

Grutter and Gratz Decisions Underscore Pro-Diversity Trends In Schools and Businesses

BY JOHN E. HIGGINS

Over the past several months, old and new ideas about diversity – especially racial and ethnic diversity – have taken on new importance for law schools and other institutions of higher education, as well as for the nation’s employers. In light of several recent pro-diversity developments nationally and closer to home in New York, the same must also be said for lawyers, private law firms, and state and local bar associations.

These developments include the U.S. Supreme Court’s already historic decisions in *Grutter v. Bollinger*,¹ and *Gratz v. Bollinger*,² both decided by narrow majorities during its 2002–2003 term, which affirmed that racial and ethnic diversity in law schools and institutions of higher education are important, indeed constitutionally compelling, educational and national interests. The long-term consequences of these decisions are yet to be determined, but talk of “diversity” in all its many stripes, shapes, colors and hues has replaced talk about “affirmative action” in the new, more global parlance of the Court, in our nation’s schools, and in businesses across the country.

Other recent developments raising the diversity bar for the entire legal profession include the Equal Employment Opportunity Commission’s cautiously optimistic 2003 report on Diversity in Law Firms (“2003 Diversity Report”),³ and the recent challenge by the EEOC’s current chair, Cari M. Dominguez. Speaking recently at a national conference of the American Bar Association, she said, “We must all make a constant, unwavering effort to ensure that our nation’s law firms are open and inclusive to all individuals.”⁴ She also pointed out, as graphically illustrated in the EEOC’s 2003 Diversity Report, that although significant strides have been made in the employment of women and minority attorneys by private law firms over the past 20 years (especially at large firms), as a profession, “we must also be mindful of how far we have to go.”⁵

On November 10, 2003, the New York State Bar Association published a policy on diversity in its membership, governance, and leadership, which is likely to be the harbinger of even greater state-wide diversity initiatives. Similar efforts are also under way at the Amer-

ican Bar Association, which has long been committed to a policy of racial and ethnic diversity and to a goal of promoting the full and equal participation of minorities and women in the profession,⁶ and in local bar associations.⁷

All of these pro-diversity developments are being driven by changing demographics affecting the nation, our schools and workplaces, and the military. At the same time, the growing diversity consciousness is being fueled by a wider recognition and acceptance from America’s biggest businesses, and an increasing number of law firms, of the view that workplace diversity is good for competition and the corporate bottom line.⁸ In other words, as businesses have come to associate diversity with greater competitiveness, new business, and even greater profits, colleges, universities, and law schools, and now lawyers, law firms, and bar associations are increasingly following suit.⁹

The central premise of this article is that if the legal profession – and private law firms in particular – fail to heed these calls and achieve greater diversity, the role of lawyers in an increasingly global economy will be marginalized and, in the words of the ABA’s most recent



JOHN E. HIGGINS practices law in Albany, where he is counsel to Nixon Peabody LLP and a member of the firm’s national Labor and Employee Benefits Group. He concentrates his practice on the representation of employers in state and federal courts, before the EEOC, the OFCCP, the N.Y. Division of Human Rights and other administrative agencies in discrimination, employment and traditional

labor matters. He is a member of the National Bar Association, the NYSBA’s Labor and Employment Law Section, the Albany County Bar Association, the Capital District Trial Lawyers Association, and the recently reorganized Capital District Black and Hispanic Bar Association. A graduate of Hamilton College, he received his J.D. from Albany Law School of Union University.

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past president, William G. Paul, “put at risk our profession’s historic role as the connecting link between our society and the rule of law.”¹⁰

Described here are steps that can be taken to avoid these risks within the parameters laid down by the Supreme Court during the past 25 years, together with a number of specific proactive efforts developed and suggested by American businesses, bar associations and diversity experts for those interested in “moving from lip service to diversity.”¹¹

Gratz and Grutter Declare Diversity A Compelling Interest

In *Gratz* and *Grutter*, both decided on June 23, 2003, the Supreme Court strictly scrutinized and resolved 14th Amendment/Equal Protection challenges by classes of white student applicants to the pro-diversity admissions policies at the University of Michigan Law School (*Grutter*), and at one of the University of Michigan’s undergraduate colleges (*Gratz*).

