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## "I Will Not Sit Idly By While My Future is Determined:" The Response of the University of Michigan Black Law Students' Alliance to *Grutter V. Bollinger, Et Al.*

The Black Law Students' Alliance

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"I WILL NOT SIT IDLY BY WHILE  
MY FUTURE IS DETERMINED:"  
THE RESPONSE OF THE UNIVERSITY OF MICHIGAN  
BLACK LAW STUDENTS' ALLIANCE\*  
TO *GRUTTER V. BOLLINGER, ET AL.*

INTRODUCTION

Back in 1998, the *Michigan Journal of Gender & Law* expressed support for the University of Michigan Law School's defense of its affirmative action policy, which is at controversy in *Grutter v. Bollinger*.<sup>1</sup> Today, as in 1998, "[W]e certainly do not believe the Law School admissions policy truly addresses the inequalities within our law school and the legal profession generally. Legal education is unfortunately not a bastion of diversity."<sup>2</sup> Women and students of color struggle to be heard and seen, and to achieve equal representation in both the study and practice of law.

"Without active efforts, we cannot create a society with equal opportunity for people of different races, genders, and sexual orientations. We strive for such a reality, and we hope that the Law School will not be prohibited from trying to move us there. Diversity is more than a method of enhancing the intellectual experience of law students or a

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\* The Black Law Students' Alliance (BLSA) serves as a political, academic and social resource for students of African descent at the University of Michigan Law School. As a political organization, BLSA works to enlighten the University community about the intersection of law and African-Americans. Further, BLSA seeks to influence policies affecting African-American law students and African-Americans generally. BLSA continues to be a strong voice articulating the shared goals and interests of African-American law students. BLSA members Kimberly Braxton, Jamal M. Edwards and Cecily Carolyn Williams authored the response to *Grutter v. Bollinger*. Ms. Braxton is chairperson of the University of Michigan Black Law Students' Alliance. A native of Detroit, Michigan, she is an alumna of Wayne State University and is a J.D. candidate for 2002. Mr. Edwards is BLSA's National/Regional Liaison and Executive Editor of the *Michigan Telecommunications & Technology Law Review*. In 2002, he will serve as law clerk to Hon. Raymond A. Jackson, U.S. District Court (E.D.Va.) and in 2003, he will serve as law clerk to Hon. Roger L. Gregory, U.S. Court of Appeals for the Fourth Circuit. Thereafter, Mr. Edwards will join Kirkland & Ellis as an associate. Ms. Williams, a native of Washington, D.C. and BLSA general body member, graduated from the University of Virginia and served as Special Assistant to the President during the Clinton Administration. She is a J.D. candidate for 2002.

1. The case is currently on appeal to the Sixth Circuit from the United States District Court for the Eastern District of Michigan.
2. 5 MICH. J. GENDER & L. 207 (1998).

narrow manifestation of 'fairness' which should be protected; it is justice that the Law School, its faculty, and its students are affirmatively obligated to seek out."<sup>3</sup>

Now, three years later, the validity of the Law School's affirmative action policy still hangs in the balance. Unfortunately, the most recent decision in the matter was not favorable for supporters of affirmative action.<sup>4</sup> Now more than ever, the *Michigan Journal of Gender & Law* stands by the Law School and its policies.

As a journal, however, we also are committed to providing a forum for the discussion of all views, regardless of whether they comport with our own. Accordingly, we solicited responses to the District Court's *Grutter* opinion from the Michigan Law School community. The Black Law Students' Alliance ("BLSA") submitted the following press release and amicus brief. Although we would prefer to publish a range of opinions on the issue, BLSA is the only entity that submitted a response piece to us for publication.

The *Michigan Journal of Gender & Law* remains committed to providing a forum in which all voices are heard—herein is BLSA's voice. ❀

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3. 5 MICH. J. GENDER & L. 209 (1998).

4. Judge Friedman found that the Michigan Law School's admission policy violated the Equal Protection Clause. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

## PRESS RELEASE

THE UNIVERSITY OF MICHIGAN  
BLACK LAW STUDENTS' ALLIANCE  
RESPONSE TO  
*GRUTTER V. BOLLINGER, ET. AL.*

March 27, 2001

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"[T]oday's decision marks a deliberate and giant step backward in . . . affirmative-action jurisprudence."

