

COMMENTARY

TAKING DIVERSITY SERIOUSLY: AFFIRMATIVE ACTION AND THE DEMOCRATIC ROLE OF LAW SCHOOLS: A RESPONSE TO PROFESSOR BROWN

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I. INTRODUCTION

Professor Dorothy Brown's address provides us with a forward looking implementalist vision of affirmative action. Professor Brown makes the case for integrating diversity into all aspects of the law school curriculum.¹ She urges us to take the diversity rationale seriously by diversifying our law school curriculum.² She argues that curriculum diversity will afford students more opportunities to learn how to think critically and to come to understand that as lawyers they cannot afford to be colorblind as long as race still matters in America.³ I strongly agree with Professor Brown's forward looking view of affirmative action in legal education. Professor Brown has urged law schools that presently use affirmative action to make the best use of the diversity they profess to value by moving beyond the diversity as "window dressing" model and toward the diversity as an essential part of integrated learning model.⁴

Professor Brown's ultimate conclusion is that affirmative action's continued viability as a policy depends upon how well law schools use the diversity they profess to value; I couldn't agree more.⁵ While *Grutter v. Bollinger* holds that diversity in legal education is a compelling government interest that permits the consideration of race in law school admissions,⁶ the dissent reveals the vulnerabilities of affirmative action in legal education.⁷ Because Professor Brown foresees future challenges to affirmative action, she urges law schools to look for ways to strengthen the diversity rationale so that the next time a law school's admission policy is challenged, the dissent in *Grutter* will not become the majority.⁸ Professor Brown challenges me to think of ways in which law schools can strengthen the diversity rationale, and I think she is correct to look to the opinion in *Grutter* for clues of how to do so.

Professor Brown argues that if law schools use diversity as a tool that operates to advance the interests of all students in all

1. Dorothy A. Brown, Address, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1 (2006).

2. *Id.* at 16–27.

3. *Id.* at 18–19.

4. *See id.* at 35 ("I want to encourage you . . . to take racial diversity and the law seriously.").

5. *See id.* at 4 (asserting that law schools must do more than merely admit racially diverse classes to prevail against the "next challenge" to affirmative action).

6. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

7. *Id.* at 346–49 (Scalia, J., concurring in part and dissenting in part).

8. *See Brown, supra* note 1, at 27–35 (suggesting methods by which law school professors and deans can incorporate critical race theory into their curricula).

aspects of the law school curriculum, it strengthens the diversity rationale and increases the chances that affirmative action will survive scrutiny in the future.⁹ Professor Brown's argument for making the best use of the diversity rationale by putting diversity to work might be applied more broadly to the very mission and functional role of the law school. Making diversity part of the mission of the law school by recognizing the functional role that law schools play in our democracy may serve to strengthen the diversity rationale and extend the useful life of affirmative action as a constitutionally viable admission policy.

The Court in *Grutter* recognized the all-important mission of public law schools as not merely educating for education's sake, but as preparing citizens for work and citizenship in our democracy.¹⁰ The Court explained:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. . . . The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.¹¹

This language suggests that law schools, like other institutions of higher education, should recognize their important role in our democracy. Like Professor Paul Carrington, I find it difficult to focus on law schools to the exclusion of the professional context in which they operate.¹² And like Carrington, I view "[l]aw schools [as] not only parts of universities, but also of the legal profession that they share with courts and other institutions of government, which, in turn, are parts of a larger social and political order."¹³ Law schools should understand that their role is not simply to educate for the sake of educating, but to prepare students for participation in the legal profession and

9. *Id.* at 4–5.

10. *Grutter*, 539 U.S. at 331 (majority opinion).

11. *Id.* at 331–32 (alterations in original) (citations omitted).

12. PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION, at ix (1999).

13. *Id.*

for participation in democratic leadership. A law school that embraces this democratic mission has an added rationale for adopting an inclusive anti-subordinating methodology for determining whom to educate. My thesis is simply that law schools should take greater account of their functional role in our democracy when determining who to admit as students. And while exploring the functional role of law schools in our democracy in depth is beyond the scope of this Commentary, I do hope to nudge the dialogue toward more discussion of how democracy is enhanced by race-conscious affirmative action in law school admissions.

II. A DIVERSE LEGAL PROFESSION IS ESSENTIAL TO THE MAINTENANCE AND ENHANCEMENT OF OUR DEMOCRACY

A. *Law School Admission as a Democratic Exercise*

I am not the first person to suggest that institutions of higher education have a democratic mission that is best fulfilled through the use of affirmative action. In commenting on the empirical study of Michigan Law School graduates that was published in 2000,¹⁴ Professor Lani Guinier argued that “this study should prompt a much larger reevaluation of how Michigan and other universities might realize their mission to educate and train leaders for a multiracial democracy.”¹⁵ By adopting a mission that recognizes the law school’s role in creating leaders for our multiracial democracy, law schools strengthen the rationale for using race-conscious measures in the admissions

14. Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000). At the time it was conducted, the study was “the most detailed quantitative exploration of how minority students fare after they graduate from law school and enter law practice or related careers.” *Id.* at 395. The study found that nearly all of Michigan Law School’s minority alumni were admitted to practice in at least one jurisdiction and held jobs in every area of the legal profession. *Id.* at 401. However, the study found that minority alumni chose different careers than those of their white counterparts, and specifically, that they were “more likely . . . to begin their careers in government or other public service or public interest jobs.” *Id.* For minority alumni who entered private practice, the study revealed that they, on average, performed “considerably more service to minority clients than white alumni,” and that they did “more pro bono work, [sat] on the boards of more community organizations, and [did] more mentoring of younger attorneys than white alumni [did].” *Id.* Finally, the study revealed that “[i]f admission to Michigan had been determined entirely by LSAT scores and UGPA, most of the minority students who graduated from Michigan would not have been admitted even though the measures that would have worked to exclude them seem to have virtually no value as predictors of post-law school accomplishments and success.” *Id.* at 401–02.

