
Affirmative Action Assumptions

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INTRODUCTION

The landmark case of *Bakke v. UC Regents* established not only the jurisprudential foundation for affirmative action litigation, but also the factual record of relevant evidence when evaluating race-conscious admissions policies in higher education. Yet, the *Bakke* Court relied on various fictions and assumptions in its determination that educational diversity alone was a compelling state interest sufficient to justify affirmative action in university admissions when utilized in a narrowly tailored fashion.

In the forty years since *Bakke* was decided, much has changed. Affirmative action jurisprudence has developed further — still reliant on strict scrutiny, but with clarifications based on additional Supreme Court cases that have expounded on the issue. Facts have also changed with the times, as increasing numbers of students of color in higher education offer new realities and contexts associated with their enrollment. Perhaps most importantly, social norms have also evolved. Now, more than ever, race is recognized as a fluid social construct rather than a fixed biological trait. Together, these changes raise a number of critical questions that must be explored and investigated to realize the realities of affirmative action today. By separating fact from fiction, and testing various assumptions, we can tailor appropriate admissions policies.

Courts should rely on data rather than assumptions to validate policy. The law should be grounded in fact, relying on reliable empirical evidence to support any assertions made. For forty years, however, the Supreme Court has depended primarily on assumptions to craft and develop national affirmative action jurisprudence — law that determines who has access to our institutions of higher education and the accompanying rewards and recognition. Today, we have the empirical data to test many of the hypotheses the Court relied on prematurely as fact; we must employ that data to determine whether the Court's determinations in *Bakke* and its aftermath were grounded in fact or fiction. Empirical research should also inform improved affirmative action standards for the future.

This Article begins with a detailed discussion of the facts, laws, and assumptions relied on by the Court when *Bakke* was decided. The specific university policy at play drew from numerous assumptions about race and admissions; the Court not only failed to challenge these notions, but also relied on additional unproven beliefs to justify its holding. In Part II, the Article explores contemporary realities by reviewing the evolution of affirmative action jurisprudence through relevant case law as well as discussing current empirical data on

students. Numerous studies conducted over the past forty years provide an opportunity to confirm or reject earlier assumptions, while new assumptions continue to cloud the field. Part III explicitly raises new questions, assumptions, and areas for consideration directly relevant to educational diversity as a compelling state interest to tailor an affirmative action policy that fits contemporary realities. While some may seem to advance support for affirmative action, others may work against current conceptions; taken together, the theoretical concepts and empirical data presented provide necessary context for fully understanding affirmative action today so that policy-makers, admissions officers, and institutional leaders can ensure that affirmative action is both constitutional and effective.

I. BAKKE FACTS

In 1974, Allan Bakke initiated suit against the University of California Davis Medical School for rejecting his application for admission.¹ That year, the medical school admitted sixteen students of color through its special admissions process and eighty-four additional students through its general admissions process.² The inaugural class of the medical school just six years prior had failed to include any African American, Mexican American, or Native American students.³ To ameliorate this disparity, the university devised a new admissions program with two tracks: a “special” track for “minority applicants,” defined as those who self-identified as “Black,” “Chicano,” “Asian,” and “American Indian,” and another for general applicants.⁴ No White applicants had been admitted through the special admissions track; a handful of prospective students of color applied and gained admission through the general track.⁵ Aside from these basic details, little is known about the UC Davis Medical School admissions system at the

¹ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978) (Powell, J.).

² *Id.* at 289.

³ *Id.* at 272 (noting that the first class at Davis Medical School in 1968 “contained three Asians but no blacks, no Mexican-Americans, and no American Indians”).

⁴ *Id.* at 272-74. In the first year of operation, the special admissions track was geared toward “economically and/or educationally disadvantaged” applicants, though this was changed in 1974. *Id.* at 274. In the first year of operation, the Chairman of the Admissions Committee also “screened each application to see whether it reflected economic or educational deprivation.” *Id.* at 275. It is unclear whether a similar screening continued to determine the racial/ethnic background of applicants in 1974.

⁵ *Id.* at 275-76.

time, in part because of a thin formal record documented at the trial court level.⁶

Allan Bakke applied twice to Davis. In 1973, his application was submitted late and he was rejected.⁷ In 1974, he applied early and was again rejected.⁸ Believing his academic achievements and on-campus interviews should have been sufficient to gain him admission, he filed suit that year in California state court.⁹ In his lawsuit against the UC Regents, Allan Bakke claimed the Davis admissions policy utilizing affirmative action violated both the California and U.S. Constitutions as well as Title VI of the Civil Rights Act.¹⁰

A. *The Law According to Bakke*

The Justices who decided the *Bakke* case agreed on very little. Based on its investigation into this admissions system, the fractured *Bakke* opinion did clarify that an Equal Protection challenge to a state policy involving race automatically activated the strict scrutiny standard.¹¹ Justice Powell's majority opinion¹² reasoned that strict scrutiny applied because: "Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination."¹³ Though initially applied only to African Americans, the Equal Protection Clause had been extended over the years to people who identified as Irish, Chinese, Austrian, Japanese, and Mexican-American.¹⁴ The Court held in *Bakke* that non-immigrant

⁶ The university's case was full of "mistakes, omissions, and sloppy presentation." LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974–1980*, at 185 (2010). In contrast, the *Grutter v. Bollinger* litigation had a rich record, largely because of the Intervening-Defendants and the witnesses they brought. See *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998).

⁷ *Bakke*, 438 U.S. at 276 (Powell, J.).

⁸ *Id.* at 277.

⁹ *Id.*

¹⁰ *Id.* at 277-78.

¹¹ *Id.* at 291.

¹² Some questioned whether Justice Powell's opinion was binding precedent, since the case generated over half a dozen separate opinions. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). The *Bakke* case included separate opinions from Justices Stevens, Burger, Stewart, and Rehnquist; Justices Brennan, White, Marshall, Blackmun; Justice White; Justice Marshall; and Justice Blackmun. *Bakke*, 438 U.S. at 324-25, 379, 387, 402.

¹³ *Bakke*, 438 U.S. at 291 (Powell, J.).

¹⁴ See *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954) (Mexican-Americans); *Korematsu v. United States*, 323 U.S. 214, 215 (1944) (Japanese); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (Austrian resident aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Chinese); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Celtic

White male plaintiffs suing on Equal Protection grounds were entitled to enjoy the same heightened standard of review.¹⁵ The Court provided various reasons for why Whites should enjoy the same 14th Amendment protections as the African Americans the law was originally drafted to protect. Among them was that the United States “had become a Nation of minorities,” and not all Whites engaged in “a willingness to disadvantage other groups.”¹⁶ Additionally, the Court argued, “The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments,” which would create distinctions too fine for courts to navigate.¹⁷ Furthermore, Justice Powell reasoned that courts should not engage in the complicated task of determining what constituted a “benign” preference¹⁸ — especially since “the white ‘majority’ itself is composed of various minority groups,” some of whom he argued faced prior discrimination.¹⁹

The Court reaffirmed its commitment to evaluating strict scrutiny using a two-pronged analysis.²⁰ To satisfy strict scrutiny, Justice Powell wrote, the policy in question must both serve a “compelling state interest” and be “narrowly tailored” to address that interest.²¹ The Court then set about to apply this test to the policy at hand.

1. Compelling State Interests Explored

The University of California, Davis Medical School policy identified four primary goals for its special admissions process.²² The Court reviewed each of those four objectives to determine if any would satisfy the compelling state interest prong of the strict scrutiny standard.²³

Irishmen) (dictum).

¹⁵ *Bakke*, 438 U.S. at 291-99 (Powell, J.).

¹⁶ *Id.* at 292; see also Ian Haney-Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1035-36 (2007).

¹⁷ *Bakke*, 438 U.S. at 295 (Powell, J.).

¹⁸ *Id.* at 298.

¹⁹ *Id.* at 295.

²⁰ See *id.* at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

²¹ *Id.* at 299 (noting that governmental policies seeking to withstand strict scrutiny must be “precisely tailored to serve a compelling governmental interest”).

²² *Id.* at 305-06.

²³ See *id.* at 307-15. The University did not put forth any additional compelling state interests for the Court to consider, aside from the four identified in the special admission policy itself. The Court has not considered others since that date, though there could be alternatives to educational diversity as a compelling state interest. See Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action*

a. *Should We Want More Minority Doctors?*

The University special admissions program was implemented in part to increase the number of medical students of color and ultimately doctors of color. Specifically, the policy stated the goal of “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession.”²⁴ The Court responded by asserting that this interest was expressed as a racial quota system, which could not withstand Constitutional muster.²⁵ Arguably, the interest itself was not stricken down; rather, the Court conflated the compelling state interest of increasing the representation of “disfavored minorities” with the means employed to do so (a “quota system,” which would fail the narrow tailoring prong) when it determined, “If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid.”²⁶ Conversely, if petitioner’s purpose was simply to increase the number of doctors of color — without any specified percentage listed and under a unified admissions policy — such a preferential purpose actually could perhaps have been sustained.²⁷ Thus, faulty reasoning may be to blame for the compelling state interest of increasing the number of doctors of color being summarily rejected.

b. *Should We Strive to Reduce Societal Discrimination?*

A second objective of the admissions policy was “countering the effects of societal discrimination.”²⁸ The Court did affirm an interest in reducing broad discrimination, noting, “The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”²⁹ School desegregation at the elementary school level was provided as a

Jurisprudence, 65 HASTINGS L.J. 661, 661 (2014) [hereinafter *Empirically Derived*].

²⁴ *Bakke*, 438 U.S. at 306 (Powell, J.). Others have since noted that “while African Americans and Latinos constituted almost a quarter of California’s population, they constituted just 3 percent of its doctors.” KALMAN, *supra* note 6, at 188.

²⁵ *Bakke*, 438 U.S. at 307.

²⁶ *Id.* at 306, 307.

²⁷ Ironically, the Court continues by noting, “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” *Id.* at 307. Nevertheless, using race as a proxy for perspective they endorse as the worthy goal of educational diversity.

²⁸ *Id.* at 306.

²⁹ *Id.* at 307.

worthy example.³⁰ Yet Justice Powell determined that the “amorphous concept of injury” brought up by societal discrimination was too vague and deeply rooted in the past to be a justifiable compelling state interest.³¹ Additionally, he decried the injustice of harming “innocent” Whites if applicants of color were to receive a boost from affirmative action.³² Thus, this goal was also deemed insufficient.³³

c. *Should We Increase Service to Disadvantaged Communities?*

The third listed goal of the special admissions program was “increasing the number of physicians who will practice in communities currently underserved.”³⁴ Again, the Court here confused the compelling state interest prong with narrow tailoring to reject this goal. As he did with the suggested rationale of reducing societal discrimination, Justice Powell began on a positive note, affirming that “in some situations, a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification.”³⁵ Then he quickly rejected this objective based on narrow tailoring. Instead of using an applicant’s race as a proxy for interest in working in disadvantaged communities, the Court suggested the University simply ask all applicants about their interest in serving in these areas, thereby meeting the seemingly laudable and constitutional goal of increasing service to disadvantaged communities through a race-neutral means.³⁶ The Court also noted the lack of evidence in the record supporting the claim that doctors of color would serve communities of color or other disadvantaged clients or regions — despite some available evidence suggesting that doctors of color were more likely than White doctors to do so.³⁷ True, the

³⁰ *Id.* Perhaps ironically, when an affirmative-action style system was put in place by a school district that would otherwise be segregated, the Court struck that down as unconstitutional. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007).

