

INTEGRATING ELITE LAW SCHOOLS AND THE LEGAL PROFESSION: A VIEW FROM THE BLACK LAW STUDENTS ASSOCIATIONS OF HARVARD, STANFORD, AND YALE LAW SCHOOLS

*Danielle C. Gray**
*Travis LeBlanc***

I. INTRODUCTION

The University of Michigan affirmative action cases¹ are the most high-profile cases the United States Supreme Court has undertaken since *Bush v. Gore*.² These lawsuits present the Court, and the country, with the constitutional question of affirmative action in higher education for the first time in a quarter of a century. Although the Court has had many opportunities since 1978 to review its momentous affirmative action deci-

* J.D., Harvard Law School, 2003; A.B., Duke University, 2000.

** J.D., Yale Law School, 2003; M.P.A., John F. Kennedy School of Government, Harvard University, 2003; A.B., Princeton University, 1999.

Special thanks to Kevin Chambers, Lani Guinier, Alexis Karteron, Brandon Paradise, and Sam Spital for helpful comments and suggestions.

The brief that follows was conceptualized, researched, and written by Harvard Law School students Troy Brown, Danielle C. Gray, D. Austin Hare, and Brooke Richie; Stanford Law School students Alexis Karteron and Dawn L. Smalls; and Yale Law School students Stephen S. Bailey and Travis LeBlanc. Additional research and editorial assistance was provided by Nicole Birch, Kevin A. Chambers, Jia Cobb, Dominick Cromartie, Mercedes Davis, Norina Edelman, Trevor Gardner, Michael J. Gottlieb, Jamal Greene, Ayo Griffin, Latonia Haney, Corrine Irish, Harmony Loube, Randall Minor, Walter Mosley, Kamil Redmond, Rahsaan Sales, and Holly A. Thomas. We are especially grateful to our counsel for their helpful comments and criticisms, and to Paul, Weiss, Rifkind, Wharton & Garrison, LLP for providing the firm's support in producing and submitting the final version. Thanks are also owed to Angelo Ancheta, Roger Fairfax, Heather Gerken, Kumiki Gibson, Pam Karlan, Neal Katyal, Richard Parker, Richard Primus, Larry Tribe, Paul Watford, and David Wilkins for their generous feedback. Finally, special thanks go to Dr. Linda F. Wightman for providing us with an updated study to cite in the brief and to David Brown, Melanca Clark, and George W. Jones, Jr., for all of their dedication, hard work, and patience in the final production of the brief.

1. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted* at 2002 LEXIS 8677 (2002) (challenging law school admissions policies and practices); *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001), *cert. granted* at 2002 LEXIS 8681 (2002) (challenging undergraduate admissions policies and practices).

2. 531 U.S. 98 (2000).

sion in *Regents of University of California v. Bakke*,³ it has repeatedly declined any such invitation.⁴ Similarly, while the Court has considered a number of cases raising important questions of race during the past twenty-five years,⁵ none required the Justices to reconsider the special and unique relationship of race-conscious practices for historically disadvantaged minorities in the context of higher education. Indeed, the Court historically has taken very few landmark race cases. Prior to the Civil Rights Movement, the Court only took on such cases every fifty years or so, beginning with *Dred Scott v. Sandford* in 1856,⁶ *Plessy v. Ferguson* in 1896,⁷ and finally *Brown v. Board of Education* in 1954.⁸ Since the *Brown* decision, the Court has halved the time between such cases to about twenty-five years, with *Bakke* in 1978 and now *Grutter v. Bollinger* and *Gratz v. Bollinger* in 2003. This linear analysis of the Court's jurisprudence only goes to show that, like the broader American polity, even the Justices have taken cautious steps in advancing the Court's docket to the stride of integration.