15. Lani Guinier, *Commentary, Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 578 (2000).

process because *Grutter* suggests that diversity is not only a benefit to students during the educational process, it is also a benefit to society once the educational process is completed.¹⁶

This democratic view of race-conscious affirmative action recognizes the anti-subordination principle as the central purpose of the Fourteenth Amendment, which serves as the legal foundation for affirmative action.¹⁷ By employing race-conscious affirmative action, law schools are able to ensure that the democratic leaders they produce reflect the demographic makeup of our democracy as a whole; so that individuals from historically subordinated and marginalized groups have a meaningful opportunity to effectively participate in our democracy. Such inclusion increases the delegated trust that these groups place in our government and further legitimizes the project that is our democracy. A law school that understands its mission as creating leaders for our democracy should recognize the need for race-inclusive affirmative action because the failure to do so will result in the continuation of illegitimate forms of hierarchy where those with the most means (predominately wealthy whites) will receive the caliber of legal training necessary to compete for and obtain power and democratic leadership positions. As evidenced by *Grutter*, law schools that use affirmative action as a tool to achieve a diverse student body will use it most effectively if they use it as a forward looking, anti-subordinating tool that is neither race-based nor race-neutral, but race-inclusive.¹⁸ For example, the University of Michigan's policy in determining whom to admit considered not only race, but other subordinating factors, such as socioeconomic status.¹⁹

The purpose of a law school establishing a mission of inclusive education is to achieve not only the goal of classroom diversity, but also the goal of a diverse legal profession because the profession can only be as diverse as our law schools. Each state has a compelling interest in achieving a diverse state bar because each state bar serves a diverse population of citizens within the state whose trust and willingness to participate in the legal system is enhanced when they see members from their subordinated social group represented among those entrusted

16. *Grutter*, 539 U.S. at 331–32.

17. See Victor C. Romero, *Are Filipinas Asians or Latinas? Reclaiming the Anti-Subordination Objective of Equal Protection After Grutter and Gratz*, 7 U. PA. J. CONST. L. 765, 786 (2005) (noting that anti-subordination fulfills the equal protection ideal of educational equity).

18. See *Grutter*, 539 U.S. at 337–39 (recognizing a multitude of other factors that contribute to “minority” status).

19. *Id.* at 338.

with power in democratic institutions.²⁰ Law schools, which are in most instances the only avenue to entering the legal profession, have a compelling interest in diversifying the student body because the state has a compelling interest in having a diverse legal profession.²¹

Several scholars and jurists have acknowledged the importance of education generally and legal education specifically to our democracy. Professor Guinier has argued that “race matters in law school admissions because racial diversity is deeply connected to successful intellectual and democratic outcomes in a multiracial society.”²² She has also argued that law school admission decisions affect “the stability and legitimacy of our democracy.”²³ It is my hope that Professor Brown’s challenge to us to utilize diversity within the law school curriculum will not stop there. It is my hope that law schools will consider the post-law-school benefits of diversity in legal education and will incorporate those back-end benefits into the mission of the institution; so that one of the recognized purposes in delivering a legal education is to create a diverse legal profession. Student body diversity yields a diverse legal profession that will deepen and strengthen our democracy by advancing the democratic principles of freedom, citizenship, and equality.

The sort of forward looking rationale for diversity in legal education that I advance has its genesis in the market-based rationales for affirmative action proffered by the various amicus curiae that submitted briefs in support of the University of Michigan’s affirmative action policy in *Grutter*.²⁴ Since *Grutter*, there has been much discussion about the marketplace rationales for affirmative action with some scholars arguing that affirmative action in legal education benefits corporate America,

20. See *id.* at 332 (implying that “[a]ll members of our heterogeneous society” will attach legitimacy to legal institutions when they recognize that those institutions are “open to talented and qualified individuals of every race and ethnicity”).

21. See *id.* at 325, 332 (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”).

22. Lani Guinier, *Race Shows the Way: From the Lessons of Admitting Students of Color, Law Schools Can Learn How to Fix the Rules for Everyone*, LEGAL TIMES, Sept. 16, 2002, at 58, 59; see also LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 268 (2002) (asserting that the mission of public institutions of higher education is “to serve the nation’s democracy and economy by developing critical skills in citizens and future leaders”).

23. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003).

24. See *Grutter*, 539 U.S. at 330–31 (discussing the briefs submitted by major American corporations and branches of the military that suggest a diverse workforce and officer corps are essential to their continued success).

which desires a diverse, educated workforce and a diverse pool of lawyers from which to choose corporate leadership and legal representation.²⁵ The discussion of marketplace rationales in *Grutter* suggests that a diverse legal profession is essential not only for economic or market reasons but, more importantly, also for broader democratic reasons.²⁶ Professor Guinier has also interpreted *Grutter* as embracing “democratic legitimacy as a justification for diversity.”²⁷ She suggests that the opinion offers us the opportunity to refocus the conversation on the “distributive and functional role of higher education in a democracy,”²⁸ and I agree wholeheartedly. I think we should refocus the discussion of diversity in legal education on the functional role of law schools in our democracy as the creators of democratic leadership. Race-conscious affirmative action in legal education yields a diverse legal profession, and unless and until there is real structural change to the overall methods for dispersing educational opportunity, affirmative action will remain a necessary tool for accomplishing that goal.²⁹ The majority in *Grutter* acknowledged the need for diversity in legal education by recognizing the need for diversity in the legal

25. David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1558 (2004).

26. *Grutter*, 539 U.S. at 331–32.

