



SOCIETY OF AMERICAN LAW TEACHERS

**COMMENT OF THE SOCIETY OF AMERICAN LAW
TEACHERS (SALT) ON PROPOSED STANDARD 206**

September 30, 2024

INTRODUCTION

Although no legal necessity exists to amend the Standards or scrub the language, SALT acknowledges the Council’s efforts to address the critical needs within the law school’s learning environment and the legal profession’s mission to serve an increasingly diverse client and business community. Broad representation and engagement in law schools are essential to a quality learning environment. However, the Standards (and any proposed new language) must operate in the context of the current environment within law schools.

Therein, SALT’s comment seeks to highlight relevant data as part of this dialogue. Further, SALT proposes alternative complimentary language for Standard 206(a-b) drawn from concepts already embedded within existing important Standards 205, 303, and 501. Additionally, SALT suggests more robust guidance to law school administrators by recommending an additional interpretation, SALT Proposed Interpretation 206-4, which expounds upon the implementation of belonging procedurally as well as how students should experience belonging in schools, as the term *belonging* appears in the Standards for the first time in ABA Proposed Interpretation 206-3.

The Standards must continue to ensure that law schools strive to enroll a diverse student body, and to hire a diverse faculty and staff, in order to provide an equitable and inclusive educational environment and student experience for all students, as well as to train all lawyers with the tools to represent clients in a very diverse national and global landscape across a myriad of practice areas.

Notably the Council has previously recognized these underlying core objectives in Standard 303 which requires that schools “provide education to law students on bias, cross-cultural competency, and racism.” Interpretation 303-7 articulates the obligation that all lawyers share—to “work to eliminate racism in the legal profession.” Similarly, Standard 205(a) requires that each law school “adopt, publish, and adhere to a policy of non-discrimination that prohibits the use of admission policies or other actions to preclude admission of applicants or retention of students on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status. At the same time Standard 501(b) clarifies that schools also have an obligation to “only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the

bar.” It is important that Standard 206’s articulation complement the broad goals in other Standards and not operate at cross purposes with those important principles.

I. BACKGROUND

A. Relevant Demographic Data

The data from 2014 to the present demonstrate that there has been little to no improvement in diversifying law schools, the legal profession, and the judiciary. For example, the ABA reported in late 2023 that “the number of Black lawyers is virtually unchanged over the past decade, according to the survey. Black lawyers were 4.8% of the profession in 2013 and 5% in 2023.” Five percent is a clear underrepresentation compared to the demographic data that Black people comprise 13.6% of the U.S. population. The rate of Native American lawyers actually has fallen in the last decade. Women continue to be underrepresented in the legal profession despite their strong presence in law schools. Women are 39% of all lawyers in the United States. This is an improved presence but remains below the percentage of women in the population.¹

Similar demographic concerns exist regarding the lack of representation for law faculty, relevant to Standard 206(b)’s goals. Professor Meera E. Deo’s recent book titled *Unequal Profession: Race and Gender in Legal Academia*, analyzed the relevant law faculty data by race and gender:

AALS reports that women of color account for a mere 7.0% of the 10,965 law faculty members— including all levels of professors, deans, lecturers, and instructors. Of the 771 women of color law faculty identified in AALS data, 408 are Black/African American, 138 are Hispanic/Latino, 112 are Asian or Pacific Islander, 58 are “more than one race,” 34 identify as some “other race,” and only 21 are American Indian or Alaskan Native. In contrast, a full 5,090 are white men (a whopping 46% of existing law faculty), 2,741 are white women (25%), and 860 are men of color (7.8%). Put differently, almost three-quarters (71%) of all law faculty are white. The American Bar Association (ABA), which publishes annual data on law faculty, reports similar figures. ABA statistics for all fulltime teaching faculty, deans, and associate or vice deans include 935 women of color law professors, out of 9,759 law faculty total (9.6%); this includes 511 African Americans, 186 Asian Americans, 191 Hispanics, and 29 American Indians, compared to 4,683 white men (close to half, at 48%), 3,093 white women (32%), and 918 men of color (9.4%).²

While important progress has been made, a great deal of work remains to remove barriers to legal education and the full range of the legal profession.

