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The End of Affirmative Action

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THE END OF AFFIRMATIVE ACTION*

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We have arrived at the end of affirmative action. Now, more than ever, institutions of higher learning must move beyond a single-minded focus on educational diversity, which admits students of color primarily to enrich the classroom experiences of their white peers and then ignores what they may need to maximize both engagement and retention. Instead, affirmative action programs need an immediate update; they should take contemporary issues of race and racism into account, as well as the lived realities of students of color—by including multiracial students, recognizing diversity beneath the student of color umbrella, acknowledging intra-racial differences in pan-ethnic groups, and accepting that the resources and realities of Black immigrants differ from Black native-born Americans. Furthermore, to maximize the benefits of educational diversity, institutions must also prioritize equity and inclusion once students are enrolled. Using national longitudinal data from the Law School Survey of Student Engagement, this Article compares and contrasts students from different backgrounds on multiple measures to reveal how their lived realities should guide affirmative action policies for their remaining years.

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INTRODUCTION

Affirmative action has failed. It not only ignores the lived realities of current students and applicants, but admits students to promote educational diversity without prioritizing equity and inclusion. Recent years have highlighted the persistence of racial differences, not only between people of color and whites, but among people of color themselves. The experience of Asian Americans draws from a troubled racist history of Chinese exclusion, as well as recent increases in hate crimes resulting from references to the COVID-19 pandemic as the "Chinese Virus" or "Kung Flu."[1] Meanwhile, Black Americans have risked exposure to this deadly disease, taking to the streets to demonstrate that Black Lives Matter.[2] Thousands of Latinx children were separated from their parents at the border, with hundreds still awaiting reunification.[3] At the same time, Native Americans struggled to resist the

1. In August 2020, Stop AAPI Hate released a report revealing increases in hate crimes against Asian Americans and Pacific Islanders since March 2020 when COVID-19 began spreading in earnest in the United States and elected officials began referring to it as the "Chinese Virus" or "Kung Flu." *See* STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT 3.19.20 - 8.5.20 (2020), http://www.asianpacificpolicyandplanningcouncil.org/wp-content/uploads/STOP_AAPI_Hate_National_Report_3.19-8.5.2020.pdf [https://perma.cc/ZJ9D-W2M4]; Madeleine Aggeler, *The U.S. Is Seeing a Massive Spike in Anti-Asian Hate Crimes*, CUT (Feb. 10, 2021), https://www.thecut.com/2021/02/the-us-is-seeing-a-massive-spike-in-anti-asian-hate-crimes.html?utm_campaign=thecut&utm_medium=s1&utm_source=tw [https://perma.cc/K5KZ-B6PG].

2. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/Z9YL-F5EL (dark archive)].

3. Teo Armus & Maria Sacchetti, *The Parents of 545 Children Separated at the Border Still Haven't Been Found. The Pandemic Isn't Helping.*, WASH. POST (Oct. 21, 2020, 6:28 PM), https://www.washingtonpost.com/nation/2020/10/21/family-separation-parents-border-covid [https://perma.cc/HXG4-XKME (dark archive)].

ravages of a global pandemic on tribal lands long neglected by the federal government.[4] Yet when applying to law school in the United States, applicants from each of these backgrounds are lumped together under the "student of color" moniker with the presumption that they individually and collectively benefit from affirmative action and interchangeably add to educational diversity. These students are admitted to improve the experience of their white classmates, supplementing the standard law school curriculum with their own experiences. Yet institutions have given little thought to what it means to be a student of color today or how these students might contribute to diversity once they are enrolled.

While students of color are gaining access to higher education today in greater shares than in decades past, the individuals who are admitted are not necessarily the applicants most in need of support at the admissions stage or most underrepresented in colleges, universities, and professional schools.[5] Furthermore, because the primary focus is on admitting people of color who can add unique perspectives to supplement the educational experience of their white classmates, a lack of support for students of color once they are enrolled translates into suboptimal retention rates and less than meaningful opportunities after graduation—undermining the potential full benefits of affirmative action.[6]

The Supreme Court has signaled the end of affirmative action. In 2003, Justice O'Connor asserted that affirmative action should sunset within twenty-five years—leaving institutions committed to actively enrolling students of color with less than a decade to find a better solution.[7] At worst, with a new composition of Justices on the Court and relevant cases winding their way through the lower courts, the end of affirmative action could come even sooner.[8] Other articles have considered alternatives to educational diversity as a

4. Lizzie Wade, *COVID-19 Data on Native Americans Is 'a National Disgrace.' This Scientist Is Fighting To Be Counted*, SCIENCE (Sept. 24, 2020, 12:20 PM), https://www.sciencemag.org/news/2020/09/covid-19-data-native-americans-national-disgrace-scientist-fighting-be-counted [https://perma.cc/HXG5-A69N].

5. *See* MEERA E. DEO, CHAD CHRISTENSEN & JAKKI PETZOLD, LAW SCH. SURV. OF STUDENT ENGAGEMENT, THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A 15-YEAR LSSSE RETROSPECTIVE 7–11 (2020) [hereinafter DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION], https://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE_Annual-Report_Winter2020_Final-2.pdf [https://perma.cc/R8PQ-82Y9].

6. MEERA E. DEO & CHAD CHRISTENSEN, LAW SCH. SURV. OF STUDENT ENGAGEMENT, DIVERSITY & EXCLUSION 6–10 (2020) [hereinafter DEO & CHRISTENSEN, DIVERSITY & EXCLUSION], https://lssse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf [https://perma.cc/HA7Y-MWLR].

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

8. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 179 (D. Mass. 2018). A similar case was filed the same day against the University of North Carolina at Chapel Hill. Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14CV954, 2018 WL 4688388, at *2 (M.D.N.C. 2018).

compelling state interest sufficient to satisfy this constitutional requirement.[9] By revealing differences in the student experience, this Article first warns that we must modernize current policies that are relics of the past focused solely on educational diversity before the end of affirmative action, and also proposes incorporating equity and inclusion as the best way forward.

While affirmative action may have been considered a groundbreaking way to make real change when first instituted in the 1970s, there have been insufficient changes to admissions policies in the intervening half century. Current programs rely on outdated models that purport to champion diversity but do not account for the evolution of race or racism and often ignore the lived experiences of students from differing backgrounds. The conventional but antiquated plan—still in use today at many institutions of higher learning—relies on "plus" factors in admission granted to individual students from backgrounds that have been traditionally underrepresented on campus who could contribute to the learning of their classmates.[10] The "diversity rationale" has been effective in making some change, but does not adequately reflect current priorities or realities—both because it fails to take account of the complexities explored in this Article and because it is divorced from equity and inclusion.[11]

Instead of relying solely on diversity, we need an equity-focused affirmative action model that targets the full inclusion of our most vulnerable students. Schools need policies that bolster students who are most in need of educational opportunity—those who have the most to gain from a "plus" on their application. Finally, these institutions must continue to support students throughout their educational careers rather than simply adding a "plus" at the admissions stage. Law schools must provide these students with equitable resources while promoting full inclusion throughout the time students remain enrolled.

This Article builds on a recent piece that discusses "Affirmative Action Assumptions" that courts of the past half century have relied on to support affirmative action, investigating data-driven complications that serve to critique

9. Meera E. Deo, *Affirmative Action Assumptions*, 52 U.C. DAVIS L. REV. 2407, 2412–15 (2019) [hereinafter Deo, *Affirmative Action Assumptions*]; Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661, 662–63, 668 (2014) [hereinafter Deo, *Empirically Derived Compelling State Interests*] ("Equal Protection challenges based on race trigger strict scrutiny, which requires defendants to prove that their policies are in pursuit of a compelling state interest and are narrowly tailored to meet that goal."); *see also infra* Section I.A.

10. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–17, 321 (1978).

11. As discussed in Part II, there are higher percentages of students of color in law schools today than in years past. But debt levels are also higher for these students and disparities between them and white students have grown. DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION, *supra* note 5, at 7–11.

current affirmative action policies.[12] In addition, it proposes a modern and more effective affirmative action model drawing not just from educational diversity, but more broadly from equity and inclusion. Overall, it argues that as affirmative action policies in use today are outdated and imperfect, they must be modernized to take account of changing conceptions and contemporary racial realities—drawing from the lived experiences of students from different backgrounds and working towards the broader goals of diversity, equity, and inclusion.

Part I of this Article begins with a brief overview of the case law of affirmative action. It also covers admissions policies that have been celebrated in the past and continue to be used as models. Part II introduces the Law School Survey of Student Engagement ("LSSSE"), the largest dataset on law students with over 350,000 responses over the course of almost twenty years. Drawing from LSSSE data, this part explores the lived experiences of current law students by examining similarities and differences between groups to highlight the importance of diversity generally as well as the ways in which our current analyses oversimplify the term and its application in admissions decisions. Analyzing empirical data from law students by race, ethnicity, gender, immigrant background, and other relevant variables reveals that what is fundamental to affirmative action at a policy level with a strict reliance on "educational diversity" does not translate into maximizing the benefits of diversity in the classroom or for students generally. Part III suggests a modern and holistic policy that takes the lived realities of applicants into consideration—drawing from diversity, equity, and inclusion—and creates meaningful change in legal education, and ultimately, American society.

I. AFFIRMATIVE ACTION AS WE KNOW IT

A. *Evolving Jurisprudence*

From 1978 to today, the doctrinal analysis for affirmative action policies has evolved considerably. This section provides a brief overview of affirmative action jurisprudence, with more detailed analyses on the actual policies involved to follow.[13] In *Regents of the University of California v. Bakke*,[14] when an unsuccessful white male applicant challenged the race-inclusive admissions policy at UC Davis Medical School, the Court confirmed that strict scrutiny was the relevant standard of review for affirmative action cases.[15] Justice Powell determined that in any equal protection challenge involving race, courts should conduct a two-pronged analysis to determine (1) whether there was a

12. Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2409–10.
13. *See infra* Section I.B.1.
14. 438 U.S. 265 (1978).
15. *Id.* at 291.

compelling state interest for the policy, and (2) whether the policy at issue was narrowly tailored to fit that interest.[16] He ultimately determined that while the policy at hand served one of the four compelling state interests advanced by the school—namely, educational diversity—it was not sufficiently tailored to satisfy the second prong of strict scrutiny.[17] Justice Powell positively cited and appended Harvard University's admissions plan, which recognized racial diversity (among other criteria) as an added bonus or "plus factor" for applicants, suggesting other universities could follow suit.[18] They did.

Institutions of higher learning continued to rely on Justice Powell's *Bakke* opinion, the approved compelling state interest of educational diversity, and the narrow tailoring evident in the Harvard policy for decades without much interference. The Court did not again consider affirmative action in admissions to higher education until the twin University of Michigan cases, *Gratz v. Bollinger*[19] (challenging the policy at the University's College of Literature, Science, and the Arts) and *Grutter v. Bollinger*[20] (challenging the University's Law School policy).[21] In the twenty-five years between *Bakke* and the University of Michigan cases, some questioned whether Justice Powell truly had written for the majority in *Bakke*, and therefore whether educational diversity was an appropriate compelling state interest.[22] This debate was laid to rest in *Grutter*, which held definitively that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[23] The law school policy was sufficiently tailored to survive strict scrutiny while the affirmative action methods used at the undergraduate level were rejected for failing to be narrowly tailored.[24]

Ten years later, in *Fisher v. University of Texas at Austin*,[25] the Court again considered affirmative action policies. In *Fisher I* and *Fisher II*,[26] the Court reviewed admissions at the University of Texas at Austin, after a similar challenge by an unsuccessful white applicant.[27] While the Court continued to

16. *Id.* at 291, 299. While there was some debate about whether Justice Powell was writing for himself or for the majority, the Court in *Grutter* again confirmed that strict scrutiny was the appropriate standard of review. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

17. *Bakke*, 438 U.S. at 311–24; *see also* Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2415 ("With *Bakke*, educational diversity became the only sanctioned justification for affirmative action, and remains the only compelling state interest validated by the courts today.").

18. *Bakke*, 438 U.S. at 315–17, 321.

19. 539 U.S. 244 (2003).

20. 539 U.S. 306 (2003).

21. *Id.* at 316–17; *Gratz*, 539 U.S. at 244.

22. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

23. *Grutter*, 539 U.S. at 325.

24. *Id.* at 334; *Gratz*, 539 U.S. at 270–75.

25. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297 (2013).

26. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

27. *Fisher I*, 570 U.S. at 300–03; *Fisher II*, 136 S. Ct. at 2202.

support educational diversity as a compelling state interest, noting the ways in which it "enhanced classroom dialogue and [lessened] racial isolation and stereotypes,"[28] it also narrowed the second prong further. In doing so, the Court accused the Fifth Circuit of unnecessarily and improperly deferring to the University and requiring instead that institutions of higher education prove "it is 'necessary' for a university to use race to achieve the educational benefits of diversity."[29] Furthermore, the Court "insisted that going forward, those using affirmative action must engage in 'regular evaluation of data and consideration of student experience [to ensure] that race plays no greater role than is necessary to meet its compelling interest.'"[30]

Ongoing data collection and review is thus *mandated* by the Supreme Court for universities that seek to continue affirmative action policies for the purposes of supporting educational diversity. Yet it is unclear whether any universities have collected and analyzed data along the lines of the findings presented in this Article, which suggest that current affirmative action policies may have reached their end point. Instead, guidelines and procedures governing the admission of students from diverse backgrounds at most institutions have changed very little in the forty years since Justice Powell first appended the Harvard plan to his *Bakke* opinion. As discussed in the next section, this means that recent policies, and likely current ones, do not take account of contemporary issues or racial realities that are central to educational diversity.

B. *Outdated Procedures*

The past forty years have seen over half a dozen affirmative action cases litigated, many in the Supreme Court.[31] Today, we can rely on the record from some of these cases to consider the contours of acceptable affirmative action policies—how universities can utilize race in admissions decisions while still operating within the confines of the Constitution and other antidiscrimination laws. This section outlines affirmative action programs that were litigated over the years and then considers patterns that emerge from this review, highlighting particular elements of successful affirmative action policies and what may be off limits. Because institutions tend to keep their admissions processes private, only those disclosed through litigation are available for review. Overall, it is evident from this assessment of current affirmative action policies that little has changed

28. *Fisher I*, 570 U.S. at 308.

29. *Id.* at 311–14.

30. Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2427–28 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies." (quoting *Fisher II*, 136 S. Ct. at 2215)).

31. These include cases like *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher II* that were heard in the Supreme Court as well as more recent and ongoing cases. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 179 (D. Mass. 2018); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14CV954, 2018 WL 4688388, at *2 (M.D.N.C. 2018).

since the days of *Bakke*—though contemporary realities of race, racism, and race relations have evolved significantly in the past forty years. Current policies, therefore, rely on outdated conceptions of race and racism rather than taking modern racial realities into consideration.

1. Understanding Current Policies

Current affirmative action policies are grounded in the Court's 1978 opinion in *Bakke*—guidelines approaching a half century in age. In *Bakke*, the Court struck down the UC Davis Medical School policy that reserved sixteen seats for students who self-identified as "Black," "Chicano," "Asian," or "American Indian," determining that while one of the four rationales for their program was a compelling state interest, the policy could not survive narrow tailoring.[32] While in the first year the policy also took economic or educational disadvantage into consideration, the policy being litigated appeared to be purely race-based.[33]

The UC Davis plan is noteworthy and relevant to this discussion for three main reasons. First, the only rationale to survive the first prong of strict scrutiny was educational diversity.[34] Justice Powell's opinion summarily rejected the three other compelling state interests advanced by the University defendants, both conflating the two prongs of strict scrutiny and rejecting potentially viable interests based on narrow tailoring in spite of existing data to the contrary.[35] With a stroke of his pen, Justice Powell initiated the need for institutions to rely on educational diversity alone, rather than any other compelling state interest, which schools have single-mindedly done ever since.

Second, only four racial groups were singled out for special treatment. Although naming of these four groups moved beyond a traditional Black-white binary, it nevertheless clearly excluded a number of racial and ethnic groups that could also contribute to educational diversity.[36] Emphasizing the importance of racial diversity by naming only particular groups is out of step not only with current realities, but also with the nuances of race explored later in this Article.

Third, while the Court did not take issue with the underinclusive nature of the policy, it did balk at what it considered a "quota" as white students were

32. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274–75, 305–06 (1978).

33. The special admissions track was geared toward "'economically and/or educationally disadvantaged' applicants" in 1973. *Id.* at 274.

34. *Id.* at 305–12.

35. The *Bakke* Court was unwilling to acknowledge a compelling state interest in increasing the number of doctors of color, reducing societal discrimination, or increasing service to disadvantaged communities, though all of these were advanced by the University as priorities of their special admissions policy. *Id.* at 305–11. For a discussion of these goals and their rejection by the Court, see Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2412–15.

36. For more on this discussion, see Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2417–20.

unable to compete for the sixteen seats reserved for those applying under the special admissions policy.[37] Justice Powell, seemingly believing that "there were both less intrusive means and more meaningful ways to achieve the compelling state interest of educational diversity," appended the Harvard affirmative action policy as a guide for institutions of higher education to follow.[38] That plan from more than forty years ago continues to guide policies today, in spite of the clear evolution of American conceptions of race and actual experiences with race and racism over that time. As discussed in detail later in this Article, these static policies in the face of changing times suggest how out of touch institutions are with the current lived experiences of applicants and students from all backgrounds, as well as contemporary race and racism more generally.

Decades later, when the Fifth Circuit issued an opinion in *Hopwood v. Texas*,[39] that court maintained that Justice Powell's decision in *Bakke* was not binding precedent and courts need not maintain a commitment to educational diversity.[40] In his concurring opinion, Judge Weiner "declined to issue a ruling on the issue of diversity," but nevertheless ruled against the University on narrow tailoring grounds.[41] Soon thereafter, the Ninth Circuit heard oral arguments in a similar case filed in Washington State, with the additional complication of a statewide initiative banning the use of race in admissions resulting in a new university policy.[42] While the Ninth Circuit ultimately determined that the case was moot once the university changed its policy to comply with the new initiative, it nevertheless took this opportunity to assert that *Bakke* was in fact binding precedent and therefore courts should continue to deem educational diversity a compelling state interest.[43]

This split set the stage for the twin cases filed against the University of Michigan in 1997—twenty-five years ago—alleging that the affirmative action policies used by the undergraduate College of Literature, Science, and the Arts, as well as the Law School, violated the U.S. Constitution and other antidiscrimination laws.[44] The litigation was especially unusual because of the intervenors who joined both the undergraduate and the law school cases—pushing the district court to consider a number of policy issues and broader

37. *Bakke*, 438 U.S. at 274–75, 307–09.

38. *Id.* at 316–19, 321–24; Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2416–18.

39. 78 F.3d 932 (5th Cir. 1996).

40. *Id.* at 944–46.

41. *Id.* at 962 (Weiner, J., concurring); Meera E. Deo, *Ebbs and Flows: The Courts in Racial Context*, 8 RUTGERS RACE & L. REV. 167, 183 (2007) [hereinafter Deo, *Ebbs and Flows*].

42. Smith v. Univ. of Wash., L. Sch., 233 F.3d 1188, 1191–92 (9th Cir. 2000).

43. *Id.* at 1200 n.9, 1201.

44. Gratz v. Bollinger, 539 U.S. 244, 252 (2003); Grutter v. Bollinger, 539 U.S. 306, 316–17 (2003).

context than would have been included by the plaintiffs and university defendants alone.[45]

No court reviewing the affirmative action policies at issue in *Gratz* or *Grutter* supported use of any alternative compelling state interests. For instance, the intervenors in *Grutter* challenged testing as a valid and reliable metric for admissions and also tied affirmative action policies directly to integration efforts from fifty years prior as a way of shifting the focus away from relying solely on educational diversity and considering equality more generally.[46] Nevertheless, the only compelling state interest to survive at the Supreme Court level was educational diversity, with the Court supporting this rationale due to an expected exchange of perspectives and viewpoints in the classroom that could only be achieved through prioritizing the admission of traditionally underrepresented students of color.[47]

Furthermore, the Court drew a distinction between the undergraduate policy (which it asserted drew from a formulaic assessment of each applicant) and the law school plan (which it deemed to be more flexible and holistic), striking down the former on narrow tailoring grounds while upholding the latter.[48] Even with the law school plan, experts argued over the relative weight of race in any admissions decision, how to measure critical mass, and whether diversity goals were appropriate.[49] Ultimately, the Court was unwilling to punish the law school for maintaining diversity goals (in spite of plaintiffs asserting these were quotas in disguise) and also did not oppose the university's reliance on critical mass as an important tool in working toward the many benefits of diversity.[50] Notably, even in this exhaustive record, there was little attention given to questions of equity or inclusion, and almost no focus on student retention, enrollment, or experiences after admissions decisions had been made.

45. *See* Memorandum of Law in Support of Motion for Intervention at 11, 22, Grutter v. Bollinger, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928) ("[Intervenors' interests] imbricate questions of entrenched educational and social inequality and the effect of existing racism and sexism on students. While the University's most prudent course may be to defend its affirmative action program by invoking—and by only invoking—the most clearly established legal principles that do not potentially subject it to liability, in particular the compelling state interest in diversity upheld in *Bakke*, applicants intend to raise fundamental questions of equality."). This author was one of the intervenors in *Grutter*.

46. Grutter v. Bollinger, 137 F. Supp. 2d 821, 855–63 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

47. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (1978).

48. *Gratz*, 539 U.S. at 275; *Grutter*, 539 U.S. at 341–43.

49. *Grutter*, 137 F. Supp. 2d at 825–39.

50. The Supreme Court in *Grutter*, citing an expert witness, describes critical mass as "'meaningful numbers' or 'meaningful representation' . . . that encourages underrepresented minority students to participate in the classroom." *Grutter*, 539 U.S. at 318. Both the district court and the Supreme Court in *Grutter* cite an expert who described critical mass as "numbers such that . . . minority students do not feel isolated or like spokespersons for their race." *Id.* at 319; *Grutter*, 137 F. Supp. 2d at 834.

Within a few years, another unsuccessful white applicant filed suit against the University of Texas at Austin, claiming the school could not use race in admissions because a statewide program already created diversity on campus.[51] The "Top Ten Percent Plan" prioritized admission for the highest performing students at each of the state's high schools, which resulted in some diversity at the flagship campus because of the segregated nature of the state—a phenomenon clearly not anticipated by or incorporated into Justice Powell's *Bakke* opinion which continued to guide affirmative action policy.[52] In addition, the University followed a traditional admissions process for the remainder of the class not accepted through the Top Ten Percent Plan.[53] Those students—roughly 25% of each class—were "admitted through a complex calculation of 'personal achievement' and the standard academic index (generally, the applicant's performance on the SAT or a comparable exam, plus high school grade point average (GPA))."[54] Again, both times the Court issued an opinion in this case, it affirmed its support for educational diversity as a compelling state interest, singling out as expected benefits "enhanced classroom dialogue and the lessening of racial isolation and stereotypes."[55] In this way, the Court did look beyond diversity to broader social justice goals; yet it did not directly invoke either equity or inclusion or give weight to how the experience or realities of students of color from different backgrounds should interact with admissions policies generally.

Furthermore, Justice Kennedy's majority opinion in *Fisher I* reiterates that because of academic freedom, courts should defer to a university's pursuit of a diverse student body if it purportedly supports pedagogical priorities.[56] However, courts should not defer to the university by assuming the means they use to achieve their stated compelling state interest in educational diversity is sufficiently narrowly tailored.[57] Instead, in order to withstand strict scrutiny, the university must prove that "no workable race-neutral alternatives would produce the educational benefits of diversity."[58] Critically, the Court also placed a burden on the university of conducting ongoing empirical assessments, perhaps based on the student experience itself:

51. *Fisher I*, 631 F.3d 213, 216–17, 242–43 (5th Cir. 2011), *vacated*, 570 U.S. 297 (2013).

52. *Fisher II*, 136 S. Ct. 2198, 2205–09 (2016).

53. *Id.* at 2206–07; *see also Fisher I*, 631 F.3d at 227–29.

54. Deo, *Empirically Derived Compelling State Interests*, *supra* note 9, at 671–72 (citing *Fisher I*, 570 U.S. at 300–06).

55. *Fisher I*, 570 U.S. at 308.

56. *Id.* at 310–11.

57. *Id.* at 311–12.

58. *Id.* at 312 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."); *id.* at 298 ("[T]he University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference.").

> The University [can continue to survive strict scrutiny only] by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests.[59]

While the Court itself has charged universities with conducting ongoing assessment and review of student and applicant data, there is nevertheless no attention given to contemporary realities of law students or how evolving conceptions of race fit within outdated affirmative action policies.

The most recent challenge to affirmative action at an elite institution that has gained some traction is playing out on the Harvard University campus, with anonymous Asian American plaintiffs who were rejected from the University alleging discrimination in admissions.[60] Plaintiffs assert that the only way to avoid a default cap on Asian American admissions—essentially a quota—is to make the process race-blind.[61] In response, the University both disputes any discrimination against Asian Americans and defends its race-conscious admissions process as essential to creating a diverse student body and sufficiently tailored to meet that goal.[62] In a 130-page order, the district court sided with the University, concluding that while the University "could do

59. *Fisher II*, 136 S. Ct. 2198, 2203 (2016).