27. Guinier, *supra* note 23, at 118.

28. *Id.*

29. Professor Richard Sander recently challenged this assertion using empirical data that he argues demonstrates affirmative action actually hurts black law students more than it helps them. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 478 (2004). Sander argues that affirmative action causes black students to be mismatched with a law school, making them unable to compete as effectively with the remainder of the class, which causes lower grades, higher attrition rates, as well as lower bar examination pass rates. *Id.* at 478–79. Sander’s ultimate conclusion is that an increase in the number of black lawyers will occur if the “mismatching” theory he posits is cured by abandoning affirmative action in law school admission. *Id.* at 479. Sander’s conclusions have been refuted by social scientists and law professors who assert that without affirmative action, there will be fewer minorities in the legal profession and, more specifically, there will be substantially fewer minorities with degrees from elite law schools, which provide entry to elite positions within the legal profession. David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1888–89 (2005); William C. Kidder, *Does Affirmative Action Really Hurt Blacks and Latinos in U.S. Law Schools?*, TRPI POL’Y BRIEF, Sept. 2005, at 1, 3. Professor Michael Olivas opines that despite the fact that America is becoming more diverse, the “river” that will supply law schools with students in the future may not see such measured growth in diversity because lower high school graduation rates and test scores of minority students may prevent them from becoming part of the “river” in the first place. Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 22 (2005).

profession.³⁰ But the need for a diverse legal profession extends far beyond the desire to open the doors of individual success to people of color. Because lawyers are the administrators of our democracy, the need for a diverse legal profession is causally connected to the need for a diverse group of leaders in our multiracial democracy.³¹ Because governance by the people and the dispersal of power are normative ideals underlying democracy, our democracy is enhanced by policies directed to achieve these ideals.³² A democratic rationale for affirmative action in legal education looks forward to creating diverse democratic leadership for the future. But it also looks back to a time when our democracy stood on the verge of collapse because we did not fully subscribe to the foundational democratic principles of freedom, inclusion, and equality. The civil unrest that erupted during the Civil Rights Movement is indicative of what can happen when a nation that proudly professes to be built upon democratic ideals fails to extend the rights and privileges of democracy to everyone equally.³³ This tumultuous past reminds us that democracy is weakened by racial and other forms of illegitimate subordination.

1. *Understanding What We Mean by "Democracy."*

Democracy, of course, has no universal meaning; political scientists have composed numerous theories of democracy. Political scientist William Hudson has condensed the various theories into four models of democracy: Protective, Developmental, Pluralist, and Participatory.³⁴ Liberalism heavily influences the Protective model of democracy, which has as its primary goal the protection of individual liberty of the citizen.³⁵ This model of democracy has a pessimistic view of humans as

30. See *Grutter*, 539 U.S. at 332–33 (“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 the training and education necessary to succeed in America.”).

31. *Id.* at 332.

32. *Id.*

33. See Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991) (recognizing that Jim Crow laws, the lack of capacity to participate in civic activities, poll taxes, unfair court filing fees, and the victimization of the poor and disadvantaged were impetuses for the Civil Rights Movement).

34. WILLIAM E. HUDSON, AMERICAN DEMOCRACY IN PERIL: SEVEN CHALLENGES TO AMERICA’S FUTURE 8 (2001). For another primer on the various models of democracy that discusses more models than Hudson, see DAVID HELD, MODELS OF DEMOCRACY 13, 143–44, 186 (1987), whose models include classic Athenian democracy, competitive elitism and technocracy, and pluralism and corporate capitalism.

35. See HUDSON, *supra* note 34, at 8.

generally selfish and concerned with private wealth.³⁶ “The Protective model values democracy because democratic institutions are thought to provide the best protection for individual liberties, particularly economic ones such as the right to individual control of property.”³⁷ Accordingly, Protectivist democrats do not value active participation by all citizens.³⁸ Instead they believe that passive participation by the citizenry is sufficient because it leaves citizens free to pursue their individual economic interests.³⁹ Moreover, Protectivists believe that the elite, more educated citizens should control policymaking.⁴⁰ Finally, the Protective model views equality as a central component of democracy, but only political equality;⁴¹ the model assumes that social and economic inequality will exist.⁴²

Developmental democracy’s goal is to nurture citizenship.⁴³ “Developmental democracy considers democratic politics the best method of developing the personal qualities associated with its idea of the ‘good citizen.’”⁴⁴ Developmental democrats view citizens as having an active role in the democracy although they acknowledge that the Athenian model of direct democracy is not workable in the modern state.⁴⁵ They believe that all citizens have equal opportunity to participate in government institutions regardless of class.⁴⁶

Pluralist democracy is akin to Protective democracy because both view people as selfish and acquisitive.⁴⁷ Pluralists believe that due to human nature, most people will have limited interest in public affairs and that this political apathy is unobjectionable because it contributes to the stability of the system.⁴⁸ Hence, the litmus test for democracy for the Pluralists is not the activism of

36. *Id.* at 9–10.

37. *Id.* at 18.

38. *See id.* at 10 (observing that the only people likely to participate are those concerned about protecting their wealth).

39. *Id.*

40. *See id.* (finding that wealth-holders are the ones most likely to vote and participate to the “extent necessary to protect their freedom in the marketplace”).

41. *See id.* (“Protective Democracy is very concerned with equality in political rights.”).

42. *Id.*

43. *Id.* at 11 (describing the “civic virtue” citizens learn in democracies).

44. *Id.* at 18.

45. *See id.* at 11 (quoting John Stuart Mill who wrote that direct democracy will not work in a community any bigger than a small town).

46. *Id.* at 12.

47. *Id.* at 19.

48. *See id.* at 13–14 (describing Pluralist scholars who believed “apathy contributed positively to the stability of democratic politics”).

a state's citizens but whether the society has competitive elections.⁴⁹ Political apathy does not concern Pluralists because they assume that every citizen's interests are represented by an interest group.⁵⁰ Like Protective democrats, Pluralists believe that equality in a democracy need only apply to political rights such as universal suffrage.⁵¹

Participatory democracy, on the other hand, takes a broad view of democracy as incorporating more than governmental institutions.⁵² Participatory democrats believe that social and economic inequality serves to limit the political equality of citizens who are socially and economically subordinated.⁵³ Accordingly, Participatory democrats believe that greater economic equality is "both a prerequisite for more meaningful participation and a likely consequence of popular power over economic decision making."⁵⁴ Participatory democracy incorporates more institutions into its ambit of democratic institutions and means "popular control of authoritative decisions in corporations, factories, unions, and schools."⁵⁵ Participatory democrats view the role of citizens as very active in these broadly defined democratic institutions.⁵⁶

If I had to adopt one of Hudson's four models, my conception of democracy is probably most closely aligned with the Participatory model because I view economic institutions such as banks, and educational institutions such as law schools, as democratic institutions. I also believe that citizens should have an active role in participating in our democratic institutions and that the duties of the office of citizen should not be delegated completely to the elite. Finally, I believe that the strength and stability of democracy is enhanced relative to the level of social, economic, and political equality enjoyed by the citizens of the democracy.