¹ ABA Profile of the Legal Profession 2023 <https://www.abalegalprofile.com/index.html>.

² MEERA DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA*, 4 (2019).

B. Relevant Legal Landscape

The Background and Explanation of Revisions provided with the materials for the proposed changes to Standard 206 make clear that *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (U.S. 2024) led to these revisions. SALT is concerned that the proposed revisions reflect an overly cautious reading of this decision, inconsistent with that of many Constitutional Law scholars, and one that exceeds what the caselaw requires. Most importantly, the United States Supreme Court nowhere called into question the constitutionally valid objective of diversity within the educational environment.

In anticipating legal decisions that have not been issued, the Council proposes broad and more vague language disconnected from the persistent lack of access in legal education and the profession. In *SFFA*, the United States Supreme Court rejected the manner in which the defendants sought to protect diversity, not diversity itself. In a similar vein, the Proposed Standard's language reaches beyond the issue of student admissions, anticipating issues not addressed by the Court.

The ABA's proposed changes to Standard 206, erasing any mention of race and racial discrimination, flies in the face of the Constitution's command that racial discrimination be "eliminated root and branch."³ Schools have a duty to "*recognize and confront* the [racial] flaws and injustices that" persist today, which "*is especially true* when we seek assurance that opportunity is not denied on account of *race*."⁴ The ABA, by seeking to wipe away all mention of race and racial diversity from Standard 206, fails to understand that "the enduring hope is that race should not matter; *the reality is that too often it does*."⁵

SALT's proposed alternative Standard 206 seeks to compel law schools to fulfill their constitutional duty to eliminate racism root and branch. "This Nation has a moral and ethical *obligation* to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all."⁶ As a moral duty, law schools *must* take active steps "to ensure that all people have equal opportunity regardless of their *race*."⁷ To that end, law schools should pursue the "important [interest] in bringing together students of different racial, ethnic, and economic backgrounds."⁸

To be sure, *SFFA* tells law schools that they must use facially race neutral admissions policies to promote legitimate, commendable educational goals. As long as facially race neutral measures are used, however, such policies are *not* subject to *SFFA*'s stringent strict scrutiny standard. That is still true even if schools enact race neutral policies fully *conscious* of their impact on the racial diversity of the student body. Consistent with *SFFA*, "[i]t is permissible to consider the racial makeup of [the student body] and to adopt *general policies* to encourage a diverse student body,

³ *Green v. New Kent County*, 391 U.S. 430, 437-38 (1968).

⁴ *Parents Involved v. Seattle School District*, 551 U.S. 701, 787 (2007) (Kennedy, J, concurring) (emphasis added).

⁵ *Id.* (emphasis added).

⁶ *Id.* at 797 (emphasis added).

⁷ *Id.* at 787-88 (emphasis added).

⁸ *Id.* at 797.

one aspect of which is its *racial composition*.⁹ Law schools may “employ facially neutral measures with *confidence* that a constitutional violation does not occur whenever a decisionmaker considers the impact a [race neutral] approach might have on students of different races.”¹⁰

The ABA’s proposed standards, however, do not reflect confidence, but unwarranted hesitancy and overcompliance. Nowhere in *SFFA* did the Court say or imply that schools are required to be completely race blind in all aspects of their educational missions. Chief Justice Roberts emphatically stated, “*Nothing* in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹¹ Actively considering a student’s experience with racial discrimination is *facially race neutral*, and schools should be confident that they do not violate the Constitution when they do so.

II. PROPOSED STANDARDS DISCUSSION

A. *Alternative Modifications to Proposed Standards 206(a-b), Interpretation 206-2, and Interpretation 206-3*

1. *Alternative Proposed 206(a-b)*

In light of these concerns, **SALT proposes** the following language for **Standard 206(a-b)**:

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to *equality of status and cross-cultural integration* by providing full opportunities for the study of law and entry into the profession *by students who have experienced discrimination or adversity on the basis of race, ethnicity, and gender*, and a commitment to having a *cross-culturally integrated student body* with respect to race, ethnicity, and gender.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to *cross-cultural integration* by having a faculty and staff that is *integrated* with respect to gender, *culture, and experience with racial discrimination and adversity*.