60. *See supra* note 8 and accompanying text. Notably, since the plaintiffs are anonymous, the "face" of the lawsuit is Edward Blum, a white sixty-six-year-old whose organization also supported Abigail Fisher and has filed a similar lawsuit against the University of North Carolina at Chapel Hill. Alexia Fernández Campbell & P.R. Lockhart, *The Harvard Admissions Case that Could End Affirmative Action, Explained*, VOX (Oct. 2, 2019, 2:50 PM), https://www.vox.com/identities/2019/10/2/20894934/harvard-admissions-case-affirmative-action [https://perma.cc/V4UJ-RNRD (staff-uploaded archive)]. Plaintiffs' attempt to resurrect a challenge to the flagship state university in *Students for Fair Admissions, Inc. v. University of Texas at Austin* was summarily rejected. Allyson Waller, *Federal Judge Tosses Lawsuit that Sought To End UT-Austin's Affirmative Action Policy*, TEX. TRIB. (July 27, 2021, 11:00 AM), https://www.texastribune.org/2021/07/27/ut-austin-affirmative-action [https://perma.cc/S34F-UZLU]. In February 2021, on the same day plaintiffs filed a petition for certiorari to the Supreme Court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, they filed a similar case against Yale University. Complaint at 1, Students for Fair Admissions, Inc. v. Yale Univ., No. 21-cv-00241, 2021 WL 736917 (D. Conn. Feb. 25, 2021). This newest case has been stayed pending a decision on the petition for certiorari in *President & Fellows of Harvard College*.

61. *See* Complaint at 6, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174 (D. Mass. 2018) (No. 14-cv-14176-DJC) ("[T]he proper response is the outright prohibition of racial preferences in university admissions.").

62. *See* Memorandum in Support of Defendant's Motion for Summary Judgment on All Remaining Counts at 2, *Students for Fair Admissions, Inc.*, 346 F. Supp. 3d 174 (No. 14-cv-14176-ADB) ("Harvard does not use quotas or engage in racial balancing and . . . race is but one of many factors that Harvard considers in evaluating how its students will learn from one another . . . . [Harvard] carefully considered other potential race-neutral measures, ultimately concluding that the consideration of race remains necessary to attain an exceptional class that is racially diverse.").

better," its admissions policy meets the requirements of strict scrutiny.[63] In November 2020, the First Circuit upheld Harvard's use of race in admissions, finding that the affirmative action program in use was narrowly tailored to achieve the compelling state interest of educational diversity.[64] In June 2021, the Court invited the Solicitor General to file a brief opining on the merits of the case, pushing off a decision on certiorari.[65] Thus, it remains unclear whether and how the Supreme Court might rule on either narrow tailoring or educational diversity grounds, though equity and inclusion have not been presented as central matters and the policy at issue is not substantially different from the many others that have been litigated over the past forty years—all of which continue to rely on the 1978 decision in *Bakke* and the appended Harvard Plan from that time period.

This case does differ from its predecessors in that it directly considers differences between students of color from different backgrounds. Yet it falls short by lumping Asian Americans in with whites rather than with students of color—pitting Asian Americans against Black, Latinx, and Native American students rather than recognizing how they also contribute to educational diversity. Instead, data on the student of color experience should showcase each group individually, in order to reference how it may contribute individually and collectively to the "enhanced classroom dialogue" expected of educational diversity.[66]

2. Analyzing Existing Models

What patterns can we discern from these policies, which are rooted in the past but continue to guide affirmative action programs today? If we treat each affirmative action plan as a separate data point and consider the Court's interaction with them, a set of guidelines emerge. Ironically, each institution of higher learning likely engages in a similar reading of the tea leaves to attempt to decipher what courts will see as acceptable with regard to affirmative action. Notably, none of these center on or even include equity and inclusion or give consideration to individual differences between groups based on race, ethnicity, or immigrant background.

First, though there may be additional contemporary information, including empirical data, to support alternative compelling state interests, the Court seems unwilling to entertain anything beyond educational diversity.

63. Findings of Fact & Conclusions of Law at 127, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB).

64. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 185–95 (1st Cir. 2020).

65. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 141 S. Ct. 2753, 2753 (2021) (mem.).

66. *Fisher I*, 570 U.S. 297, 308 (2013).

Numerous scholars in law, sociology, education, and related fields have published on viable alternatives to educational diversity as a compelling state interest, though no additional rationales have been sanctioned by the courts.[67] Institutions of higher learning that have been sued have relied almost exclusively on educational diversity to support their affirmative action policies.

Second, courts do take note of broader societal context surrounding the specific policy being litigated. In other words, these cases are not decided in a vacuum. The statewide initiative that passed soon after litigation began against the University of Washington Law School ultimately rendered the lawsuit moot; nevertheless, the Ninth Circuit issued guidance on following Justice Powell's opinion in *Bakke* as binding precedent, specifically rebuking the Fifth Circuit for its "flawed" reasoning in asserting the opposite perspective.[68] The University of Texas was sued not specifically because it utilized race in admissions but because it did so *alongside* a statewide program that already resulted in some race-based diversity on the flagship campus.[69] In both instances, courts looked beyond the actual affirmative action policy alone to consider the broader environment in which it was situated. Courts have even considered the context of students of color from different backgrounds; for instance, Asian Americans, who the district court noted may have faced discrimination during interviews for admission to Harvard, are seen as separate from Black, Latinx, and other applicants of color also vying for admission to that elite institution.[70]

Third, quotas are clearly unconstitutional. Although set-asides, quotas, or reservations are widely used internationally—even by countries that model their constitution on the U.S. Constitution[71]—they would be seen in the United States as a per se failure of the narrow-tailoring prong (absent clear evidence of prior institutional discrimination requiring this level of intervention).[72] Yet

67. Previous research has drawn from current empirical data to advance various alternative compelling state interests aside from educational diversity. Deo, *Empirically Derived Compelling State Interests*, *supra* note 9, at 661.

68. Smith v. Univ. of Wash., L. Sch., 233 F.3d 1188, 1200–01, 1200 n.9 (9th Cir. 2000) ("[A]t our level of the judicial system Justice Powell's opinion remains the law.").

69. *Fisher I*, 570 U.S. at 304–05 (stating that the university adopted multiple admissions programs, including a "holistic . . . Personal Achievement Index," along with legislation, known as the "Top Ten Percent Law"); *see Fisher II*, 136 S. Ct. 2198, 2204 (2016) ("Petitioner also claims that the University need not consider race because it had already achieved critical mass by 2003 under the Top Ten Percent Plan.").

70. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 175 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

71. *See* Gaurav Khanna, *Does Affirmative Action Incentivize Schooling? Evidence from India*, 102 REV. ECON. & STAT. 219, 222 (2020) ("In the Indian context, affirmative action programs are more salient and larger in magnitude than in most other countries.").

72. *See Fisher II*, 136 S. Ct. at 2208 ("A university cannot impose a fixed quota."); Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

universities that set diversity goals can be supported in their efforts. Similarly, critical mass can be considered an important priority for those seeking to maintain diversity among the student body and especially to realize the benefits of "cross-racial understanding" and meaningful classroom conversation.[73]

A fourth pattern is that while courts defer to the university's interest in determining the composition of their student body, there is no deference with regard to narrow tailoring.[74] This signals an important nod to academic freedom, the role of the university in structuring their student body and crafting a pedagogical approach that educators—not courts—feel best suits the goals and mission of the school.[75] Yet this deference is limited to the goal itself and does not extend to the means utilized to achieve that goal.

Fifth, and perhaps most significant for purposes of this Article, is the importance of data. Justice Powell's opinion in *Bakke* overlooked data—on the one hand, essentially taking judicial notice of the significance of educational diversity, while on the other hand ignoring relevant data that could have supported alternative compelling state interests.[76] *Grutter* saw competing experts arguing about the significance of race in any particular admissions file, with the court questioning whether the weight given to race had the effect of a brick or a feather on the delicate scale of law school admissions.[77] Ultimately, courts have come to recognize the importance of empirical data. In *Fisher II*, the Court established that universities utilizing race in admissions decisions "have a continuing obligation" to collect and analyze data on admissions to ensure the policy remains not only constitutional but also effective.[78] The next part turns to data itself to consider varying student experiences based in part on race, ethnicity, immigrant background, and other characteristics that should matter when considering race in admissions as well as the retention necessary to ensure the maximum benefits of educational diversity.

II. LIVED REALITIES OF CURRENT STUDENTS

Because educational diversity is the only sanctioned justification for affirmative action, law schools should admit classes of students who are broadly diverse along many dimensions. Those students should then be treated

73. *Grutter*, 539 U.S. at 330 (quoting Appendix to Petition for Certiorari at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

74. *Fisher I*, 570 U.S. at 311 ("The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

75. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 602–03 (1967).

76. For a thorough discussion of the various assumptions made by the *Bakke* Court without relying on data or evidence, see Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2417–22.

77. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 836 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

78. *Fisher II*, 136 S. Ct. 2198, 2203 (2016).

equitably and wholly included on campus in order to encourage their full participation. While educational diversity may be the constitutional justification for affirmative action, only with an added focus on equity and inclusion will students be able to completely and uninhibitedly contribute to "the robust exchange of ideas" the Court expects will accrue from affirmative action.[79] Optimal results from affirmative action and educational diversity are not required; yet they should be a goal of any policy that hopes to withstand strict scrutiny, especially given the mandate of ongoing review of relevant data.[80]

This part uses empirical data from a national longitudinal sample to reveal actual experiences of contemporary law students. The law student experience is an important one in this context because—as discussed at various points earlier in this Article—many affirmative action battles have revolved around law school admissions; given the number of unsuccessful white applicants challenging existing affirmative action policies, examining diversity and the student experience in law schools is especially germane. Reviewing variations by race, ethnicity, gender, immigrant background, and more, it is apparent that there is a diversity of experience based on background. However, it is also clear that the optimal benefits of diversity are not being satisfied through current affirmative action efforts focused exclusively on diversity and ignoring current realities of race and racism.

A. *Introducing Contemporary Law Students*

The Law School Survey of Student Engagement measures the effects of law school on law students by gathering empirical data directly from them.[81] LSSSE is a repository for what is likely the largest longitudinal database of students in legal education—with over 350,000 responses from law students at dozens of schools across the country (as well as internationally) over almost two decades.[82] LSSSE conducts an annual survey of law students in partnership with participating schools, then shares school-specific data with each institution along with aggregate data from both "peer schools" (as selected by each

79. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

80. Furthermore, chief among every law school's focus on professional competencies—specifically, helping students develop the skills needed to excel in legal practice—should be "exposure to diverse ideas and perspectives," which in turn cultivate cultural competency. Chad Christensen, *Preparing Law Students To Be Successful Lawyers*, 69 J. LEGAL EDUC. 502, 511 (2020). Thus, optimizing the benefits of educational diversity serves career goals as well as academic priorities. *See id.* at 509–20.

81. For more information on LSSSE, see the LSSSE homepage. LSSSE, http://lssse.indiana.edu/ [https://perma.cc/9YQQ-KHX8].

82. *Who We Are*, LSSSE, http://lssse.indiana.edu/who-we-are/ [https://perma.cc/53GD-PTG3] ("Since 2004, 203 law schools in the U.S. (184), Canada (17), and Australia (2) have administered the LSSSE Survey, eliciting over 380,000 student responses—the largest such dataset in existence.").

institution) and national averages.[83] With this process in place, each school receives not only a general assessment of its own students along dozens of metrics but also a comparative appraisal of responses to each question asked on the survey. While many law schools are especially likely to participate in LSSSE to prepare for ABA accreditation or review site visits, others use the data to assess particular staff or offices, evaluate new and ongoing programming, and highlight a variety of important school priorities and preferences.[84]

LSSSE strives to explore the full range of the law school experience. Questions on the LSSSE Annual Survey range from demographic to behavioral to attitudinal.[85] The Annual Survey captures a number of student background characteristics including race/ethnicity, gender, age, first-generation status, socioeconomic status, sexual orientation, country of origin of both students and their parents, LSAT score, and undergraduate grade point average. Student engagement is a central feature of the project, with a number of related behavioral questions involving daily preparation, class participation, co-curricular endeavors, organizational membership, and relationships with faculty, staff, and peers. In addition, the Annual Survey asks questions about student attitudes ranging from how much they believe their school supports the use of technology in the classroom to satisfaction with career services, academic advising, and the overall law school experience.[86] Academics, practitioners, administrators, LSSSE staff, and others then use the data to better understand law students and tailor policies to meet their needs and expectations.

Who are contemporary American law students? We know from LSSSE data as well as national data collected by the American Bar Association and other sources that women comprise a slight majority of law students today.[87] Furthermore, over 60% of American law students are white, and under 10% are Black, Latinx, Asian American, or multiracial, while fewer than 1% are Native American, as shown in Figure 1. Roughly 28% are first-generation students,

83. A link to the survey and information about it can be found at *LSSSE Survey*, LSSSE, http://lssse.indiana.edu/about-lssse-surveys/ [https://perma.cc/5CPX-HAB6].