*City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)  
(Marshall, J. *dissenting*).

\*\*\*\*

We are extremely disappointed and disturbed by Judge Friedman's decision. As students of color at the University of Michigan Law School, we are outraged that Judge Friedman decided that "the law school's justification for using race—to assemble a racially diverse student population—is not a compelling state interest."

We support the affirmative action admissions policy and we applaud the tremendous efforts of the Administration, Faculty and Staff of the University in their pioneering defense of our admissions policy. The University provided Judge Friedman with overwhelming evidence that racial diversity is critical to a high quality legal education. Judge Friedman's opinion is inconsistent with the constitutional mandates of *Bakke*, holding that race could be considered in achieving a diverse student body. We are confident that our appeal to the Sixth Circuit Court of Appeals will be successful.

This decision will not diminish our Law School community's sincere embrace of racial and ethnic diversity. In fact, this decision has only served to strengthen our resolve to oppose the re-segregation of legal institutions. Indeed, Judge Friedman's marginalization and dismissal of the unique contributions that students of color make to the legal classroom, courtroom, and community only inspires us to achieve even higher levels of social, political, and academic excellence.



BARBARA GRUTTER,  
PLAINTIFF-APPELLEE,

V.

LEE BOLLINGER, ET AL.,  
*DEFENDANTS-APPELLANTS,*

AND

KIMBERLY JAMES, ET AL.,  
*INTERVENING DEFENDANTS.*

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR

THE EASTERN DISTRICT OF MICHIGAN  
(FRIEDMAN, J.)

BRIEF AMICUS CURIAE OF THE BLACK LAW  
STUDENTS' ALLIANCE\* IN SUPPORT OF  
DEFENDANTS-APPELLANTS

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\* BLSA members Kimberly Braxton, Jamal M. Edwards, Brandy Y. Johnson, Kristin N. Johnson, Luttrell Levingston and Cecily Carolyn Williams contributed to the Brief. Biographical information for Ms. Braxton, Mr. Edwards and Ms. Williams may be found on page 101. Ms. Brandy Y. Johnson is a second-year law student and Associate Editor for the *Michigan Journal of Race & Law*. Ms. Kristin N. Johnson is a second-year law student and Associate Editor for *Michigan Law Review*. She also serves as BLSA's Employment and Clerkship Chair. Mr. Levingston is a third-year law student and Symposium Coordinator for the *Michigan Journal of Race & Law*. He is also a member of BLSA.

INTEREST OF THE AMICUS CURIAE	• 106
SUMMARY	• 107
ARGUMENT	• 109
I. THE EQUAL PROTECTION CLAUSE SHOULD BE INTERPRETED CONSISTENTLY WITH ITS “ONE PERVADING PURPOSE”	• 109
II. “EQUAL” PROTECTION CAN NOT MEAN “SAME” PROTECTION BECAUSE UNDERREPRESENTED MINORITY APPLICATIONS AND WHITE APPLICANTS ARE NOT SIMILARLY SITUATED	• 111
III. EQUAL PROTECTION LAW MUST ACCOUNT FOR DIVERSITY AND FAIR ACCESS AS LEGITIMATE AND COMPELLING INTERESTS	• 112
IV. THE LAW SCHOOL’S ADMISSIONS POLICY DOES NOT VIOLATE A PROPERLY-INTERPRETED EQUAL PROTECTION CLAUSE	• 114
A. <i>The Admissions Policy Promotes Diversity and Equal Access</i>	• 114
B. <i>The Admissions Policy Strengthens the Legal Profession</i>	• 115
C. <i>The Admissions Policy Is Fair Because Minority Students’ Backgrounds Often Make Them More Qualified</i>	• 116
D. <i>Qualified Underrepresented Minority Students Should Be Admitted Because They Are Qualified</i>	• 118
CONCLUSION	• 119

#### INTEREST OF THE AMICUS CURIAE

The Black Law Students’ Alliance (“BLSA”) of the University of Michigan respectfully submits this brief as amicus curiae in support of the University of Michigan Law School’s policy of considering race in making admissions decisions.<sup>1</sup>