2. *Alternative Proposed Interpretation 206-2*

In addition to proposed Interpretation 206-1, **SALT proposes** that the Council retain Interpretation **206-2** as previously written with the following edits:

In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student

⁹ Id. at 788 (emphasis added).

¹⁰ Id. at 789 (emphasis added).

¹¹ *SFFA v. Harvard*, 600 U.S. 181, 230 (2023) (emphasis added).

body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds as required for professional development given the increasingly diverse client and business community. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. ~~If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion.~~ The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions ~~and the results achieved.~~ The commitment to providing full educational opportunities for ~~members of underrepresented groups~~ students who have experienced discrimination or adversity on the basis of race, ethnicity, and gender typically includes a special concern for determining the potential of these applicants through the admission process, ~~special~~ recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups. Compliance with Standard 206(b) does not require a law school to take race or any other identity characteristic into account in making an individual employment decision.

3. Alternative Proposed Interpretation 206-3

SALT proposes that the Council **modify Interpretation 206-3** to make clear that a supportive learning environment must also be consistent with Standard 205:

A supportive learning environment is one that promotes professionalism, mutual respect, and belonging for everyone in the law school community, in a manner consistent with the non-discrimination and equal opportunity requirements set forth in Standard 205.

B. BELONGING - NEW Proposed Interpretation and Research Based Guidance

Belonging is an important concept that the ABA's Interpretations propose to include. Various surveys and other sources report that minoritized students in law schools—including Black, Latino/a, Native American, Asian American, lower income, and LGBT+ students—are less likely to experience belonging within their institutions: The 2020 Law School Survey of Student Engagement found that 21% of students who are Black, Latino/a, or Native American, and 32% of students whose parents did not finish high school, report they do not feel comfortable being themselves at their institutions. It also found that 79% of Black students, 79% of Native Americans, 74% of Asian Americans, and 72% of Latinx students do *not* “strongly agree that they are part of the community.”¹² Furthermore, 20 percent of gay students, 16 percent of lesbians, 15 percent of bisexual students, and 19 percent of those identifying as another sexual orientation believe their schools do “very little” to ensure students are not stigmatized based on their identity—though 89 percent of heterosexual students believe their schools do more.¹³ Thus, “what the data unequivocally show, is that those who are most affected by policies involving diversity—the very students who are underrepresented, marginalized, and non-traditional

¹² LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT 2020 ANNUAL SURVEY RESULTS, DIVERSITY & EXCLUSION, <https://lssse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf>.

¹³ *Id.*

participants in legal education—are the least satisfied with diversity efforts on campuses nationwide.”¹⁴

Based on these important concerns and to provide guidance on implementation of Standard 206’s goals and objectives, SALT proposes new **Interpretation 206-4** (presuming adoption of ABA Proposed Interpretation 206-3):

1. Proposed Interpretation 206-4

Belonging is a fundamental need. People deprived of belonging tend to have adverse physiological, emotional, and behavioral outcomes.¹⁵ Accordingly, a vast literature shows that “school belonging” is correlated with academic outcomes as well as social and emotional wellbeing.¹⁶ In the context of higher education, belonging has been defined as “students’ perceived social support on campus, a feeling or sensation of connectedness, and the experience of mattering or feeling cared about, accepted, respected, valued by, and important to the campus community or others on campus such as faculty, staff, and peers.”¹⁷

Promoting a sense of belonging requires doing more than treating everyone equally or making opportunities open to all on formally equal terms. It requires attending to the ways in which students perceive and experience the institution and their social interactions within it; and to how this might vary in different situations and contexts, depending on students’ backgrounds and identities.¹⁸ Even if an institution’s policies are formally open to all, its practices and social dynamics may nonetheless convey subtle messages about who is/is not accepted and valued as a member of the community. Such subtle messages may come through curricular choices, perspectives that are centered in the classroom, pressure to assimilate with certain values, or norms of dress, speech, and the like.¹⁹

For example, promoting belonging includes recognizing that not all students are similarly situated when it comes to belonging. Members of historically excluded groups, especially

¹⁴ *Id.*

¹⁵ Mark Leary & Cody Cox, *Belongingness Motivation: A Mainspring of Social Action* in *HANDBOOK OF MOTIVATION SCIENCE* 27, 28 (James Shah & Wendi Gardner eds., 2008).