According to Harvard sociologist Orlando Patterson, the issue of understanding what we mean when we refer to democracy has been approached in three ways.⁵⁷ Some political

49. *Id.* at 14.

50. *See id.* at 14–15 (extolling interest groups as more capable of effectuating policy goals than ordinary citizens).

51. *See id.* at 15.

52. *Id.* at 15–16.

53. *Id.* at 17.

54. *Id.* at 19.

55. *Id.*

56. *Id.* at 17–18.

57. Orlando Patterson, *Liberty Against the Democratic State: On the Historical and Contemporary Sources of American Distrust*, in *DEMOCRACY AND TRUST* 151, 157 (Mark E.

scientists speak of democracy in stipulative terms assuming that all persons subscribe to the same notion of democracy.⁵⁸ Others take a positivist approach of inferring the nature of democracy by making generalizations about actual democracies and using actual cases of democracy as exemplary support for the generalizations.⁵⁹ The third approach Patterson has described as sociohistorical.⁶⁰

A sociohistorical approach to understanding democracy draws out central tendencies in democracy by looking at the history of democracy and the history of the people who create it.⁶¹ Applying this sociohistorical approach, Patterson identifies five central components of democracy.⁶² First, democracy has always meant some form of power sharing to ordinary citizens—in other words, a notion of political equality so that there is a sense of sharing equally in a common political culture.⁶³ Second, democracy has always entailed some form of participation in the political life of one's society.⁶⁴ Third, the notion of legal equality is a central tenet of democracy, which is also commonly referred to as the rule of law.⁶⁵ Fourth, democracy generally includes the idea of citizenship, of belonging to a political community.⁶⁶ A final central tenet of democracy is freedom, including the personal freedom to pursue one's desires.⁶⁷

Although most if not all Western democracies share the above-referenced characteristics, democracy in the West has taken several forms.⁶⁸

Patterson describes three forms of democracy that have emerged in modern Western societies and posits that the United States has shifted between these democratic forms.⁶⁹ The first is what he describes as a "primal democracy" that was based on the modern system of slavery in the United States.⁷⁰ This form of democracy viewed the personal freedom of most Americans as

Warren ed., 1999).

58. *Id.* at 157.

59. *Id.* at 157–58.

60. *Id.* at 158.

61. *Id.*

62. *Id.* at 158–59.

63. *Id.* at 158.

64. *Id.*

65. *Id.* at 158–59.

66. *Id.* at 159.

67. *Id.*

68. *See id.* at 160.

69. *Id.*

70. *Id.*

dependent upon the intentional subjugation of a minority group. In this form of democracy, freedom included the right to hold property, including slaves.⁷¹ The second form of democracy that Patterson describes is an “elite capitalist democracy” that privileges personal liberty as the fundamental freedom and results in the elite members of society monopolizing power and restricting political power of the non-elite.⁷² The third and final form of democracy, according to Patterson, is the inclusive liberal pluralist democracy that seeks to expand the franchise and “increase [participation] and representation of all interests in the government of the society.”⁷³ This pluralist form of democracy “emphasizes the idea of freedom as political equality and . . . as equality in economic security and social citizenship.”⁷⁴ It also emphasizes trust in government as essential for good democracy.⁷⁵ Patterson’s pluralist democracy differs greatly from Hudson’s Pluralist model. Patterson’s pluralist form of democracy seems most akin to Hudson’s Participatory model. Hence, the label that one attaches to democracy is less important than the meaning that is packed into the label.

In short, my conception of democracy is most closely aligned with Patterson’s inclusive liberal pluralist form of democracy and Hudson’s Participatory form, although my embrace of these forms of democracy does not necessarily mean that I totally reject the other models. And while the arguments that I make herein are rooted in a liberal pluralist philosophy, they should concern all who believe in democracy, regardless of the form. At the heart of each model lies three core elements: control of government by the people, liberty, and equality.⁷⁶ It is these democratic principles that democratic institutions, such as law schools, must keep in mind when implementing their democratic mission of creating future democratic leaders.

2. *The Role of Law Schools in Our Democracy.* Educational institutions in general, and law schools in particular, are democratic institutions. Law schools are democratic institutions not only because they create informed citizens who are then

71. *Id.* at 163.

72. *Id.* at 160.

73. *Id.*

74. *Id.*

75. *Id.* at 166.

76. See HUDSON, *supra* note 34, at 18 tbl.I.1, 20 (explaining that all models of democracy—including Participatory democracy, which is similar to Patterson’s pluralist form—incorporate the underlying principals of popular rule, political equality, and political liberty).

capable of active participation in our democracy, but also because law schools create lawyers, who as leaders in our society have a unique and substantial role in the construction and maintenance of our democracy. Many if not most of our democratic institutions⁷⁷ historically were created by and presently are maintained and administered by lawyers. Lawyers have a significant and perhaps disproportionate role in creating the law and policy that gives birth to the institutions within which lawyers operate to administer our democracy.

Alexis de Tocqueville recognized the unique role of lawyers in our democracy during the early nineteenth century.⁷⁸ Tocqueville saw lawyers as liaisons between the people and the democratic leadership.⁷⁹ He recognized the power of lawyers to represent the interests of the state and the interests of the people.⁸⁰ Tocqueville saw lawyers as intellectual aristocrats enlightened through the study of law.⁸¹ This enlightenment in his opinion equipped the lawyer with the power to exert much influence on the habits and opinions of the polity, and he observed that lawyers are “naturally called on to occupy most public offices.”⁸² He noted that lawyers “fill the legislatures and are at the head of administrations; they therefore exert a great influence on the formation of the law and on its execution.”⁸³ Tocqueville recognized that lawyers were creatures of their experiences, and that they import their cultural customs and

77. Rawls defines “institution” as:

a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property. An institution may be thought of in two ways: first as an abstract object, that is, as a possible form of conduct expressed by a system of rules; and second, as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules.

