

Skeptics will cite data integrity and the temptation to "teach to the algorithm." Both are real, but neither is unique to this model. Others may reasonably worry whether quantitative metrics can truly capture all essential elements of being a competent and ethical lawyer, such as critical thinking, ethical judgment, client counseling, and negotiation. In an age of ever-evolving AI, however, where machines can sensibly evaluate essay examinations or perhaps even live human performances, it might well be possible to develop additional inexpensive testing mechanisms that measure these additional skills better than ABA accreditation requires.

There are further complexities that this short essay cannot fully address. Developing initial algorithms, data infrastructure, and interstate compacts involves initial costs and complexity. Who would bear these costs? Moreover, even once accreditation rules were in place, a system would have to be developed for new schools and provisional accreditation: you can't measure employment or bar passage where none of your students have yet gotten a job or taken the bar. Perhaps the new school could show through a predictive model that, given the credentials of its admitted students, satisfaction of algorithmic criteria is likely.

Conclusion

Professional licensure seldom rewards innovation; path dependence is its defining instinct. Politics, economics, and technology have combined to question the continuing ABA monopoly. Transparent, multi-metric accreditation administered annually and recognized across a compact of like-minded states promises faster

correction of institutional failure, lower tuition, and the freedom for new entrants to experiment without first mustering a decade's worth of operating cash. But the proposal neither abolishes the ABA nor consigns its standards to irrelevance. Indeed, even established institutions might opt into dual accreditation, using annual metrics as an early-warning system while retaining ABA status for prestige and as a belt-and-suspenders device. The proposal merely restores what federalism has always offered American education and professional training: competition based on merit.

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Ending the ABA's Role in Accreditation Will Benefit Texas

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

Texas should no longer cede a critical gatekeeping function for the legal profession to a private organization whose members directly benefit from restricting competition. The Texas Supreme Court deserves applause for challenging the American Bar Association's (ABA) role in accrediting law schools, a move that could significantly expand access to legal services across the state. If the Court ultimately opens doors to alternative routes to the practice of law, it will expand the availability of legal services in the state, primarily benefiting poor and middle-class Texans who are largely shut out of the market for legal services by the high cost of hiring a lawyer. One reason those costs are high is that the ABA has driven up the price of legal education through outdated accreditation standards.

Today, most people assume that accreditation of educational institutions is a consumer protection measure. This sounds plausible. Buying a law degree or other higher education degree is a big purchase, often the largest that a prospective student has made in his or her life thus far. Prospective students are often ill-equipped to evaluate the quality of law schools' offerings. Even if they have family members who are lawyers, those relatives often graduated from law school decades ago. So their experience of legal education (even at the same school) is likely vastly different than a prospective student's today.

As Roger Meiners and I argue in a forthcoming article on the anti-competitive effects of accreditation more generally, when the federal government expanded its role in funding higher education after World War II by providing funds for veterans to attend college, it became concerned that unscrupulous colleges would take advantage of veterans' relative ignorance about college quality. Rather than attempt to regulate colleges directly, it instead required that colleges be accredited by an organization approved by the government. As anyone familiar with public choice theory would predict, these accrediting agencies were quickly captured by the colleges they were supposed to regulate and became effective means of enforcing a cartel that raised prices and stifled innovation (e.g. requiring minimum credit hours for degrees).

The ABA's historical role in accrediting law schools is even more unsavory. As Prof. George Shepherd thoroughly documented in a 2003 article, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools,* the ABA standards for legal education were specifically designed to raise the cost of legal education to exclude Blacks, immigrants, and Jews, who were flocking to inexpensive night law schools. In the 1930s, the ABA's regulations of legal education, which required years of pre-law school higher education (and eventually an undergraduate degree), expensive libraries, a preponderance of full-time faculty, and other elements, successfully raised prices to exclude many lower-income individuals from the practice of law when they were instituted. They still do. The Texas Supreme Court could lead the nation in expanding access to justice by abolishing this archaic, anticompetitive accreditation requirement and allowing competitive forces to drive innovation in the preparation of lawyers.