The Black Law Students’ Alliance of the University of Michigan is a student organization that articulates, defends and facilitates the shared

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1. Amicus curiae, the Black Law Students’ Alliance states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

goals and interests of African-American law students at the University. BLSA actively and directly works with students to aid them with academic performance and intellectual growth, seeks to foster community amongst African-American law students, and eases the transition both into and out of the law school environment for African-Americans. BLSA's student membership and direct contact with African-American law students make it representative of many African-American student voices that, thus far in this appellate process, have not been heard. This Court's rulings as to the constitutionality of law school admissions policies involving race will directly affect the Law School African-American community of whom we are composed and with whom we interact. Our community has a unique perspective to offer on the far-reaching issues raised in this case.

#### SUMMARY

The Fourteenth Amendment was adopted to stop this country from turning a blind eye to the dehumanizing indignities it forced upon its minority citizens, not to institutionalize color-blindness. Guaranteeing that the Fourteenth Amendment is effectuated requires taking race into account in some instances.<sup>2</sup> Doing otherwise perpetuates racial supremacy:

[W]e cannot and . . . need not under our Constitution . . . let color-blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior by the law and by their fellow citizens.<sup>3</sup>

While some assert that Supreme Court precedent requires it, knee-jerk application of strict scrutiny in every race-based Equal Protection case embraces color-blind myopia and eschews reality.<sup>4</sup> Here, the lower court's application of strict scrutiny proves the point. The result of that court's analysis jeopardizes the ability of higher-learning institutions to create and maintain an optimal and accessible educational environment in a country where the vestiges of minority enslavement and oppression still pervade our social and economic system. But no application of strict

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2. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1172-73 (6th Cir. 1994) (Jones, J., dissenting).

3. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Opinion of Brennan, White, Marshall, & Blackman, J.J.).

4. See *Plyler v. J. & R. Doe*, 457 U.S. 202, 230-31 (1982) (Marshall, J., concurring).

scrutiny should run counter to the very purposes underlying the Fourteenth Amendment. Accordingly, the lower court's holding should be reversed, and progress toward racial harmony should continue unfettered by the courts in this Circuit.

\* \* \* \*

The University of Michigan Law School instituted policies aimed at creating a diverse student body in a field where, absent such measures, diversity failed to exist. As current students of that law school, and as United States citizens of African-American descent, the Black Law Students' Alliance of the University of Michigan is uniquely positioned to convey to the Court two important points that are at risk of incomplete coverage in this appeal.

*First*, notions of so-called "reverse discrimination" pit the Fourteenth Amendment against its original purpose. The lower court's holding was to the benefit of a student who is a member of our nation's historically—and presently—dominant race. Although whites should not be excluded from the protections afforded by the Equal Protection Clause, application of the Clause to whites should in no event undermine its original "one pervading purpose" of addressing slavery's and oppression's adverse effects on minorities.<sup>5</sup> Striking down the Law School's admissions policy as unconstitutional does exactly that.

The Court can avoid undermining the fundamental policies underlying the Fourteenth Amendment by holding that "equal" protection does not necessarily require "same" protection. Different races are differently situated. American whites, unlike blacks and other minorities, historically have not been pervasively oppressed, discriminated against, stigmatized and marginalized. This crucial distinction between the races must be considered in achieving the right result in this appeal. Races require *different* treatment to achieve *equal* protection.

*Second*, although the Law School, not-for-profit groups and Fortune 500 corporations have addressed the many state interests that justify the Law School's admissions policy, these entities have not fully addressed the minority students' point of view on these topics. Accordingly, we address herein two compelling interests:

- (a) As an institution where discrimination has existed and still exists, the Law School has a particular interest in providing a first-rate legal education administered in an

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5. *Bakke*, 483 U.S. at 291.

environment resembling the racial profile of clients, judges, juries, colleagues and co-workers with whom Law School graduates will interact, and whom they will represent and profoundly affect when they enter the increasingly-diverse, real world; and

- (b) The Law School has an interest in ensuring that deserving minorities have the opportunity to become members of one of our society's most influential and empowering professions.