³¹ *Bakke*, 438 U.S. at 307 (Powell, J.).

³² *Id.* The assumptions built into this argument are further discussed *infra* Part I.B.2.

³³ *Id.* at 309. In his separate opinion, Justice Marshall detailed historical discrimination against African Americans, concluding, “I do not believe that anyone can truly look into America’s past and still find that a remedy for the effects of that past is impermissible.” *Id.* at 402 (Marshall, J., concurring). Four Justices agreed that remedying past racial discrimination was a constitutionally-permissible justification for affirmative action. *Id.* at 325, 355 (Brennan, J., concurring).

³⁴ *Id.* at 306.

³⁵ *Id.* at 310.

³⁶ *Id.* at 311.

³⁷ *Id.* at 310-11 (citing Terrance Sandalow, *Racial Preferences in Higher Education*:

University had no guarantee that all medical students of color who “expressed an ‘interest’ in practicing in a disadvantaged community, will actually do so.”³⁸ Though the Court’s erroneous application skirts the issue of whether this type of service could be a compelling state interest, even if it may perhaps have been ultimately rejected on narrow tailoring grounds, this potential justification for affirmative action has not been asserted since.

d. Should We Support Educational Diversity?

The fourth and final purpose listed in the Davis admissions policy was “obtaining the educational benefits that flow from an ethnically diverse student body.”³⁹ The Court noted that this objective “clearly is a constitutionally permissible goal for an institution of higher education.”⁴⁰ Coupled with the University’s First Amendment rights of academic freedom, the Medical School should continue to enjoy the privilege “to make its own judgments as to education[, which] includes the selection of its student body.”⁴¹ The compelling state interest of educational diversity was thus elevated to a First Amendment concern, as “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas’” necessary to foster optimal intellectual growth.⁴² Because doctors should be able to “serve a heterogeneous population,” the Court determined it especially important that they be exposed to different “experiences, outlooks, and ideas that enrich the[ir] training” in medical school.⁴³ Immediately, educational diversity became a Constitutionally permissible justification for affirmative action.

While accepting that race matters, Justice Powell nevertheless cautioned that it should be “only one element in a range of factors” contributing to diversity that admissions officials consider.⁴⁴ With *Bakke*, educational diversity became the only sanctioned justification for affirmative action, and remains the only compelling state interest validated by the courts today.

Political Responsibility and the Judicial Role, 42 U. CHI. L. REV. 653, 688 (1975)).

³⁸ *Id.* at 310.

³⁹ *Id.* at 306.

⁴⁰ *Id.* at 311-12.

⁴¹ *Id.* at 312.

⁴² *Id.* at 313.

⁴³ *Id.* at 314.

⁴⁴ *Id.*

2. Narrow Tailoring Refined

Although Justice Powell erroneously conflated the compelling state interest and narrow tailoring prongs when discussing the former, he nevertheless gave considerable direct attention to the latter in analyzing whether the Davis policy was narrowly tailored to meet the compelling state interest of educational diversity. He determined that Davis's two-track system was akin to reserving a quota of seats for students of color.⁴⁵ Though that policy would likely continue to result in many students of color joining the university, the opinion argued that there were both less intrusive means and more meaningful ways to achieve the compelling state interest of educational diversity.⁴⁶ Diversity, the Court insisted, "encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element."⁴⁷ The Court stressed that future policies should be reviewed with an assumption of "good faith" on the part of the university, so long as schools were not utilizing a quota system.⁴⁸

It must have been clear to the Justices that simply naming a compelling state interest and requiring that the relevant policy be narrowly tailored to achieve it would be insufficient for admissions officers to comfortably craft Constitutionally acceptable procedures. Therefore Justice Powell appended Harvard University's admissions policy as a guideline, proffering that their system was an appropriately tailored method of utilizing affirmative action to support the compelling state interest of educational diversity.⁴⁹ The Court looked favorably on that plan because it did not use a quota (keeping all applicants in a single pool with seats open to all applicants), and took a host of background characteristics (not solely race) into consideration.⁵⁰ The Court made clear that in any given file race might weigh heavily in favor of a particular applicant, so much so that it could "tip the balance in his favor" and result in admission, though other aspects of diversity could be just as beneficial for any applicant.⁵¹ Specified characteristics of diversity, beyond race and ethnicity, could include "exceptional personal talents, unique work or

⁴⁵ *Id.* at 315.

⁴⁶ *Id.* at 315-18.

⁴⁷ *Id.* at 315.

⁴⁸ *Id.* at 318-19.

⁴⁹ *Id.* at 316-19, 321-24.

⁵⁰ *See id.* at 316-17.

⁵¹ *Id.* at 316.

service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”⁵² The Court suggested a policy that was “flexible enough to consider all pertinent elements of diversity,” though it specified that race could play a more significant role than other factors; admissions officers should consider various personal characteristics of their applicants, but were free to operate without “according them [all] the same weight.”⁵³

B. Assumptions of the Bakke Court

Despite the Court’s intent to clarify the boundaries of affirmative action, the realities of race in America have led to ongoing confusion and complexity in the years after *Bakke*. In part, this is because the *Bakke* opinion relied on various incorrect assumptions in its analysis, sometimes treating fiction as fact. Assumptions are things that are accepted as true without relying on evidence to prove as much. When we rely on assumptions rather than data, or fictions rather than facts, we likely miss crucial realities and truths. A few assumptions of the *Bakke* Court are explored here.

1. Beyond the Black–White Binary

For much of the twentieth century and long before, American courts and even scholars assumed that people were either White or non-White, or in the alternative Black or non-Black.⁵⁴ The “Black-White binary” prevalent throughout U.S. history continues to shape the lives of Americans in many ways, especially as the country becomes increasingly multicultural, multiracial, and multiethnic.⁵⁵ With regard to hate crimes, incarceration rates, intermarriage, and even interactions in public places,⁵⁶ and especially for indicators such as

⁵² *Id.* at 317. All these qualities are somewhat vague, though it is completely unclear what the Court meant by “ability to communicate with the poor.” *Id.*

⁵³ *Id.* at 317.

⁵⁴ See generally Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997).

⁵⁵ EDUARDO BONILLA-SILVA, WHITE SUPREMACY & RACISM IN THE POST-CIVIL RIGHTS ERA 27 (2001); see Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 101 (1991); Perea, *supra* note 54, at 1215; see also TANYA KATERI HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED RACE STORIES OF DISCRIMINATION 76 (2018).

⁵⁶ See generally JOE R. FEAGIN & EILEEN O’BRIEN, WHITE MEN ON RACE (2004).

“income, education, occupation, [and] residential location,” race continues to matter for people from all racial and ethnic backgrounds.⁵⁷

Who counts as a “disfavored minority” for university admissions? The Davis policy did not include a formal definition of who could be considered “disadvantaged,” and thereby qualify for admission through the special admission system.⁵⁸ Davis had seemingly moved beyond a rigid “Black-White binary,” understanding with its special admissions system that successful students could come from additional racial and ethnic backgrounds.⁵⁹

The Davis admissions policy referred directly to people who identified as “Black,” “Chicano,” “Asian,” and “American Indian.”⁶⁰ Yet these categories themselves are underinclusive for a policy seeking to truly diversify the profession, ameliorate societal discrimination, service disadvantaged communities, or provide for meaningful educational diversity.⁶¹ Simply listing a few categories of “minorities” ignores the reality of the many people of color who did not fit easily into one of these groups, yet would nevertheless consider themselves and be seen by others as people of color who could contribute to the priorities listed in the policy.

The Court itself responded that such a policy “tells applicants who are not [African American, Native American], Asian, or Chicano that they are totally excluded” from participating in a special admissions program geared toward increasing diversity.⁶² Even applicants of color from groups not specifically singled out in the admissions policy whose life experiences and worldviews present significant “potential for contribution to educational diversity” were excluded.⁶³ In this way,

⁵⁷ STANLEY LIEBERSON, A PIECE OF THE PIE 2 (1980). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (2009); IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2015); MELVIN L. OLIVER AND THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (2006).

⁵⁸ *Bakke*, 438 U.S. at 274-75 (“No formal definition of ‘disadvantaged’ was ever produced . . .”).

⁵⁹ *See id.* at 274. Arguably, Justice Powell’s opinion goes too far in its broad definition of diversity — favorably citing Harvard’s policy equating being a musician to being African American, noting that each type of applicant would add something special to a campus otherwise lacking similar students. *See id.* at 316.

⁶⁰ *Id.* at 274.

⁶¹ *Id.* at 307 (delineating the four goals specified in the special admissions policy).

⁶² *Id.* at 319.

⁶³ *Id.*

applicants with ancestors from Central and South America, the Middle East, and the Pacific Islands, among other regions, were not considered as part of the special admissions program. The potential diversity contributions of multiracial applicants were similarly ignored.

Justice Powell's opinion also reveals a simplistic view of race that ignores the ways in which race was relevant to many Americans of color at the time. The opinion warns that no applicant should be rejected "simply because he was not the right color or had the wrong surname."⁶⁴ This sentiment belittles the racialized reality of overt discrimination, microaggressions, and implicit bias affecting both the mundane and major life experiences of people of color.⁶⁵ Recognizing race is not simply about noticing variations of an applicant's skin tone, but actually shows appreciation for the many ways in which people of color tend to live with different sets of experiences from Whites, specifically because of their race.⁶⁶ Ironically, while this particular sentiment reduces people of color to simply their skin tone, other parts of the opinion support the conflicting perspective that race matters a great deal; the opinion includes many attempts to extoll the benefits of educational diversity — drawing on the ways in which race can clearly affect perspectives and experiences — and even elevate it to a compelling state interest, though assumptions about race, color, and names seep through the opinion as well.⁶⁷

Similarly, Justice Powell's statement that having the "wrong surname" prevents participation in the special admissions pool reduces the reality of name-based discrimination, pretending that there is no hierarchy or preference for Anglo-based names, but rather that some names are simply different from others. Decades of empirical and experimental research confirm that "familiar" names are strongly preferred by those in power (in the United States, usually Whites) to others. For instance, when employers are asked to select

⁶⁴ *Id.* at 318.