Perhaps even if you are persuaded that the ABA's initial motives for establishing accreditation were ill-intentioned, you remain doubtful about removing it now. Won't opening the doors to the legal profession more widely bring in more poor-quality lawyers? It need not. As Prof. Samuel Estreicher has argued, the brilliant jurist Benjamin Cardozo never completed a three-year law degree; he attended Columbia Law School for just two years before passing the bar exam.[1] More generally, relatively few countries follow the American model of requiring seven years of higher education to become a lawyer. In many countries, law is an undergraduate degree. In Britain, an undergraduate degree in *any* subject, achieved with a minimum level of competence, together with passing a two-part test of legal knowledge and a two-year apprenticeship, is sufficient. There are many ways to acquire the knowledge and skills necessary to practice law. There is no reason to limit prospective lawyers to one particularly expensive one.

What would happen if the Court ended the requirement? Few existing law schools are likely to abandon their current model or relinquish ABA-accreditation, if for no other reason than to enable their graduates to practice in other states, where it remains a requirement. So just what would ending the requirement mean for Texas? There are states with state-accredited and unaccredited law schools (California, for example), and similar developments may occur in Texas. More likely, however, we would see some completely different models of legal training programs emerge, particularly in areas of high need which lack law schools. New training programs (which may or may not offer a degree) for lawyers could be created without the substantial fixed and subscription cost of a library (virtually all crucial materials are online) and relying primarily on practicing lawyers as part-time instructors. Indeed, before the ABA got its hands around their throats, that is precisely what the network of part-time and evening law schools in the 1930s looked like.

Where would this happen first? The Rio Grande Valley, Laredo, and El Paso are major population centers with vast unmet legal needs. Enabling people in those communities to become lawyers without the disruption and expense of moving away from home for three years (a significant expense) is one likely benefit. Texans deserve better access to justice, and better access to the legal profession, than the current anti-competitive system provides. The Texas Supreme Court has the power to unlock access to justice and the legal profession for all Texans. Let's hope it seizes this opportunity.

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New Paths for Legal Education Should Be Considered

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

Higher education accreditation is a boring and thankless task. Independent accrediting bodies develop standards that meet federal Department of Education guidelines. Those groups hold schools to those standards. If schools meet those standards, they are eligible for higher education funding and loans. Most Americans could not name accrediting bodies like the Higher Learning Commission or the Middle States Commission on Higher Education. An exception is the American Bar Association.

The ABA has long had public-facing liberal political positions. In recent years, for instance, it has regularly rated Republican-appointed judicial nominees, controlling for other factors, as less qualified than those appointed by Democrats. It "remains committed to supporting reproductive choice" and weighed in on a recent controversy involving the abortion drug mifepristone. It believes the Equal Rights Amendment is currently enacted as the Twenty-Eighth Amendment to the Constitution.

The Section on Legal Education and Admissions to the Bar is the ABA's accrediting arm for law schools in the United States. The Section is ostensibly independent of the ABA. But if a relationship with the ABA brand remains, and as long as the ABA's House of Delegates retains some power to review the decisions of the Section, that independence will be met with understandable skepticism to the outsider who regularly sees the ABA's public-facing ideological progressive positions.

The Section is hardly immune to controversy. After the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, the Section originally retained Standard 206, which required that law schools demonstrate a commitment to having a student body that is "diverse with respect to gender, race. and ethnicity." The Section received pushback, and in 2024, it moved to eliminate the provision. That amendment also received pushback from a number of law school faculty and deans. So the Section moved in the other direction with an amendment to Standard 206. It required a law school "demonstrate by concrete actions" a commitment to "diversity, inclusion, and access to the study of law and entry into the legal profession for all persons including those with identities that historically have been disadvantaged or excluded from the legal profession due to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and/or socioeconomic background."