Diversity not only facilitates a good education—as the Law School essentially argues. It also inherently addresses the discrimination that occurs at the Law School and throughout society, makes the legal profession more effective by making it representative of the population, and creates an educational environment in which minority students can thrive. Achieving diversity, however, is not the only compelling interest. Deserving minorities have traditionally not had the same access to premier legal institutions as whites. The Law School's admissions policy helps ensure that qualified minorities have the access they have been historically denied.

#### ARGUMENT

##### I. THE EQUAL PROTECTION CLAUSE SHOULD BE INTERPRETED CONSISTENTLY WITH ITS "ONE PERVAIDING PURPOSE"

Affirmative action and the *Bakke* line of cases are only the latest in a long history of controversies that characterize the struggle of America's minorities to achieve equal opportunity. But *Bakke* cases are uniquely complex. Difficulties arise not only because they involve members of society's dominant race seeking Constitutional protection traditionally sought by minorities, but because affording white plaintiffs relief often conflicts with societal goals designed to place minorities on equal footing with the dominant race. Resolution can be reached, however, by relying upon the original purpose of the Fourteenth Amendment.

Our country has a long and continuing history of giving unequal rights to inherently equal people. From the barbaric shackling, beating, and trading of enslaved Africans 400 years ago to the relegation of African-Americans to "colored" rest rooms and water fountains less than 40 years ago, it is beyond question that white people have enjoyed and

guarded the privileges of freedom throughout the building of America, at the expense of blacks and other minorities. The etiology of the Equal Protection Clause of the United States Constitution reveals that the original purpose of the Clause, and indeed of the entire Fourteenth Amendment, was to remedy this imbalance by taking aim at its root, the once legal and "peculiar institution" of slavery upon which much of this nation was built. The United States Supreme Court recognized that the "one pervading purpose" of the Fourteenth Amendment was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised dominion over him."<sup>6</sup> As has often been the unfortunate case in race-related jurisprudence, however, the "one pervading purpose" of "[t]he Equal Protection Clause was . . . [v]irtually strangled in infancy by post-civil-war judicial reactivism."<sup>7</sup>

Indeed, the courts interpreted the Clause into meaningless oblivion by upholding racial segregation. The judiciary's immoral inaction lasting for almost a century, has devastatingly set back racial progress for much longer. Segregation crippled the futures and opportunities of generations of American minorities. As the House Committee on Small Business concluded in 1975:

The effects of past inequities stemming from racial prejudices have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system . . . *The presumption must be made that past discriminatory systems have resulted in present economic inequities.*<sup>8</sup>

A 1977 Report by the House Committee on Small Business concluded: "[o]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. . . . Currently, we more often encounter a business system that is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities . . . ."<sup>9</sup>

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6. *Bakke*, 483 U.S. at 291 (quoting *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872)).

7. *Bakke*, 483 U.S. at 291 (internal citations omitted).

8. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 531 (1989) (Marshall, J., dissenting) (emphasis added) (citing H.R. REP. NO. 94-468, at 1-2 (1975)).

9. *Croson*, 488 U.S. at 531-32 (citing H.R. REP. NO. 94-1791, at 182 (1977)).

The studies and statistics are numerous and voluminous. But the most visible facts, so obvious that we have become callused and blinded to them, are nonetheless equally telling: the racial compositions of our poverty-stricken neighborhoods, the millions of minority prisoners in our extensive prison system, the lack of color in the typical law school classroom, including behind the lectern. Inequity is omnipresent even after the abolition of slavery. While deplorable, given the degree, breadth, length of time and manner in which blacks were enslaved and oppressed, this state of affairs should surprise no one. But we should be surprised, indeed outraged, that the Equal Protection Clause, conceived as a tool for freeing the United States from slavery's legacy of entrenched and systemic discrimination, is being used by district courts within this Circuit to retard progression toward racial equality, diversity and harmony.

The deep issue presented by this case—whether to apply the Equal Protection Clause to further its primary reason for existence, or rather to use it in a manner that heightens privilege for already-privileged races—is as timely as ever, involves the highest of stakes, and is squarely before the Court. No meaningful way exists to undo the centuries of dehumanization and degradation that are both a national legacy and the unfortunate heritage of today's minority youth. But by taking into account this dark past in applying the Equal Protection Clause, the Court can help minimize the negative role it will play in the next 40, and indeed 400 years.

