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Faculty Insights on Educational Diversity

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FACULTY INSIGHTS ON EDUCATIONAL DIVERSITY

Meera E. Deo*

Twice in the past two years, the U.S. Supreme Court has approved educational diversity as a compelling state interest that justifies the use of race in higher education admissions decisions. Nevertheless, it remains on somewhat shaky ground. Over the past decade, the Court has emphasized that its acceptance of diversity stems from the expectation that a diverse student body will enhance the classroom environment, with students drawing on their diverse backgrounds during classroom conversations that ultimately bring the law to life. Yet, the Court provides no support for its assumption that admitting and enrolling diverse students actually result in these educational benefits. In fact, empirical research on law students indicates that structural diversity (i.e., diversity in numbers) does not lead automatically to interactional diversity (i.e., meaningful interaction among diverse students) or classroom diversity (i.e., meaningful diverse interaction in the classroom specifically); instead, these enhanced classroom experiences depend on adept facilitation by faculty and mutual respect among diverse students.

The Court could draw from a wide body of empirical scholarship with students to better understand the ways in which educational diversity could provide true scholastic and professional benefits. Yet, another group of classroom participants and observers offers even more astute perspectives. Law faculty members have never been asked about their perspectives on educational diversity as part of a formal empirical study, though as the ones facilitating discussion, leading classroom conversations, and instilling a model of respect, they have unique experiences and insights into the possible benefits of educational diversity.

This Article presents findings from the Diversity in Legal Academia (DLA) project, a landmark empirical study of the law faculty experience. DLA findings suggest that law faculty members from all racial/ethnic

* Associate Professor of Law, Thomas Jefferson School of Law. The author thanks the many supporters of the Diversity in Legal Academia (DLA) project, from inception through current dissemination. Kale Sopoaga, Brittany Nobles, Jillian Kates, and Eva Kobi provided outstanding research assistance. Thanks are especially due to the ninety-three law faculty members whose perspectives are included in this Article as DLA findings. This Article is part of a larger symposium publishing articles from the *Critical Race Theory and Empirical Methods Conference* held at Fordham University School of Law in November 2014. For an overview of this symposium, see Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953 (2015).

backgrounds not only appreciate the many benefits of diversity, but they also recognize the educational and professional challenges associated with the lack of diversity currently plaguing many law schools. Courts, administrators, and others should rely on these findings to provide additional support for affirmative action through educational diversity, especially to bolster it while it is under attack.

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INTRODUCTION

From the days of *Grutter v. Bollinger*,¹ legal scholars as well as those in education, sociology, and related fields have lavished considerable attention on understanding, discussing, and dissecting educational diversity. Legal scholars have examined theoretical bases of the diversity rationale, suggesting that by “drawing on their experiences and contributing their unique viewpoints,” students improve classroom learning.² Social science experts have conducted empirical research on structural, interactional, and classroom diversity, noting that while numeric representation does not lead automatically to meaningful interaction between diverse students in the classroom or elsewhere on campus, it is a prerequisite for those eagerly

1. 539 U.S. 306 (2003).

2. Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CALIF. L. REV. 1149, 1158–60 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)).

sought-after enhanced classroom conversations where students rely on personal experience to illuminate discussions of substantive law.³

Courts have acknowledged the growing body of scholarship supporting the many benefits of educational diversity. The U.S. Supreme Court has agreed that diversity creates “substantial” benefits for students in the law school context.⁴ These range from “more spirited” classroom discussions⁵ to “the lessening of racial isolation and stereotypes.”⁶ The Court specifically predicts that educational diversity yields an “enhanced classroom dialogue” that is so compelling that universities may pursue them through well-crafted affirmative action policies.⁷

Yet, each of these studies and court opinions relies on only the *student* perspective. Missing from this rich literature are faculty insights into whether educational diversity matters and, if so, how and why.

Ironically, in spite of their empirical silence on this matter until now, faculty members are in the best position to gauge teaching and learning in the classroom and therefore make judgments as to the worth of educational diversity. Because faculty members are tasked with imparting knowledge and facilitating student understanding of legal material, faculty perspectives on student learning in both diverse and non-diverse environments are crucial to forming a true understanding of the value of diversity in higher education.

Educational diversity is the sole surviving non-remedial rationale supporting affirmative action as a compelling state interest.⁸ However, because the Supreme Court has retreated somewhat in its support of educational diversity, the long-term future viability of this rationale is unclear.⁹ This Article draws from a national dataset of law faculty members, ranging from assistant professor to dean emeritus in every region of the United States and from diverse racial/ethnic backgrounds, to explore faculty perspectives on educational diversity. Empirical data show that law faculty members appreciate student diversity, especially because it brings unique perspectives into the classroom, energizing discussions, improving the educational process, and creating benefits for students’ future professional careers. Those who teach in non-diverse environments see the

3. See, e.g., Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63 (2011); Patricia Gurin, Expert Report, *The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999) (prepared for litigation in *Gratz v. Bollinger* and *Grutter*).

4. See *Grutter*, 539 U.S. at 330.

5. See *id.*

6. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013).

7. See *id.*

8. Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661, 668 (2014) (“In the context of higher education, educational diversity is the only non-remedial compelling state interest that courts have sanctioned to date.”).