By no means should this suggest that the Court has not considered a number of other cases raising important questions of race. Our only point is that such landmark "constitutional moments," to borrow from Bruce Ackerman,⁹ are rare occurrences. As concerned citizens and members of the legal profession, we are not often presented with a chance to participate in such monumental judicial decision-making. Indeed, such cases frequently concentrate on issues that are too divisive for the more political branches to regularly assess. It is at times like these that it is most important that students, academics, private organizations, and the public capitalize on the opportunity to participate in the judiciary's decision-making. This can come about in any number of ways—from protesting in

-
3. 438 US 265 (1978) (holding racial quotas in university admissions unconstitutional).
 4. See *Smith v. University of Washington Law School*, 233 F.3d 1188, 1197 (9th Cir 2000) (holding that using race as one of several factors to attain a diverse student body is constitutionally permissible), *cert. denied*, 532 US 1051 (2001); *Texas v. Hopwood*, 518 U.S. 1033 (1996) (denial of certiorari) (opinion of Ginsburg, J., joined by Souter, J., respecting the denial of the petition for a writ of certiorari) (refusing to grant certiorari on the ground that petitioners challenged the rationale rather than the judgment of the lower court).
 5. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny applies to all race-based affirmative action plans); *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that the "bizarrely" shaped North Carolina reapportionment scheme unconstitutionally segregated voters into separate districts on the basis of race); *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989) (holding that the city of Richmond failed to demonstrate a compelling governmental interest since the factual predicate supporting it did not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Equal Protection Clause); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that a race-based layoff program agreed to by a school board violated the Equal Protection Clause because there was not a factual determination that the board had a strong basis in evidence for its conclusion that remedial action was necessary).
 6. 60 U.S. 393 (1856) (holding that slaves of African descent were not citizens).
 7. 163 U.S. 537 (1896) (holding that separation of the races by state law is constitutional).
 8. 347 U.S. 483 (1954) (holding that segregated schools protected by the "separate but equal" doctrine are "inherently unequal" and deprive African American children of equal protection).
 9. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

front of the Supreme Court to writing opinion pieces in local and national news media to organizing community forums that foster broad public discussion about affirmative action. While the fate of affirmative action, for the time being, is in the hands of nine Justices, there is a role for everyone to play in contributing to the public's conversation about race. Democracy requires nothing less.

II. DEMOCRACY IN ACTION: FINDING AN AMICUS MANDATE

We write as law students. Like so many of our peers across the country, we felt a particular calling to advance a legal argument in the Michigan cases.¹⁰ This is not the only way we could—or even did—participate in this historic moment, but it reflects an unsurprising choice given our training on how to affect law and public policy in this country. And it was certainly the way that we felt we could offer the greatest contribution to the cause for affirmative action. In the *Bakke* litigation, a number of law school student organizations played a role in the case by filing amicus briefs, including Yale's predecessor-chapter of the Black Law Students Association.¹¹ In this same spirit, we researched and wrote an amici brief with a team of students on behalf of the Black Law Students Associations of Harvard, Stanford, and Yale Law Schools [hereinafter "the BLSAs"] supporting the admissions policies and practices of the University of Michigan Law School at issue in *Grutter v. Bollinger*. We have an interest in this case because we are committed to maintaining racial diversity in legal education and in the legal profession. In short, our brief argues that racial diversity is necessary for elite state and private law schools to fulfill their public mission of training students for leadership in the legal profession and that alternative race-neutral admission practices would fail to sustain meaningful racial diversity at these schools.¹²

In addition to our desire to have a voice in the debate over affirmative action, the BLSAs were motivated by the fact that our memberships include students who are beneficiaries of law school policies that consider race as one factor among many in admissions decisions. Although it should be axiomatic by now, it bears emphasizing that our membership

10. See, e.g., Brief of Amici Curiae 13,922 Current Law Students, *Grutter* (No. 02-241); Brief of Amici Curiae Howard University Law Students, *Grutter* (No. 02-241); Brief of Amici Curiae UCLA School of Law Students of Color, *Grutter* (No. 02-241); Brief of Amici Curiae University of Michigan Law Students, *Grutter* (02-241).