JOHN RAWLS, A THEORY OF JUSTICE 47–48 (rev. ed. 1999).

78. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 251–58 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (emphasizing the critical role that the American lawyer played in America’s early democratic society by acting as a necessary counterweight to democracy).

79. See *id.* at 254 (explaining that the lawyer in a democratic society is trusted by the people because of his designated role and impartiality, and is also considered a member of the aristocracy, making him the natural liaison between the two and the appropriate representative of both).

80. *Id.*

81. *Id.* at 252, 256.

82. *Id.* at 257.

83. *Id.*

ideas into their own handling of political and legal affairs, and that ultimately the polity adopts the “habits and tastes” which I interpret as the “ideology” of lawyers and judges.⁸⁴ Tocqueville captured the political power of lawyers in American democracy when he observed that lawyers in the United States form an invisible power that operates constantly on society so that ultimately society is molded to the desires of the collective power of lawyers.⁸⁵

Many contemporary political and legal commentators have also acknowledged the integral role of lawyers in our democracy.⁸⁶ Since our country’s birth, lawyers have played a prominent role in the administration and maintenance of our democracy.⁸⁷ Many of the “founding fathers” were lawyers and many of our past political leaders have been lawyers. During the 1960s and 1970s, more than two-thirds of U.S. Senators were lawyers.⁸⁸ And although some scholars charge that there has been a decline in lawyer-politicians and lawyer-statesmen,⁸⁹ lawyers continue to occupy a significant place in American political life.⁹⁰ But the contribution that lawyers make to our democracy extends beyond their direct service as politicians in the Executive and Legislative branches of government. Lawyers are the primary administrators of the democratic institutions in our Judicial branch of government. Courts were created by our democratic Constitution and obtain their authority to resolve disputes between citizens from the citizens themselves. Courts must adhere to the democratic principles of the rule of law and formal equality.⁹¹ Courts possess the hallmarks of democracy and

84. *Id.* at 258.

85. *Id.*

86. See Carrie Menkel-Meadow, Commentary, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 350–51 (2004-05) (suggesting that lawyers are uniquely positioned to facilitate participatory democracy); Jeffrey W. Stempel, Response, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEV. L.J. 479, 479–80 (2004-05); see also William W. Kilgarlin, Justice of the Supreme Court of Tex., *Lawyers: Guardians of Democracy*, Commencement Ceremony Speech at Baylor Law School (May 17, 1986), in 38 BAYLOR L. REV. 249, 250 (1986) (opining that lawyers are the “Guardians of Democracy”).

87. See generally TOCQUEVILLE, *supra* note 78, at 251–58 (discussing the key role of the American lawyer in maintaining democracy in the United States by acting as a counter-weight to the masses and as an avenue for neutral representation).

88. Stempel, *supra* note 86, at 484.

89. *Id.*

90. *Id.* at 488. Professor Stempel notes that “law remains a leading occupation of gubernatorial candidates” and that while the proportion of lawyers in modern politics may have declined, lawyers “still abound in political office and in political staffs.” *Id.* at 485, 488.

91. For an enlightening philosophical discussion of the rule of law and formal

were created through democratic means, which renders them democratic institutions. Virtually all judges who preside over disputes in our courts are lawyers.⁹² In fact, Alexis de Tocqueville saw our courts as “the most visible organs used by the body of lawyers to act on democracy”⁹³ because the courts are armed with the power to enter into political affairs through the right to declare laws of the majority unconstitutional. Tocqueville noted that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”⁹⁴

Lawyers are also democratic officials because they are officers of the court. Lawyers are empowered by state government to represent the interests of citizens in legal disputes and other legal matters.⁹⁵ Lawyers in many jurisdictions take an oath to support, obey, and defend the Constitution of the United States and to discharge the duties of their “office” with fidelity not only to the client but, paradoxically, to the court as well.⁹⁶

Democratic institutions, however, are not confined to the three branches of government. If we define democratic institutions broadly to include those institutions that have a significant impact on democratic life, we would include market institutions in our analysis. The markets are administered through corporate institutions that have lawyers as leadership. Legal institutions are of paramount importance to a democratic market economy. Contract common law and statutory law provide the rules for contract negotiation, execution, performance, and enforcement. Corporate law provides the rules for corporate governance and shareholder rights, and securities law provides the rules for investing in our market economy. Bankruptcy and banking law provide the market rules for the lending and repayment of money. Market institutions are democratic institutions because they have power over the lives of

equality within the context of the legal profession and justice, see ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003). For a masterful discussion of how judicial review promotes democratic participation and equality, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

92. MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 50 (1995).

93. TOCQUEVILLE, *supra* note 78, at 256.

94. *Id.* at 257.

95. See CHARLES Z. COHEN, *YOUR FUTURE AS A LAWYER* 10 (1977) (“[A] lawyer is a person granted the license to act on behalf of others in all matters pertaining to the law.”).

96. See Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 879 & n.97 (2003) (quoting 42 PA. CONS. STAT. § 2522 (2000)).

our citizens, and lawyers have a substantial role in administering these market institutions.

Law schools are democratic institutions⁹⁷ because a significant portion of the country's wealth and political power resides in persons who have attained a law degree.⁹⁸ Moreover, a legal education affords an individual citizen a deep understanding of our democratic institutions and democratic processes which enhances that citizen's ability to participate in our democracy. The beneficiary of a legal education is equipped to critique our current policies and practices and envision new and perhaps better models for implementing our democratic project. A legal education also affords its beneficiaries greater access to democratic positions with decisionmaking authority. As democratic institutions, law schools should recognize that they have a democratic role in our society. Law schools should not view their mission as simply the delivery of the best possible legal education, but should recognize their role in the maintenance of our democracy and use democratic principles of liberty, equality, and citizenship to guide the process of deciding whom to educate.