84. *See by the Numbers: Class of 2022*, UCI LAW (Oct. 5, 2019), https://www.law.uci.edu/admission/publications/pdfs/htmlversions/bythenumbers2022.html [https:// perma.cc/9JER-7W9R] ("UCI Law students rate their overall educational experience as 'Excellent,' and report developing clearer career goals and acquiring job-related knowledge at a significantly better rate than the national average (Law School Survey of Student Engagement—LSSSE)."); RTI INT'L, EVALUATION OF ELON UNIVERSITY SCHOOL OF LAW 2.5-YEAR CURRICULUM 5–6 (2019), https://www.elon.edu/u/news/wp-content/uploads/sites/74/2019/12/RTI-Final-Report-with-Executive-Summary.pdf [https://perma.cc/UFS6-CE3K].

85. The 2019 LSSSE Annual Survey is online. *See* LAW SCH. SURV. OF STUDENT ENGAGEMENT, US SURVEY 2019 (2019), https://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-US-Survey-2019.pdf. [https://perma.cc/Z3PW-ERNA].

86. The figures and tables in this Article are derived from data on file with LSSSE.

87. Jakki Petzold, *LSSSE Demographic Characteristics Reflect the U.S. Law Student Population*, LSSSE INSIGHTS BLOG (Nov. 6, 2018), https://lssse.indiana.edu/blog/lssse-demographic-characteristics-reflect-the-u-s-law-student-population/ [https://perma.cc/75Q4-XHDT].

with neither parent holding a bachelor's degree, and 44% are 23–25 years old (while an additional 31% are between the ages of 26 and 30).[88]

Although LSSSE did not yet collect data when *Bakke* was decided in 1978, almost two decades of data do reveal changes over time that demand a similarly evolving affirmative action policy rather than reliance on a forty-year-old relic. LSSSE data indicate that there has been an increase in the percentage of students of color enrolling in law school over the past fifteen years, with 17% in 2004 compared to 29% in 2019.[89] Correspondingly, Figure 1 also shows that the percentage of white students dropped from 77% to 69% over fifteen years.[90] A deeper look at the intersection of race and gender ("raceXgender") reveals that gains are not equal across groups.[91] Black men climbed from comprising only 3% of all law students in 2004 to 6% in 2019; Black women saw more modest gains though they had already captured a larger share, rising from 7% to 10% over the same fifteen-year period.[92] Those changes in diversity suggest that affirmative action has succeeded in enrolling more students of color, especially Black students; they also make clear that contemporary law schools are significantly different than what the *Bakke* Court envisioned over forty years ago when it laid out procedures for the constitutionally sanctioned affirmative action policies that law schools still follow today.

88. These and other analyses can be performed by anyone in the general public with the click of a button using the LSSSE online Public Reporting Tool, "a robust, interactive data analytics tool that provides access to aggregate LSSSE data." *LSSSE Public Reporting Tool*, LSSSE, https://lssse.indiana.edu/advanis/ [https://perma.cc/4ZXC-W6WJ].

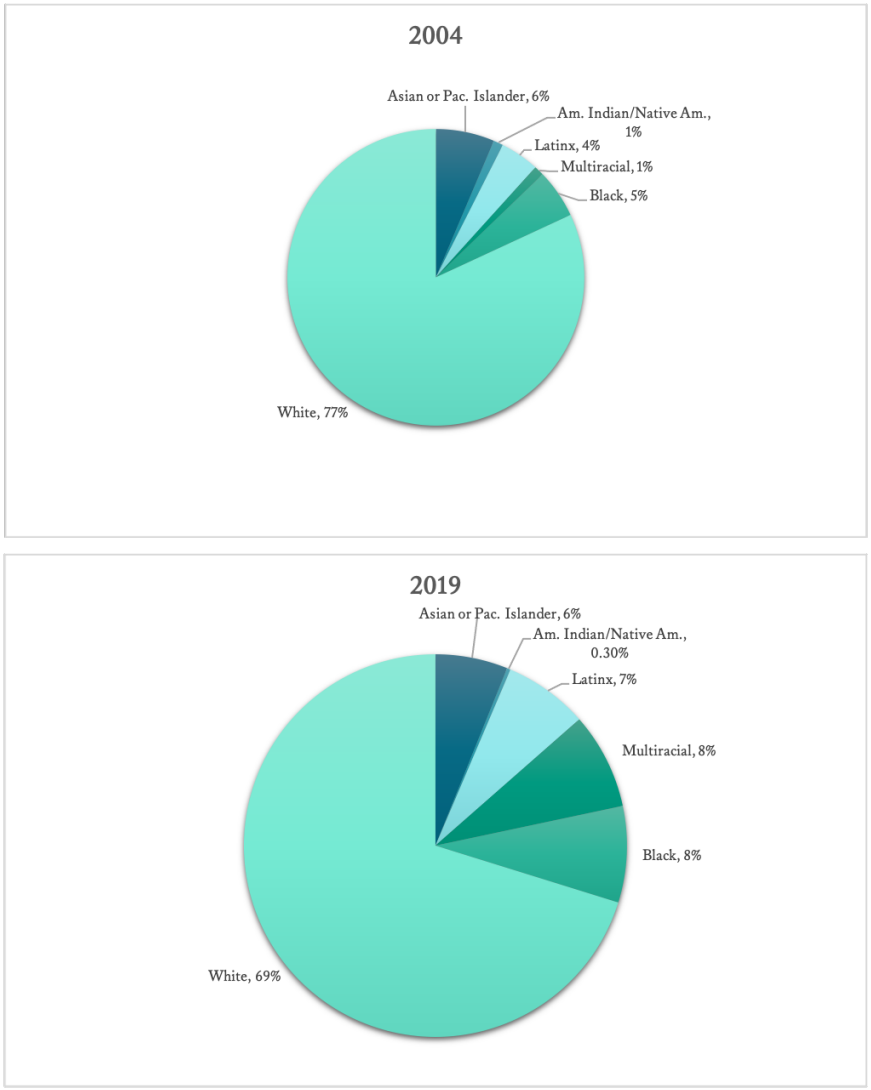
89. *See also* DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION, *supra* note 5, at 7.

90. *See also id.*

91. The concept of raceXgender refers to "the compound effects often caused by holding multiple devalued identity characteristics, namely the intersection of race and gender." MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 8 (2019) [hereinafter DEO, UNEQUAL PROFESSION].

92. DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION, *supra* note 5, at 7.

Figure 1. Race/Ethnic Background of Law Students, by Year (LSSSE 2019)



In addition to sharing individualized data with partner schools, LSSSE staff analyze and share aggregate national data so schools can place their law students' experiences in context. Furthermore, LSSSE staff craft Annual Reports that reflect on as well as influence current trends in legal education.

Recent reports have focused on debt loads and scholarships,[93] career preferences and expectations,[94] the quality of various relationships in law school,[95] the cost of women's success,[96] diversity and inclusion,[97] and longitudinal trends in legal education.[98] Additionally, the LSSSE Insights Blog provides a quick glimpse into various points of interest involving legal education—everything from the benefits of participation in enrichment activities to how the overall composition of LSSSE participants mirrors other national data on law students.[99] The Blog also showcases monthly guest authors, including prominent legal education researchers highlighting how LSSSE data is featured in their work,[100] emerging scholars discussing their partnerships with LSSSE,[101] and administrators and other leaders sharing their perspectives on the importance of relying on LSSSE data.[102]

93. AARON N. TAYLOR & CHAD CHRISTENSEN, LAW SCH. SURV. OF STUDENT ENGAGEMENT, LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY 6 (2017), http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-2016-Annual-Report-1.pdf [https://perma.cc/2G2P-47VG].

94. AARON N. TAYLOR, MEERA E. DEO & CHAD CHRISTENSEN, LAW SCH. SURV. OF STUDENT ENGAGEMENT, PREFERENCES AND EXPECTATIONS FOR FUTURE EMPLOYMENT 4 (2018) [hereinafter TAYLOR ET AL., PREFERENCES AND EXPECTATIONS], http://lssse.indiana.edu/wp-content/uploads/2015/12/2017-Annual-Survey-Results.pdf [https://perma.cc/AE66-TXCV].

95. CHAD CHRISTENSEN & MEERA E. DEO, LAW SCH. SURV. OF STUDENT ENGAGEMENT, RELATIONSHIPS MATTER 3 (2019), http://lssse.indiana.edu/wp-content/uploads/2015/12/Relationships-Matter.pdf [https://perma.cc/8TPX-UM37].

96. MEERA E. DEO & CHAD CHRISTENSEN, LAW SCH. SURV. OF STUDENT ENGAGEMENT, THE COST OF WOMEN'S SUCCESS 3 (2019) [hereinafter DEO & CHRISTENSEN, THE COST OF WOMEN'S SUCCESS], http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-AnnualSurvey-Gender-Final.pdf [https://perma.cc/294A-NZNC].

97. DEO & CHRISTENSEN, DIVERSITY & EXCLUSION, *supra* note 6, at 6.

98. *See generally id.* (comparing trends in law student experiences over time).

99. *Blog*, LSSSE, http://lssse.indiana.edu/category/blog/ [https://perma.cc/H6TM-UYCZ].

100. See, for example, a guest post by Indiana University Maurer School of Law Professor Victor Quintanilla on his work with the state bar of California to consider psychosocial predictors of bar success using LSSSE data. Victor D. Quintanilla, *A LSSSE Collaboration on the Role of Belonging in Law School Experience and Performance*, LSSSE INSIGHTS BLOG (Jan. 25, 2019), http://lssse.indiana.edu/blog/role-of-belonging-in-law-school-experience-and-performance/ [https://perma.cc/795T-HT5U]. Jerry Organ, another guest blogger, shares his research on learning outcomes. Jerry Organ, *LSSSE as a Key Tool To Support the Learning Outcomes Enterprise*, LSSSE INSIGHTS BLOG (Mar. 28, 2019), https://lssse.indiana.edu/blog/guest-post-lssse-as-a-key-tool-to-support-the-learning-outcomes-enterprise [https://perma.cc/TAQ4-6GGH].

101. *See, e.g.*, Elizabeth Bodamer, *Antecedent Experiences Affecting Belonging in Law School*, LSSSE INSIGHTS BLOG (Feb. 25, 2019), http://lssse.indiana.edu/blog/guest-post-antecedent-experiences-affecting-belonging-in-law-school/ [https://perma.cc/CY5E-MMG]; *see also* Aryssa Ham, *Public Service Intent Among Asian American Law Students*, LSSSE INSIGHTS BLOG (Feb. 12, 2020), https://lssse.indiana.edu/blog/guest-post-lssse-data-illustrates-public-service-intent-among-asian-american-law-students/ [https://perma.cc/N3R5-8JGQ].

102. See, for example, a guest post by American University Washington College of Law Dean Camille Nelson on using LSSSE data to improve the student experience. Camille A. Nelson, *Towards Data-Driven "Deaning,"* LSSSE INSIGHTS BLOG (Aug. 22, 2019), http://lssse.indiana.edu/blog/guest-post-towards-data-driven-deaning/ [https://perma.cc/64U3-WMJ4]; Leah Teague, *What LSSSE Data Can Teach Us About Developing Our Law Students for Influence and Impact as Leaders*, LSSSE INSIGHTS

Much of the scholarship and other publications utilizing LSSSE data incorporate analyses of both demographic and experiential questions, allowing for comparison of groups from different backgrounds. Some researchers have investigated how debt load varies by race, by gender, and by raceXgender—ultimately recognizing that students of color, women, and especially Black women and Latinas carry a higher debt burden than their peers.[103] Other research has delved into diversity within racial groups, investigating, for instance, how the successes of particular Asian American populations may mask ongoing challenges and limitations for others within the Asian American umbrella.[104] Still others have considered how the experiences of students who are the first in their families to attend college or law school also tend to differ from those whose parents are lawyers.[105]

Comparing groups with different background characteristics gives administrators, policymakers, and others interested in improving the law student experience an opportunity to observe various trends that may be unique to particular groups of students, often those who are most in need of individualized support. It also provides an opportunity to review how current affirmative action policies focused purely on educational diversity to admit students are not yielding the expected benefits or maximizing success without additional attention given to issues of equity and inclusion.

B. *Empirically Measuring Student Differences*

This Article uses demographic data to review how students with different identity characteristics experience law school. This reveals, first, whether racial diversity matters—in the sense that it may result in different experiences for students from different backgrounds. Second, this analysis investigates who is in law school and how closely this resembles the educational diversity that affirmative action purports to promote. Furthermore, the data suggest that as we near the end of affirmative action, it is even more imperative for educational

BLOG (Dec. 19, 2019), https://lssse.indiana.edu/blog/guest-post-what-lssse-data-can-teach-us-about-developing-our-law-students-for-influence-and-impact-as-leaders/ [https://perma.cc/2JDF-WJK8].