11. See, e.g., Brief of Amicus Curiae Cleveland State University Chapter of the Black American Law Student Association, *Bakke* (No.76-811); Brief of Amicus Curiae Black Law Students Association at the University of California, Berkeley School of Law, *Bakke* (No. 76-811); Brief of Amicus Curiae Black Law Students Union of Yale University Law School, *Bakke* (No. 76-811). George W. Jones, Jr., who served as co-counsel to the BLSAs in filing the amici brief in *Grutter*, worked on the BLSA brief submitted in *Bakke* while attending Yale as a law student. Not only is this an interesting twist in fate, but it is also quite telling as to how far the Court—and indeed the entire country—has come over the last twenty-five years in our national conversation about race, education, and opportunity.

12. See Brief of Amici Curiae Harvard Black Law Students Association, Stanford Black Law Students Association and Yale Black Law Students Association, *Grutter* (No. 02-241) [hereinafter "BLSA Brief"]. All BLSA Brief citations are to the brief as it was submitted to the Supreme Court.

also includes students who were not the direct beneficiaries of such admissions policies. The BLSAs are diverse organizations. We represent a membership dedicated to promoting the academic and professional goals of black law students, but our organization nevertheless reflects an array of national, religious, ethnic, political, economic, and academic backgrounds. Like all of our classmates, the students who make up the BLSAs have received a broader, more intellectually stimulating education because we have had the opportunity to study and socialize in academic environments that are enriched by racial diversity.

As students at the nation's three most selective law schools—which, historically speaking, produce many of the future leaders of the legal profession—our interest in the course of this litigation is particularly important. Alumni of the BLSAs rank among the most distinguished graduates of their institutions, and are currently serving as respected litigators, judges, law professors, legislative officials, and principals of major corporations and nonprofit organizations. These graduates have been pioneers in integrating the legal profession, and have helped make the bar and the bench more responsive to the needs of a society that is rapidly growing more diverse. The role of our law schools in graduating leaders of the legal profession of all races—and especially racial minorities—is equally telling: eight of the nine Justices currently sitting on the Court, including all of its female and minority members, attended Harvard, Stanford, or Yale Law School. A similar reflection springs from the traditional pool of the Justices' law clerks, the partnerships of the nation's corporate law firms, the ranks of legal academia, and many other areas of the legal profession. As black law students at these schools, we felt that our mandate was clear: we aimed to contribute to the Court's latest consideration of the role of race in our democracy by demonstrating that preserving a critical mass of racial minorities at elite law schools is crucial to the missions of our respective BLSA chapters, our law schools, and the leadership of the legal profession.

III. REFLECTIONS OF AN AFFIRMATIVE ACTION BRIEF

In retrospect, we think it is fair to say that our brief reflects the product of competing conceptions about our role as amici to the Court and our unique voice as black law students at Harvard, Stanford, and Yale. Amicus briefs, by design and tradition, function to educate the Court about narrow issues in more detail than can be achieved in a brief on the merits or about broader legal issues that are often outside the merits of a case, such as the public policy implications of possible decisions or social science evidence that bolsters a certain proposition or point of contention. Amicus briefs may also serve to provide the Court with different perspectives on the case—perspectives that the parties to the case may not share with the larger public who will be affected by the Court's decision. As black law students at schools where an overwhelming majority of the Justices and their clerks attended, we sought to use the brief as an opportunity to present the Court with evidence that *their* law schools are better places to study law today than they were fifty, or even twenty-five, years ago because of their far greater racial diversity. We also wanted to emphasize that in the course of integrating the profession, black gradu-

ates of Harvard, Stanford, and Yale have lived up to—and at times exceeded—the stated goals and objectives of their institutions. In our view, substantial support for these two propositions with respect to the University of Michigan was available in the record amassed by the respondents. Our contribution as an amicus, we decided, was to attempt to personalize this powerful and compelling evidence for the majority of the Justices by linking the story of blacks at Michigan to blacks at our schools, and to use this story to dispel the conventional narrative that excellence and racial diversity are competing or offsetting values. We decided to focus on black students and graduates not only because the brief was submitted by our BLSAs, but also because of the conspicuous absence of our voice in a debate that often, and necessarily, turns to whether and how the presence of blacks in these institutions can be justified. Symbolically and substantively, we felt it was time for us to speak out.