The 6–3 majority in *Gratz*, in an opinion written by Chief Justice Rehnquist, struck down a quota-like point system under which qualified underrepresented minority applicants (Blacks, Hispanics, and Native Americans) were automatically awarded 20 points (out of a possible 150) in the admissions process based solely on their race or national origin.¹² According to the Court, this use of race and ethnicity in the university’s admissions program was unconstitutional because it was not tailored narrowly enough to any compelling governmental interest and failed to afford individualized consideration for all applicants.¹³

In the *Grutter* decision affecting the law school, however, a 5–4 majority of the Court upheld the use of race as a “plus” to be considered together with other factors in the law school’s more flexible and holistic admissions process. When race and ethnicity are used in such “a flexible, nonmechanical way” and all qualified applicants compete for admission and are considered individually, the *Grutter* Court held that the 14th Amendment is not violated.¹⁴ The *Grutter* Court also upheld the law school’s use of numerical goals (not quotas or set-asides) designed to achieve an undefined “critical mass” of minority students, observing, “[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”¹⁵

Majorities in both *Grutter* and *Gratz* expressly acknowledged that colleges and universities have a “com-

pellent interest in securing the educational benefits of a diverse student body.”¹⁶ For this proposition, both *Gratz* and *Grutter* relied on and endorsed the Court’s 1978 decision in *Regents of University of California v. Bakke*, where a narrow majority led by Justice Powell held that “the attainment of a diverse student body... is a constitutionally permissible goal for an institution of higher education.”¹⁷

In both *Gratz* and *Grutter*, the Court also expressly endorsed the race-plus admissions plan at Harvard College, which was approvingly referred to by Justice Powell in *Bakke* more than 25 years ago.¹⁸ Under that plan, as Justice Powell noted in *Bakke*, the legitimate interest of educational diversity “may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”¹⁹

Both *Grutter* and *Gratz* thus provide renewed vigor and a clearer road map for the use of such race-conscious and ethnicity-conscious programs in law schools and other institutions of higher education.

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The “Business Case” Made in *Grutter*

The decisions in *Grutter* and *Gratz* do not specifically address the limits of what law firms and other private employers not subject to the dictates of the 14th Amendment may do to increase their own racial and ethnic diversity. Nor do *Grutter* and *Gratz* alter the discretion afforded to private employers for many years under Title VII of the Civil Rights Act of 1964 to adopt voluntary, race- and sex-conscious affirmative action plans to eliminate a manifest imbalance in traditionally segregated job categories.²⁰

These voluntary private employment practices, including hiring and promotion policies modeled after the Harvard Plan cited with approval in *Bakke* and endorsed again in *Grutter*, remain lawful – and fully consistent with Title VII – when narrowly tailored and supported by a sufficient factual predicate. Indeed, as long as voluntary affirmative action policies and plans are temporary in nature and do not unnecessarily diminish the rights of non-minorities, these types of efforts to diversify private workplaces were upheld by the Supreme Court more than 15 years ago in *Johnson v. Transportation Agency*.²¹ Neither *Grutter* nor *Gratz* curtails this important management prerogative.

Nonetheless, *Grutter* made the “business case” for diversity in America’s workplaces clearer than it has

ever been. Indeed, the *Grutter* decision expressly acknowledged that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”²² Thus, the majority decision written by Justice Sandra Day O’Connor in *Grutter* states:

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide training and education necessary to succeed in America.²³

This position was also taken by 65 of America’s largest businesses in a joint *amicus* brief in support of the law school’s race-plus admissions policy. The companies included Xerox, General Electric, Eastman Kodak, Lockheed Martin, John Hancock Financial Services, Microsoft, Mitsubishi Motors, Pfizer, The Boeing Company, Coca-Cola, PepsiCo, Nike, Reebok, Sara Lee, Proctor & Gamble, Shell Oil, Chevron Texaco, DaimlerChrysler, American Express, Dow Chemical, General Mills, Johnson & Johnson, Kraft Foods, Kellogg, Whirlpool, United Airlines, PricewaterhouseCoopers, Bank One, and PPG Industries. Their brief states:

The existence of racial and ethnic diversity in institutions of higher education is vital to [our] efforts to hire and maintain a diverse workforce . . . [and] such a workforce is important to [our] continued success in the global marketplace.²⁴

Joining this pro-diversity lineup was corporate heavyweight General Motors, which filed a separate *amicus* brief in support of the University of Michigan Law School’s race-plus diversity plan.²⁵ Its brief was cited and relied upon for support by Justice O’Connor in *Grutter*.²⁶