3. *Diversity in Law School Enhances Democratic Freedom.* Each model of democracy incorporates the notion of liberty.⁹⁹ Many citizens view liberty as requiring a certain level of freedom from government interference in one's affairs. But many scholars have argued that liberty is much more than freedom from government intrusion. According to Orlando Patterson, one is free not only to the extent that one is not under the power of another, but also to the "degree that one shares in the collective power of the community."¹⁰⁰

In his new book, *Active Liberty*, Justice Stephen Breyer wrote that "liberty means not only freedom from government coercion but also the freedom to participate in the government itself."¹⁰¹ Relying on the writings of political philosopher

97. In arguing for faculty diversity, Professor Duncan Kennedy of Harvard Law School has referred to law schools as political institutions. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 705.

98. See *id.* at 713 (asserting that minority communities cannot meaningfully share in the wealth and power of society without having legal scholars amongst their ranks). For an analysis of the deleterious economic impact on the nation caused by higher education inequality, see PATRICK J. KELLY, AS AMERICA BECOMES MORE DIVERSE: THE IMPACT OF STATE HIGHER EDUCATION INEQUALITY 1-3, app. A (2005), available at <http://www.higheredinfo.org/raceethnicity/InequalityPaperNov2005.pdf>.

99. See Patterson, *supra* note 57, at 159.

100. *Id.*

101. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC*

Benjamin Constant, Breyer describes the notion of sharing a nation's sovereign authority by active and constant participation in the collective power of the sovereign as "active liberty" while referring to the freedom from government coercion as "civil liberty."¹⁰² I view democracy as incorporating and requiring both civil and active liberty, and I agree with Justice Breyer that "[a] society that overemphasizes [civil] liberty runs the risk that citizens, 'enjoying their private independence and in the pursuit of their individual interests,' will 'too easily renounce their rights to share political power.'¹⁰³ As Orlando Patterson reminds us, a democracy hyper-focused on freedom from government intrusion once permitted the liberty interests of those with power to be elevated over the liberty interests of those without power, resulting in generations of a reprehensible democracy rooted in human slavery.¹⁰⁴ Active liberty ensures active and constant participation by the governed in the collective power of the political community, and it is active liberty that affirmative action in law school advances by ensuring active and meaningful participation by individuals from the most vulnerable segments of our society.

While it is important that the goal of diversity be inclusive of all forms of diversity and not just race, I use race as the lens through which to view the immeasurable benefits that diversity in law school brings to the legal profession. This is because race is frequently a proxy for diversity of perspective and political identity. Law schools must ensure that there is racial diversity among the students they educate because we need lawyers of color to participate in the deliberative process of our democracy. Participation in the deliberative process is a form of liberty that should be promoted for all segments of our society. Participation is important in a democracy, for theorists believe that "greater, wider and deeper participation in democracy and political and legal decision making will be better for our society" because it will produce more well-reasoned decisions.¹⁰⁵

Political scientist Iris Young argues that inclusion in the deliberative processes of our democracy increases the likelihood

CONSTITUTION 3 (2005).

102. *Id.* at 3–5.

103. *Id.* at 5 (quoting Benjamin Constant, *De La Liberté des Anciens: Discours prononcé à l'Athénée royal de Paris en 1819*, available at http://www.libres.org/francais/fondamentaux/liberte/liberte_constant.htm).

104. Patterson, *supra* note 57, at 163 (discussing the old South's flavor of democracy which did not consider slavery to be mutually incompatible with the concept of liberty).

105. Menkel-Meadow, *supra* note 86, at 357.

that democratic decisionmaking processes will promote justice.¹⁰⁶ People value democracy because they believe that it is the best means of promoting justice and that “[t]he normative legitimacy of a democratic decision [whether it be from our courts or some other democratic institution] depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes.”¹⁰⁷ Under Young’s deliberative model of democracy, which is akin to Hudson’s Participatory Model, democracy is not only a means for citizens to promote their individual interests and hold the power of rulers in check, but also a means of collective problem-solving.¹⁰⁸ Collective problem-solving depends for its legitimacy and wisdom on the expression and criticism of the diverse opinions of all members of society.¹⁰⁹ Inclusion of people from various sectors of society is likely “to promote the most just results because people aim to persuade one another of the justice and wisdom of their claims, and are open to having their own opinions and understandings . . . change in the process.”¹¹⁰ Accordingly, the inclusion of people with a group identity, such as race, can “pluralize and relativize hegemonic discourses, and offer otherwise unspoken knowledge” to those participating in the deliberative process.¹¹¹

According to Young, democratic institutions are most inclusive when they encourage and ensure participation of those from relatively marginalized or disadvantaged social groups.¹¹² Law schools create the democratic leaders of tomorrow. Inclusion of people from relatively marginalized or disadvantaged social groups in the law school will yield lawyers who are intellectually equipped to contribute to the discourse that occurs among leaders in our democracy. The democratic ideal of liberty is not achieved when certain segments of society are relegated to the lower ranks of participation. While the office of citizen and its attendant duties are important, active liberty of traditionally subordinated groups is achieved when persons from those groups are equipped to occupy the higher ranking, often more powerful leadership offices in our democracy. Without the benefit of a legal education, persons from disadvantaged social groups are not well-equipped

106. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 5–6, 27 (2000).

107. *Id.* at 5–6.

108. *Id.* at 6.

109. *Id.*

110. *Id.*

111. *Id.* at 7.

112. *Id.* at 8.

to assume leadership roles or to argue the merits of governmental policies such as affirmative action. Without the benefit of a legal education, persons from disadvantaged social groups will be excluded from many discussions entirely because they will not occupy the coveted leadership roles that are invited to participate in the deliberative process.

I view race as a political identity. Political action groups form and operate around race, and much of the politics in America involve a racial component.¹¹³ I am not suggesting that there is an essential black lawyer or an essential Latina/o lawyer or any other essentialist notion of identity. Lawyers of color who share the same racial classification do not all think alike, but they do bring a nonwhite perspective to the legal profession. Lawyers of color have a different experience in America than white lawyers. They have experienced being “raced” in America. They have not had the privilege of living with an un-raced, “neutral,” or transparent racial identity.¹¹⁴ The experience of being raced in America has the consequence of shaping one’s identity and perspective, albeit not always in the same way. Because of their unique experience, lawyers of color bring a unique perspective to our political and legal processes and they genuinely share a desire to achieve racial equality. Even the notorious example of black non-essentialism, Justice Clarence Thomas is exemplary of the inability to escape being raced in America and the impact that such status has on identity.¹¹⁵ He acknowledged being sympathetic to the goals of race-conscious admission policies in his dissent in *Grutter*.¹¹⁶ Because lawyers of color have a raced perspective, they are able to participate in the deliberative process from this unique, nonwhite perspective. Professor Sherrilyn Ifill has recognized the distinct contributions

113. See Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17, 25 (1999) (commenting that race “permeates our politics”).