While the decision to write an amicus brief in support of the University of Michigan Law School's admission policies and practices was relatively easy to make, actually implementing that decision forced us as a collective to confront a number of unforeseen challenges. The Court did not grant certiorari in the *Grutter* and *Gratz* cases until December.¹³ Not only were we all in exams or on winter break during December and January when most of the work needed to be completed, but we also found ourselves split among three different states (and two different time zones). While we were able to hold a number of conference calls and several weekend meetings in Cambridge and New Haven, this endeavor would have been nearly impossible as little as ten or fifteen years ago—before the dominance of the Internet—given the short timeframe in which we had to act. This seems to have been true for all the law student briefs that were filed in the *Grutter* case. Whereas almost all of the *Bakke* amicus briefs filed by law students were authored by individual black student groups, all the law student amici briefs filed in *Grutter* were authored by broad coalitions of individuals and organizations representing a diverse array of racial and ethnic backgrounds.¹⁴ Moreover, the geographic and demographic diversity of the law students filing amici briefs grew vastly in the twenty-five years between *Bakke* and *Grutter*. We have no doubt that the successful efforts of all these students are in large part due to the Internet.¹⁵ But this type of multiracial coalition building and collective action in support of affirmative action is not merely attributable to technological advances; more importantly, it also reflects a transformation in race relations made possible by two decades of meaningful integration in legal education,¹⁶

13. See cases cited *supra* note 1.

14. Technically, all the law student briefs filed in *Grutter* are “amici” because they represent multiple individuals or groups. Compare sources cited in note 10 with sources cited in note 11.

15. Indeed, the very fact that any of us had a final brief to submit to the Court in February is truly a testament to the commitment and coordinated efforts of a number of hard-working law students at all of our schools.

16. Recent social science studies have documented the role of racial diversity in breaking down stereotypes, challenging assumptions and preconceptions, promoting tolerance and cooperation, and broadening the scope of classroom and campus discourse and debate. See, e.g., GARY ORFIELD & DEAN WHITLA, *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (2001) (exploring the positive educa-

the legal profession,¹⁷ and in our racially diverse democracy.¹⁸ The BLSA brief recognizes this progress, and cautions against regressing from our nation's strides toward achieving this compelling governmental interest.¹⁹

In the course of our research for the brief, we discovered an inspiring, even humbling, commonality about the missions of our respective institutions and elite law schools more generally: A public commitment to tackling the most complex and challenging social and legal problems faced by our multiracial democracy.²⁰ The goal of an elite law school education is, thus, not simply to train students in blackletter law and doctrine, but to train future lawyers to confront the tough normative questions about law and to challenge the bounds of law so that it is more equitable, administrable, useful, and just.²¹ Accordingly, a law school could not meet its public mission by accepting students solely on the basis of their past achievements; it also needs to consider their future potential to contribute to the advancement of law and society. Any law school that lays claim to such a mission of excellence cannot avoid, responsibly, the most challenging and complex dilemma of them all—the salience of race in our social, political, and legal order. Thus, it is imperative that these schools admit and train a racially diverse student body that is equipped to confront enduring American challenges such as racial inequities in the administration of criminal justice, public education, health care access, and employment opportunities.

One of the first decisions that we confronted as a team was whether to write a brief for only one or both of the Michigan cases. While many of our members wanted to file a brief in both cases since the arguments were

tional benefits of diversity at elite law schools). These powerful effects are unsurprising given the numbers of students who are introduced to significant interracial interaction for the first time in college and law school. *See id.* at 156.