Similarly, in another *amicus* brief supporting the law school’s plan, more than two dozen former high-ranking military and civilian leaders of the Army, Navy, Air Force, and Marine Corps acknowledged that, to fulfill its mission, the military “must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.”²⁷ As this brief and the *Gutter* majority agreed, “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”²⁸

Like the *Grutter* Court’s admission that “race unfortunately still matters,”²⁹ these truisms, and the Court’s recognition of them, suggest that diversity has emerged as an old idea whose time seems to have finally come. That idea – that public and private institutions, including law schools and other institutions of higher educa-

tion, and our shared experiences as students, employees, and citizens are (or should be) enriched and enhanced through exposure to people of different races, ethnicities, cultures, and backgrounds – is hardly a new one. Indeed, it is an idea that has been debated (and sometimes beaten back) by courts, politicians, voters and able advocates at least since Jim Crow was a baby.

But only recently – and certainly not since the *Bakke* decision by a similar 5–4 majority back in 1978 – have the need for and benefits of diversity in higher education, in the military, and in the nation’s workplaces been so clearly defined. And, only recently have racial and ethnic diversity programs in schools, government institutions, and workplaces received the kind of endorsement provided in *Grutter*, and to a lesser extent in *Gratz*.

Why Diversity Affects the Legal Profession

Lawyers play critical leadership roles in our nation’s courts and governmental institutions. As explained by Justice O’Connor in *Grutter*:

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.³⁰

The central role lawyers play in today’s society was also recently highlighted by the EEOC in its 2003 Diversity Report, where EEOC Chair Dominguez observed:

[L]awyers are very often key players in designing and activating the institutional mechanisms through which property is transferred, economic exchange is planned and enforced, injuries are compensated, crime is punished, marriages are dissolved and disputes are resolved. The ideologies and incentives of the lawyers engaged in these functions directly influence the lived experience of Americans, including whether they feel fairly treated by legal institutions.³¹

Consider also the changing demographics that affect our nation’s cities, counties, and local communities. As noted in the *amicus* brief filed in *Grutter* by 65 of America’s leading businesses, “The population of the United States is increasingly defined by its diversity.”³² Proof of this is demonstrated by the increasing numbers of African-Americans, Hispanics, Asians, and Native Americans tracked by federal census figures. According to one estimate, “these groups will constitute almost half – 47 percent – of the United States’ population by the year 2050.”³³

These demographic trends are already changing the political landscape of cities and counties in New York

and elsewhere.³⁴ They are likewise changing the faces of the nation's law school graduates, who are also increasingly female, Black, Hispanic, Asian, and "multi-racial."³⁵

These same shifting demographics provided a modern-day context for many of the *amicus* briefs filed in *Grutter*.³⁶ And it was these very same trends that caused former ABA President William Paul, in July 2002, to decry the "alarming lack of racial and ethnic minority representation in the legal profession."³⁷ A somewhat finer point was put on it when past ABA President Paul, commenting on data in support of this assessment, observed, "[O]ur profession is more than 90 percent white, and enrollment in our law schools is about 80 percent white. But 30 percent of our society are people of color, and in the next few decades it will be 50 percent."³⁸

The EEOC's Assessment of the Past 20 Years

The EEOC's 2003 Diversity Report looks critically at the historic stratification and under-representation of minorities and women in private law firms in light of the experience of the past 20 years. The report's most promising findings show proportionally dramatic and statistically significant increases in the numbers of female and minority attorneys hired in large private law firms across the country, including elite law firms in New York, Chicago, Washington, and Los Angeles.³⁹

At these firms, as noted in one study cited by the EEOC, "the lawyers . . . historically have been white Protestant men who graduated from prestigious law schools such as Harvard, Columbia, and Yale. As recently as 1970, women and people of color were almost completely excluded."⁴⁰ But the EEOC's report shows that the times have changed over the last 20 years, at least statistically, for women and minorities in larger firms.

Not surprisingly, the largest increases in minority and female attorneys have been at large firms (*i.e.*, those with 100 or more employees who are required to file annual EEO-1 reports with the government). The report also shows that the greatest increases have taken place at firms with multiple offices and offices in large metropolitan cities such as New York, Chicago, Los Angeles, Washington, Miami, etc.