This explicit race-based language quickly drew the attention of the Trump administration, and in a series of repetitive notices, the Section has indicated it will suspend implementation of the Standard. This is no surprise. The ABA has regularly capitulated to the demands of the federal government with respect to its accreditation standards. In 1995, it entered a settlement with the Department of Justice for having standards that were too stringent. In 2016, it faced challenges from the Department of Education for being too lax and likewise implemented changes. In short, pressure from the federal government can make an accrediting body like the Section change its practices.

The Section has increasingly micromanaged the decisions of law schools—decisions that often increase the costs for legal education with no assessment of any corresponding benefit to students. A new batch of rules requires "learning outcomes" on course syllabi to match each other across sections and to be reviewed regularly, along with obligations for faculty to engage in "educational activities that promote effective teaching." Another proposed rule requires minimum thresholds of costly "experiential" education in all institutions, with micromanagement about the timing and the type of experiences. These changes may be beneficial or detrimental to a given institution. But they undoubtedly increase costs, both for the institution to implement them and for the institution to keep a record of them as proof to the accreditor.

Most states have further empowered the ABA by requiring that bar exam test-takers must graduate from an ABA-accredited law school. This separate requirement is a creation of state supreme courts and can easily be undone. State supreme courts, such as those in Florida and Texas, are now considering whether the ABA should maintain its monopoly on accrediting law schools. It is a worthwhile endeavor, but some notes of caution are in order.

First, many state bars have been exploring alternative pathways to licensure. These reforms typically assume graduates of ABA-accredited law schools are the only appropriate licensed attorneys and aim to provide multiple ways for them to become practitioners. Rather than reforming the two-day, $1000 bar exam, innovative state bars should look to reform the three-year, six-figure cost of legal education.

Second, what one state does can have a significant ripple effect outside the state, and its effects might be unanticipated. Suppose Texas were to require all bar exam test-takers to have taken a course in Evidence. Some law schools already require this. Others do not. Inside Texas, law schools may start requiring Evidence, simply because most graduates of Texas schools would take the Texas bar. Outside the state, law students in Maine, Montana, or Alabama who might want to take the Texas bar may learn too late that this is a requirement.

Third, deregulation may not be as significant as one might expect. Suppose Texas were to permit graduates of any accredited school, whether accredited by the ABA or some other body, to take the bar exam. Most existing law schools, including those in Texas, would still maintain ABA accreditation, allowing their graduates to practice in the other 49 states.

Experiments with deregulation have had limited success and some significant failures. California permits graduates of schools accredited by the state, regardless of whether they are accredited by the ABA, to take the bar exam, along with graduates of unaccredited institutions. They are less expensive than ABA-accredited schools, but most of these schools have high bar failure rates. (An exception is San Joaquin, which serves the Fresno region without any ABA-accredited competition and outperforms many ABA schools.)

Nevertheless, state supreme courts should begin to explore ways to break the ABA's grip on legal education. If the ABA continues to demand more conditions—and more expensive conditions—on law schools, state bars should no longer feel beholden to increasingly unreasonable demands. But state supreme courts must work carefully to create effective alternatives.

One promising solution is to empower existing schools to create legal programs outside the ABA's purview and permit graduates of those programs to pass the bar exam. Law schools already offer myriad degrees, including LLM and Master's degree programs, that fall outside the ABA's accrediting arm. And rather than have the state bar dictate the terms of the programs, let law schools (or other colleges and universities) come up with those programs, subject to some outer bounds of what is permissible (say, a two-year minimum period of education, or a minimum of 60 academic credits).

Success can be easily measured by looking at how graduates of those programs ultimately perform on the bar exam. If graduates of these programs pass at a first-time rate of, say, at least 70%, and if they pass within two years at an 80% rate, the program could be deemed acceptable in the eyes of the state.

If a school wanted to offer a two-year program with a one-year apprenticeship, it could do so. Or an eighteen-month program followed by an experiential component as a capstone. Whatever the case, alternative pathways permit schools to innovate. If graduates pass the bar, that is the measure of success. It allows innovation and flexibility. The state bar can always revisit these programs to determine if they are ineffective or if graduates of these programs face malpractice allegations or discipline at higher rates than other attorneys.