17. *See generally* ELIZABETH CHAMBLISS, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2002).
18. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 442 (1998) (“Institutions of higher education are uniquely positioned to combat prejudice and to foster the empathy required for responsible public decision-making. Therefore, attaining a racially diverse student body is a governmental interest of paramount importance. We will be one step closer to fulfilling the promise of democracy when we may recognize this statement not only as a claim of educational policy but also as a holding of constitutional law.”)
19. *See* BLSA Brief at 4-20.
20. *See, e.g.*, HARVARD LAW SCHOOL, HARVARD LAW SCHOOL CATALOG 2002-2003 24 (2002) (stating that Harvard Law School seeks to train its students to provide “solutions to many of the world’s complex legal and social challenges.”); STANFORD LAW SCHOOL, STANFORD LAW SCHOOL STUDENT HANDBOOK 2002-2003 1 (2002) (stating that Stanford seeks to graduate lawyers “who contribute actively to solving the problems that confront individuals, the nation, and the world . . . and who . . . will assume positions of leadership in the profession and in public and private institutions”); YALE LAW SCHOOL, BULLETIN OF YALE LAW SCHOOL 19 (2002) (Yale takes a “broad view of the role of law and lawyers in society” and seeks to “advance inquiry at the boundaries of the law.”). *See also* BLSA Brief at 5 n.6.
21. For a powerful argument that an educational institution’s admissions policies ought to be linked to its mission, *see* Lani Guinier, *Confirmative Action*, 25 LAW & SOC. INQUIRY 565 (2000) (reviewing a study of the careers of University of Michigan Law School graduates that found that minority graduates were fulfilling the public mission of the law school and the legal profession generally).

sufficiently similar, we ultimately decided that as law students, our argument would be strongest if we concentrated on the law school case. Further, we especially avoided the temptation to file the same brief in both cases because we saw fundamental differences between admissions to college and admissions to graduate and professional schools. Nevertheless, we did not realize when we made that decision that so many of the other amici would, like the United States, file essentially the same brief in the *Grutter* and *Gratz* cases.²² Filing the same brief in both cases ignores important differences between the law school and undergraduate contexts, and as we saw in the oral arguments, it also lends to conflation of the two in the Court's deliberations.²³

Undergraduate admissions are relevantly and importantly distinguished from graduate and professional school admissions. First, the ratio of available seats to the number of applicants is substantially smaller in graduate and professional school admissions than at the undergraduate level. Consequently, admissions to the top graduate and professional schools are significantly more competitive than at the top colleges and universities. Second, professional schools such as law and medical schools are gatekeepers to the legal and medical professions. While someone could work as a chef, for example, by going to college, community college, culinary school, or opening up her own restaurant, it is simply not possible to practice law or medicine without attending an accredited law or medical school. Third, and most importantly for the Court's strict scrutiny analysis, the race-neutral alternatives developed in the context of undergraduate admissions are functionally incompatible with graduate and professional school admissions, which must necessarily take into account demonstrated interest and experience in applicable fields of study, not simply generalized academic achievement. For example, the so-called "percentage plans" touted by the United States in its brief²⁴ were created in the late 1990s for use in undergraduate admissions at state universities.²⁵ These plans grant automatic admission to students graduating within a certain top percentage of their public high school classes.²⁶ In contrast, elite law schools recruit applicants from hundreds of colleges throughout the United States, and the number of undergraduate applicants vastly exceeds the number of students that are accepted by these schools.²⁷ In short, we focused our arguments only on the importance of racial diversity in law

22. See, e.g., Brief of Amicus Curiae Cato Institute, *Grutter* (No. 02-241) and *Gratz* (No. 02-516) (filing one brief for both cases); Brief of Amicus Curiae Center for Individual Freedom, *Grutter* (No. 02-241) and *Gratz* (No. 02-516) (same); Brief of Amicus Curiae The Michigan Association of Scholars, *Grutter* (No. 02-241) and *Gratz* (No. 02-516) (same).

23. See, e.g., Respondents' Oral Argument at 29, 51-52, *Grutter* (No. 02-241) (questioning about the admission of "high school graduates" and "high school seniors" to medical and law schools).

24. See Brief of Amicus Curiae United States at 13-18, *Grutter* (02-241).

25. See CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 19-23 (2003).

26. See *id.*

27. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 540 (2002) (explaining the practical ineffectiveness of percentage plans).

school admissions because we believed that there were good, strong arguments to be made in that context which do not bolster the case for racial diversity in undergraduate admissions, and vice versa.