## II. "EQUAL" PROTECTION CAN NOT MEAN "SAME" PROTECTION BECAUSE UNDERREPRESENTED MINORITY APPLICATIONS AND WHITE APPLICANTS ARE NOT SIMILARLY SITUATED

A principle shared by virtually every parent serves as a powerful insight into the often-murky concepts of justice: You love your children "equally." But because each child's individual qualities and circumstances are unique, you must love and provide for each child differently to achieve truly "equal" treatment. Each child has unique, individual needs that should equally be met, but they can not all be met with the exact same means.

The principle holds true when applied to law students, lawyers, judges and other professionals alike. To assume that "equal protection of the laws" requires the exact same treatment for each individual illogically discounts the indisputable fact that people are not the same. The

law must treat each group, class or society member “equally,” but in doing so cannot treat everyone the “same.”<sup>10</sup>

If you are black in this country, you are more likely than a white to live at or below the poverty level, be discriminated against in purchasing housing, live in racial isolation, attend poor educational facilities, suffer from poor health, be jailed, be executed or lose the life of your infant. Whites and minorities are simply not similarly situated. The question then becomes, does a white person need the “same” protection as a member of a race that has been illegally, immorally and consciously dominated in order for each person’s rights to be “equal”? Common sense and Cartesian logic dictate that the answer must be “no.”

We do not dismiss the Supreme Court’s observation in *Bakke* that the guarantees of equal protection “are universal in their application” and not limited to the protection of one race, blacks, from discrimination at the hands of another, whites. No doubt that “[a]lthough many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the [black] race and the ‘white majority,’ the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.”<sup>11</sup> But these corollaries can not trump the “one pervading purpose” for creating and protecting minorities’ civil rights in the first place. Recognizing the difference between treating persons differently situated equally, as opposed to simply the same, places the concept of equal protection in its proper context. Within that context one may properly consider so-called “reverse discrimination” cases.

### III. EQUAL PROTECTION LAW MUST ACCOUNT FOR DIVERSITY AND FAIR ACCESS AS LEGITIMATE AND COMPELLING INTERESTS

Removing the remnants of past oppression from our society involves just what courts, legislatures and other institutions have been doing the past quarter century: recognizing that encouraging racial diversity and access within our institutions helps, and acting accordingly.

It was not that long ago that universities around the country excluded students of African descent from even being *considered* for

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10. See *Aiken*, 37 F.3d 1155, 1172, (Jones, J., dissenting) (“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.”).

11. See *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 293 (1978) (internal citations omitted).

admission to their academic programs solely on the basis of race.<sup>12</sup> Although the University of Michigan was just the second university to confer a degree upon a black student in 1870, blacks were not admitted into the University in significant numbers until very recently.<sup>13</sup> Despite the gradual progression towards more open admissions in some law schools, minority entry into the profession has slowed considerably since 1995. More must be done. In areas other than legal education, courts and legislatures have acted to address the effects of prior exclusion of underrepresented minority groups through encouraging diversity and fair access. The following are just a sample of such actions:

- Recognizing the stagnating effects of race-neutral legislation and business practices on underrepresented minority groups,<sup>14</sup> the U.S. Senate enacted Section 103(f)(2) of the Public Works Act of 1977, mandating that 10% of public works funds go to minority-owned businesses. The section survived an Equal Protection challenge in *Fulliove v. Klutznick*, 448 U.S. 448 (1980).
- Systematic exclusion of minorities from jury duty has been held to be a violation of Equal Protection and other fundamental rights.<sup>15</sup>
- The Voting Rights Act of 1965 was enacted “to protect the right of racial minorities to participate effectively in the political process.”<sup>16</sup>

Voting rights law is particularly analogous here. The inability to exercise one’s right to vote renders a citizen impotent, unable to effect change through the democratic voting process.<sup>17</sup> Further insult occurs when others around him easily access the process and reap the political benefits.<sup>18</sup> So it goes with education.<sup>19</sup> When the majority group benefits from a system perpetuating privilege, educationally or otherwise, denying access to premier educational institutions is especially debilitating to an aspiring minority student. While the Supreme Court has not

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12. See *Bakke*, 438 U.S. at 326–27.