⁶⁵ This is not meant to trivialize the ways in which skin color impacts the life experiences of people of color. Research on skin tone makes clear that those with darker skin (regardless of race/ethnicity) face greater discrimination than light-skinned individuals. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1709 (2000). However, reducing race to skin color is simplistic and unrealistic.

⁶⁶ Of course, intra-racial diversity exists as well; not all people from within the same racial/ethnic background share the same experiences. For more on this, see *infra* Part III.C. *Intra-racial Differences*. This issue is explored further in Meera E. Deo, *Improving Affirmative Action* (in progress).

⁶⁷ See *Bakke*, 438 U.S. at 311-15.

between virtually identical resumes — with “Anglo” and “ethnic” names of applicants being the primary difference — most prefer the candidate with the “Anglo” name.⁶⁸ Thus, the “right” name alone actually can create a better outcome. Further, “surname” is not always a reliable proxy for racial or ethnic background, as those who are adopted, multiracial, or even married and changed names may have a name that others may think does not “match” their racial identity. This research and these people existed at the time that *Bakke* was decided, though Justice Powell’s opinion erases or ignores them and their lived realities.

2. “Innocent” Whites

Justice Powell’s *Bakke* opinion also spends considerable attention on the assumption that White applicants who could be harmed by affirmative action are “innocent” bystanders. In rejecting societal discrimination as a compelling state interest, the opinion notes: “We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent individuals* in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”⁶⁹ The opinion assumes that Whites are “innocent” and should therefore be spared from the harm that would result from affirmative action. This section of the opinion ignores the many ways in which Whites have been complicit in oppression — from slavery through Jim Crow to more modern methods.⁷⁰

Continuing in the same vein, the Court makes clear that judicial oversight would be necessary “to assure that [any race-conscious policy] will work the least harm possible to other *innocent persons* competing for the benefit.”⁷¹ Here, the opinion perhaps correctly assumes that admissions is a competition or a zero sum game, where some will be rejected in order for others to be admitted; yet, it does

⁶⁸ See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004). For a macro-level analysis of names and economic assimilation among immigrant populations using first names and last names, see generally Joshua R. Goldstein & Guy Stecklov, *From Patrick to John F.: Ethnic Names and Occupational Success in the Last Era of Mass Migration*, 81 AM. SOC. REV. 85, 100 (2016).

⁶⁹ *Bakke*, 438 U.S. at 307 (emphasis added).

⁷⁰ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

⁷¹ *Bakke*, 438 U.S. at 308 (emphasis added).

not extend this same logic to ongoing discrimination: people of color *as a group* suffered injury at the hands of particular Whites; but the system as a whole worked to benefit Whites, *as a group*, not only those who directly caused the harm. The Court should have questioned the assumption that Whites were innocent unless they personally acted out in a racist fashion, recognizing the ways in which Whites as a group benefitted from the racism that had harmed people of color for centuries. Even “innocent” Whites have received race-based benefits that were specifically based on discrimination against people of color. For instance, education and housing GI Bill benefits provided only to Whites after World War II provided Whites with extra advantages in access to higher education; in turn, Whites built greater wealth in a short period of time, with non-Whites remaining relegated to positions that did not require a college degree and neighborhoods reeling from White flight.⁷² Clearly, Whites benefitted from race to the disadvantage of non-Whites — and continue to do so today, with segregation at higher levels now than before *Brown v. Board of Education*.⁷³

While the Court did highlight the importance of working against past discrimination, it refused to support efforts to ameliorate societal discrimination when doing so “imposes disadvantages upon persons like [Allan Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”⁷⁴ Yet Allan Bakke personally benefitted from White (and male) privilege, perhaps in addition to overcoming some personal challenges. The irony here is that the Court assumed the Davis policy resulted in some harm to Whites, but required no proof of this.⁷⁵ Allan

⁷² See Edward Humes, *How the G.I. Bill Shunted Blacks into Vocational Training*, 53 J. BLACKS, in HIGHER EDUC. 92, 94 (2006) (“[B]lack veterans and their families were denied their fair share of the multigenerational, enriching impact of home ownership and economic security that the G.I. Bill conferred on a majority of White veterans, their children, and their grandchildren”); Sarah E. Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, National 25 (Nat’l Bureau of Econ. Research, Working Paper No. 9044, 2002), <http://www.nber.org/papers/w9044>.

⁷³ GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT, *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE* 2-7 (2016), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state>.

⁷⁴ *Bakke*, 438 U.S. at 310.

⁷⁵ The additional irony is that supporting affirmative action based on the desire for educational diversity actually results not only in benefits to the individual students of color admitted, but also significantly to the other — predominantly White — students at the school. Thus, the beneficiaries of affirmative action are purported to be those

Bakke did not have to prove that he was personally harmed by affirmative action, that he would have gained admission to the Medical School without the policy in place.⁷⁶ Conversely, Justice Powell seemed skeptical about “perceived” ongoing discrimination against people of color, noting that “whatever harm the beneficiaries . . . are thought to have suffered” did not rise to the level of a compelling state interest.⁷⁷

These were egregious and erroneous assumptions; if the Court had recognized the ways in which past and ongoing discrimination not only harms certain groups but also benefits others, it may have ruled differently; if Justice Powell had demanded evidence showing that Allan Bakke would have been admitted under a race-neutral program rather than ignoring evidence of ongoing racial oppression, he may have recognized societal discrimination as a worthy interest.⁷⁸

3. Benefits of Structural Diversity

In upholding educational diversity as a compelling state interest, the Court made the assumption that certain expected benefits would result from admitting a diverse student body. When *Bakke* was decided, the Court cited little support for its determination that educational diversity was an interest worthy of affirmative action, or that admitting diverse students would result in meaningful cross-racial interaction and improved learning.

The Court did express confidence that because doctors “serve a heterogeneous population,” medical students from a diversity of backgrounds would add to the university “experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to

admitted, though truly all students and primarily the White students would benefit from the “robust exchange of ideas” the Court envisions will result from these policies. *Id.* at 313.

⁷⁶ The Court discusses this briefly with regard to standing. *Id.* at 280 n.14. However, it seems to assume that Allan Bakke would have received admission but for the special admission policy in place at the Medical School. *See id.* at 320.

⁷⁷ *Id.* at 310.

⁷⁸ While the special admissions policy sought to remedy societal discrimination, the Court cast it as a present-day attempt to fix problems of the past. *See id.* at 307. Instead, racial animus, direct discrimination, and implicit bias were alive in 1978 just as they are today. The Court virtually ignored the ongoing discrimination plaguing communities of color, not only in its response to the second stated goal of ameliorating societal discrimination (*see id.* at 307-10), but also in its response to the first goal of increasing diversity in medical school and in the medical profession. *Id.* at 307.

humanity.”⁷⁹ Yet the Court cited no studies supporting the theory that diversity would lead either to the sharing of “experiences, outlooks, and ideas” or that such sharing would improve educational or professional outcomes.

Educational diversity was lauded in the opinion as an important and worthy goal at both the undergraduate level and in law school. Though the Court opined that “the contribution of diversity is substantial” not only during university years but even after, they cited no empirical or scholarly support, relying instead on simply “our tradition and experience.”⁸⁰ The opinion did cite legal precedent, quoting *Sweatt v. Painter* for the proposition that law students would not “choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”⁸¹ Thus, they assume students would want to study in a diverse environment because earlier case law suggested it — again, without supporting evidence. Similarly, the opinion notes that law school “cannot be effective in isolation from the individuals and institutions with which the law interacts,” but gives no citation or justification for this pronouncement.⁸²

II. CONTEMPORARY REALITIES

Both laws and facts have changed in the forty years since *Bakke* was decided. Affirmative action jurisprudence has evolved through multiple Supreme Court cases. Though strict scrutiny still applies to the policy of any public institution utilizing affirmative action, the compelling state interest prong has remained remarkably static while narrow tailoring has become increasingly narrow. Facts have also changed, in addition to increasing data available to support various facts. Data is now available to test some of the hypotheses the Court relied on in *Bakke* — regarding the benefits of educational diversity as well as alternative compelling state interests.

A. Legal Challenges & Changes

Justice Powell’s opinion in *Bakke* was intended to clarify the legal doctrine surrounding affirmative action. It was successful in doing so, at least to the extent that strict scrutiny was selected as the appropriate

⁷⁹ *Id.* at 314.

⁸⁰ *Id.* at 313.

⁸¹ *Id.* at 314 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

⁸² *Id.*

standard of review for any policy that included race as a factor in admissions to a public institution of higher education.⁸³ Applying this standard has always been notoriously arduous. In 1995, the Supreme Court warned that strict scrutiny should not be “strict in theory, but fatal in fact”;⁸⁴ yet this “demanding requirement traditionally has meant that nearly all such classifications are deemed invalid.”⁸⁵

Forty years of case law have significantly developed the relevant jurisprudence. After a split in the circuit courts questioned whether educational diversity was a compelling state interest and *Bakke* was binding precedent, *Grutter v. Bollinger* settled these issues.⁸⁶ Justice O’Connor’s majority opinion in *Grutter* held that Justice Powell’s opinion supporting educational diversity did adequately portray the legal landscape.⁸⁷ Barbara Grutter, like Allan Bakke, was an unsuccessful White applicant to an institution of higher education utilizing affirmative action — in this case, the University of Michigan Law School.⁸⁸ In determining that the Law School’s policy was constitutional, the Court both affirmed and advanced earlier assumptions regarding the “substantial” benefits of diversity.⁸⁹

Justice O’Connor began by making clear that the Justices “endorse Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.”⁹⁰ She went on to emphasize the ways in which education diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”⁹¹ The Justices also noted that “classroom discussion is livelier, more spirited, and simply more enlightening and

⁸³ *Id.* at 299.

⁸⁴ *Adarand v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

⁸⁵ Rachel F. Moran, *The Heirs of Brown: The Story of Grutter v. Bollinger*, in *RACE LAW STORIES* 451, 455 (Rachel F. Moran & Devon W. Carbado eds., 2008).

⁸⁶ See *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996); see also *Empirically Derived*, *supra* note 23, at 670.

⁸⁷ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

⁸⁸ *Id.* at 316.

⁸⁹ *Id.* at 330 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.)).

⁹⁰ *Id.* at 325. This was especially relevant given the Fifth Circuit challenge to *Bakke* as binding precedent in *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996).