The ABA will likely remain an accrediting body with significant influence on legal education throughout the United States. But state supreme courts can rightly consider whether alternatives to the ABA's monolithic and costly model are appropriate.

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The ABA Deserves to Lose Its Accreditation Monopoly

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

Leadership failures and bureaucratic bloat have led to a crisis in higher education. We've seen a subversion of the core university missions to seek truth and knowledge, as well as a distortion of classical liberal values such as free speech, due process, and equality under the law. The theme of my new book *Lawless* is that this *illiberal* dynamic is particularly dangerous in the context of law schools, which produce the gatekeepers of our legal and political institutions.

The root cause of all of this is a noxious postmodern ideology that contends that truth is subjective and must be viewed through the lenses of race, gender, and other identity categories, according to some privilege hierarchy. Your rights and freedoms depend on whether you're part of a class deemed oppressor or oppressed. It's a frontal attack on the rule of law on which American liberty, equality, and prosperity reside.

One of the underappreciated aspects of what's gone wrong, especially with law schools, is accreditation. Analyzing the rules governing legal education may not be as attention-grabbing as showing how critical theory has perverted pedagogy or documenting the inquisitions of DEI offices, but it's crucial for understanding underlying pathologies and thus for any possibility of reform. That's why Attorney General Pam Bondi wrote to the American Bar Association in February to demand that it abandon its diversity mandates or lose the role it's held since 1952 as the sole accreditor of U.S. law schools. And it's why President Trump's April 23 executive order on accreditation specifically called out the ABA requirement that law schools have "a student body that is

diverse with respect to gender, race, and ethnicity" as violating the Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* to bar racial preferences.

The Texas Supreme Court has now also gotten into the act, soliciting comments on "whether to reduce or end" reliance on the ABA for determining which law schools meet the "legal study" requirement to be a licensed lawyer. This move follows a similar one by the Florida Supreme Court, which also cited the "ABA's active political engagement." These developments are overdue and should conclude by removing the ABA's monopoly on law-school evaluation.

There was a time when the ABA was one of our leading institutions and a relatively conservative, or at least institutionalist, one. Most lawyers paid dues, and Lewis Powell parlayed his presidency into a seat on the Supreme Court! However, the ABA then began moving leftward, and a group whose complaints once led Chief Justice Warren Burger to address concerns about how the Warren Court's activism became a progressive energy center. The ABA now adopts policy positions and files amicus briefs that go far beyond issues of particular concern to the legal profession. It long ago alienated conservatives—who now have the Federalist Society as a membership organization—but in recent years it's also lost the broad swath of lawyers who don't want to mix work and politics, such that fewer than 15 percent are members.

Allegations of ABA bias go back to Richard Nixon, who called the group "a bunch of sanctimonious assholes"—though more for elitism, and Nixon did end up appointing Powell. But studies show that the ABA rates Democratic judicial nominees higher than Republican ones, all things being equal, justifying the decisions of George W. Bush and Donald Trump to stop having the association prescreen candidates. (Joe Biden became the first Democratic president to do likewise, out of frustration that many of President Obama's "diverse" candidates had been rated "not qualified.") More recently, Attorney General Bondi cut off the ABA's access to non-public information about nominees, calling the group "activist."

Beyond its judicial evaluations, the ABA has used its accreditation monopoly to bend law schools to its ideological will. For example, in February 2022, the ABA instituted a new rule that all law schools must "provide education on bias, cross-cultural competency, and racism" through compulsory "orientation sessions, lectures, courses, or other educational experiences." Ten Yale law professors, including such liberal lions as Bruce Ackerman and Akhil Amar, responded with an open letter calling it a "disturbing" attempt to "institutionalize dogma."

Even before our recent "woke" era, the ABA's Section of Legal Education pressured schools to engage in racial balancing and lower academic standards in favor of diversity. Deans and faculty often support such enforcement for ideological reasons, but also to control the competition: If one school uses preferences not based on merit, it hurts its academic profile and bar passage rate. But if all law schools have to do the same, nobody will be worse off relatively.