According to the EEOC, the number of women and minority attorneys (or other "legal professionals") employed at large firms increased significantly between 1975 and 2002. Notably, the greatest advancements dur-

ing this period have been made by women and Asian attorneys. In fact, according to the EEOC, women attorneys now make up 44% of all those employed as "legal professionals" in large firms, compared with 14% in 1974; Black or African-American attorneys have nearly doubled from 2.3% to 4.4% during this period; Hispanic attorneys have quadrupled to 2.95% from 0.7%; and Asian-American attorneys have outpaced all other attorneys of color, jumping in the last 18 years from 0.5% to 5.3% of all legal professionals employed in large firms.

Nevertheless, the EEOC's report tells a cautionary tale, full of signs indicating that much more can and must be

done by large and small firms alike, particularly in terms of attrition. In particular, the report notes that "male minority associates [are] more likely to have departed their employers within 28 months . . . and were far more likely to have departed within 55 months of their start date. . . . Nearly two-thirds . . . of female minority associates had departed their employers within 55 months compared to just over half . . . of women overall."⁴¹

An even greater problem exists with respect to what the EEOC calls the "major issue in law firms generally [concerning] the movement from an associate attorney to partner." According to the EEOC's report, the odds of becoming a partner in a private law firm are still stacked against minorities and women. The EEOC reports that "women's odds of working as law-firm partners are less than one-third of men's odds," and there are significant disparities between the odds of being made a partner for Blacks, Hispanics, and Asians and those of White men. The EEOC views these promotion-to-partner disparities as a special concern because, as explained in the 2003 Diversity Report:

[P]romotion to partner not only involves the greatest increase in income within the law firm, but the partnership includes membership to a professional elite with access to substantial social and political capital. . . . More generally, partners of large corporate law firms are among the elite class in the U.S. . . . Given the power and influence that accompanies large law firm partnership, women's [and minorities'] attainment within law firms has larger societal ramifications for access and opportunities.⁴²

According to the EEOC, all of these problems have "several broad implications for civil rights enforcement."⁴³ More specifically, the EEOC concludes, "[i]n

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large, national law firms, the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership.⁴⁴ A different problem may exist at smaller, regional and local firms, where questions about the “fairness and openness of hiring practices probably still remain, particularly for minority lawyers.”⁴⁵

Proactive Steps to Increase Diversity

For law firms, the process of developing a business plan to increase and promote diversity within their workplaces cannot begin in earnest until it is acknowledged that the “[u]nderrepresentation of lawyers of color in our ranks is an institutional weakness and diminishes our capacity to serve.”⁴⁶ In private firms, as recently articulated by the Minority Corporate Counsel Association (MCCA),⁴⁷ the reasons for this weakness include:

- A lack of understanding “of the link between diversity and the bottom line [and] its connection to strategic business initiatives.”

- The “myth of meritocracy” at private law firms, which places a premium on law school GPAs, class rank and law review participation as the best measurements of a candidate’s ability to practice law and develop business.

- Attrition and retention problems that create a “[r]evolving door” for associates of color (and women).

- A basic “[l]ack of senior partner commitment and involvement in the planning and execution of diversity initiatives.”

- “Insufficient infrastructure and resources” committed by private firms to addressing diversity as a business imperative.

- The existence and perpetuation (at least in some places) of old stereotypes about minorities and women which “often . . . become ‘self-fulfilling prophesies.’”

- “Good intentions but little willingness to examine specific issues at each firm historically.”⁴⁸

There are also many proactive steps that private law firms (and bar associations) can take, well within the bounds of the law, to increase their own racial and ethnic diversity. As recently explained by EEOC Chair Dominguez, law firms can increase the employment of both people of color and women by adopting programs with a “greater focus on diversity in the recruitment and hiring process” and with “increased mentoring and training opportunities,” addressing the “pervasive

problem of attrition, especially for women of color,” providing more management authority at the partner level, and offering family-friendly policies and flexible work options.⁴⁹

How does a law firm, bar association, or law school truly committed to real diversity not only “talk the talk” but “walk the walk?” At a minimum, there is consensus among businesses and diversity experts about the need for senior partner and managing partner commitment to the creation of a firm-wide diversity and equal employment opportunity program. Without this type of commitment from the very highest ranks of an organization, little if any serious or prolonged change can occur. In other words, as noted in the *amicus* briefs filed in *Grutter*, true diversity in any workplace requires that diversity and equal employment opportunity become “part of the very fabric of [our] cultures,” that they be “implemented and overseen by senior managers,” and that they be “supported at the highest levels.”⁵⁰

The corporate *amicus* briefs filed in *Grutter* go further, stating that real commitment to the creation and maintenance of a diverse workforce also requires “substantial financial and human resources.”⁵¹ In this sense, law firms, state and local

bar associations, and others truly committed to greater racial and ethnic (as well as gender) diversity in the legal profession would do well to follow more closely the direction of America’s leading businesses.