¹⁶ See, e.g., Kelly Allen, et al., *What Schools Need to Know About Fostering School Belonging: A Meta-Analysis*, 30 *EDUC. PSYCH. REV.* 1, 2-3 (2018); Brief for American Psychological Association et al., as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3108813 at *10-14 (summarizing research on the importance of belonging, and how diversity on campus relates to belonging); Carol Goodenow, *The Psychological Sense of School Membership Among Adolescents: Scale Development and Educational Correlates*, 30 *PSYCHOLOGY IN THE SCHOOLS* 79 (1993).

¹⁷ TERRELL STRAYHORN, *COLLEGE STUDENTS’ SENSE OF BELONGING: A KEY TO EDUCATIONAL SUCCESS FOR ALL STUDENTS* 4 (2d ed. 2019).

¹⁸ See Rebecca Covarrubias, *What does it mean to belong? An interdisciplinary integration of theory and research on belonging*, *SOC PERSONAL PSYCHOL COMPASS*. 2024; e12858 (“Systems of power, including the relations within that exist to maintain (or resist) power, dictate particular meanings about who belongs and who does not within and across spaces,” and thus, “thinking about belonging as universal and stable or as achieved through treating everyone equally [] reflects the exact power structure that dictates who gets to belong or not.”)

¹⁹ See, e.g., DeLeon Gray et al., *Black and Belonging at School: A Case for Interpersonal, Instructional, and Institutional Opportunity Structures*, 53 *ED. PSYCH.* 97, 100 (2018) (“A curriculum that does not acknowledge the cultural values of its learners signals that the perspectives, philosophies, and histories of Eurocentric racial-ethnic groups are more important than those of other groups.”).

*Black students, experience well-documented isolation, tokenization, stigmatization, and ostracism within institutions of higher education.*²⁰

*To cultivate a sense of belonging for everyone—including members historically excluded groups—schools need to recognize that people who have historically been excluded may experience the institution’s norms and policies as alienating, nonrepresentative of, or unwelcoming to their own identities and culture. Schools exhibit their commitment to belonging by recognizing and valuing differences in peoples’ identities, experiences, and backgrounds; and creating spaces where people feel valued for their distinct values, perspectives, and experiences.*²¹

To promote belonging, a primary step for schools is to exhibit a commitment to do more to understand the situational factors and interactions that influence students’ sense of belonging within the institution, as they move from one context to another throughout the day.

Many factors may influence belonging, and more research needs to be done to fully understand the various factors that shape students’ sense of belonging in different situations and contexts within the law school environment. Grey et al. identify interpersonal, educational, and institutional opportunity structures that tend to influence students’ sense of belonging. Interpersonal opportunity structures are opportunities to develop interpersonal relationships. Educational opportunity structures include relatable, relevant curriculum that includes and values distinctive culture and means of self-expression (allowing students to “stand out while fitting in (SOFI)”). Institutional opportunity structures involve eliminating structural barriers to participation.²² School administrators and faculty can influence all three. These may be a helpful starting point for law schools in evaluating how their policies, practices, and norms might influence experiences of belonging for students from different social backgrounds and identities.

²⁰ See, e.g., *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580, 667 (M.D.N.C. 2021) (“Nearly seventy years after the first Black students were admitted to UNC, the minority students at the university still report being confronted with racial epithets, as well as feeling isolated, ostracized, stereotyped and viewed as tokens.”). *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 339 & n.20 (2023) (Sotomayor, J., dissenting) (observing that “students of color . . . continue to experience racial harassment, isolation, and tokenism” and quoting students testifying about how being the only representative of their racial group made them hesitant to speak up and feel “foreign” and “like an outsider”); Brief for American Psychological Association et al., as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, No. 20-1199, 2022 WL 3108813, *9-*10 (U.S. June 29, 2023) (“[S]ubtle discrimination and implicit bias in communities lacking sufficient racial and ethnic minority representation” causes “a feeling of distinctiveness and unbelonging” and “these feelings of distinctiveness often create an internal fear that one will conform to others’ implicit biases,” called “social identity threat,” and research has consistently shown that it negatively impacts educational outcomes.); *id.* at *12 (“[W]hen someone is the *only* person of a social identity within a group, their “solo status” causes extreme isolation and “tokenism” which can cause people who are sole representatives of their group to underperform, relative to when they are in more diverse groups . . . because being the sole representative of the group leads the person to . . . feel pressure to act as a representative of that group.”).