⁹¹ *Grutter*, 539 U.S. at 330 (internal citations omitted) (quoting *Petition for Writ of Certiorari* at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

interesting' when the students have 'the greatest possible variety of backgrounds.'"⁹²

Empirical research supports at least the potential for these benefits.⁹³ Yet, the Court seemed most moved by its own perspectives on "the importance of education in contemporary society, beginning with its longstanding belief in the 'overriding importance of [education as a vehicle for] preparing students for work and citizenship.'"⁹⁴ The significance of allowing all people the opportunity to "participate in the educational institutions that provide the training and education necessary to succeed in America"⁹⁵ means that "institutions of higher education must be accessible to all individuals regardless of race or ethnicity."⁹⁶ Supplementary First Amendment deference based on "educational autonomy" also suggested the Court should defer to the Law School's expertise in selecting its student body.⁹⁷

The *Grutter* Court also clarified that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups."⁹⁸ *Grutter* insisted that only through a flexible and holistic review comparing each candidate against all others could university officials craft a diverse study body that appropriately took account of race as one factor among many.⁹⁹ This followed directly from *Bakke*. In his *Bakke* opinion, Justice Powell not only appended the Harvard College plan, but also quoted directly from it to emphasize that "the race of an applicant may tip the balance in his favor," just as any other characteristic given consideration could.¹⁰⁰ The priority would be for the admissions officers to maintain a flexible, comprehensive policy that keeps "a

⁹² *Id.* (quoting Petition for Writ of Certiorari at 246a, 244a, *Grutter*, 539 U.S. at 306 (No. 02-241)).

⁹³ This research is discussed in greater detail in Part II.C.1. of this Article. See discussion *supra* Section I.B.3.

⁹⁴ Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 72 (2011) [hereinafter *Promise of Grutter*] (quoting *Grutter*, 539 U.S. at 331).

⁹⁵ *Grutter*, 539 U.S. at 333.

⁹⁶ *Id.* at 331.

⁹⁷ *See id.* at 329.

⁹⁸ *Id.* at 339.

⁹⁹ *Id.* at 336-37.

¹⁰⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978)).

number of criteria in mind”;¹⁰¹ the various criteria would mean that all applicants — regardless of race — would be “on the same footing for consideration,” though some criteria could be of more importance than others rather than automatically “according them the same weight.”¹⁰² Yet twenty years later, the strict point system used by the University of Michigan’s undergraduate College of Literature, Science, and the Arts failed narrow tailoring in the companion case of *Gratz v. Bollinger*.¹⁰³ Cases after *Grutter* and *Gratz* both focused on the narrow tailoring prong and interpreted narrow tailoring in increasingly narrow ways.¹⁰⁴

In the past decade, the Supreme Court has further clarified the relevant law. The University of Texas, Austin also followed a dual system of admissions: one that guaranteed admission to the top high school students in the state, while all other applicants competed for the remaining 25% of the seats through a holistic process that included race as a factor.¹⁰⁵ Abigail Fisher was an unsuccessful White applicant to the university whose suit claiming discrimination was heard twice in the Supreme Court.¹⁰⁶ Justice Kennedy, writing for the Court in *Fisher I*, affirmed educational diversity as a compelling state interest.¹⁰⁷ The Court emphasized (again, without evidence) the ongoing assumption that greater diversity results in “enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”¹⁰⁸

Fisher I and *Fisher II* followed *Bakke* in asserting that universities hold a First Amendment right to craft a diverse student body to meet

¹⁰¹ *Bakke* 438 U.S. at 316.

¹⁰² *Bakke* 438 U.S. at 317.

¹⁰³ *Gratz v. Bollinger*, 539 U.S. 244, 270-72 (2003) (holding that the undergraduate system did not provide sufficient “individualized consideration” to survive strict scrutiny).

¹⁰⁴ See *Empirically Derived*, *supra* note 23, at 668-69 (“Recently, courts have given much more attention to the second prong of strict scrutiny: narrow tailoring.”). Voluntary and purposeful integration at the elementary school level was also considered and struck down on the basis of narrow tailoring in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 846-47 (2007).

¹⁰⁵ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2202 (2016); see *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. at 2413-15 (2013); see also *Empirically Derived*, *supra* note 23, at 671-72 (“The remaining 25% of the entering class was 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’).”).

¹⁰⁶ *Fisher II*, 136 S. Ct. at 2202; *Fisher I*, 133 S. Ct. at 2413.

¹⁰⁷ *Fisher I*, 133 S. Ct. at 309.

¹⁰⁸ *Id.* at 2418.

their goals.¹⁰⁹ However, the cases stressed greater judicial intervention in evaluating narrow tailoring; though “some, but not complete, judicial deference is proper”¹¹⁰ with regard to educational diversity, “the University receives no deference” regarding narrow tailoring.¹¹¹ This pronouncement moved the needle significantly from the time of *Bakke*, when the Court offered guidance to lower courts that they:

[N]ot assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, *good faith would be presumed* in the absence of a showing to the contrary in the manner permitted by our cases.¹¹²

The *Fisher I* Court added to the restriction in narrow tailoring, determining that “the university [bears] the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”¹¹³ The Court supported this more stringent interpretation of narrow tailoring by asserting that strict scrutiny perhaps had weakened substantially, where before the Court warned that some leeway was necessary, now they asserted that it “must not be strict in theory but feeble in fact.”¹¹⁴ When the same case came before the Court three years later, the Court reiterated its commitment to ensure that schools use the least restrictive means to achieve educational diversity.¹¹⁵ It even insisted that going forward, those using affirmative action must engage in “regular evaluation of data and consideration of student experience” in order for the university to “tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 2419.

¹¹¹ *Id.* at 2420 (“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.”).

¹¹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (Powell, J.) (emphasis added).

¹¹³ *Fisher I*, 133 S. Ct. at 2420.

¹¹⁴ *Id.* at 2421.

¹¹⁵ *Fisher II*, 136 S. Ct. at 2208 (“Though ‘[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative’ or ‘require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,’ it does impose ‘on the university the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice.’” (first quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2016); then quoting *Fisher I*, 133 S. Ct. at 2411).

necessary to meet its compelling interest.”¹¹⁶ The Court thus added a requirement for longitudinal assessment and potential policy correction to the already strict narrow tailoring prong.¹¹⁷

Taken as a whole, these doctrinal developments have resulted in maintaining today only the single compelling state interest found to be constitutionally permissible forty years ago: educational diversity.¹¹⁸ They also have signaled an even narrower interpretation of narrow tailoring, requiring admissions officers to use only the least restrictive means to add diversity to their student bodies or risk constitutional challenge.¹¹⁹ Together with the pronouncement that affirmative action may become superfluous in this decade, urgent empirical attention to this problem is necessary.¹²⁰

B. Testing Assumptions with Empirical Data

Today, with greater empirical data on relevant topics from diversity, to students in higher education, and broader issues involving race and ethnicity, many of the Supreme Court’s earlier assumptions can be directly tested. Applying empirical evidence to the Court’s hypotheses provides an opportunity to confirm them as fact — or reject them as fiction.

There is unquestionably more structural diversity, meaning diversity in numbers, in higher education — more students of color applying for, being admitted to, and enrolling in colleges, universities, and post-

¹¹⁶ *Id.* at 2210; *see also id.* at 2215 (“It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.”).

¹¹⁷ *See id.* at 2203 (“The University, however, does have a continuing obligation to satisfy the strict scrutiny burden: 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.”).

¹¹⁸ Even in *Schutte v. Coal. to Defend Affirmative Action*, 572 U.S. Ct. 291, 300-01 (2013), the Court did not strip educational diversity of its status as a compelling state interest — though the relevant state proposition prohibiting affirmative action was deemed constitutional (“The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”).

¹¹⁹ Furthermore, the diversity rationale has not been extended to the elementary or secondary education context. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007).

¹²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“25 years from now, the use of racial preferences will no longer be necessary . . .”).

secondary programs than ever before.¹²¹ Yet data also reveal deep disparities between White students and students of color in terms of their qualitative experiences. For purposes of this Article, the law school environment is especially instructive as we have valid, reliable data available through the Law School Survey of Student Engagement (“LSSSE”).¹²²

LSSSE offers a glimpse into the lives of law students by surveying them annually to capture various aspects of their experiences.¹²³ Every Spring for the past fifteen years, thousands of students at dozens of law schools around the United States have participated in the LSSSE survey.¹²⁴ Each student answers basic demographic questions (about their race, ethnicity, gender, sexual orientation, first-generation status, year in school, undergraduate GPA, etc.), in addition to a range of questions involving behaviors (e.g., quality of relationships with faculty), opinions (e.g., satisfaction with career counseling), and experiences (e.g., preparation for critical thinking and analysis).¹²⁵ Dozens of scholars have published articles and books drawing from LSSSE;¹²⁶ hundreds of law school administrators have relied on this

¹²¹ For instance, in 1976, the year that Bakke was argued before the California Supreme Court, only 10% of American college students were Black, 4% were Latino, and 2% were Asian/Pacific Islander while a full 82% were White. By 2008, the percentages of students of color in higher education had all increased to 14% Black, 13% Latino, and 7% Asian/Pacific Islander, with 63% White. *Status and Trends in the Racial and Ethnic Minorities*, NAT'L CTR. FOR EDUC. STAT. (July 2010), https://nces.ed.gov/pubs2010/2010015/tables/table_24_1.asp. Similarly, in 1975, fewer than 7% of African Americans and Latinos had attained a Bachelor's degree, compared to 24% of African Americans, and 17% of Latinos by 2017. *Rates of High School Completion and Bachelor's Degree Attainment Among Persons Age 25 And Over, By Race/Ethnicity and Sex*, NAT'L CTR. FOR EDUC. STAT. (2018), https://nces.ed.gov/programs/digest/d17/tables/dt17_104.10.asp.

¹²² LSSSE provides valid and reliable data on law students around the country. Basic demographics match national trends, though there could be some variation from a national representative sample based on participant school selection. See Jakki Petzold, *LSSSE Demographic Characteristics Reflect the U.S. Law Student Population*, LSSSE (Nov. 6, 2018), <http://lssse.indiana.edu/blog/lssse-demographic-characteristics-reflect-the-u-s-law-student-population> [hereinafter *LSSSE Demographic*].

¹²³ For more on LSSSE, see generally LSSSE, <http://lssse.indiana.edu> (last visited Mar. 22, 2019).

¹²⁴ LSSSE has also been offered in Canada and Australia. For more on participants in the LSSSE survey and optional modules, see generally *LSSSE Survey*, LSSSE, <http://lssse.indiana.edu/about-lssse-surveys> (last visited Mar. 22, 2019).

¹²⁵ *LSSSE U.S. Survey 2019*, LSSSE, <http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-US-Survey-2019.pdf> (last visited Mar. 22, 2019).

¹²⁶ See, e.g., Deborah J. Merritt & Andrew L. Merritt, *Agreements to Improve Student Aid: An Antitrust Perspective*, 67 J. LEGAL EDUC. 17 (2017); Jacqueline M. O'Bryant & Katharine T. Schaffzin, *First-Generation Students in Law School: A Proven Success*

data to improve the overall quality of legal education.¹²⁷ After fifteen years of annual surveys, with over 350,000 responses gathered, LSSSE houses perhaps the largest repository of law student data in the country. Although it is not formally a representative sample of all law students, LSSSE demographic data matches impressively with other national data on law students, suggesting it is nevertheless broadly representative of law students today.¹²⁸ Thus, LSSSE data will be used in the remainder of this Article when testing assumptions of the *Bakke*, *Grutter*, and *Fisher* Courts — and also when suggesting considerations for the future.