114. See Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–70 (1993) (discussing the transparency phenomenon as the tendency for whiteness to vanish from whites’ self-perceptions; “to be white is not to think about it”); see also GUINIER & TORRES, *supra* note 22, at 89–91 (arguing that colorblindness explains the way whites experience race, which is as something that is invisible and should be ignored); Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 24 (2005) (noting that the racial identity of a person shapes how they view race, with whites tending to be unaware of race).

115. See Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 965 (2005).

116. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

that judges of color make to the judicial process.¹¹⁷ In arguing for increased racial diversity of judges in our state trial courts, Professor Ifill argues that “structural impartiality” is realized when there is racial diversity on the bench. Racial diversity yields “diverse viewpoints” which diminish the “opportunity for one perspective to consistently dominate judicial decision making.”¹¹⁸

Likewise, individuals chosen to become lawyers should reflect the racial, economic, and social diversity of our democratic citizenry to ensure that there is diversity of viewpoint among those participating in the deliberation. While race does not dictate a particular viewpoint, race remains “a rough but adequate proxy for connection to a subordinated community” because blacks and other people of color recognize that political alliances have been and continue to be formed around racial identity.¹¹⁹ Moreover, there is an expectation from our citizenry that their political group, which is frequently identified by race,¹²⁰ will be visibly represented in our democratic leadership. Law schools should seek to achieve what Professor Duncan Kennedy has described as “cultural pluralism” in the selection of students.¹²¹ Cultural pluralism “means that we should structure the competition of racial and ethnic communities and social classes in markets and bureaucracies, and in the political system, in such a way that no community or class is systematically subordinated.”¹²² Cultural pluralism in law school admission will serve to strengthen democratic participation of subordinated groups by affording people from those subordinated groups the legal education which is often a prerequisite to their being entrusted with decisionmaking authority in our democratic institutions. If we fail to include people of color and other subordinated groups in the political institutions of our democracy, they are likely to see themselves as powerless objects of a government that is indifferent to their views, interests, and welfare. If we allow a substantial segment of our polity to view

117. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 119–20 (1997).

118. *Id.* at 119.

119. Kennedy, *supra* note 97, at 713.

120. When district lines are drawn for the purpose of creating voting districts, politicians consider the race of the residents in a particular area because they understand that race is often a proxy for political ideology. Fukurai, *supra* note 113, at 25.

121. See Kennedy, *supra* note 97, at 712 (noting that “large scale race-based affirmative action” is necessary to achieve the goals of cultural pluralism).

122. *Id.* at 712–13 (“[T]here should be a substantial representation of all numerically significant minority communities on American law [school] faculties.”).

government in this way, we invite democratic dis-ease which may ultimately metastasize into revolution.

4. *Diversity in Legal Education Advances Political Equality in Our Democracy.* Another core value of most theories of democracy is political equality.¹²³ Political equality encompasses not only the “one person, one vote” principle, but also the idea that all people are morally equal and are therefore equally entitled to evaluate alternative courses of action and make political judgments.¹²⁴ Accordingly, there should not be certain groups of people who consistently hoard a disproportionate share of political power. Because democratic political power is efficiently captured in the formation of interest groups, political equality must mean political equality on the group as well as the individual level.¹²⁵ Individuals who belong to groups that have traditionally been denied political power should be included in the democratic institutions that create political power brokers. To deny these individuals admission to these democratic institutions is to deny their group political equality. Absent affirmative action in admission decisions, blacks, Latino/as, and other racial minority groups would be further excluded from the opportunity to obtain a legal education.¹²⁶ This structural exclusion of people of color would undermine the equality principle by further subordinating already subordinated groups

123. See Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955, 982 (2004) (explaining that “in liberal democracy it is an accepted postulate that economic disparity should yield to political equality”); Patterson, *supra* note 57, at 158 (“Central to the idea of the democratic community is the notion of fraternal equality, of being equal . . .”).

124. HUDSON, *supra* note 34, at 197; see also Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005, 1058 (1997) (introducing a postulate of equality—“that all individuals are morally equal as individuals”).

125. HUDSON, *supra* note 34, at 199–200.

126. See William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 LA RAZA L.J. 173, 174 (2001) (“[W]hen race can no longer be a factor in admission decisions, it is minority students who are denied access to higher education opportunities.”); see also Johnson, *supra* note 124, at 1060 (arguing that affirmative action is a prerequisite to the achievement of “prospect-regarding equality of opportunity,” which Johnson explains as occurring when “two or more persons have equal opportunities for obtaining the desired good”). Prospect-regarding equality of opportunity recognizes that some players are better equipped than others to compete for resources and seeks to remedy the situational disparity by giving the players who are at a disadvantage at the outset the tools necessary to remediate the disadvantage so that these players truly have equal opportunity to obtain the desired good. *Id.*

in our society, thereby further institutionalizing or locking in existing inequality.¹²⁷

Lawyers hold a significant amount of wealth and political power in our democracy. Therefore, a legal education can be expected to increase the wealth and power of its beneficiaries. Without leaders in positions of wealth and power to advocate for subordinated communities, those communities are caught in a vicious cycle where they cannot compete for wealth and power. Because of the inability to compete, they will continue to be marginalized and subordinated in our democracy.¹²⁸

Regardless of which model of democracy one adopts, cultural pluralism in law school admission will enhance our democracy because it operates to disperse power. Power sharing is at the core of all models of democracy.¹²⁹ It is the idea of power sharing that erected the vertical and horizontal separation of government power in our Constitution.¹³⁰ Cultural pluralism will enhance the power sharing goal of democracy by extending power, both political and economic, to persons from groups that have typically been powerless. Enhanced power sharing with people from subordinated groups helps to ensure that the power of the majority does not operate, even unintentionally, to effectuate tyranny upon those in a subordinate group. And because people from a subordinated group are more likely than those from outside the subordinated group to represent the interests of the subordinated group to which they belong,¹³¹ the power to make

127. See, e.g., Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 731–32, 738 (2000). Professor Roithmayr uses the market lock-in analogy from antitrust law to describe affirmative action as a type of antitrust remedy designed to dismantle a locked-in white monopoly on opportunity and resources. *Id.* at 731–32. She argues that since current affirmative action has little impact on the lock-in of white dominance in the law school market, more intensive affirmative action may be needed to dismantle market lock-in. *Id.* at 738.