Some other recommended steps, described in greater detail in the MCCA’s *Getting Started: Moving from Lip Service to Diversity* report, include: (1) establishing firm-wide committees, task forces and focus groups to get “a handle on where the firm stands and why” and to develop a firm-wide business case for greater diversity; (2) adopting a zero-tolerance policy on all types of discrimination and harassment and making “the current environment hospitable to all attorneys”; (3) “invest[ing] in lateral minority and women hires” and adopting an “[a]ggressive and pro-active approach to finding qualified candidates,” particularly attorneys of color and women; (4) creating “viable work/life programs” designed to enable all attorneys to better balance their personal/family lives with their professional commitments; (5) “expand[ing] recruitment at law schools” and actually hiring (not just interviewing) minority lawyers; and, (6) “encourag[ing] informal relationships between partners, senior attorneys and associates.”

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In addition, as explained in the *amicus* brief that the 65 American businesses filed in *Grutter*:

[M]any of the *amici* pursue a variety of endeavors to support minority students in higher education, including participating in numerous joint initiatives with the University of Michigan and other leading universities with strong academic programs and diverse student bodies, providing under-represented minority students with substantial financial assistance and summer internship opportunities, recruiting and mentoring minority students, extending financial grants, and partnering with university staff and chapters of national minority professional organizations.⁵²

If these extensive steps can be and are being taken by some of America's largest corporations, why can't they be (or why aren't they being) followed by more private law firms in New York and across the country? The answer is not simple, but anecdotal evidence suggests that these steps can be taken, and already have been in some places.⁵³ In others, they may never be.

That is where national, state, and local bar associations may be able to offer the greatest assistance, serving as a catalyst for greater action by private firms and by the profession as a whole, and as a clearinghouse of the many diversity programs available. In this regard, the ABA has been committed for many years to a broad policy of racial and ethnic diversity and to a goal of promoting the full and equal participation of minorities and women in the profession.⁵⁴

More recently, the ABA, in conjunction with companies such as BellSouth Corporation and others, including many of the businesses that filed *amicus* briefs in *Grutter* and *Gratz*, has encouraged partnering corporations to become signatories to a compelling *Diversity in the Workplace Statement of Principle*.⁵⁵ The statement, now signed by more than 250 corporate and in-house legal departments, puts private law firms on notice that many corporate clients expect the law firms that represent their companies "actively to promote diversity within their work place." The statement continues by saying that in making their respective decisions concerning selection of outside counsel, "[we] will give significant weight to a firm's commitment and progress in the area of diversity."

The ABA has also published a *Resource Guide: Programs to Advance Racial and Ethnic Diversity in the Legal Profession*. This *Resource Guide*, which resulted from a 1999 ABA Colloquium on Diversity in the Legal Profession, contains a catalogue of diversity programs across the nation designed to "help increase opportunities for people of color to attend and graduate from law school, to pass the bar examination and be admitted to practice, and to be placed, retained and advanced in jobs, on the bench, as prosecutors, and throughout the profession."⁵⁶

There is much to recommend here. Indeed, the ABA's Resource Guide shows that there are many creative steps that can be taken to achieve greater diversity in all sectors of the profession, and there is no need to reinvent the wheel.

Attorneys in New York should also consider the diversity policy adopted on November 8, 2003, by the House of Delegates to the New York State Bar Association. That policy, which passed with some differences of opinion, states:

The New York State Bar Association is committed to diversity in its membership, officers, staff, House of Delegates, Executive Committee, Sections, and Committees and their respective leaders. Diversity is an inclusive concept, encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability.

We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership.

Additional steps are being considered for adoption by the House of Delegates at the Annual Meeting in January 2004 in New York City.