103. *See* TAYLOR ET AL., PREFERENCES AND EXPECTATIONS, *supra* note 94, at 14–15; DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION, *supra* note 5, at 10–11; *see also* Christopher J. Ryan, Jr., *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, 2021 U. ILL. L. REV. 97, 103–06 (2021).

104. *See generally* AARON N. TAYLOR, F.N. MUSTAFAA & CHAD CHRISTENSEN, LAW SCH. SURV. OF STUDENT ENGAGEMENT, DIVERSITY WITHIN DIVERSITY: THE VARIED EXPERIENCES OF ASIAN AND ASIAN AMERICAN LAW STUDENTS (2017) [hereinafter TAYLOR ET AL., DIVERSITY WITHIN DIVERSITY], http://lssse.indiana.edu/wp-content/uploads/2015/12/Diversity-within-Diversity.pdf [https://perma.cc/5DY9-85XJ] (reporting the vast disparities in socioeconomic and educational attainment among Asian subgroups).

105. Many publications document the experiences of students who are the first in their families to attend college or law school. For one example, see DEO & CHRISTENSEN, THE COST OF WOMEN'S SUCCESS, *supra* note 96, at 7.

diversity to link directly to equity and inclusion; attending to all three will yield the best results for legal education.

1. Multiracial Students

Over the past twenty years in American society, it has become increasingly common for people to identify as belonging to two or more racial or ethnic groups. The 2000 U.S. Census, which for the first time gave participants the option of selecting more than one racial category, found that "roughly 6.8 million Americans (2.4% of the U.S. population) were multiracial."[106] By 2010, the U.S. Census documented that people who are multiracial comprised 2.9% of the population, and by 2015 a Pew Research study found that number had grown to 6.9%.[107] Like other pan-ethnic groups, multiracial people cannot be shown to have one uniform, universal, or set experience. They themselves come from various backgrounds—a potential combination of Black, white, Asian American, Latinx, Native American, Middle Eastern, and any other racial or ethnic group. What multiracial people who are white and Asian American experience may be quite different from those who are Black and Latinx, with variations even within groups based on skin color, hair texture, language usage, class background, and more.[108]

Nevertheless, there are some common experiences between multiracial individuals, especially when we consider their law school trajectory and perspectives. Often, the experiences of multiracial students are different from white students but also different from other students of color. Like their heritage, the multiracial experience is a combination of different backgrounds, often falling somewhere between those of other people of color and whites.

Student debt in law school illuminates this variation. As shown in Table 1, a full 28% of Black and Latinx law students accrue over $160,000 in debt to attend law school, as compared to just 13% of white students who have borrowed the same amount. Clearly this reveals wide debt disparities between white students on the one hand and Black/Latinx students on the other, reflecting and

106. Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2440 (citing NICHOLAS A. JONES & JUNGMIWHA BULLOCK, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2010, at 5 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf [https://perma.cc/H225-V6WP]).

107. NICHOLAS A. JONES & JUNGMIWHA BULLOCK, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2010, at 5 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf [https://perma.cc/H225-V6WP]; KIM PARKER, JULIANA MENASCE HOROWITZ, RICH MORIN & MARK HUGO LOPEZ, PEW RSCH. CTR., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 10 (2015), https://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/ [https://perma.cc/4RBJ-FTRQ (staff-uploaded archive)].

108. *See generally* TANYA KATERÍ HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION (2018) (exploring the experiences of multiracial people and the racial discrimination they face).

amplifying larger societal inequities.[109] Debt levels of multiracial law students are in between white students and Black/Latinx, with 21% borrowing over $160,000.

Table 1. Expected Debt at Law School Graduation, by Race (LSSSE 2018)

	More than $60,000	More than $100,000	More than $160,000
Am. Indian/Native Am.	75%	54%	28%
Asian Am.	56%	41%	19%
Black	82%	59%	28%
Latinx	79%	60%	28%
Native Hawaiian/Pac. Islander	76%	67%	33%
White	58%	35%	13%
Other	66%	45%	21%
Multiracial	69%	47%	21%

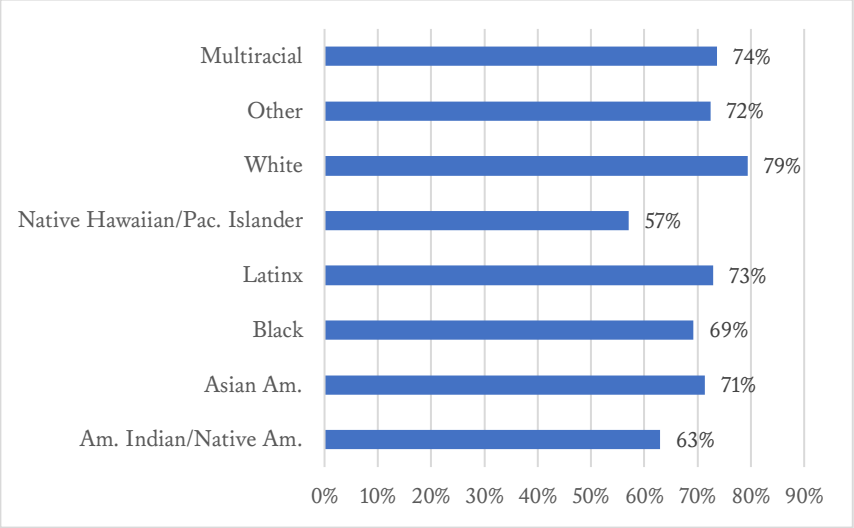
A more qualitative measure—characterizations of their interactions with fellow students—is also instructive in demonstrating the experiences of multiracial students as compared to their classmates. When asked to rate the quality of interactions with fellow law students on a scale of 1 to 7, with 1 referencing "unfriendly" peers and a "sense of alienation" and 7 signaling "friendly" classmates fostering a "sense of belonging," white students are more likely than any other racial/ethnic group to rank classmates positively (as a 5 or higher). Figure 2 shows that a full 79% of white students report positive relationships with peers compared to 63% of American Indian or Alaska Native students, 69% of Black students, and 71% of Asian American students. Multiracial students—with 74% rating the quality of their interaction with classmates at a 5 or above—again fall in between the students of color who are more alienated and the white students who have more of a sense of belonging with classmates.

109. *See generally* BRENDAN O'FLAHERTY, THE ECONOMICS OF RACE IN THE UNITED STATES (2015) (analyzing socioeconomic status by intersections of race, ethnicity, and gender); U.S. BUREAU OF LAB. STAT., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2017 (2018), https://www.bls.gov/opub/reports/race-and-ethnicity/2017/pdf/home.pdf [https://perma.cc/Z4QR-HSLL] (comparing by race unemployment rate, education attainment, industry, and earnings).

Table 2. Quality of Interactions with Classmates, by Race (LSSSE 2018)

	Unfriendly, unsupportive, sense of alienation					Friendly, supportive, sense of belonging	
	1	2	3	4	5	6	7
Am. Indian/Native Am.	12%	7%	7%	12%	23%	16%	23%
Asian Am.	2%	5%	7%	15%	23%	22%	26%
Black	2%	5%	9%	16%	19%	21%	29%
Latinx	2%	4%	8%	13%	19%	21%	33%
Native Hawaiian/Pac. Islander	5%	10%	14%	14%	10%	19%	29%
White	1%	4%	6%	10%	19%	28%	32%
Other	3%	7%	7%	11%	18%	21%	34%
Multiracial	3%	4%	7%	12%	20%	26%	28%

Figure 2. Positive Interactions with Classmates, by Race (LSSSE 2018)



Thus while the multiracial experience is salient in law school, it is not specified within affirmative action policies or programming. Multiracial applicants and students are virtually invisible when it comes to considering affirmative action or educational diversity specifically. They are not noted in pleadings or court findings, and are rarely mentioned in handbooks or policies. Nevertheless, their experience should be validated, and they should "count" for

affirmative action purposes. Based on the data presented here and elsewhere, they clearly have unique perspectives even within the student of color umbrella—even assuming they identify as students of color. Although multiracial students are rarely singled out as a group in this context, they clearly could contribute to the "robust exchange of ideas" that the Court envisioned would result from affirmative action efforts.[110] Additionally, few schools look beyond diversity itself to support multiracial students outright when it comes to equity or inclusion efforts, though their unique experiences suggest that what works for white students or for other students of color with regard to diversity, equity, and inclusion may not have the same effects for multiracial students.

2. Diversity Beneath the "Student of Color" Umbrella

As evidenced by the example of students from multiracial backgrounds, students of color as a whole do not share uniform experiences. Instead, there is significant variation between students of color from different racial and ethnic backgrounds. Many schools today use the "student of color" moniker to refer to any nonwhite student; the "student of color" term includes students who identify as Black, Latinx, Asian American, Native American, multiracial, and those from other nonwhite racial backgrounds.[111] While students of color share similarities, especially as compared to their white classmates, their experiences also vary widely based on their specific racial/ethnic backgrounds.[112] Students of color from particular racial groups may even have more in common with their white classmates in certain instances than with other students of color. For purposes of this Article, we can differentiate between Black and Asian American students using their responses to the LSSSE Survey.

There are certainly ways in which students of color have similar experiences in law school. In fact, students have some similar experiences regardless of their racial or ethnic background. For instance, Table 3 shows that overall satisfaction rates among law students are roughly parallel regardless of racial background, as all groups report high levels of satisfaction with their law school experience; however, white students indicate higher satisfaction rates than any other group. While a full 85% of whites report their overall law school experience as "good" or "excellent," the majority of law students who are Asian American (81%), Black (77%), Latinx (81%) and multiracial (81%) agree.

110. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

111. Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 124 (2021) [hereinafter Deo, *Why BIPOC Fails*].

112. For more on the benefits of using the "people of color" moniker (especially as compared to the term "BIPOC" and in comparison to whites) as well as the importance of disaggregating between communities of color, see generally Meera E. Deo, Beyond BIPOC (Aug. 15, 2021) (unpublished manuscript) (on file with the North Carolina Law Review) [hereinafter Deo, Beyond BIPOC].

Table 3. Overall Satisfaction with Law School, by Race (LSSSE 2018)

	Poor	Fair	Good	Excellent
Am. Indian/Native Am.	5%	19%	54%	23%
Asian Am.	4%	16%	52%	29%
Black	3%	19%	49%	28%
Latinx	4%	15%	48%	33%
Native Hawaiian/Pac. Islander	0%	24%	29%	48%
White	3%	13%	46%	39%
Other	4%	17%	46%	34%
Multiracial	4%	16%	48%	33%

There are also instances where Asian Americans and whites have similar experiences—ones that are quite different from those of Black and Latinx students. As shown in Table 4, the former are less likely to utilize financial aid services on campus, with 67% of Asian Americans and 70% of whites utilizing these services, compared to significantly higher percentages of Black (85%) and Latinx (83%) students. Students identifying as multiracial again fall between whites and other students of color, with 77% utilizing financial aid on campus.

Table 4. Use Financial Aid Services on Campus, by Race (LSSSE 2018)

	Not used	Used
Am. Indian/Native Am.	12%	88%
Asian Am.	33%	67%
Black	15%	85%
Latinx	17%	83%
Native Hawaiian/Pac. Islander	29%	71%
White	30%	70%
Other	25%	75%
Multiracial	23%	77%

A deeper look reveals a reality of difference beyond some superficial similarities. When we consider law-related jobs that students undertake while in law school, students initially appear to have similar experiences regardless of their racial background. Black and Latinx students (22%) are as likely as multiracial (21%) and white students (21%) to work more than ten hours per week during law school in a job related to the law, with Asian Americans only slightly less likely (17%) to do so.

Table 5. Work for Pay in a Legal Job, by Race (LSSSE 2018)

	0 hrs/wk	1–5 hrs/wk	6–10 hrs/wk	>10 hrs/wk
Am. Indian/Native Am.	79%	5%	2%	14%
Asian Am.	72%	5%	7%	17%
Black	69%	4%	6%	22%
Latinx	69%	4%	5%	22%
Native Hawaiian/Pac. Islander	48%	5%	10%	38%
White	69%	5%	6%	21%
Other	69%	4%	6%	21%
Multiracial	68%	5%	7%	21%

Yet jobs that are *related* to the law tell only part of the story. When we consider students working in non-law-related jobs there are clear racial/ethnic disparities, even within student of color communities. The data follow somewhat expected outcomes when considering that Black students are more likely to be first-generation college students,[113] rely on financial aid,[114] and seek to supplement their law school loans with money earned at work even in a job unrelated to the law.[115] Thus, almost a quarter (23%) of Black law students nationwide work more than ten hours per week at jobs unrelated to their future legal careers, compared to only 13% of whites and 10% of Asian Americans.