1. Does Diversity Improve Classroom Conversations?

The *Bakke*, *Grutter*, and *Fisher* Courts expected that the educational diversity resulting from affirmative action would in turn produce a “robust exchange of ideas”¹²⁹ and meaningful “cross-racial understanding,”¹³⁰ though they cited no evidence that this occurred. In his *Fisher II* Dissent, Justice Alito directly questioned the ongoing assumption that educational or professional benefits flow from educational diversity.¹³¹ This open question has now been answered with overwhelming data.

Model, 70 ARK. L. REV. 913 (2018); Steven A. Ramirez, *Diversity in the Legal Academy After Fisher II*, 51 UC DAVIS L. REV. 979 (2017); William C. Whitford, *Law School-Administered Financial Aid: The Good News and the Bad News*, 67 J. LEGAL EDUC. 4 (2017); Stephen Daniels, *The Perennial (and Stubborn) Challenge of Cost, Affordability, and Access in Legal Education: ‘We Will Continue to Muddle Through’* (Am. Bar Found., Research Paper No. 6-17, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058392. Additional publications relying on LSSSE data are available at <http://lssse.indiana.edu/scholarship>.

¹²⁷ Individual case studies showcasing how LSSSE data helped improve legal education at particular schools — including Indiana University, Washington & Lee, Southwestern, and UC Irvine — are outlined at the LSSSE website. *Case Studies*, LSSSE, <http://lssse.indiana.edu/case-studies> (last visited Mar. 22, 2019).

¹²⁸ LSSSE national statistics match overall law school enrollment statistics with regard to race, gender, first-generation status, and more. See *LSSSE Demographic*, *supra* note 122.

¹²⁹ *Fisher II*, 136 S. Ct. 2198, 2211 (2016).

¹³⁰ *Id.*

¹³¹ *Id.* at 2215 (Alito, J., dissenting) (“The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking ‘the educational benefits of diversity’ is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.”).

Over the past four decades, volumes of research have confirmed the potential for vast and far-reaching benefits resulting from educational diversity — though these are by no means assured. While affirmative action is necessary to increase *structural diversity*, the raw numbers of students of color on any given campus, these increases are a necessary condition, but may not be sufficient to produce the optimal benefits of diversity.¹³² Students from different backgrounds who simply sit silently next to one another in a classroom rarely meaningfully enrich the lives of their peers. True, to enjoy the “robust exchange of ideas” between diverse groups, schools must prioritize and realize student diversity. But schools must also create an environment where students of color are normalized instead of tokenized, where everyone feels comfortable speaking up, where classmates listen to the experiences of their peers. To truly realize the benefits of diversity, schools must enroll a critical mass¹³³ of students from diverse backgrounds and these students must be provided with meaningful opportunities for classroom exchange in an environment that is supportive and respectful.¹³⁴ When affirmative action is employed to simply add a few diverse students to an overwhelmingly heterogeneous White campus, those underrepresented students frequently become marginalized and silenced, rather than confidently trading experiences.¹³⁵

LSSSE data confirm that students from diverse backgrounds do regularly contribute to class discussion.¹³⁶ When asked about their

¹³² *Promise of Grutter*, *supra* note 94, at 109; see also Patricia Gurin, *Expert Report: Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 376-77 (1999).

¹³³ The *Grutter* Court adopted descriptions of critical mass provided by the District Court, including: (1) “‘meaningful numbers’ or ‘meaningful representation’ . . . that encourages underrepresented minorities to participate in the classroom,” *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003), and (2) “numbers such that underrepresented minority students do not feel isolated or like spokespeople for their race,” *Id.* at 319. The same understanding is applied in this Article.

¹³⁴ See *Promise of Grutter*, *supra* note 94, at 83-84.

¹³⁵ See Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115, 3151 (2015) [hereinafter *Faculty Insights*] (“A White woman named Jordan [explains] how tokenization leads to silencing: ‘If you don’t have that critical mass, I think it makes the few diverse students you have feel uncomfortable; maybe they are not going to voice opinions.’ Instead, her goal would be ‘to have that critical mass where everyone feels comfortable and it enables everyone to broaden the discussion and bring a variety of perspectives to the classroom conversation.’”); see also Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 23 (2012).

¹³⁶ Women students, however, are less likely to participate overall than their male classmates. Jakki Petzold, *Classroom Participation by Gender Identity*, LSSSE (July 20, 2018), <http://lssse.indiana.edu/blog/classroom-participation-by-gender-identity>.

contributions to class, whether asking questions or joining discussions, 67% of Black students, 54% of Latinos, 44% of Asian Americans, 61% of multiracial students, and 63% of White students respond that they do so often or very often (See Table 1). Students from various racial and ethnic backgrounds are engaging in class discussion, perhaps promoting the “robust exchange of ideas” the Courts expected to result from educational diversity through affirmative action.¹³⁷

Table 1. Raise Questions or Participate in Class Discussion, by Race (LSSSE 2018)

	Never		Sometimes		Often		Very often	
American Indian or Alaska Native	3	7%	16	37%	11	26%	13	30%
Asian Am.	32	4%	462	53%	247	28%	134	15%
Black or African American	32	3%	401	32%	414	33%	413	33%
Hispanic or Latino	47	4%	488	42%	361	31%	259	22%
Native Hawaiian or Other Pacific Islander	0	0%	11	52%	2	10%	8	38%
White	203	2%	3353	35%	3150	33%	2912	30%
Other	7	2%	123	33%	111	30%	132	35%
Multiracial	41	3%	464	36%	405	32%	373	29%

The Court was therefore correct in its assumption that admitting students through affirmative action to improve educational diversity could lead to more meaningful classroom conversations. The next test

¹³⁷ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J.). Note however that Latino and Asian American students not only participate at lower rates than Whites, but over half of Asian Americans (57%) and almost half of Latinos (46%) only sometimes or even never join in.

is to consider whether this exchange of ideas improves legal education.

2. Are There Benefits to Educational Diversity?

Over the years, empirical data on students in elementary school through law school have illustrated how meaningful exposure to diverse students and faculty results in personal, educational, and professional benefits. The *Grutter* Court cited experts in the fields of Education and the Social Sciences to support its determination that diversity improves student learning.¹³⁸ “It also referenced volumes of education research documenting the ways in which diversity ‘better prepares students for an increasingly diverse workforce and society.’”¹³⁹ Additional empirical data supports this hypothesis today.

The importance of diversity in medical school is now more clearly understood through empirical evidence. Medical schools across the country focus more today than ever before on issues involving the diverse patients that doctors will serve — from ameliorating racial disparities to raising cultural competence.¹⁴⁰ In 2015, the Medical College Admissions Test (“MCAT”) was updated to include a section on “Psychological, Social, and Biological Foundations of Behavior,” with questions related to psychology, sociology, and the humanities which are “weighted equally with three other sections focused on Chemistry, Biology, and Critical Analysis.”¹⁴¹ The goal of this revision, to provide greater attention to the underappreciated human aspects of medicine, is also likely to increase representation among students who may not have

¹³⁸ *Grutter*, 539 U.S. at 330 (quoting Brief for American Educational Research Association et al. as Amici Curiae Supporting Respondent at 3); see, e.g., WILLIAM G. BOWEN & DEREK CURTIS BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); *COMPPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang, Daria Witt, James Jones & Kenji Hakuta eds., 2003); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michal Kurlaender eds., 2001).

¹³⁹ *Promise of Grutter*, *supra* note 94, at 71; see also *Grutter*, 539 U.S. at 440.

¹⁴⁰ See, e.g., *Cultural Competence Education*, ASSOC. OF AM. MED. COLL. (2005), <https://www.aamc.org/download/54338/data> (“In 2000 the Liaison Committee on Medical Education (LCME) introduced the following standard for cultural competence: ‘The faculty and students must demonstrate an understanding of the manner in which people of diverse cultures and belief systems perceive health and illness and respond to various symptoms, diseases, and treatments. Medical students should learn to recognize and appropriately address gender and cultural biases in health care delivery, while considering first the health of the patient.’”).

¹⁴¹ Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 456 n.74 (2015).

chosen traditional hard science fields for their undergraduate majors — frequently underrepresented students of color.¹⁴²

Increased empirical research with law students also provides support for the benefits of educational diversity in legal education and the legal profession. A recent empirical study found that most law students of color — and a whopping 89% of White students — support faculty including *diversity discussions*, which are “discussions of race, gender, or sexual orientation in the classroom.”¹⁴³ Furthermore, “the vast majority of students from all race/ethnic backgrounds not only appreciate diversity, but would prefer greater diversity on campus in order to improve their learning of legal concepts and benefit them in their future careers.”¹⁴⁴ A national study of over 8,000 law students confirms these findings, reporting that a full 88% express support for diversity.¹⁴⁵ The vast majority (over 70% from each racial/ethnic group and for each question) agrees that diversity adds different viewpoints to the classroom experience, helps students get along after graduation, and provided past educational enhancement.¹⁴⁶

Current LSSSE data support these findings, revealing that most students of color at least occasionally join diversity discussions in class. When asked whether they include diverse perspectives regarding race, religion, sexual orientation, gender, or political beliefs in class discussions or in writing assignments, the vast majority of students from all backgrounds answered that they at least sometimes do. A full 93% of Whites, 91% of Asian Americans, and 90% of Black, Latino, and multiracial students sometimes, often or very often participate in diversity discussions (Table 2).

¹⁴² The Association of American Medical Colleges (“AAMC”) “contends that ‘tomorrow’s physicians need broader skills and knowledge than in the past,’” necessitating changes to the MCAT that may draw in more applicants of color and those who may be more likely to appreciate the importance of good bedside manner and sociological factors that contribute to health concerns. See Allan Joseph & Karan Chhabra, *For the New Doctors We Need, the New MCAT Isn’t Enough*, FORBES (Apr. 22, 2015, 6:00 PM), <https://www.forbes.com/sites/dandiamond/2015/04/22/we-need-a-new-type-of-doctor-but-will-the-new-mcat-be-enough/#2280bbdb14d0>. In fact, there is increasing diversity in medical schools after implementation of the new MCAT. See Lindsay Kalter, *Medical Schools Are Becoming More Diverse*, AAMC NEWS (Dec. 7, 2018), <https://news.aamc.org/medical-education/article/medical-schools-are-becoming-more-diverse>.

¹⁴³ *Promise of Grutter*, *supra* note 94, at 95.

¹⁴⁴ *Empirically Derived*, *supra* note 23, at 690.