When all is said and done, the greatest challenge for the Association and private law firms is to devise specific, action-oriented policies designed to meet the challenges of the 2003 Diversity Report and the Recommendations of the Special Committee on Association Governance. According to that Special Committee Report to the Bar Association's Executive Committee:

[W]hile we can count more minority attorneys among our membership and in the House of Delegates than in earlier years, we are far from achieving levels of minority participation in which we can take pride. We must exert improved efforts . . . to become truly inclusive of members from all races, ethnic groups and other traditionally under-represented groups. One of our strongest assets . . . should be our diversity and we must take forceful and positive steps if we are to improve beyond our current situation.

The same things can be said for private law firms, as well as for law schools seeking to employ more diverse faculties and attract more diverse student bodies.

Conclusions

Some will say that little or nothing else needs to be done, or should be done until more judicial guidance is provided by the courts on precisely what types of private diversity programs are acceptable for law firms and bar associations. Others seeking to be more proac-

tive and to do more to embrace the benefits of diversity will seize this opportunity to dedicate or rededicate themselves to a more racially, ethnically, and in other ways more diverse profession of highly qualified attorneys, partners, judges, and association leaders.

If nothing else, all law firms and bar associations should revisit and review their policies, cultures and employment diversity (or lack thereof) not only in light of *Grutter* and *Gratz*, but also in the light of current marketplace realities, the changing demographics, and increasing competition among and for lawyers, law firms, and law students. To do otherwise, or to remain on the fence and do nothing, would be to abdicate our responsibility as a profession and miss out on an unprecedented, historic opportunity to make even more meaningful improvements in the number of racial and ethnic minorities in the profession, in private law firms, and in the leadership ranks of the bar associations we join.

1. ___ U.S. ___, 123 S. Ct. 2325 (2003).
2. ___ U.S. ___, 123 S. Ct. 2411 (2003).
3. Equal Employment Opportunity Commission, Diversity in Law Firms (2003), available at <<http://www.eeoc.gov/stats/reports/diversitylaw/index.html>>.
4. See Equal Employment Opportunity Commission, *Law Firms Embrace Diversity, But Hurdles Remain* (press release) (October 22, 2003) available at <<http://www.eeoc.gov/press/10-22-03.html>>.
5. *Id.*
6. See Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 3, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241), available at <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.aba.pdf> (describing Goal IX of the ABA's mission statement and efforts by the ABA to diversify its membership and leadership ranks).
7. See, e.g., *American Bar Association Resource Guide: Programs to Advance Racial and Ethnic Diversity in the Legal Profession* (July 2000), available at <<http://www.abanet.org/leadership/recmenu.html>> (describing various diversity programs sponsored by the ABA and by law firms, law schools and local bar associations).
8. See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), available at <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.sixtyfive.pdf>. See also *Diversity: An Imperative for Business Success*, The Conf. Board (1999); *Diversity Helps to Deliver Better Business Benefits*, Personnel Today, June 18, 2002; Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, Competitiveness Rev., Vol. 8, No. 2, at 3-17 (1998); Trevor Wilson, *Diversity at Work: The Business Case for Equity* (1996).
9. See *Race Matters: Law firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
10. Foreword, *American Bar Association Resource Guide*, *supra* note 7, at 3.
11. See Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms*; Minority Corporate Counsel Association, *Getting Started: Moving from Lip Service to Diversity*, (2000), available at <<http://www.mcca.com/site/data/researchprograms/lfbestpractices/pathways11/gettingstarted.pdf>>.
12. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2419 (2003).
13. *Id.* at 2428.
14. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2342 (2003).
15. *Id.* at 2343.
16. *Id.* at 2341.
17. 438 U.S. 265, 311-12 (1978). Justice Powell also observed, as previously observed by the Court in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), that "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."
18. See *Gratz*, 123 S. Ct. at 2428; *Bakke*, 438 U.S. at 314; *Grutter*, 123 S. Ct. at 2342.
19. 438 U.S. at 320.
20. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding the right of private employers under Title VII to adopt temporary race-conscious plans aimed at eliminating manifest imbalances in traditionally segregated jobs where there is evidence of discrimination or a statistical disparity between minorities in the relevant labor market and those in an employer's work force).
21. 480 U.S. 616 (1987). *But see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (making it clear that societal discrimination generally is not a sufficient factual predicate for voluntary race-conscious employment actions, and that layoff and termination decisions based on race or sex almost always fall too harshly on non-protected class members to withstand judicial scrutiny).
22. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003).
23. *Id.* at 2341.
24. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8, at 1.
25. See Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), available at <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.gm.pdf>.
26. 123 S. Ct. at 2340.
27. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 29, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), available at <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.military.pdf>.
28. *Id.* (quoted and agreed with by Justice O'Connor in *Grutter*, 123 S. Ct. at 2340).
29. *Grutter*, 123 S. Ct. at 2341.
30. *Id.* (citations omitted).
31. EEOC, *Diversity in Law Firms*, *supra* note 3, at 2.
32. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents in *Grutter*, *supra* note 8, at 6.