13. See *Gratz v. Bollinger*, 135 F. Supp.2d 790, 796–98 (E.D. Mich. 2001).

14. See, e.g., H. R. REP. NO 94-468, at 1–2 (1975).

15. See, e.g., *Strauder v. W. Virginia*, 100 U.S. 303 (1879); *Norris v. State of Alabama*, 294 U.S. 587 (1935); *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

16. *Solomon v. Liberty County*, 865 F.2d 1566, 1569 (11th Cir. 1988).

17. See *Solomon*, 865 F.2d at 1569.

18. See *Solomon*, 865 F.2d at 1569.

19. *Plyler*, 457 U.S. 202, 230–31 (Marshall, J., concurring).

recognized a constitutional right to an education,<sup>20</sup> the right to participate in the political process and the acquisition of education (or the development of any skill) are fundamentally similar in that each provides an individual with the ability to make meaningful contributions to his community and his country. On the other hand, dispossession of either renders him politically and economically ineffective. Political and economic empowerment are defining characteristics of freedom. Providing access to a high quality, internationally-renowned legal education like that offered at the University of Michigan is one legitimate means for providing political and economic empowerment for all people, especially for minorities.

#### IV. THE LAW SCHOOL'S ADMISSIONS POLICY DOES NOT VIOLATE A PROPERLY-INTERPRETED EQUAL PROTECTION CLAUSE

The Law School's policy effectively embodies and embraces the "one-pervading purpose" of the Equal Protection Clause. It promotes the interests of diversity and fairness in admissions. The Law School's policy guarantees equal protection, it does not violate it.

##### A. *The Admissions Policy Promotes Diversity and Equal Access*

The Law School's admissions policy is a well-designed tool that proficiently accounts for race as "one of many factors" that a University "properly may consider" to achieve a diverse student body.<sup>21</sup> The policy recognizes that each applicant is an individual and, therefore, one applicant can never be exactly the same as another. The policy does not violate equal protection, but rather helps promote it by ensuring that underrepresented minority groups, who historically have been denied equal protection, now have equal access to a prestigious top-ranked law school. Ensuring such access also tends to increase the level of diversity of the student body, conveying "diverse perspectives" and other such benefits to students rightly touted in the numerous other briefs filed in support of Defendants-Appellants.

Diversity is a particularly compelling interest in the case of the University of Michigan. In *Gratz v. Bollinger*, students, faculty and even

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20. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

21. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

the Department of Defense testified that the University of Michigan had developed an “unfavorable image” among the African-American community.<sup>22</sup> That is because a 1980 study of African-American students at the University revealed that eighty-five percent of the students surveyed had encountered racial discrimination while at the University, ninety percent wanted more African-American students at the University, and over sixty percent stated they had little or no contact with African-American faculty and staff.<sup>23</sup>

From 1986 to 1987, a number of racist events occurred at the University, including the distribution of racist fliers, vandalism in minority lounges and racist jokes broadcast over the University’s campus radio station.<sup>24</sup> An investigation resulted in a report recognizing that African-American students at the University were “likely to be subjected to ridicule, abuse, and threat,” as well as “instructors who make openly racist comments, inside and outside of class,” and that the radio broadcasts were “only a symptom of a pervasive atmosphere on this campus.”<sup>25</sup>

While the Law School has not highlighted its own past discrimination, it can not go ignored. Policies encouraging racial diversity and minority access address hostile educational environments, whether or not the Law School claims such as an intended result. The District Court’s holding unfortunately turns back the clock on the progress Law School policies have made toward increasing diversity, providing equal access and facilitating a non-hostile educational environment.

### *B. The Admissions Policy Strengthens the Legal Profession*

The policy not only promotes diversity, but promotes the legal profession itself by creating a diverse bar. The bar’s growing diversity helps break down racial barriers, inject greater understanding into our system, and enhance the level of lawyering. Three prominent legal scholars studied the careers of Law School alumni from 1970–96 and concluded that:

African American, Latino, and Native American alumni though on average admitted to the Law School with lower numerical entry credentials than those of whites have fully

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22. 135 F. Supp. 2d 790, 797 (E.D. Mich. 2001).