Early in our discussions about the brief, we decided to ground our legal argument supporting affirmative action in empirical data. We observed that past decisions of the Court consistently rejected arguments for race-based protections that were theoretically sound, but empirically vacuous. “[S]tatistical analyses,” the Court has repeatedly reminded, “serve[] and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue.”²⁸ Thus, in *City of Richmond v. J. A. Croson Co.*,²⁹ the Court searched for evidence of a “significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [city of Richmond’s] prime contractors” before it would infer discriminatory exclusion.³⁰ Similarly, we reasoned that statistical evidence of the benefits of diversity in higher education would significantly bolster the case for race-conscious admissions. Indeed, Steven A. Holmes, among others, has attributed the success of the Michigan litigation to “an emerging strategy by affirmative action’s supporters to make an empirical case for it, rather than a purely anecdotal or intuitive one.”³¹ To that end, we committed ourselves to supporting all of our arguments with social science and statistical data—a task that proved especially challenging for those among us who chose law school as an escape from “number crunching.”

While there has been a wealth of empirical study on the vital role of diversity in advancing the quality of educational, social, and political fora over the past twenty-five years, we found that much of that data had either already been conveyed to the lower courts in the record for the *Grutter* and *Gratz* cases or was only loosely responsive to the role of diversity in progressing legal education at our own schools and integrating the leadership of the legal profession. To narrow the scope of our research, we limited our empirical support to studies that focused on our own students and alumni³² and to studies that would be published in the near future which the Court likely would not encounter otherwise.³³ Unfortunately, we were unable to find data for many arguments that we would have liked to present to the Court, but in which no one has done any substantial research and in which it was impossible for us within the confines of

28. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (citations omitted).

29. 488 US 469 (1989).

30. *Id.* at 509.

31. Steven A. Holmes, *A New Turn in Defense of Affirmative Action*, N.Y. TIMES, May 11, 1999, A-1.

32. See, e.g., DAVID B. WILKINS ET AL., HARVARD LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI 1869–2000 (2002); GARY ORFIELD & DEAN WHITLA, DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (2001) (exploring the impact of diversity on current Harvard and Michigan law students and alumni).

33. See, e.g., Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, forthcoming in 53 J. LEGAL EDUC. (2003) (examining the impact of “numbers-only” policies on the admission of racial minorities to elite law schools). We are especially grateful to Dr. Wightman for providing us with a final draft of her 2003 study prior to publication.

two months to collect and analyze in a manner that is scientifically sound.³⁴ Thus, despite our first-hand experiences with minority professors at our own schools, for example, we limited our argument about the role of diversity in integrating legal academia at elite law schools to a footnote.³⁵

However, it is not surprising to us that such data was not available. These are areas in which the numbers of minorities are small. In legal academia, for example, among our schools, Harvard leads with seven black professors, Stanford with four, and Yale with three (with all but one attending Harvard, Stanford, or Yale for law school). Indeed, if it were not for David B. Wilkins's influential research on the representation of blacks in corporate law firms,³⁶ we would have been constrained from including that section of the brief as well. Although the number of blacks in academia at elite law schools and in partnerships at corporate law firms was infinitesimal in 1978 and their growing presence in these institutions today is a testament to the successes of the *Brown* and *Bakke* legacies, there remains a lot of room for progress. As several commentators have noted, legal education and the profession still have miles to go.³⁷