113. *See supra* note 88 and accompanying text.
114. *See supra* Table 4.
115. *See infra* Table 6.

Table 6. Work for Pay in a Non-Legal Job, by Race (LSSSE 2018)

	0 hrs/wk	1–5 hrs/wk	6–10 hrs/wk	>10 hrs/wk
Am. Indian/Native Am.	69%	12%	2%	17%
Asian Am.	79%	5%	5%	10%
Black	65%	6%	6%	23%
Latinx	76%	6%	5%	14%
Native Hawaiian/Pac. Islander	57%	5%	10%	29%
White	76%	6%	5%	13%
Other	75%	5%	5%	15%
Multiracial	75%	7%	5%	12%

The experience of working while in law school, seeking help navigating financial aid, and even the slight differences in overall satisfaction rates tell a compelling story when we consider how students might share their unique experiences in the classroom context. The *Grutter* Court anticipated that "classroom discussion [would be] livelier, more spirited, and simply more enlightening and interesting" with students from "the greatest possible variety of backgrounds."[116] This should include distinct groups of students of color—from Asian American students to Black students to multiracial students.

Clearly, separate racial/ethnic groups within the student of color umbrella are considered in affirmative action programming, though schools are rarely transparent about how these processes work. The differing experiences of various student of color groups also mean that their equity needs and inclusion expectations will be different from one another. In fact, LSSSE publications have shown significant racial differences in the student experience, even between students of color, when considering topics as far-reaching as student development of antidiscrimination tools and the level of stigma they face on campus.[117] Yet schools tend to lump all students—and especially students of color—together in a one-size-fits-all inclusion initiative, assuming they go beyond diversity at all.[118]

116. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001)).

117. DEO & CHRISTENSEN, DIVERSITY & EXCLUSION, *supra* note 6, at 10–14.

118. Using community-specific language is especially critical in circumstances where aggregating them into one group would obscure population-specific variations. *See* Deo, *Why BIPOC Fails*, *supra* note 111, at 126.

3. Intra-Racial Diversity

Just as there is diversity within the broad community of students of color, there is also diversity even within groups that are generally considered one racial or ethnic entity. The Asian American community is a case in point when considering pan-ethnicity.[119] Not all Asian Americans are the same or have the same attitudes, behaviors, or outcomes; this is true whether considering their experiences in law school or in American society more generally. A long history of discrimination in the United States created the "Asian American" label and bound members together for mutual social and political benefits.[120] Yet there is significant variation even with the umbrella group of Asian Americans, which includes "a diverse population with over 50 ethnic subgroups, 100 languages, and a broad range of socio-historical, cultural, religious, and political experiences."[121] There are vast differences with regard to economic stability, family resources, educational background, professional status, and more.[122]

These differences carry over into law school, beginning with who applies, gains admission, and enrolls. Those with ancestors from China, India, or Korea are much more heavily represented in law school than those who identify as Vietnamese or Thai.[123] The representation of particular Asian ethnic groups and absence of others persists even when considering their overall population percentages in the United States.[124] One previous LSSSE publication

119. *See* YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY 19–42 (1992) (recounting the beginning of Asian American pan-ethnicity in the United States).

120. *See* ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY 3 (2015); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 502 (1989).

121. Brief for Asian American Legal Defense & Education Fund et al. as Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment at 6, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB), 2020 WL 3169412; *see also* ESPIRITU, *supra* note 119, at 19.

122. CAMPAIGN FOR COLL. OPPORTUNITY, THE STATE OF HIGHER EDUCATION IN CALIFORNIA—ASIAN AMERICAN, NATIVE HAWAIIAN, PACIFIC ISLANDER 22 (2015), https://collegecampaign.org/wp-content/uploads/2015/09/2015-State-of-Higher-Education_AANHPI2.pdf [https://perma.cc/V8UR-4P3H]; NAT'L COMM'N ON ASIAN AM. & PAC. ISLANDER RSCH. EDUC., THE RELEVANCE OF ASIAN AMERICANS & PACIFIC ISLANDERS IN THE COLLEGE COMPLETION AGENDA 8 (2011), https://apiascholars.org/wp-content/uploads/2019/04/2011_CARE_Report.pdf [https://perma.cc/MNQ2-QGRL]; Brief for Asian American Legal Defense & Education Fund et al. as Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 121, at 5–6.

123. The Asian American law student umbrella includes students who have ancestors from China (24%), India (21%), Korea (16%), Vietnam (5%), Thailand (1%), and dozens of other countries. A table of Asian American law students by ethnicity is available at Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2446 tbl.5.

124. For example, as of 2019, the number of people in the United States with ancestors from Korea (1.9 million) was slightly lower than those with ancestors from Vietnam (2.2 million), although 2018 LSSSE data reflected significantly more Korean American law students (roughly 175) than Vietnamese American law students (roughly 50). Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr.

specifically investigated diversity within the Asian American community, finding vast differences by ethnicity when considering socioeconomic background, parental education, immigrant status, LSAT score, scholarships, student loan debt, and a variety of student experiences.[125] That report ultimately concluded, "The experiences of Asian [American] subgroups within the LSSSE pool varied, belying the prevailing assumptions about the Asian monolith."[126] This Article builds on those differences to reveal variation between Asian Americans as relevant to affirmative action, educational diversity, equity, and inclusion.

Along with variations in *structural diversity* (specifically, numeric representation) of Asian American law students, there are variations with regard to their qualitative experience in law school.[127] In the LSSSE survey, students are asked whether they have worked "on a legal research project with a faculty member outside of course or program requirements"; the Asian American groups most likely to note that they either planned to do so or had already done so were ethnically Chinese (44%), Japanese (43%), or Asian Indian (43%), as compared to only 27% of Thai students, as shown in Table 7. Similarly, when asked how much the law school helped them "cope with . . . non-academic responsibilities" including work and family, Thai (54%) students were much more appreciative than students from other Asian ethnic groups (likely because they have more nonacademic obligations to contend with, including more time caring for dependents living in the household); in comparison, only 16% of Taiwanese and 23% of Korean students receive significant support from the school on this metric, as shown in Table 8.[128]

29, 2021), https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-koreans-in-the-u-s/ [https://perma.cc/TNL7 -AQKK]; Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2446 tbl.5.

125. TAYLOR ET AL., DIVERSITY WITHIN DIVERSITY, *supra* note 104, at 6–13.

126. *Id.* at 12.

127. Structural diversity refers to "numerical representation of individuals with diverse backgrounds." Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 7 n.21 (2010).

128. Only half (50%) of all Thai students spend *no* time caring for dependents in their household, compared to 67% of Korean and 74% of Taiwanese students.

Table 7. Collaborate with Faculty, by Asian Ethnicity (LSSSE 2018)

	Undecided	Do not plan to do	Plan to do	Done
Chinese	25%	32%	32%	12%
Japanese	19%	38%	24%	19%
Korean	25%	35%	25%	15%
Asian Indian	25%	32%	23%	20%
Taiwanese	16%	45%	29%	10%
Thai	18%	55%	9%	18%
Vietnamese	18%	43%	31%	8%
Other Asian	22%	31%	28%	19%
Multiethnic Asian	24%	32%	31%	13%

Table 8. School Support for Non-Academic Responsibilities, by Asian Ethnicity (LSSSE 2018)

	Very little	Some	Quite a bit	Very much
Chinese	28%	42%	18%	12%
Japanese	29%	44%	18%	8%
Korean	33%	44%	14%	9%
Asian Indian	32%	40%	19%	10%
Taiwanese	32%	52%	13%	3%
Thai	9%	36%	27%	27%
Vietnamese	34%	30%	28%	8%
Other Asian	35%	40%	14%	11%
Multiethnic Asian	33%	38%	20%	10%

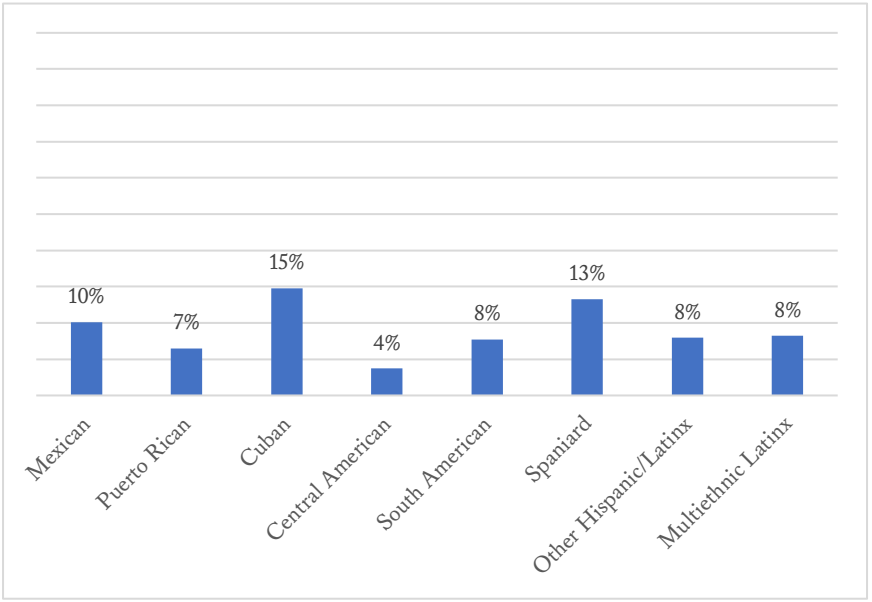
There is similar ethnic diversity within the Latinx community, which is also comprised of various subgroups. Though they are often considered one umbrella group, and have drawn political leverage from banding together, the Latinx community is comprised of people with ancestors from North America, Central America, South America, the Caribbean, Europe, and elsewhere, with distinct legal protections and challenges.[129] There are increasing numbers of Mexican law students today, but they remain underrepresented compared to

129. *See generally* George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997) (discussing the particular challenges Mexican Americans face in the legal race classification process).

their population statistics while those with ancestors from Cuba are better represented in law schools.[130] Latinx students are another pan-ethnic group with clear differences between populations once we disaggregate the data.

Debt is one area where there are obvious differences between subgroups falling under the Latinx umbrella. The national poverty rates for Mexicans are much higher than that of Cubans, for example, who have "the lowest poverty rate of all Hispanics"; thus, it may be no surprise to see in Figure 3 more significant debt burdens carried by students with ancestors from Mexico than those from Cuba.[131] Similarly, as Spanish Americans have higher educational outcomes and greater wealth than Americans with roots in Central America, significantly more from the former group than the latter graduate with no law school debt at all.

Figure 3. Students with No Law School Debt, by Latinx Ethnicity (LSSSE 2018)



130. Of roughly 50 million Hispanics in the United States, more than 31 million (62%) are Mexican while only about 1.7 million (3.4%) are from Cuba. Emily Deruy, *New Report Breaks Down Poverty Levels Among Latinos*, ABC NEWS (Feb. 21, 2013, 12:07 PM), https://abcnews.go.com/ABC_Univision/Politics/report-details-hispanic-poverty/story?id=18557721 [https://perma.cc/5BVF-VG4W]. While Mexican Americans comprise 45% of current Latinx law students, this is far below their population percentage of 62%; Cuban law students comprise 9.4% of Latinx law students (significantly higher than their 3.4% population percentage). For disaggregated percentages of Latinx law students, see Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2446 tbl.6.

131. Deruy, *supra* note 130.

Variations by ethnicity are not limited to debt loads or other outcomes directly associated with family socioeconomic circumstances. Within the Latinx community, those who traditionally face less discrimination based on ethnicity, skin color, and immigration status—namely, Cuban Americans and those with ancestors from Spain—are also most satisfied with the ways in which their schools encourage contact among students from different economic, social, sexual orientation, and racial or ethnic backgrounds. Thus, Table 9 shows that 66% of Spanish American and 63% of Cuban American students are satisfied with the ways in which their schools encourage contact among people from diverse backgrounds, a much higher percentage than those of Latinx students who identify as South American (42%) or Puerto Rican (48%).