¹⁴⁵ Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71, 81-82 (2010).

¹⁴⁶ *Id.* at 94 tbl.3.

Table 2. Participate in Diversity Discussions, by Race (LSSSE 2018)

	Never		Sometimes		Often		Very often	
American Indian or Alaska Native	6	14%	11	26%	12	29%	13	31%
Asian Am.	81	9%	345	39%	264	30%	187	21%
Black or African American	124	10%	441	35%	350	28%	341	27%
Hispanic or Latino	118	10%	397	35%	352	31%	283	25%
Native Hawaiian or Other Pacific Islander	4	19%	6	29%	7	33%	4	19%
White	686	7%	3398	35%	3386	35%	2121	22%
Other	34	9%	127	34%	108	29%	103	28%
Multiracial	122	10%	420	33%	416	32%	327	25%

In addition to student support, professors also value the ways in which diversity discussions provide benefits to students both during and after law school. Providing students with competing perspectives on a particular issue is a critical skill for future lawyers to master; a recent empirical study of American law faculty determined that professors appreciate the ways in which educational diversity “allows for a richer range of perspectives to be included in the classroom.”¹⁴⁷ Law professors also appreciate how “deeper and more personal student engagement with substantive law improves learning outcomes.”¹⁴⁸ When individuals from different backgrounds contribute to classroom conversations, this “personal context” serves to “illuminate black letter law,” making it more understandable and memorable.¹⁴⁹ Empirical evidence shows that diversity discussions both improve student learning and provide professional benefits “that will reach into future legal practice.”¹⁵⁰

¹⁴⁷ See *Faculty Insights*, *supra* note 135, at 3138.

¹⁴⁸ MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 191 n.19 (2019), (citing *Faculty Insights*, *supra* note 135, at 3141-47).

¹⁴⁹ See *Faculty Insights*, *supra* note 135, at 3138.

¹⁵⁰ *Id.*

Data thereby confirm the Court's assumption that affirmative action based in educational diversity improves student learning, at least in the law school context. These findings provide additional support for the compelling state interest of educational diversity. Current data can also be used to determine whether alternative compelling state interests that the Court rejected without justification could actually be viable.

3. Who Prefers to Work in Underserved Communities?

The *Bakke* Court disregarded early evidence suggesting that alumni of color are more likely to invest in disadvantaged communities than their White classmates.¹⁵¹ However, there is more empirical evidence today indicating that professionals of color are committed to investing in their communities. Their investment is sorely needed, as empirical evidence also confirms ongoing racial disparities. Experimental research including audits show that African American patients have worse outcomes in their healthcare interactions with medical professionals than perhaps any other racial group, whether seeking medical help for childbirth¹⁵² or pain management.¹⁵³ Increasing attention to this problem, and increasing the numbers of qualified medical professionals of color to serve these communities, could result in meaningful progress.¹⁵⁴

¹⁵¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310-11 (1978) (Powell, J.) (citing Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 688 (1975); see also *id.* at 310 (“[T]here is virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote [serving underserved communities].”).

¹⁵² See NAT’L PUB. RADIO, *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF AFRICAN AMERICANS* 6 (2017), <https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf>; Theresa Chalhoub & Kelly Rimar, *The Health Care System and Racial Disparities in Maternal Mortality*, CTR. FOR AM. PROGRESS (May 10, 2018, 9:00 AM), <https://www.americanprogress.org/issues/women/reports/2018/05/10/450577/health-care-system-racial-disparities-maternal-mortality/> (finding that “African American women are three to four times more likely to die from childbirth than non-Hispanic White women, and socioeconomic status, education, and other factors do not protect against this disparity”).

¹⁵³ See generally Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. 4296 (2016) (indicating that White patients receive greater attention and resources than Black patients presenting with the same symptoms).

¹⁵⁴ Recognizing this, the medical profession dramatically overhauled the MCAT to increase participation from those traditionally underrepresented in the medical profession. See Robert M. Kaplan, Jason M. Satterfield, and Raynard S. Kington,

Professionals of color express continuing interest in serving their communities. One case study of the University of Michigan Law School found that for Black and Latino students, “the most popular career goal is to work as a public interest attorney, with almost one-quarter of African Americans (24%) and Latinos (23%) selecting that as their preferred choice.”¹⁵⁵ Additionally, traditionally underrepresented students are more likely to aspire to public office, serving their communities as formal representatives; a full “10% of African American students and 12% of Latinos [selected] ‘Politician’ as their ultimate career goal, as compared to only 4% of whites.”¹⁵⁶ Universities create meaningful opportunities for graduates to become leaders; the law school to leadership pipeline makes these findings especially salient.

National data on law students also suggest a deep commitment to service work, with students of color more likely to aspire to public interest and government positions after graduation.¹⁵⁷ LSSSE data in Table 3 reveal that a full 40% of Black students — the highest percentage of any racial group — prefer to work in public service after graduation.¹⁵⁸ These data “support the view that lawyers from underrepresented backgrounds are more likely to work in underserved communities.”¹⁵⁹ There are disparities between expectations and preferences, with students of color and female students more likely than their White male classmates to expect to work in areas different from those they prefer, likely based on economic considerations involving debt, salary, and wealth.¹⁶⁰ Data from the National

Building a Better Physician — the Case for the New MCAT, 366 NEW ENG. J. MED. 1265, 1265-67 (2012).

¹⁵⁵ *Empirically Derived*, *supra* note 23, at 700 (2014). In that study, “public interest jobs” include both public interest law firm and public interest non-profit positions. *Id.*

¹⁵⁶ *Id.* at 702.

¹⁵⁷ IND. UNIV. CTR. FOR POSTSECONDARY RESEARCH, 2017 ANNUAL SURVEY RESULTS: PREFERENCES & EXPECTATIONS FOR FUTURE EMPLOYMENT 9 (Oct. 9 2018), <http://lssse.indiana.edu/wp-content/uploads/2015/12/2017-Annual-Survey-Results.pdf> [hereinafter 2017 ANNUAL SURVEY].

¹⁵⁸ Latinos, multiracials, and Whites are not far behind in terms of their preference to work in public service. However, additional data would be useful here. For instance, another recent report found that 42% of African Americans, 38% of Latinos, and a slightly smaller percentage of White students expressed a desire to work in public interest. *See id.* at 9 fig.5. These analyses combine public interest and government positions when considering public service jobs.

¹⁵⁹ *Id.* at 15.

¹⁶⁰ *See id.* at 10 fig.7, 11 fig.11. There is significant research now on law student debt and the ways in which this creates special burdens for students of color. *See, e.g.*, Aaron Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41 (2018); Stephen Daniels, *The Perennial (and Stubborn)*

Association of Law Placement (“NALP”) suggest that legal professionals of color are more likely than Whites to serve the community through public interest law.¹⁶¹ Additional research can confirm the ongoing and disproportionate participation of professionals of color in underserved communities.

Table 3. Work Preferences After Graduation, by Race (LSSSE 2018)

	American Indian or Alaska Native		Asian Am.		Black or African American		White		Hispanic or Latino		Multiracial		Other	
Academic	2	5%	29	3%	32	3%	220	2%	15	1%	29	2%	10	3%
Accounting firm	0	0%	3	0.3%	8	1%	33	0.3%	10	1%	4	0.3%	0	0%
Business and industry	4	9%	125	14%	168	13%	1090	11%	134	12%	134	11%	37	10%
Government agency	7	16%	87	10%	193	15%	953	10%	132	12%	139	11%	45	12%
Judicial clerkship	2	5%	41	5%	62	5%	692	7%	66	6%	61	5%	18	5%
Legislative office	0	0%	5	1%	28	2%	108	1%	10	1%	25	2%	4	1%
Military	1	2%	7	1%	9	1%	122	1%	11	1%	17	1%	2	1%
Nonlegal organization	4	9%	9	1%	38	3%	176	2%	14	1%	22	2%	8	2%
Private firm - small	6	14%	58	7%	104	8%	1222	13%	160	14%	138	11%	41	11%
Private firm - medium	1	2%	139	16%	165	13%	1618	17%	175	15%	222	18%	59	16%
Private firm - large	2	5%	236	27%	159	13%	1350	14%	142	12%	176	14%	59	16%
Prosecutor's office	1	2%	41	5%	59	5%	557	6%	61	5%	75	6%	26	7%
Public defender's office	0	0%	19	2%	56	5%	329	3%	55	5%	51	4%	8	2%
Public interest group	2	5%	41	5%	67	5%	550	6%	87	8%	88	7%	21	6%
Solo practice	5	12%	29	3%	78	6%	327	3%	59	5%	61	5%	18	5%
Other	6	14%	14	2%	27	2%	219	2%	15	1%	30	2%	12	3%
Total	43	100%	883	100%	1253	100%	9566	100%	1146	100%	1272	100%	368	100%

Challenge of Cost, Affordability, and Access in Legal Education, in POWER, LEGAL EDUCATION, AND LAW SCHOOL CULTURES (Meera E. Deo, Mindie Lazarus-Black & Elizabeth Mertz eds.) (forthcoming 2019).

¹⁶¹ NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDs: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2017 (2018). NALP data from 2017 law school graduates indicate that attorneys of color enter public interest at slightly higher rates (15.5%) than Whites (13.3%). The gap widens if we include government positions as service-oriented work, with attorneys of color at 24.6% and Whites at 19.6%. *Id.*

III. COMPLICATIONS TO CONSIDER

While empirical evidence can test certain theories, it also brings up additional questions. There will likely be more confusion ahead — as well as further assumptions in need of testing — as affirmative action continues to be challenged and our conceptions of race continue to evolve. Currently at the trial court level is a lawsuit against Harvard University and another against the University of North Carolina, Chapel Hill filed by Asian Americans complaining of discrimination.¹⁶² Though many Asian American groups and individuals are aligned on the side of the university, preserving the use of race as a factor in admissions, the lawsuit has caused some friction within the Asian American community.¹⁶³ These and future investigations into the constitutionality of admissions policies will have to grapple with a number of questions that the Court has heretofore largely ignored. A sampling of these issues is presented briefly below, again using LSSSE data. Each issue raises relevant questions that we must address in order to craft truly effective and legal affirmative action policies.

A. *Multiracial Inclusion*

Today, law schools and American society generally have moved further beyond the Black-White binary to recognize the existence and encourage the full civic participation of many non-White and non-Black groups. A current policy created to increase diversity that

¹⁶² *Students for Fair Admission, Inc. v. Univ. of N.C.*, No. 1:14CV954, 2018 U.S. Dist. LEXIS 168636, (M.D.N.C. Sept. 29, 2018); *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. Harvard Corp.*, No. 1:14-CV-14176-ADB, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Sept. 28, 2018).