We are all fortunate that our law schools have trained us with practical skills that we can use to affect judicial decision-making. One challenge that we did not foresee fully as law students, who usually only write briefs for our legal writing class or for moot court competitions, was the importance of writing to your audience. In briefs written during law school, we assume an objective audience—namely, the *tabula rasa*, reasonable judge—rather than a subjective audience, in which the judge has his or her own judging or interpretative philosophy and prior views on the question presented. We recognized in constructing the brief that such an assumption would be foolhardy in this context. The fact of the matter is that the Michigan cases do not present issues of first impression to the Court—either in its jurisprudence or in the Justices' own experiences. They have all thought about affirmative action, some of them have even taken public stances on it, and many have well-defined views already. Consequently, we made a conscious decision not to write for the objectively reasonable Justice. Instead, we found ourselves compelled to write for those Justices who we believed were most likely to find our position persuasive. This was a task that none of us had ever previously engaged. We tried to learn everything that we could about those Justices who have expressed a concern for racial integration, but have also expressed doubts about the use of race-conscious measures to reach that goal. We reviewed every opinion that those particular Justices had written on issues of race and even those opinions that might be relevant but did not deal explicitly with race, such as cases involving gender. We read their opinions on racial diversity beyond the educational context, namely employment and vot-

34. Data that we gathered independently on the numbers and alma maters of black federal judges, members of Congress, and mayors were excluded from the brief because of time pressure in confirming its statistical significance.

35. BLSA Brief at 13 n.7.

36. See, e.g., David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000).

37. See generally ELIZABETH CHAMBLISS, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2002); Mark Hansen, *And Still Miles to Go*, 85 A.B.A.J. 68 (1999).

ing rights. Apart from the Court's jurisprudence, we also reviewed any academic writings, lectures, or statements to the press that could help us understand the way those Justices think, both about race and more generally. All in all, we aimed to uncover their judging paradigms, and yet cloak our own arguments within them.

Though coordinating, researching, and writing a Supreme Court brief with students engaged in the pressures of final exams posed significant barriers, they were by no means the most challenging obstacles to the endeavor. Surprisingly, the more difficult trials had nothing to do with distance, division of labor, and time, and *everything* to do with the questions and issues that are fundamental to this case. We found ourselves debating what it means to be black, and whether black students—as opposed to minority students more generally—had a unique perspective and stake in the social and legal propositions of the case. We also had to resolve whether to sacrifice arguments that were compelling to us in order to write a brief that might persuade one Justice and at the same time avoid infuriating another, more sympathetic Justice. Finally, we engaged in many long discussions over the legal arguments and the credibility of the empirical support offered in the brief. Throughout the experience, we were forced to continuously balance concerns of speaking in a common and persuasive voice with respect for the multitude of viewpoints and positions held by our fellow student contributors, our counsel, and members of our respective BLSAs. To that end, ours really is a living brief. It is the product of the very diversity that it urges the Court to validate. Our brief is also a democratic document. It is the result of debate, deliberation, and compromise among black students with varying backgrounds and beliefs who were able to come together despite our differences to offer a negotiated perspective on a complex socio-legal problem. Our experience defied any notion of blacks as a monolith, yet it also powerfully contributed to the case for diversity urged in the brief.

Our brief concludes that the number of black students at elite law schools would critically diminish if those law schools were not allowed to consider race in their admissions. This is not to say that there would be no blacks or minority students at the nation's top law schools; only that they would be present in such token levels that their voice would be effectively silenced. The censorship of blacks in legal education and the leadership of the legal profession would seriously undermine the capacity of the profession to solve the most complex legal and social problems confronting our multiracial democracy and would certainly call its legitimacy into question. Given our country's history, the mere presence of racial minorities in positions of power and leadership in the legal, political, private, and even social communities militates against perceptions of bias by the public. As evidenced by the record 102 amicus briefs filed in the Michigan cases,³⁸ the people of the United States have called upon the government to ensure that all institutions—whether private or public—reflect the demography of the citizenry to preserve its public democratic mandate. If race is eliminated as a consideration in admissions and institutions that

38. Of the 102 amicus briefs submitted in the Michigan cases, 78 were submitted in support of Michigan, 19 opposed (including the United States), and 5 took neither side.

are almost wholly white produce leaders in every sphere who are almost wholly white, whether we have changed the letter of the law such that “separate, but equal” is no longer the law of the land is beside the point. It would be the spirit of the land, a spirit that would eternally haunt the legitimacy of American democracy.