23. *Gratz*, 135 F. Supp. 2d at 798.

24. *Gratz*, 135 F. Supp. 2d at 798.

25. *Gratz*, 135 F. Supp. 2d at 798.

entered the mainstream of the American legal procession. They earn large incomes, perform pro bono work in generous amounts, and feel satisfied with their careers. The initial and current job choices of minorities and whites differ somewhat, but across time the achievements of minority graduates are quite similar and very few differences between them are statistically significant.<sup>26</sup>

C. *The Admissions Policy Is Fair Because Minority Students' Backgrounds Often Make Them More Qualified*

It is undisputed that in this case the relevant "minority and non-minority admittees were all well qualified for admission."<sup>27</sup> Furthermore, there is no doubt that minority graduates of the law school are contributing significantly to the private and public sectors.<sup>28</sup> Appellee is therefore left only with an argument that admittance of some minorities is unfair to some prospective white students.<sup>29</sup>

In accepting this position, the District Court relied upon expert testimony concluding that "African American, Mexican American, and Puerto Rican applicants in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a *similarly-situated* Caucasian American applicant."<sup>30</sup> This misses the point. As discussed above, minority and majority members of our society are not similarity situated. In fact, a minority applicant's diverse racial heritage and the difficulties the applicant overcame because of that heritage make the minority applicant more qualified than the white applicant in some cases.

Our culture purports to measure success by merit, but inconsistent with that principle, tends not to account for the fact that some people inherently start out with the above-described burdens, while others start out with privileges. We should. With respect to race, the gap between blacks and whites has no doubt closed since emancipation. Still, because

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26. David Chambers, et al., *Doing Well & Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School 1970-1996*, available at [www.law.umich.edu/newsandinfo/lawsuit/survey.htm](http://www.law.umich.edu/newsandinfo/lawsuit/survey.htm).

27. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001).

28. See generally Chambers, et al., *supra* note 26.

29. *Grutter*, 137 F. Supp. 2d at 824.

30. *Grutter*, 137 F. Supp. 2d at 837 (emphasis added).

of the invidious discrimination ultimately traceable to slavery, blacks today start several steps behind the typical Caucasian.<sup>31</sup> Not only do financial wherewithal and available educational opportunities tend to lag with blacks, so do the less tangible but no less valuable assets of societal acceptance and support. Confidence and self-esteem, partially the result of such support, are necessary to excel in our competitive and complicated society. Our culture robs minorities of much of this asset.

Only recently, and through much effort at both individual and institutional levels, has society given blacks any meaningful respect or reward beyond being sports, musical and other entertainment curiosities. We should not forget that less than half a century ago, blacks were still being lynched and beaten by mobs from communities that were so typically Americana that they resembled Mayberry. Throughout the 1990's, black congregations across the South were torched. It was only in this past decade that white New Yorkers disturbingly dragged a mock black man through the streets during a parade, and white Texans gruesomely dragged a real black man to his death. Hate crimes against blacks are still reported daily, and some of those crimes are even committed by our state-supported law enforcement agencies. Racial profiling for purposes of predicting criminal behavior has not been eradicated from police departments. Yet society's choice form of informing its masses, television, often either excludes blacks or, ironically, demonizes *them* as elements to be feared and avoided. Even one of the most celebrated and financially-successful films at the turn of the new millennium, *Traffic*, portrays affluent white young women as victims of the sex and drug pushers of the black ghetto and the corrupt Hispanic narco-traffickers south of the border.<sup>32</sup>

Shackles, mobs and "colored" bathrooms are no longer the barriers. But barriers remain. The system still manages to disadvantage especially ambitious black youth, albeit through stigmatization and marginalization, if not old-fashioned direct discrimination. To his or her credit, the prospective minority law student has joined the ranks of an elite group positioned to be successful at a first-rate school despite continuously struggling with societally-imposed burdens.