¹⁶³ Although plaintiffs in the lawsuit are Asian American, a number of Asian American groups and individuals have filed amicus briefs at this early stage of the proceeding, signaling their strong support for affirmative action and educational diversity. See, e.g., Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment, *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. Harvard Corp.*, No. 1:14-CV-14176-ADB, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Nov. 17, 2014); Brief for 531 Social Scientists and Scholars on College Access, Asian American Studies, and Race as Amici Curiae in Support of Defendant, *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. Harvard Corp.*, No. 1:14-CV-14176-ADB, 2018 U.S. Dist. LEXIS 167901 (D. Mass. Aug. 30, 2018). Polls and studies show that "Asian Americans have consistently supported affirmative action policies," and in spite of a decline in support from Chinese Americans in recent years, "nearly two-thirds of Asian Americans still support affirmative action." Karthick Ramakrishnan & Janelle Wong, *Survey Roundup: Asian American Attitudes on Affirmative Action*, AAPI DATA (June 18, 2018), <http://aapidata.com/blog/asianam-affirmative-action-surveys>.

acknowledged only “Blacks,” “Chicanos,” “Asians,” and “American Indians” would seem archaic and perhaps offensive.¹⁶⁴ Yet a multiracial identity — for those who do share two or more racial/ethnic backgrounds — has only recently become more widely acknowledged, along with an explosion of those identifying as multiracial. The 2000 U.S. Census was the first to allow participants to select more than one racial category, finding that roughly 6.8 million Americans (2.4% of the U.S. population) were multiracial.¹⁶⁵ By the time the 2010 Census was administered, that number had risen to 9.0 million (2.9%) — representing a 32% increase.¹⁶⁶

The multiracial category itself is a pan-ethnic umbrella of individuals who hail from a multitude of backgrounds.¹⁶⁷ A multiracial student may identify as a person of color or as a White person or as both a person of color and a White person. Some have parents who are both people of color from different racial/ethnic categories (e.g., Black and Asian American). Others have one White parent and one parent of color. As a group, multiracials tend to have different experiences and perspectives from monoracials who share those same identities in areas as diverse as entertainment,¹⁶⁸ employment,¹⁶⁹ and education.¹⁷⁰

¹⁶⁴ These terms were used in the UC Davis Medical School admissions policy in 1974. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

¹⁶⁵ See Nicholas A. Jones & Jungmiwha Bullock, *The Two or More Races Population: 2010*, U.S. CENSUS BUREAU 5 (Sept. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf>.

¹⁶⁶ *Id.*

¹⁶⁷ Its very messiness makes it less likely to be included. See Kevin Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, IOWA L. REV 1549, 1564-65 (2011) (declining to include mixed-race individuals in a study of diversity among law school faculty because of the “thorny issues” that would raise).

¹⁶⁸ In the entertainment context, for instance, multiracial Asian Americans and Pacific Islanders actors are regularly cast as White characters, who tend to have more developed backgrounds and relationships than monoracial Asian American and Pacific Islanders on television. See Christina B. Chin et al., *Tokens on the Small Screen: Asian Americans and Pacific Islanders in Prime Time and Streaming Television*, AAPIS ON TV 4 (Sept. 2017), <https://www.aapisontv.com/uploads/3/8/1/3/38136681/aapisontv.2017.pdf>; see also Faustina M. DuCros et al., *Asian Americans and Pacific Islanders on Television*, 17 CONTEXTS 12, 16 (2018).

¹⁶⁹ A 2017 Bureau and Labor Statistics report shows that multiracial individuals have high rates of labor force participation, though their unemployment rates are also higher than the national rate. U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2017, at 1, 2 (Aug. 2018), <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/pdf/home.pdf> [hereinafter LABOR FORCE CHARACTERISTICS].

¹⁷⁰ See LAUREN MUSU-GILLETTE ET AL., U.S. DEP'T OF EDUC., STATUS AND TRENDS IN

Narratives of discrimination against multiracials abound.¹⁷¹ LSSSE data indicate that a full 8.2% of law students today identify as belonging to two or more racial/ethnic groups (see Table 4).

Table 4. Self-Identified Race/Ethnicity of American Law Students (LSSSE 2018)

	n	%
American Indian or Alaska Native	43	0.3
Asian American	878	5.6
Black or African American	1262	8.0
Hispanic or Latino	1157	7.4
Native Hawaiian or Other Pacific Islander	21	0.1
White	9642	61.4
Other	373	2.4
Multiracial	1290	8.2
I prefer not to respond	1046	6.7
Total	15712	100

The experiences of multiracial law students as a group likely differ from those of other racial/ethnic groups. They may not match perfectly with White students or align with Black or other students of color in terms of their experiences or attitudes either.

Adding data about the multiracial experience to the affirmative action context is crucial. Justice Alito, dissenting in *Fisher II*, noted the failings of a policy that did not recognize a multiracial identity; he stressed that the university categorizing “each student as falling into only a single racial or ethnic group” was a “crude classification system [that was] ill suited for the more integrated country that we are

THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2016, at v (Aug. 2016), <https://nces.ed.gov/pubs2016/2016007.pdf> (“The 2013 graduation rate was 59 percent for first-time, full-time undergraduate students who began their pursuit of a bachelor’s degree at a 4-year degree-granting institution in fall 2007. The 6-year graduation rate was highest for Asian [American] students and students of Two or more races (71 percent and 68 percent, respectively), and lowest for Black and American Indian/Alaska Native students (41 percent each).”).

¹⁷¹ See TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION* (2018) (describing allegations of discrimination against multiracials in a variety of legal contexts).

rapidly becoming.”¹⁷² How should admissions offers review the files of multiracial applicants?

B. Interracial Variation

Law schools increasingly tout their commitment to diversity, whether in glossy brochures or using statistics on their websites. Often, law schools increase their overall diversity scores by including not just the African American, Native American and Latino students who continue to be severely underrepresented in higher education, but by including Asian Americans as well. Clearly, Asian Americans are non-White.¹⁷³ Obviously, the racialized experience of Asian Americans provides viewpoints and perspectives that differ from those of White Americans. A long history of discrimination — from the Chinese Exclusion Act to the denial of citizenship — validates the importance of recognizing that race matters for Asian Americans just as much as for any other group.¹⁷⁴ Ongoing discrimination is also directly relevant to the racialized response to Asian Americans — from the Muslim Bans¹⁷⁵ to increasing hate crimes¹⁷⁶ to changes in the visa lottery system.¹⁷⁷

¹⁷² *Fisher II*, 136 S. Ct. 2198, 2229-30 (2016) (Alito, J. dissenting).

¹⁷³ Though an early settler from India tried to make the case to the U.S. Supreme Court that South Asians were White (both Aryan and descendants of people from the Caucasus mountains), his claims were rejected by the Court, which maintained, “It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.” *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923). For more on South Asian racial ambiguity, see generally Vinay Harpalani, *Desicrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U ANN. SURV. AM. L. 77 (2013).

¹⁷⁴ For a history of discrimination against Asian Americans, see generally ERIKA LEE, *THE MAKING OF ASIAN AMERICA: A HISTORY* (2015); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998).

¹⁷⁵ For a comprehensive summary of the various Muslim Bans and relevant law and literature, see generally Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE. L. REV. 1475 (2018).

¹⁷⁶ Hate crimes have increased against Asian Americans, especially South Asians and Sikhs. *New FBI Hate Crimes Statistics Show Disturbing Surge in Hate Crimes*, S. ASIAN AMS. LEADING TOGETHER (Nov. 13, 2018), <http://saalt.org/tag/hate-crimes/> (“The surge in hate crimes against Sikh and Arab Americans, which rose by 243% and 100% respectively since 2016 is particularly disturbing”); see also John Eligon, *Hate Crimes Increase for the Third Consecutive Year*, *F.B.I Reports*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html>. Advocacy group Asian Americans Advancing Justice has created a website to track hate crimes incidents: <https://www.standagainthatred.org>.

¹⁷⁷ Changes to the H-1B lottery system will now give strong preference to foreign

Across the country, roughly 5.6% of law students are Asian American compared to 8.0% who identify as Black and 7.4% who are Latino (See Table 4). Historically, people of color have had many opportunities to stand together on issues of race, presenting a unified front against White racism and oppression.¹⁷⁸ Recently, Asian Americans have become more split, with some being perhaps co-opted by Whites encouraging Asian American individuals to be more self-interested. Asian Americans have recently become the face of anti-affirmative action campaigns against both Harvard University and the University of North Carolina, Chapel Hill.¹⁷⁹ Previously, lawsuits targeting affirmative action programs used White plaintiffs, complaining that affirmative action constituted “reverse discrimination.”¹⁸⁰ Interestingly, those lawsuits that used White plaintiffs ignored the fact that White women constitute the largest group of beneficiaries of affirmative action since its inception.¹⁸¹ Yet attempts to split people of color into those who benefit from affirmative action versus those who are penalized by it are relatively new.

Of course, Black and Asian American students are not the same with regard to their background or current experiences with racism or otherwise — even as some of their collective experiences as students of color may be roughly parallel regardless of racial background. There may also be instances where Asian Americans and Whites have similar experiences, quite different from those of other students of color.

The Asian American experience must be considered in any affirmative action policy, as the group clearly has experienced

nationals with advanced degrees from U.S. institutions of higher education, which will significantly affect Asian employees. See Melia Russell, *H-1B Visa Lottery Changing to Favor Those with Advanced Degrees*, S.F. CHRON. (Jan. 30, 2019 2:54 PM), <https://www.sfchronicle.com/business/article/H-1B-visa-lottery-changing-to-favor-those-with-13574410.php> (“Three Indian firms — Tata Consultancy Services, Infosys and Wipro — often account for a majority of the H-1B applications, an analysis of government data shows.”).

¹⁷⁸ See generally TAKAKI *supra* note 174.

¹⁷⁹ *Students for Fair Admission, Inc. v. Univ. of N.C.*, No. 1:14CV954, 2018 U.S. Dist. LEXIS 168636 (M.D.N.C. Sept. 29, 2018); *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. Harvard Corp.*, No. 1:14-CV-14176-ADB, 2018 U.S. Dist. LEXIS 167901, (D. Mass. Sept. 28, 2018).

¹⁸⁰ See, e.g., *Fisher II*, 136 S. Ct. 2198 (2016); *Fisher I*, 570 U.S. 297 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁸¹ Some even argue that White men have been the primary beneficiaries of affirmative action. Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 *FORDHAM L. REV.* 843, 927 (1997).

racialized realities that can contribute to diversity on campus.¹⁸² But should all non-White students be considered equal for diversity purposes? Should universities include Asian Americans when capturing student diversity? If so, should they disaggregate or supplement those larger numbers with detailed statistics on more traditionally underrepresented groups?