IV. DEMOCRACY AT THE CROSSROADS: INTEGRATION OR SEGREGATION?

The Michigan cases have re-ignited conversations about affirmative action—and even race more generally—on campuses and in communities around the country. Our own law schools have all hosted numerous discussions, panels, and forums inside and outside of class to discuss the cases. Further broadening the public conversation about affirmative action, the final round of this year’s moot court at Yale will take up *Gratz v. Bollinger*. While the finals of this competition includes one black and three white finalists, we cringe at the prospect of what this conversation would be like if all the students and judges who participated in it were white. Irrespective of the merits of their arguments, the legitimacy of the activity as a student organization, the law school as a public institution, and the judges as public officials would be called into question. Perceptions of unfairness would cloud the substance of the moot court exercise and derivatively its participants. And when it comes to legitimacy, perceptions of unfairness are as traumatizing as actual unfairness. We, like many others, have found that the mere presence of racial minorities in public positions of power and prestige legitimizes those institutions by militating against perceptions of bias in the system.³⁹

Although we did make the argument for legitimacy in our brief, we did not emphasize it as much as the Justices did in oral arguments in the Michigan cases.⁴⁰ Contemporaneously with the Court’s decision in *Brown*, a war against totalitarian regimes abroad forced America to recognize the failings in our own democracy at home.⁴¹ Now, fifty years later, another war waged in the name of freedom is forcing our nation to admit to and accept fundamental truths about our increasingly multiracial society: It is

39. See, e.g., Sandra Day O’Connor, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994) (“When people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law.”); A. Leon Higginbotham, *The Case of the Missing Black Judges*, N.Y. TIMES, Jan. 29, 1992, A-21 (“[B]y creating a pluralistic court, we make sure judges will reflect a broad perspective It is difficult to have a court that in the long run has the respect of most segments of the population if the court has no or minuscule pluralistic strands [J]udicial pluralism breeds judicial legitimacy. Judicial homogeneity, by contrast, is more often than not a deterrent to, rather than a promoter of, equal justice for all.”).

40. Questions regarding the affirmative action policies of the military academies were pervasive at oral argument. See generally Petitioner’s Oral Argument, *Grutter* (No. 02-241). In response to one particular question regarding legitimacy, the Solicitor General responded, “the position of the United States is that we do not accept the proposition that black soldiers will only fight for—black officers.” United States’ Oral Argument at 19, *Grutter* (No. 02-241).

41. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 247 (1992) (noting that post–World War II, “[t]he emergence of totalitarianism abroad . . . rekindled thought about the relationship between democratic political culture and legal theory”).

no longer acceptable for the leadership and governing structure of our institutions to be all-white (or even all-male). In oral arguments for both *Grutter* and *Gratz*, the Justices appeared especially fascinated with an amici brief submitted by retired high-ranking military officers arguing that race-conscious admission policies are essential to the full and effective pursuit of the military's interest in promoting national security.⁴² Racial diversity in the service academies leads to racial diversity in the officer corps, argued the amici, which in turn allows for a better-trained military and heightens the legitimacy of an institution plagued by a troublesome legacy and the continuing effects of segregation and discrimination.⁴³

The Court is expected to issue decisions in *Grutter* and *Gratz* in June. But national security from terrorist and rogue regimes abroad is not the only thing at stake in this litigation; the quality of our democracy at home is equally threatened by reversing progress in integrating America's institutions of leadership, governance, and power. It is axiomatic that racial diversity in the country's leading law schools produces racial diversity in the upper echelons of the legal profession; and it is further manifest that the public mission of excellence in legal education is advanced, not compromised, by the presence of a significant number of minority—and, given the history and continued effects of discrimination, especially black—students. The officer corps produced by the military academies is functionally indistinct from the officer corps of federal judges, law professors, corporate law partners, and elected officials produced by Harvard, Stanford, Yale, and other elite law schools that we discussed in our brief. Let us all hope that the Justices' understanding of the compelling role of racial diversity in our democracy at schools like West Point will resonate with respect to schools like the University of Michigan, its Law School, and the Justices' alma maters.

42. See Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr., *et al.*, *Grutter* (No. 02-241).

43. See *id.*