128. See *id.* at 775 (discussing how barriers to entry perpetuate the subordination of minorities).

129. See HELD, *supra* note 34, at 17–18, 36, 75–76 (relating particular values in an assortment of democratic models).

130. See Scott Dodson, *Vectorial Federalism*, 20 GA. ST. U. L. REV. 393, 401–02 (2003) (commenting on the historical purpose of the separation of powers doctrine).

131. For example, at least one study of Michigan law graduates revealed that minority lawyers provide more legal service to minority clients and do more pro bono work than white lawyers. See *supra* note 14. Professor David Wilkins has described black lawyers' willingness to give back to the black community as the "obligation thesis." David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1521, 1550 (1998). The theory that people of color feel an obligation to "give back" to communities of color might also be evidenced by the phenomenon in law school admission recently identified by Dean Janice Austin. Dean Austin highlights the fact that each of the flagship law schools that have had their race-conscious admissions policy challenged have been law schools where people of color directed the admissions

decisions in our democracy should be shared with members of subordinated groups.

Lawyers of color in the legal profession occupy important leadership roles in our democracy, from high level positions in executive government to high level judicial appointments. These lawyers serve as a signifier to our citizens of color that all Americans, particularly those who historically have been excluded, have a role in creating and administering the institutions of our democracy. Lawyers of color then play an important representative role in our democracy even when they are not acting as true representatives in the legislative sense. The visual presence of lawyers of color serving in leadership positions in our democracy assures people of color that they belong to the political community and that their group interests are being represented in governmental debates and decisionmaking. Indeed, according to the “minority empowerment thesis,” the presence of minorities in government leadership “strengthens representational links, fosters more positive attitudes toward government, and encourages political participation.”¹³² By fostering more positive minority attitudes toward government we enhance the trust that our minority citizenry places in our government.¹³³ And according to the advocates of the inclusive pluralist conception of democracy, trust is “a fundamental prerequisite of a good democracy.”¹³⁴ Simply stated, by empowering individuals from subordinated groups, we empower those subordinated groups, and in doing so, we enhance their freedom which strengthens our democracy.

office. Janice L. Austin, *Panel: LSAT, U.S. News and Minority Admissions*, 80 ST. JOHN'S L. REV. (forthcoming 2006) (manuscript at 5, on file with the Houston Law Review).

132. Susan A. Banducci et al., *Minority Representation, Empowerment, and Participation*, 66 J. POL. 534, 534 (2004). The study compared the evaluation of government by African Americans in the United States to the indigenous Maori population of New Zealand. *Id.* at 535. The study concluded that African Americans appear to be more likely to know that their representative was black and were more likely to report contact with a black representative than with a nonblack representative. *Id.* at 544. This latter finding suggests that a representative of the same race can break down communicative barriers and provide constituents with more meaningful opportunities to communicate with their representative. The study also concluded that blacks with a black representative were more likely to believe the representative is in touch with their interests and has done something special for their district. *Id.* at 544–46. *But see* Jane Junn, *Participation in Liberal Democracy: The Political Assimilation of Immigrants and Ethnic Minorities in the United States*, 42 AM. BEHAV. SCIENTIST 1417, 1434 (1999) (challenging the interpretation that more participation among minorities is desirable).

133. Banducci et al., *supra* note 132, at 541.

134. Patterson, *supra* note 57, at 166.

III. CONCLUSION

Race-conscious affirmative action, in legal education in particular, operates to ensure that racialized people and other groups who historically have been excluded from political power, have an opportunity to participate in our democratic government at the leadership level. Diversity in our law schools produces a diverse pool of leadership candidates who are equipped with the education necessary to become political leaders in our democratic government. It is essential to the maintenance and enhancement of our democracy that every citizen, regardless of race, feels represented and enfranchised in our democratic enterprise. When racialized citizens see people from their racial group holding leadership positions in our democracy, their faith and trust in our government is enhanced. This includes faith and trust in the justice system that lawyers are charged with administering.

The affirmative inclusion of racialized people, and other people who as a group have historically been marginalized or excluded from political power, into leadership roles in our democracy will only enhance and deepen our democracy. Diversity in democratic leadership will add to the collective voices that debate issues facing our country and enhance the deliberative component of our democracy. Diverse leadership will also enhance the representative component of our democracy because racialized people will feel that their interests are better represented when people from their racial group are included in the decisionmaking. Finally, extending opportunities for leadership to individuals from subordinated groups advances the active liberty of that individual and the group to which that individual belongs by removing institutional barriers that would have otherwise restricted the liberty of such persons.

Race conscious affirmative action is a necessary tool for law schools that value and want to ensure continued or improved diversity in the legal profession. Law schools should embrace the commitment to a diverse legal profession by including this goal in the mission of the school. Limited access to the legal profession for people of color and other subordinated groups restricts the access of these citizens to political power by restricting their ability to participate in government on an intellectual, economic and political level. Increasing the participation of people of color, women, gays and lesbians, the economically disadvantaged, and other subordinated groups in our democracy will enable the legal profession and the democratic institutions that it administers to retain the credibility that our democracy needs to maintain its

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authority. If law schools collectively adopt racial and other forms of diversity in the legal profession as part of the law school mission, we will enhance our democracy by embracing with more strength the democratic principles of self government, liberty, and equality with the potential for maximizing justice for all.