Table 9. Satisfaction with School Encouragement of Diverse Contacts, by Latinx Ethnicity (LSSSE 2018)

	Rate of Satisfaction
Mexican	52%
Puerto Rican	48%
Cuban	63%
Central American	54%
South American	42%
Spaniard	66%
Other Hispanic or Latinx	48%
Multiethnic Latinx	57%

Pan-ethnic groups are not monolithic; yet affirmative action programs rarely carefully examine subgroups beneath the umbrella, some of which may be hidden by those in the majority.[132] Instead, Asian Americans are lumped together under the fallacy that they share the same experiences. Those in the Latinx community are also considered to share the same background, though they not only bring varying identities, languages, practices, and cultures into law school, they also have unique experiences during and after their law school careers. People from different ethnic groups beneath these umbrella categories

132. Deo, Beyond BIPOC, *supra* note 112, at 25–27.

will have unique experiences to share in the classroom and elsewhere on campus that will contribute to the "enhanced classroom dialogue and the lessening of racial isolation and stereotypes" that the Supreme Court expected to flow as natural benefits of educational diversity.[133] Affirmative action policies should take the diversity of the student of color experience and pan-ethnicity specifically into account. Rather than simply preferring, admitting, or reporting on "Asian American" or "Latinx" students, institutions should both rely on and share more ethnic-specific data on applicants and enrollees. Schools should also support the differing needs of these students—recognizing that equity for a Cuban American may mean something different than for a Puerto Rican—and work toward full inclusion for students from each of these groups.

4. Black Immigrants

An immigrant experience also creates different law school realities for students.[134] This is apparent when looking within particular communities, including the Black community. An immigrant experience is used to characterize those students who are immigrants themselves as well as those who are the children of at least one immigrant parent. LSSSE data show that roughly 71% of Black law students are nonimmigrants while 29% of Black law students are immigrants or the children of immigrants. Various similarities and differences in the Black law student community based on immigrant status are displayed in Table 10.

At first glance, both immigrant and nonimmigrant Black students have much in common. Roughly 78% of Black students have a strong sense of belonging at their law school, regardless of their immigrant background. The same percentage (66%) of Black students from immigrant and nonimmigrant backgrounds frequently engage in "serious conversations with students of a different race or ethnicity." Interestingly, even debt loads are relatively equal, with 77% of Black nonimmigrants owing over $60,000 (compared to 80% of Black immigrants), 55% owing more than $100,000 (compared to 56% of Black immigrants), 27% owing more than $160,000 (compared to 29% of Black immigrants), and 11% of each group carrying over $200,000 in educational debt.

Yet in spite of similarities with regard to relationships and debt load, differences emerge when we consider their relationships and interactions. Higher percentages of nonimmigrant Black students are satisfied with job search help (56%), financial aid advising (64%), and career counseling (66%) than Black students from immigrant backgrounds (50%, 57%, and 62%,

133. *Fisher I*, 507 U.S. 297, 308 (2013).

134. Others have investigated disparities in admissions between Black immigrants as compared to those who are the descendants of enslaved Americans. *See* Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1230–36 (2008).

respectively). Perhaps because of these and other interactions, nonimmigrant Black students also have overall satisfaction rates that are slightly higher (79%) than those of immigrant Black students (75%).

On the other hand, Black immigrant students clearly cultivate relationships with faculty and classmates in meaningful ways, even beyond their nonimmigrant Black peers. Black immigrants are slightly more likely than those who are not from immigrant backgrounds to be leaders of student organizations (63% vs. 59%), work on research projects with faculty (45% vs. 42%), and work with classmates outside of class to prepare assignments (38% vs. 34%).

Table 10. Attitudes, Behaviors, Debt, and Satisfaction of Black Law Students, by Immigrant Status (LSSSE 2019)

	Black Nonimmigrant	Black Immigrant
Strong sense of belonging	78%	78%
Serious conversations with diverse peers	66%	66%
Owe over $60k	77%	80%
Owe over $100k	55%	56%
Owe over $160k	27%	29%
Satisfied with job search help	56%	50%
Satisfied with financial aid advising	64%	57%
Satisfied with career counseling	66%	62%
Satisfied with law school overall	79%	75%
Student organization leaders (done or plan to do)	59%	63%
Conduct research with faculty (done or plan to do)	42%	45%
Work on assignments with peers outside class	34%	38%

The largest disparities between Black immigrant and Black nonimmigrant students relate to their personal lives and especially how they spend their nonacademic time. There is little difference with regard to the number of hours Black students work in a job related to the law, with 7% of Black nonimmigrant students and 5% of Black immigrant students spending more than thirty-five hours per week in these positions. A true disparity, however, is evident when we consider those who work more than thirty-five hours per week in a job that is *not* related to the law—which reflects a true need for the money associated with a paying, almost-full-time job as opposed to prestige, status, or networking that occurs in a law school job that is related to the law. A full 10% of all

nonimmigrant Black students work over thirty-five hours per week in a job that is not related to their educational or professional priorities in law, while only 5% of immigrant Black students do so. A higher percentage of nonimmigrant Black students (11%) than Black students who are immigrants (8%) also spend over thirty-five hours per week providing care to dependents.

In spite of these clear differences, conversations involving affirmative action rarely consider immigrant background. Policies also tend to ignore how the immigrant experience shapes attitudes, opinions, and behaviors—even though the Supreme Court supports educational diversity as a compelling state interest in part to inspire more engaging classroom conversations due to the wide variety of backgrounds it assumes will be represented.[135] Nevertheless, immigrant background tends to be ignored as a relevant identity characteristic, especially in terms of its coupling with race/ethnicity. Because students with an immigrant background also tend to have some different experiences than those without—even when they share a racial identity, as we have seen from the Black experience—equity and inclusion measures should also take immigrant background into consideration.

III. BUILDING ON DIVERSITY THROUGH EQUITY AND INCLUSION

This Article has contested whether we are maximizing the benefits of educational diversity because schools are not prioritizing the full range of applicants from diverse backgrounds; this is especially true because, as the data have shown, students of color from different racial and ethnic backgrounds have vastly different experiences while in law school. Using LSSSE data, we see many differences between groups when considering the realities of multiracial students compared to all others, as well as of Black students compared to Asian American students; there are even differences between ethnic groups within the Asian American and within the Latinx communities. Even those from what is often considered the same population—for instance, the Black community—have different experiences and attitudes depending on background characteristics such as immigrant identity.

Despite these significant variations, few affirmative action policies take differences between applicants of color into account. Most do not consider multiracial students at all; many lump statistics on students of color into one group; others fail to disaggregate by ethnicity, treating pan-ethnic groups as monolithic; and most do not recognize how an immigrant identity shapes experiences before, during, and after law school even from those within the same community. In addition to being stymied by these limitations, educational diversity has remained a concept tied to affirmative action with little attention given to its close cousins: equity and inclusion.

135. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

Given the affirmative action policies and the data on contemporary law students outlined above, it is clear that current programs do not fit the realities of present-day students. Now, with the end of affirmative action as we know it potentially around the corner, there is an opportunity to reconsider old policies and update them to reflect modern challenges, creating a constitutional and more effective means of achieving the same goals. This part proposes that while contemporary affirmative action policies continue to consider educational diversity for as long as courts allow, racial and ethnic groups should be treated as unique and separate in admissions decisions, and different communities should also receive customized attention for purposes of equity and inclusion.

A. *Missing Perspectives*

This section briefly outlines perspectives that have been missing from outdated affirmative action policies and suggests how to incorporate both contemporary racial realities and the lived experiences of modern applicants and students from diverse backgrounds.[136] First, multiracial students should not be aggregated within the broad student of color category. Instead, they should stand alone. The experiences of students who hail from two or more racial/ethnic backgrounds are unique and separate from those of students of color as a whole as well as from whites. As such, multiracial students should be respected as a separate group for affirmative action as well as educational diversity (and later equity and inclusion) purposes.

Second, different groups—even those standing together under the "people of color" banner—should be treated differently for purposes of affirmative action, diversity, equity, and inclusion. Counting and publishing data on "students of color" as one monolith generally conflates Asian American students with their Black peers—though the communities have vastly different backgrounds, disparate law school experiences, and separate needs when it comes to equity and inclusion on campus. Policies should therefore have specific goals tailored to different racial groups rather than aggregating them together as students of color.

Third, policies must become more nuanced and sophisticated in order to also reflect the reality of intra-racial diversity. Not all Asian American students are the same. If a school places goals or soft caps on Asian Americans as a group, it may ultimately admit and enroll a high number of Chinese, Indian, or Japanese American students who come from a completely different set of

136. While this Article shares particular perspectives that have been absent from contemporary affirmative action policies, the missed opportunities listed here are by no means an exhaustive list. For instance, policies could also take account of raceXgender, recognizing the ways in which the compound effects of racial identity combine with gender identity to create unique experiences for women of color that are separate from white women and men of color alike. *See, e.g.*, DEO, UNEQUAL PROFESSION, *supra* note 91, at 8.

experiences (often with greater resources) than those who could be their equally successful Thai, Vietnamese, and Cambodian American classmates. Similarly, Latinx students whose ancestors hail from Spain or Cuba will enjoy different law school circumstances than their peers whose family background is Mexican or Puerto Rican. Instead of thinking of them as monolithic groups, the individuality of each ethnic group should shine; the experiences of different students should help guide admissions efforts from the outset, as well as equity and inclusion efforts once students from diverse backgrounds enroll.

Fourth, the immigrant identity is a powerful one that should also be taken into consideration in admissions processes. Clearly, the immigrant experience is one that differentiates first-generation and second-generation immigrants from those without that proximate background.[137] Yet policies do not tend to include the immigrant identity as a relevant characteristic when considering applicants for law school admission. Even within the Black community, we see some similarities but also significant differences based on immigrant background. Affirmative action policies should take the immigrant experience into account in order to truly realize the goals of educational diversity; as an added benefit, doing so would also further the priorities of the Equal Protection Clause of the Fourteenth Amendment—ratified to produce equality for newly freed Black Americans and whose descendants even today may otherwise be excluded from admissions or lack full inclusion on campus.[138]

B. *The Power of the Trifecta*

How can law schools craft an admissions policy that is both constitutional and more effective? A modern affirmative action program should begin with the three touch points outlined above: continuing to rely on educational diversity, recognizing diversity within the student of color umbrella, and integrating equity and inclusion; taking these into account will facilitate the likelihood that admitted students from all backgrounds will not only survive but thrive. The best way to attain this goal is for schools to look beyond simple concepts of educational diversity to more firmly embrace the powerhouse trio of diversity, equity, and inclusion ("DEI").[139]

137. *See generally* ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION (2001) (providing insight into the experiences of second-generation immigrants in the United States).

138. For an excellent discussion of the textual origins and purpose of the Fourteenth Amendment, see generally Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237 (2017).

139. Belonging is another concept that could be included here and may be especially relevant for promoting success for students of color. *See* Elizabeth Bodamer, *Do I Belong Here? Examining Perceived Experiences of Bias, Stereotype Concerns, and Sense of Belonging in U.S. Law Schools*, 69 J. LEGAL EDUC. 455, 458–59 (2020).

1. Diversity

Diversity is "considered to be a characteristic of groups that refers to demographic differences among members"; as such, a diverse group is one comprised of individuals from different backgrounds.[140] There are many ways to define diversity in more detail. Some note that *structural diversity* refers to numerical representation specifically, while *interactional diversity* measures interactions between diverse groups and *classroom diversity* considers the participation of diverse voices in the classroom context.[141] Generally, in the context of higher education and law school admissions, diversity references an applicant's racial or ethnic background—though white women have been the primary beneficiaries of affirmative action policies, given the priority of gender diversity.[142]

Neither Justice Powell in *Bakke* nor subsequent Supreme Court decisions have provided a definition for educational diversity, though they have contributed to popular understandings of the term. Justice Powell noted that few law students "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," preferring instead a "robust" set of perspectives that could only be shared in a classroom composed of students from a variety of backgrounds.[143] In *Fisher I*, the Court added that striving for diversity is a laudable goal in part because doing so would lead not only to "enhanced classroom dialogue [but also to] the lessening of racial isolation and stereotypes."[144]

Both white women and people of color have comprised a greater share of law school enrollees in the past two decades.[145] As such, from a numerical perspective, there is currently greater racial/ethnic diversity as well as gender diversity among law schools nationwide than in the past, with more students of color enrolling in law school than at any point in history. Yet structural diversity alone cannot tell the full picture, as data from the previous part highlighting the diverse range of experiences of students from different backgrounds have

140. Quinetta M. Roberson, *Disentangling the Meanings of Diversity and Inclusion in Organizations*, 31 GRP. & ORG. MGMT. 212, 214 (2006). *See generally* JOSEPH E. MCGRATH, JENNIFER L. BERDAHL & HOLLY ARROW, TRAITS, EXPECTATIONS, CULTURE, AND CLOUT: THE DYNAMICS OF DIVERSITY IN WORK GROUPS (1995) (analyzing the impact of diversity within work groups).

141. Meera E. Deo, *The Promise of* Grutter*: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 82–84 (2011) [hereinafter Deo, *Promise of* Grutter].

142. Victoria M. Massie, *White Women Benefit Most from Affirmative Action—and Are Among Its Fiercest Opponents*, VOX (June 23, 2016, 12:00 PM), https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action [https://perma.cc/PZ25-CCE9 (staff-uploaded archive)].

143. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)); *id.* at 312 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

144. *Fisher I*, 507 U.S. 297, 308 (2013).

145. DEO ET AL., THE CHANGING LANDSCAPE OF LEGAL EDUCATION, *supra* note 5, at 7.

shown. Diversity must be coupled with both equity and inclusion to maximize its benefits.

2. Equity

Beyond diversity, we must also consider equity. The late feminist scholar Deborah Rhode made substantial theoretical and practical contributions to the literature involving gender equity specifically in legal education and the legal profession.[146] She catalogued the lack of numerical representation, decrying the low numbers of women and people of color among the ranks of lawyers.[147] Further, she noted how ongoing disparities in elite leadership roles, salary differentials, and career satisfaction served to maintain race and gender inequities at the most profitable and most powerful levels of legal practice.[148] Professor Rhode's research reveals a central tenet of equity, which goes beyond the numerical underpinnings of structural diversity to consider the more profound and powerful goals of justice and fairness. While *equality* suggests that all people should get the same thing, *equity* demands that each person gets what is fair.[149] Low levels of representation indicate low levels of structural diversity; low numbers coupled with the barriers that prevent white women and people of color from maximizing their potential as lawyers suggest injustice, unfairness, and inequity.

3. Inclusion

Inclusion is another critical piece of the puzzle, one that also depends on diversity as a necessary condition.[150] Inclusion refers to "a person's ability to contribute fully and effectively" to the endeavor they have joined.[151] Put differently, diversity occurs any time people of color or women have a foot in the door, sufficient to be counted as physically present, while inclusion means that these traditional outsiders are not only inside, but fully immersed and

146. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 29–35 (2000) (discussing the role of diversity in legal education). *See generally* Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871 (2014) [hereinafter Rhode, *Diversity and Gender*] (discussing diversity and inclusion in the legal profession); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011) (same).

147. Rhode, *Diversity and Gender*, *supra* note 146, at 872–74.

148. *Id.* at 872–75. These disparities persist today in legal practice in areas including boards of directors, executives, legal advisors, and financial advisors. Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. (forthcoming 2022) (manuscript at 3).

149. Merriam-Webster defines equity as "justice according to natural law or right" and adds, "*specifically*: freedom from bias or favoritism." *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity [https://perma.cc/5V47-PKPH] (emphasis added).

150. My previous empirical scholarship has shown that "while the admission of a critical mass of students is a *necessary* element to achieving the benefits of diversity, it is by no means *sufficient*." Deo, *Promise of* Grutter, *supra* note 141, at 65.

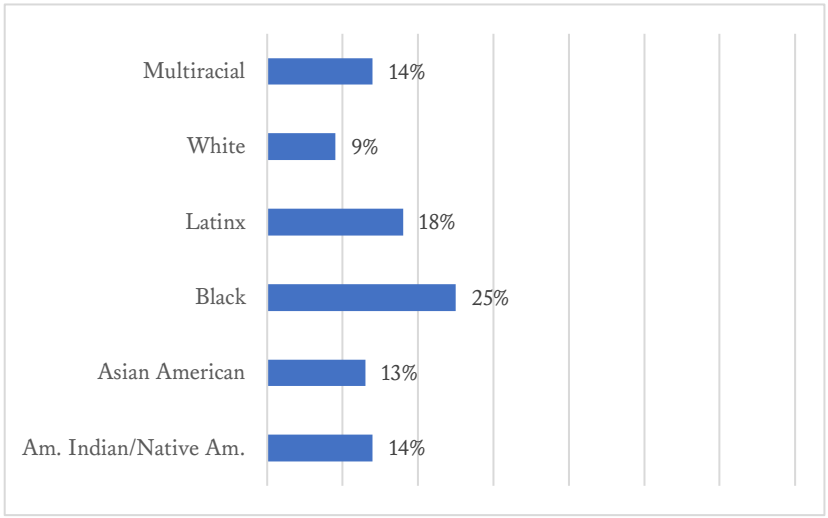
151. Roberson, *supra* note 140, at 215.

engaged. As diversity and inclusion expert Verna Myers explains, "Diversity is being invited to the party. Inclusion is being asked to dance."[152] Inclusion goes beyond diversity because, in the law school context, it emphasizes "the removal of barriers that block [students] from using the full range of their skills and competencies."[153]

C. *Prioritizing DEI in Legal Education*

In the context of legal education, we know that students from diverse backgrounds have joined law school in increasing proportions over the past decade. However, LSSSE data reveal that though they are numerically represented, students of color lack full inclusion. The 2020 LSSSE Annual Report, *Diversity & Exclusion*, revealed that in spite of their increasing numbers on campus, 25% of Black students and 18% of Latinx students strongly disagree with the statement, "I feel comfortable being myself at this institution."[154]

Figure 4. Students Who Strongly Disagree They Feel Comfortable Being Themselves on Campus, by Race (LSSSE 2020)



Similarly, although a higher percentage of them are present than ever before, only 21% of Native American students and Black students strongly agree

152. Laura Sherbin & Ripa Rashid, *Diversity Doesn't Stick Without Inclusion*, HARV. BUS. REV. (Feb. 1, 2017), https://hbr.org/2017/02/diversity-doesnt-stick-without-inclusion [https://perma.cc/L2AB-QWKP (dark archive)].

153. Roberson, *supra* note 140, at 213.

154. This compares to just 9% of white students. DEO & CHRISTENSEN, DIVERSITY & EXCLUSION, *supra* note 6, at 10.

that they feel they are "part of the community at this institution," while a full 34% of Black women students *disagree* with the statement.[155] Consistently across every racial group, women have a lower sense of belonging than men, with especially stark raceXgender disparities for Asian American, Black, and Latinx students, as shown in Figure 6.

Figure 5. Students Who Strongly Agree They Are Part of the Law School Community, by Race (LSSSE 2020)

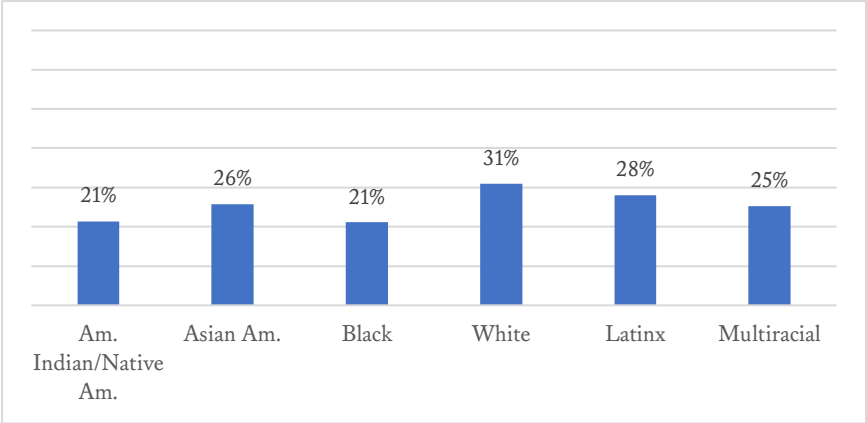
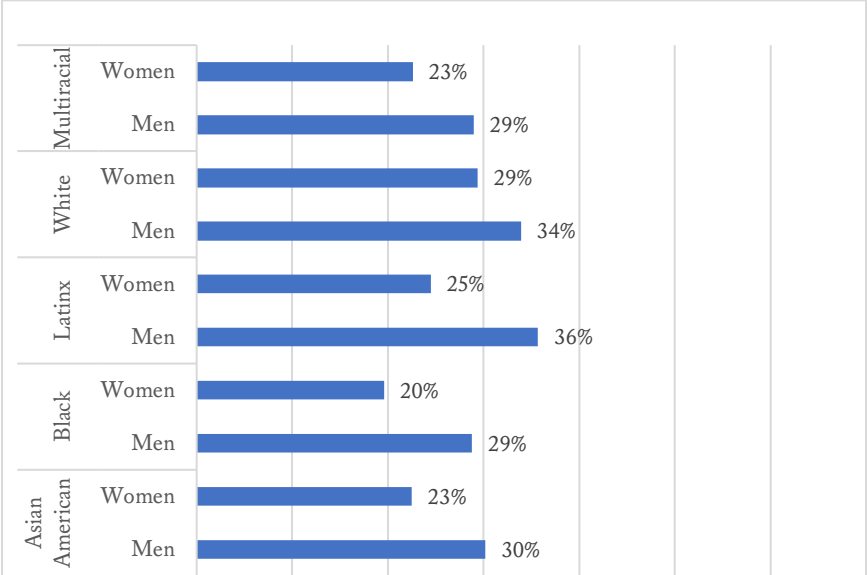


Figure 6. Students Who Strongly Agree They Are Part of the Law School Community, by raceXgender (LSSSE 2020)



155. *Id.* at 9.

Diversity, equity, and inclusion can be a powerful set of tools for a myriad of contexts. Together, they are especially useful as we near what may be the end of affirmative action. The courts have left advocates for racial justice with educational diversity as the sole constitutionally permissible rationale sufficient to support the use of race in admissions. Yet we do not have to rely on diversity alone; there are additional ways to not only increase meaningful diversity, but also bolster and support the students of color admitted through these efforts.

Current policies are relics of the past, relying on outdated models and conceptions of race to prepare future leaders for professional success. Instead, affirmative action programs must be modified and adapted to current times to better fit contemporary realities. Under current programs, students of color are admitted in part to supplement the education of their white classmates, expected to help educate their peers on matters of race and nonwhite perspectives while they get an education themselves.[156] Institutions of higher education continue to depend on a university model crafted in the 1970s to make decisions about admissions two decades into the new millennium. As we approach the end of affirmative action, we must make improvements so that it can be most effective in the years remaining, and perhaps continue in a new form into the future. The nuances of contemporary racial realities must be incorporated into affirmative action going forward.

Decoupling diversity from equity and inclusion does a further disservice to students of color—seemingly admitted only to add flavor to otherwise bland classrooms comprised primarily of whites and then left to languish rather than getting the support they need to maximize their participation, engagement, and retention.[157] If institutions seek to truly support students of color, not just to admit them to improve the educational experience of whites, they also must prioritize equity and inclusion.

156. Deo, *Empirically Derived Compelling State Interests*, *supra* note 9, at 706 ("Relying exclusively on educational diversity as a rationale for affirmative action is somewhat ironic: though most assume that students of color admitted through race-conscious policies are the (only) beneficiaries of affirmative action, the diversity rationale actually suggests that whites may be the primary beneficiaries. If the purpose of affirmative action is educational diversity, then applicants of color are given a 'plus' not because of their promise or potential or the assumption that they have overcome adversity or discrimination; rather, that 'plus' is for the purpose of improving the learning experience for all of the other admitted students.").

157. For more scholarship challenging educational diversity as problematic in its treatment of students of color, who are themselves seen as the primary beneficiaries of affirmative action despite legal reasoning that actually emphasizes the educational experience of white students, see Deo, *Affirmative Action Assumptions*, *supra* note 9, at 2421–22 n.75 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)).

CONCLUSION

Current affirmative action policies consider only diversity—the racial/ethnic and gender background of particular applicants and how these characteristics might contribute to classroom conversations and campus life. However, educational diversity cannot be divorced from contemporary racial realities. Affirmative action policies should consider the experiences of multiracial students, examine differences from within the "student of color" umbrella (for example, between Black and Asian American students), recognize pan-ethnic variances (for example, Vietnamese vs. Chinese), and appreciate how an immigrant background shapes identity and experience. Being aware of these differences provides the greatest likelihood that those who are admitted will contribute to the "livelier, more spirited, and simply more enlightening and interesting" classroom conversations the Court expects will accrue from schools utilizing affirmative action in furtherance of educational diversity.[158]

Furthermore, considering diversity in a vacuum prevents institutions of higher education from maximizing its benefits. The data presented in this Article make clear that while educational diversity may be the only currently acceptable rationale supporting affirmative action, schools that admit students of color simply because they expect they will contribute to a "robust exchange of ideas" are doing all students a disservice.[159]

Instead, institutions of higher learning should continue to rely on educational diversity for affirmative action purposes to adhere to constitutional guidelines, and should also apply equity and inclusion principles once students are on campus in order to maximize opportunities for participation, growth, and success.[160] Institutions promoting diversity, equity, and inclusion, and similar processes to admit and support students throughout their higher education careers are using programs that better fit the ideals of affirmative action as the Court has expressed them. By striving for equity and fully including students from different backgrounds in campus life, those very students are more likely to participate in classroom discussions, engage fully with classmates and others elsewhere on campus, and be more invested in their own academic and professional success.

158. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001)).

159. *Bakke*, 438 U.S. at 312 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

160. Schools seeking to maximize the educational benefits of admitting a diverse class as well as the academic and professional potential of students of color can also look beyond traditional DEI variables to consider engagement and belonging.