"In essence, the ABA enforces a 'diversity cartel' among law schools, effectively insulating schools that give large preferences from competition on issues like bar passage rate with schools that would rather give smaller preferences or none at all," wrote Gail Heriot, a longtime member of the U.S. Commission on Civil Rights. This mutually reinforcing cartel was of dubious legality even before the Supreme Court outlawed such preferences, but still a regulatory conformity flourished. Indeed, the ABA hasn't hesitated to overrule the educational judgment of the law schools it regulates. In 2006, for example, Charleston School of Law unexpectedly failed to win accreditation due in part to race concerns, until the dean promised to do "whatever we have to do" and hired a new diversity director. The case of George Mason University Law School's reaccreditation in the early 2000s is even more troubling.

There's now also a growing dissonance between the ABA and state supreme courts and bar associations. For example, scholars from across the political spectrum contend that the ABA's Model Rule of Professional Conduct 8.4(g), targeting "harassment or discrimination" on the basis of assorted protected categories, suggests a speech code, such that almost every state has rejected the rule. Meanwhile, Florida's Supreme Court found that the ABA's diversity requirement for continuing-legal-education speakers amounted to a discriminatory quota. As South Texas law professor Josh Blackman wrote in April 2023, "As the ABA drifts further and further away from

the regulation of the legal profession, and focuses more and more on achieving progressive societal goals, the organization's mandate dissolves."

Accordingly, states should encourage the development of alternative rating and accreditation systems and join interstate compacts to ensure bar reciprocity. As Harvard history professor James Hankins has written, state agencies could use FIRE free-speech rankings, among others, to grade institutions, instead of social-justice or DEI metrics, endowment size, and other criteria that favor wealthy, progressive universities. State authorities are fully justified in directing regulatory efforts to produce better stewards of the public trust.

This past February, after 21 attorneys general sent a letter opposing the ABA's diversity and inclusion standard, the ABA announced that it was suspending the rule's enforcement while considering revisions. The first proposed revision eliminated references to race, ethnicity, and gender, but criticism that the change went too far led the ABA to offer a second proposal that requires schools to show through "concrete action" a commitment to including groups that historically have been excluded from the legal profession. The state-AG letter said both proposals "impermissibly impose race-based admissions and hiring requirements as a condition of accreditation." Thus came the federal intervention described at the outset of this essay.

There's still a long way to go before law schools return to their core mission of teaching future lawyers to uphold the rule of law, but the ABA isn't helpful in that reform effort either. Opening up accreditation is a solid step forward.

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The Conserving Force of Lawyers in American Democracy

Editor's Note: Part of Civitas Outlook's "Texas and the Future of Legal Education" Symposium.

The Texas Supreme Court has taken the first necessary step in reforming legal education and restoring ideological balance to the legal profession. In April, it invited comments on whether to eject the American Bar Association (ABA) from its decisive role in approving Texas's law schools. For the last four decades, only graduates of schools approved by the ABA have been able to join the bar and hence appear in Texas courts. This has enabled a political organization to exert an ideological influence over law schools, and as a result, attempt to bias the legal profession.

Entrance into the legal profession bears far more importance than the mind-numbing topics of accreditation and syllabi. Law schools dictate who enters the legal profession. Lawyers play a fundamental role in our democracy, a fact prominently observed by the great French thinker Alexis de Tocqueville. In *Democracy in America*, Tocqueville asked how our society had replaced the function of the aristocracy, which he believed played a welcome stabilizing influence over simple majority rule. Tocqueville concluded that in America, lawyers had filled the vacuum left by the absence of a European aristocracy.

Most famously, Tocqueville viewed lawyers as a moderating influence on mass democracy because of their way of thinking and the habits of their profession. Lawyers respect precedent and procedure, they accommodate political demands within an existing legal framework, and they enforce a Constitution that itself introduces important limits on democracy (separation of powers, federalism, and individual rights). In a world where Tocqueville concluded that democracy was sweeping away the ancient regime and sparking revolutions that could turn destructive, lawyers had tempered the effects of mass democracy. Tocqueville predicted that democracy, based on the equality of man, would prove an irresistible force, but one that could easily lead to the

tyranny of the majority. There are few limits on the claims of democracy to rule, but in America, Tocqueville argued, the legal system and lawyers moderated the destructive passions of democracy.