C. Intra-racial Differences

Asian Americans are the fastest growing immigrant group in the U.S.¹⁸³ Historically, Asian Americans have purposefully joined together for mutual political and social benefits.¹⁸⁴ Yet the Asian American community includes “a diverse population with over 50 ethnic subgroups, 100 languages, and a broad range of socio-historical, cultural, religious, and political experiences.”¹⁸⁵ Asian Americans are the most economically diverse racial group in the United States, with some groups reporting wealth at levels above Whites and others among the lowest in the country.¹⁸⁶ For example, poverty levels for the Hmong (42%), Cambodian (33%) and Laoatian (30%) communities in California soar above those who are Indian, Taiwanese, and Chinese (6–7%).¹⁸⁷ Rates of education are similarly irregular, with South Asian and Chinese Americans attending college at rates higher than those of native born American Whites, while 66% of Cambodian, 67% of Laotian, 63% of Hmong, and 51% of Vietnamese Americans have not attended college.¹⁸⁸ These disparities

¹⁸² See Johnson, *supra* note 167, at 1565.

¹⁸³ Sabrina Tavernise, *U.S. Has Highest Share of Foreign-Born Since 1910, with More Coming from Asia*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/us/census-foreign-population.html>.

¹⁸⁴ See LEE, *supra* note 174, at 3; TAKAKI, *supra* note 174; see also ELAINE LOW, AN UNNOTICED STRUGGLE: A CONCISE HISTORY OF ASIAN AMERICAN CIVIL RIGHTS STRUGGLES 10 (2008), <https://jacl.org/wordpress/wp-content/uploads/2015/01/Unnoticed-Struggle.pdf>.

¹⁸⁵ Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 163, at 5; see also YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 19 (1993).

¹⁸⁶ Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RES. CTR. (Jul. 12, 2018), <https://www.pewsocialtrends.org/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/>.

¹⁸⁷ THE CAMPAIGN FOR COLLEGE OPPORTUNITY, THE STATE OF HIGHER EDUCATION IN CALIFORNIA: ASIAN AMERICANS NATIVE HAWAIIAN PACIFIC ISLANDERS 22, 22 fig.12 (Sept. 2015), https://collegecampaign.org/wp-content/uploads/2015/09/2015-State-of-Higher-Education_AANHPI2.pdf.

¹⁸⁸ ASIAN & PACIFIC ISLANDER AMERICAN SCHOLARSHIP FUND, THE RELEVANCE OF

both follow and reflect differences in immigration, as many immigrants from “Korea, China, and Taiwan traveled voluntarily to the United States as highly-educated professionals” who spoke fluent English and had already secured high-status employment, while “many Southeast Asian Americans arrived as refugees from Cambodia, Laos, Vietnam, and Myanmar” with limited English language skills and few educational or professional resources.¹⁸⁹ Even high-status and professional Asian Americans face discrimination and disparities. For instance, in spite of increasing numbers enrolling in law school, Asian Americans remain underrepresented in various elite fields within the legal profession — including clerkships and law firm partners.¹⁹⁰

A result of this *intra-racial diversity*, or diversity within a group, is that a campus may have a minority student population that consists of a high percentage of Asian American students, with particular Asian American sub-groups completely missing.¹⁹¹ Many traditionally underrepresented Asian American law students are first generation college students, come from lower socioeconomic backgrounds than Whites, and lack meaningful access to educational and professional success for other reasons. Considering the ethnic background of Asian American law students presented in Table 5, data show that just two ethnic groups — Chinese and Asian Indian — account for almost half (45%) of all Asian Americans in law school. Thai students comprise just 1% of Asian Americans in law school, while only 5% are Vietnamese. Filipinos, Cambodians, Laoations, and others are only minimally represented.

ASIAN AMERICANS & PACIFIC ISLANDERS IN THE COLLEGE COMPLETION AGENDA 8, 8 fig.5 (2011), http://www.apiasf.org/carereport/2011_CARE_Report.pdf.

¹⁸⁹ Brief for Asian American Legal Defense and Education Fund et al. as Amici Curiae in Opposition to Plaintiff’s Motion for Summary Judgment, *supra* note 163, at 5-6.

¹⁹⁰ See ERIC CHUNG ET AL., A PORTRAIT OF ASIAN AMERICANS IN THE LAW 3 (2017), <https://www.apaportraitproject.org/> (“Although Asian Americans comprised 10.3% of graduates of top-30 law schools in 2015, they comprised only 6.5% of all federal judicial law clerks.”); see also, RONIT DINOVIETZ ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 63-68 (2004); RONIT DINOVIETZ ET AL., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 18 (2009); RONIT DINOVIETZ ET AL., AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 75, tbl.9.1a (2014).

¹⁹¹ For more on this topic in the higher education context, with a focus on the salience of an applicant’s racial identity, see generally Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013).

Table 5. Asian Americans, by Ethnic Heritage (LSSSE 2018)

	n	%
Chinese	260	24.4
Japanese	72	6.7
Korean	174	16.3
Asian Indian	220	20.6
Taiwanese	31	2.9
Thai	11	1.0
Vietnamese	51	4.8
Other Asian or Asian American	186	17.4
Multiple Asian subgroups selected	62	5.8
Total	1067	100

Latinos are also a pan-ethnic group, likely also masking variation among ethnic-sub groups in law school and other settings. Table 6 reveals the ethnic variation of Latinos in law school, showing a higher percentage of Mexican Americans (45%) than Puerto Rican (12%), Cuban American (9%), and Central American (9%) combined.

Table 6. Latinos, by Ethnic Heritage (LSSSE 2018)

	n	%
Mexican	658	45.3
Puerto Rican	170	11.7
Cuban	136	9.4
Central American	135	9.3
South American	26	1.8
Spaniard	83	5.7
Other Hispanic or Latino	75	5.2
Multiple Hispanic or Latino subgroups selected	171	11.8
Total	1454	100

How should affirmative action policies take account of intra-racial diversity? Are all sub-groups within the pan-ethnic Asian American or Latino umbrella equal? How do things change when we consider intersectionality — traits in addition to race/ethnicity that comprise our core identity and can be bases for discrimination? Are there similar differences between native-born African Americans as compared to those who are immigrants or the children of immigrants

from Africa, the Caribbean, or the West Indies?¹⁹² Should we continue to aggregate all data within these groups, or can we disaggregate to better understand enrollment rates and the qualitative experience of those from less-visible ethnic groups within the larger communities?

CONCLUSION

Over the past forty years, with numerous Supreme Court cases addressing new challenges to various affirmative action policies, the legal doctrine has evolved. Contemporary understandings of the facts — how we conceptualize race — have changed as well.

Justice Alito foreshadowed this division, arguing in his *Fisher II* Dissent that the university's policy "discriminates against Asian-American [prospective] students," since the "limited number of spaces" available automatically means that "providing a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission."¹⁹³ Yet it does not have to be a zero sum game in the way he envisioned. As Justice Blackmun observed in his *Bakke* opinion, "[I]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."¹⁹⁴ Chief Justice Roberts responded to this claim in the elementary school selection case of *Parents Involved* by asserting, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁹⁵ Though after centuries of oppression against people of color, his proposal would simply maintain the status quo of ongoing White privilege. Who then should be treated differently in order for us to achieve collective equality?

The job of a university is to craft the best possible pool of students in the student body. For an affirmative action polity to be

¹⁹² See Lani Guinier, Op-ed, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13; Sara Rimer and Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004. "More recently, Kevin Brown and Jeannine Bell have made similar observations, exploring whether African Americans who trace their ancestry to American slavery are disadvantaged in admissions processes vis-à-vis other blacks." Carbado, *supra* note 191 at 1139 n.36 (citing 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 (2008)).

¹⁹³ *Fisher II*, 136 S. Ct. at 2227 n.4.

¹⁹⁴ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

¹⁹⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

constitutional, every individual must compete for admission against every other applicant. No two people are exactly alike, though many applicants may share background characteristics regarding undergraduate major, state of residence, personality, and even race or ethnicity. Universities must include broader structural context, so that their policies accurately reflect contemporary realities.

This could signal an opportunity to redefine affirmative action altogether. For instance, Justice Alito has signaled an interest in moving away from a reliance on test scores and considering broader holistic review of applicants.¹⁹⁶ In his *Fisher II* Dissent he noted that, “[The University of Texas] certainly has a compelling interest in admitting students who will achieve academic success, but it does not follow that it has a compelling interest in maximizing admittees’ SAT scores.”¹⁹⁷ We should redefine merit to focus less on test scores and more on other measures of future success. Furthermore, affirmative action should be directly connected policy-wise to desegregation efforts, rather than simply relying on educational diversity.¹⁹⁸ Today, many elementary and secondary schools are more segregated than they were before *Brown*.¹⁹⁹ If we considered affirmative action as a desegregation effort, in addition to furthering educational diversity, additional benefits would accrue.

The recently submitted Social Scientists amicus brief in the Harvard affirmative action case reminds us, “The purpose of employing a whole-person review process like the one Harvard uses is to account for the diverse range of experiences — including the role race may have played in a person’s experience — among Americans of all races

¹⁹⁶ See *Fisher II*, 136 S. Ct. 2198, 2234 n.13 (2016) (Alito, J., dissenting) (“In 2008, Wake Forest dropped standardized testing requirements based at least in part on ‘the perception that these tests are unfair to blacks and other minorities and do not offer an effective tool to determine if these minority students will succeed in college.’”).

¹⁹⁷ *Id.* at 2234.

¹⁹⁸ This was a central tenet of the Intervening-Defendants’ case in *Grutter*. In fact, “the intervenors planned to ‘raise fundamental questions of equality’ in their support of affirmative action and also ‘insisted that *Brown* [v. *Board of Education*] was a resounding call to rectify past racial injustice by overcoming the vestiges of subordination and stratification.” See Moran, *supra* note 85, at 460-62; Deo, *The Promise of Grutter*, *supra* note 94, at 70 n.35. The Court did push back against one such effort soon after *Grutter* was decided. See *Parents Involved*, 551 U.S. 701.

¹⁹⁹ See Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, in ECONOMIC POLICY INSTITUTE 2 (2013), <https://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf> (“Today, African American students are more isolated than they were 40 years ago, while most education policymakers and reformers have abandoned integration as a cause.”).

and backgrounds.”²⁰⁰ Admissions officers should take note of this admonition. Affirmative action should tie together the various complications outlined above — and dozens more that reflect the complexities of race in contemporary America.²⁰¹ Policies that include race as one factor in admission must be more directly tailored to current realities and include a truly holistic review to make the most sense of educational diversity.

²⁰⁰ Brief for 531 Social Scientists and Scholars on College Access, Asian American Studies, and Race as Amici Curiae in Support of Defendant, *supra* note 163, at 6.

²⁰¹ Similarities and differences among law students — including data from different groups of students of color and disaggregated data from pan-ethnic groups — are explored further in Meera E. Deo, *Improving Affirmative Action*, *supra* note 66 (in progress); this data and additional empirical research should be used to craft optimal and effective affirmative action policies.