²¹ John A. Powell advocates for a “targeted universalism” strategy to promoting belonging. See, e.g., Powell et al., *TARGETED UNIVERSALISM* (May 2019), https://belonging.berkeley.edu/sites/default/files/targeted_universalism_primer.pdf.

²² Gray et al., *supra* note 19, at 98-102.

In the graduate school context, specifically, research by Strayhorn and others suggests that socialization plays a significant role in enhancing students' sense of belonging. Graduate students are socialized—i.e., acquire information and understanding about the values, beliefs, and norms of their profession—through formal and informal experiences that (1) introduce them to particular customs of a graduate department or professional field, (2) encourage socializing activities that provide opportunities to create supportive relationships with faculty and other students, and (3) encourage students to work on self-directed activities.²³ Socialization experiences such as these are positively associated with belonging, which is associated with feeling safe, respected, and comfortable when interacting with peers, faculty, and staff—all of which are associated with academic success and retention.²⁴

Another set of factors schools may consider when evaluating whether and how their institutional policies and norms promote students' experiences with belonging come from procedural justice research. This literature finds that specific qualities of treatment tend to be especially important to people in building trust in institutions, and that these factors matter because they convey that the individual is a valued and accepted member of the community. These factors include: (1) giving people voice and the opportunity to participate, (2) demonstrating fairness and neutrality, (3) treating people with respect and dignity, and (4) demonstrating benevolent motives (or concern for peoples' best interests).²⁵ Schools might survey students to assess whether and to what extent they experience these qualities in interacting with faculty and administrators within the institution.

Finally, in deciding how to exhibit a commitment to belonging, schools should recognize the connection between belonging and the demographics of the institution. Increasing representation of historically excluded groups helps to counteract the disproportionate isolation, tokenization, stigmatization, and ostracism that members of these groups tend to experience within institutions of higher education.²⁶

²³ STRAYHORN, *supra* note 17 at 124-40.

²⁴ *Id.*

²⁵ A large body of research in the field of procedural justice shows that, when an institution treats people according to these qualities, people are likelier to see the institution's authorities as respecting them as a valued member of the community, and to trust the institution. While much of this research pertains to government authorities, it also applies to leadership in private institutions. *See generally*, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006). *See* Tracey Meares & Tom Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L. J. F. 525, 527 (2014), https://www.yalelawjournal.org/pdf/8.TylerMeares_FINAL_Updated_5.20.14_iugaebgj.pdf (“[P]eople understand the way in which they are treated by legal authorities to provide them with information about how that authority views them and the group or groups to which they belong. In other words, the way people interpret the fairness of procedures has a substantial relational component.”); *id.* at 535 (“The quality of the treatment that people receive . . . sends messages that people use to interpret their degree of inclusion within society and their social status/standing.”); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115 (1992).

²⁶ *See* sources cited *supra* note 17. For similar arguments focused on addressing racial isolation, *see, e.g.*, Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 Utah L. Rev. 59 (2019); Meera Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L. J. 661, 690-99 (2014) (discussing the compelling interest in avoiding racial isolation).

CONCLUSION

A critical need exists to ensure that U.S. law schools provide opportunity for all students and remove barriers to legal education and the legal profession. We encourage the ABA to amend its standards in a way that continues to advance these values and aligns more closely with the requirements of the Supreme Court decision *SFFA*. We have proposed suggestions of how the ABA might do so. By focusing on “equality of status,” “cross-cultural integration,” “providing full opportunities for the study of law and entry into the profession by students who have experienced discrimination or adversity on the basis of race, ethnicity, and gender,” and Law School’s “commitment to having a cross-culturally integrated student body with respect to race, ethnicity, and gender,” the ABA can align with the law while fostering the continued opening of the doors of opportunity and creation of a more welcoming environment in which students feel belonging.

The progress achieved in expanding access to legal education and the legal profession for traditionally excluded people has taken courage and determination at all levels of society. We observe in particular that now, especially now, is not the time to turn back. Thank you.