Given the central role that lawyers play in our politics, control over their education bears directly on the success of American democracy. Law education should not rest in the hands of those who view the legal profession not as a conserving, moderating institution, but instead one that should serve as the handmaiden to change and even revolution. Unfortunately, that is what Texas and other states did when they handed over approval of law schools to the ABA. In the early 1980s, the Texas Supreme Court invited the ABA to accredit law schools for purposes of satisfying requirements to take the bar exam. Texas, for example, requires members of its bar to have completed their legal education at an "approved law school." State law grants the authority to identify these law schools to the state Supreme Court, which, in turn, delegated this authority to the ABA in 1983.

This was a mistake. Delegating approval of a professional school to an organization might make sense if that body were devoted solely to establishing minimal national standards for practice. But the ABA does not meet that description. First, it is a membership organization, not a true professional organization. It does not select its members based on any criteria of excellence, knowledge, or achievement that would give it any claim to superior professional knowledge. Pay your annual dues of $120 and you are in. Once armed with your ABA card, you too can take advantage of group discounts from "trusted brands" for car rentals, hotels, and insurance. Currently, ABA membership can earn you $2,500 off a Mercedes-Benz and rebates on HP laptops and printers. Choosing between the ABA, AAA, and the AARP might demand careful thought.

Second, the ABA is not just a self-selected membership body (one that cannot even claim to represent half of all American lawyers); it is a political organization. It regularly takes positions on controversial political topics and lobbies government bodies to advance them. The ABA, for example, supported nationwide abortion rights under *Roe v. Wade*, race-based affirmative action, and other predictable elements of the Left's platform. It cannot be trusted to fairly evaluate law schools if it takes positions on important ideological questions. We could not trust the ABA, for example, to accredit a law school that might have a large percentage of originalist faculty who believe that the Founders would have expected the states to decide questions of abortion.

A defender of maintaining the ABA's exalted place might claim that the ABA's views on ideological questions need not infect its performance of its official professional activities. But the ABA has not been able to resist the siren song of advancing its political agenda through its other roles. The ABA has sparked controversy with its effort to impose diversity requirements in the accreditation process. Its "Standards and Rules for the Approval of Law Schools" requires law schools to obey diversity, equity, and inclusion rules for faculty and students that plainly conflict with the Supreme Court's ban on race-based affirmative action in *Students for Fair Admission v. Harvard* (2023).

The ABA requires law schools to provide "full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic groups." The Fourteenth Amendment's Equal Protection Clause prohibits the state from providing exactly such benefits based on race and gender. The ABA also requires that law schools demonstrate "a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." *Harvard* bars state schools and schools that receive federal funds from composing a student body that uses race and ethnicity (and certainly gender too).

Despite the tenuous grounds for race-based affirmative action even before the *Harvard* case, the ABA was not reluctant to use its power over law schools to engage in racial engineering. As different accounts reported, in the early 2000s the ABA refused to accredit George Mason University law school unless it lowered its admissions standards for minority students in order to produce its desired levels of racial balance. The ABA did not even stop at admissions. It also requires law schools to design their curricula to advance the ABA's progressive racial vision. Its "Standards and Rules for the Approval of Law Schools" demands that law schools "provide education to law students on bias, cross-cultural competency, and racism" both at the start of the first year of law school and again before graduation.

The Trump Justice Department has sent a letter to the ABA demanding that it remove these racist standards from its accreditation work, and the Department of Education is considering whether to end the ABA's monopoly over

approving law schools. Under this pressure, the ABA has declared that it is suspending these offensive accreditation standards. But the ABA has not eliminated them. The ABA clearly will only defer its enforcement in the hopes that the Trump administration will lose interest or that a friendlier party will take office in three years.

These developments make it imperative that the Texas Supreme Court expel the ABA from its current role of approving law schools in the state.

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