Caucasian applicants may have also overcome struggles and life-challenges. And, on a case-by-case basis, law schools have and are free to

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31. See *Sheet Metal Worker's Int'l Ass'n v. EEOC*, 478 U.S. 421, 449 (1986) ("[E]ven where the employer . . . formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities.").

32. The result of this film's decision to push racial "buttons" in this manner was reinforcement—numerous Academy Awards and nominations.

consider those characteristics as well. Nonetheless, the remnants of four centuries of deeply-entrenched racism has not crossed paths with the white student's dreams and achievements. In the life of an accomplished prospective black lawyer, however, one can safely assume race has posed a significant obstacle. In making admissions decisions, it is surely reasonable for law schools to account for the ability of prospective minority students to meet admissions criteria despite the burdens society has imposed on them due to race.

D. *Qualified Underrepresented Minority Students  
Should Be Admitted Because They Are Qualified*

The Law School states that it has a compelling interest in "achiev[ing] that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."<sup>33</sup> Diversity to optimize quality of education is a legitimate and compelling interest. But we are troubled by the Law School's lack of emphasis with respect to diversity's even more important effect of providing educational access to minorities who deserve it.

The value of minority presence in the classroom should not be measured simply by the external benefits it confers upon others. Consider the Law School's following statement in its brief at page 12:

Under the Policy, once the conceded educational benefits that flow from enrolling meaningful numbers of underrepresented minority students have been achieved or can be achieved without the conscious consideration of race, the admissions office must stop considering race or ethnicity as a factor.

Minority presence should not be viewed as a commodity, as the Law School's statement could encourage one to do, lest we legitimize the viewpoint that "the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."<sup>34</sup> That underrepresented minority students are "all well qualified for admission" indicates that admitted minority students deserve to

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33. Brief for Appellant at 8, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

34. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 22 (Kimberle Crenshaw ed., 1995).

be there.<sup>35</sup> No greater justification for admission exists than that. The concept of critical mass, discussed extensively in the parties' briefs, only furthers this compelling interest by making sure that history doesn't repeat itself by *ensuring* the presence of students in meaningful numbers from underrepresented minority groups.<sup>36</sup>

### CONCLUSION

We amended our Constitution such that "no person . . . is denied . . . equal protection of the laws" because at one point in our history, some "person" (or three-fifths of one as it was) was in fact "denied equal protection of the laws." Yet, minorities in general, and black men and women in particular, struggled for a century following that amendment and continue to struggle against the backwash from this nation's failure to live up to its own stated obligation of equality.

To preserve and further the fundamental purpose of the Fourteenth Amendment—guaranteeing racial equality, particularly for those races to which equality has been historically denied—the Law School must be allowed to continue its admissions policy and the District Court's decision must be reversed. Equality can not be achieved by treating differently situated groups of people the same. The United States' long history of slavery and racial oppression must not be forgotten. Those ills and their aftershocks justify, indeed necessitate, the Law School's admissions policy.

The admissions policy is a primary means by which the Law School fosters diversity and provides opportunities to qualified minority students who might not otherwise have received equal opportunity. Diversity is a compelling interest because of the critical role it plays in providing minorities equal access to legal education; and because of the direct impact it has upon facilitating minority success in the Law School and the legal profession. Consistent with the Law School's commitment to "improv[ing] its service to the legal profession" and "encourag[ing] students to make the most of their individual capacities for full lives in the law," law schools have a duty to help minority students realize these benefits by maintaining a commitment to race-specific admissions.<sup>37</sup>

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35. *Grutter*, 137 F. Supp. 2d at 828–29 (citing Trial Testimony of Dennis Shields, former Director of Admissions).

36. *Grutter*, 137 F. Supp. 2d at 832–33 (citing Trial Testimony of Erica Munzel, then Director of Admissions).

37. Racial diversity is "part of the general commitment to diversity." *Grutter*, 137 F. Supp. 2d at 834 (quoting Trial Testimony of Dean Jeffrey Lehman).

The Law School's admissions policy meets this duty to its students while furthering the Fourteenth Amendment's guarantee of equality for all races and helping ensure that "diversity lives on perpetually."<sup>38</sup>

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38. *Gratz*, 135 F. Supp. 2d at 824 (E.D. Mich. 2001).