33. *Id.*
34. See, e.g., *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 2003 U.S. Dist. LEXIS 11386 (N.D.N.Y. July 7, 2003). In this case, decided under the 1965 Voting Rights Act, the District Court adopted in its entirety the report and recommendation of U.S. Magistrate Judge David R. Homer preliminarily enjoining the November 2003 local legislative elections in Albany County based on significant increases in the county's Black, Hispanic and multi-racial populations, and a history of voting-related discrimination in the creation of electoral districts and in Albany politics generally. Key to the Court's decision was 2000 census data showing that between 1990 and 2000, the minority communities in the county increased from 8.2% Black and 1.8% Hispanic, for a total of exactly 10% in 1990, to 10.7% Black and 3.1% Hispanic and 1.4% multi-racial in 2000, for a total of more than 15% minorities, entitling Blacks and Hispanics in the county a larger proportionate share of majority voting districts and thus more political clout.
35. According to the EEOC's October 2003 Diversity Report, between 1982 and 2002, the number of women receiving law degrees increased from 33% to 48.3%; the number of Blacks increased from 4.2% to 7.2%; the number of Hispanics went from 2.3% to 5.7%; and the number of Asians from 1.3% to 6.5%. EEOC, *Diversity in Law Firms*, *supra* note 3, Executive Summary at 1.
36. See, e.g., Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8 at 8. See also Brief of Amici Curiae Massachusetts Institute of Technology, Leland Stanford Junior University, E.I. Du Pont De Nemours and Company, International Business Machine Corp., National Academy of Sciences, National Academy of Engineering, National Action Council for Minorities in Engineering, Inc., in support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241 and 02-516), available at <http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.mit.pdf>.
37. Foreword, *American Bar Association Resource Guide*, *supra* note 7, at 3.
38. *Id.*
39. EEOC, *Diversity in Law Firms*, *supra* note 3, Executive Summary, at 1.
40. *Id.* at 3 (quoting Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 1997, 46 Am. Univ. L. Rev. 669).
41. *Id.* at 4 (quoting the 2003 NALP Foundation Study of entry-level hiring and attrition, NALP Foundation for Law Career Research and Education, *Keeping the Keepers II: Mobility and Management of Associates* (2003) (Washington, D.C.)).
42. *Id.* at 17 (quoting C. Beckman & D. Phillips, *Interorganizational Determinants of Promotion: Client Leadership and the Promotion of Women Attorneys*, draft manuscript, Aug. 26, 2003).
43. *Id.*
44. *Id.*
45. *Id.*
46. *American Bar Association Resource Guide*, *supra* note 7, at 24 (quoting William G. Paul, former ABA President).
47. The MCCA is a growing group of corporate law departments and in-house counsel founded in 1997 to advocate for the expanded hiring, retention, and promotion of minority attorneys in corporate law departments and the law firms that serve them. A wealth of information about the "Business Case for Diversity" and certain "Barriers to Success" and how to overcome them can be found on the MCCA's Web site at www.mcca.com.
48. Minority Corporate Counsel Association, *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms*, Executive Summary, Barriers to Success (2000), available at <<http://www.mcca.com/site/data/researchprograms/lfbestpractices/pathways11/execsummary.pdf>>.
49. *Race Matters: Law Firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
50. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 8, at 1.
51. *Id.*
52. *Id.* at 1n2.
53. See *Race Matters: Law Firms Are Recognizing that Diversity Is About Business. Just Ask Their Clients*, Legal Times, Mar. 17, 2003.
54. See Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *supra* note 6.
55. See *American Bar Association Resource Guide*, *supra* note 7, at 15.
56. *Id.* at 3.



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