9. See *id.* at 664 (“Yet, diversity has been under attack in past years and faces uncertainty in the future. Justice O’Connor suggested in *Grutter v. Bollinger* that the educational diversity rationale may have a limited shelf life, and *Fisher v. University of Texas* recently narrowed strict scrutiny further.”).

flip side: a narrow set of perspectives, few fulfilling conversations about the context of the law, and alienation of the few students of color in class.

Drawing from this empirical research, this Article proposes that administrators, courts, and policy makers draw from faculty perspectives on educational diversity when discussing the continued importance of this compelling state interest. Adding the faculty perspective to existing scholarship will provide a more complete picture of the benefits of educational diversity.

I. STRICT SCRUTINY IN THEORY AND PRACTICE

A. *The Constitutional Standard*

Parties defending the constitutionality of affirmative action in higher education admissions decisions must show that their policies satisfy “strict scrutiny,” because when government decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”¹⁰ Simply put, the race-conscious policy at issue in each case must both serve a compelling state interest and be narrowly tailored to achieve that interest.¹¹

Interestingly, both prongs are currently in a state of doctrinal flux. Narrow tailoring, the second prong of the strict scrutiny analysis, has become narrower over time.¹² The Court recently asserted that “[e]ducational institutions being sued for using race as a factor in admissions must convince the trial court ‘that it is necessary for a university to use race to achieve the educational benefits of diversity.’”¹³ In other words, “Only if ‘no workable race-neutral alternatives would produce the educational benefits of diversity’ may the university maintain an admissions policy that takes account of race.”¹⁴ This moves the narrow tailoring prong of strict scrutiny into a “least restrictive means” requirement.¹⁵

Educational diversity, the first prong of strict scrutiny, may be nearing its end point as it loses favor with the Court.¹⁶ Litigants have presented both trial and appellate courts with a number of possible compelling state interests over the years, ranging from serving underrepresented

10. See *Fisher*, 133 S. Ct. at 2417 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

11. *Id.*

12. Deo, *supra* note 8, at 673.

13. *Fisher*, 133 S. Ct. at 2420; see also Rebecca K. Lee, *Fisher v. University of Texas at Austin: Promoting Full Judicial Review and Process in Applying Strict Scrutiny*, 4 HOUS. L. REV. HLR 33 (2013).

14. Deo, *supra* note 8, at 672 (quoting *Fisher*, 133 S. Ct. at 2420).

15. *Id.*

16. See *id.* at 664 (“[D]iversity has been under attack in past years and faces uncertainty in the future. Justice O’Connor suggested in *Grutter v. Bollinger* that the educational diversity rationale may have a limited shelf life, and *Fisher v. University of Texas* recently narrowed strict scrutiny further.”).

communities¹⁷ to addressing widespread societal discrimination.¹⁸ Additional potential compelling state interests, including minimizing racial isolation and diversifying American leadership, have appeared in the academic literature, drawing from empirical data on law students.¹⁹ Yet, the Supreme Court has authorized only one non-remedial compelling state interest as justifying the use of race in admissions decisions: educational diversity.²⁰

B. Statewide Initiatives and Court Challenges

Challenges to affirmative action in the higher education admissions context began with the 1978 case *Regents of University of California v. Bakke*.²¹ In that case, an unsuccessful white applicant to the University of California at Davis Medical School alleged that the school's practice of reserving a certain number of seats for underrepresented applicants violated state and federal law.²² Though no clear consensus emerged, Justice Powell authored the opinion that governed affirmative action policies for the next twenty-five years.²³ In his opinion, Justice Powell determined that institutions of higher learning were required to evaluate all applicants together;²⁴ while schools could not maintain separate applicant pools, they could award a "plus" factor to applicants who they believed would contribute to the diversity of the school.²⁵ He modeled this proposal on the "Harvard Plan," the affirmative action policy in place at that institution.²⁶ Although Justice Powell rejected a number of other possible compelling

17. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978); see also Deo, *supra* note 8, at 669 n.47 ("The [defendant in *Bakke*] also advanced the idea that students of color would graduate and work in underserved populations as a compelling state interest, though the Court determined that there was insufficient evidence in the record to rely on that interest.").

18. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). More recently in *Fisher*, the Court reaffirmed that addressing widespread societal discrimination "could not serve as a compelling interest, because a university's 'broad mission [of] education' is incompatible with making the 'judicial, legislative, or administrative findings of constitutional or statutory violations' necessary to justify remedial racial classification." *Fisher*, 133 S. Ct. at 2417 (alteration in original) (quoting *Bakke*, 438 U.S. at 307, 309).

19. Deo, *supra* note 8, at 690–98, 702–05.

20. *Id.* at 668 ("In the context of higher education, educational diversity is the only non-remedial compelling state interest that courts have sanctioned to date."). See *infra* Part I.B–C. for more on educational diversity specifically.

21. 438 U.S. 265 (1978).

22. See *id.* at 270.

23. See *id.* at 269; see also *id.* at 324 (Brennan, J., concurring); *id.* at 325 (Stevens, J., concurring in part and dissenting in part); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1045 (1996) (referencing "the Court's fractured four-one-four decision in *Bakke*").

24. *Bakke*, 438 U.S. at 319–20 (majority opinion).

25. See *id.* at 315–17.

26. See *id.* at 321 (app.).

interests,²⁷ “[p]ursuit of educational diversity was . . . singled out as a worthy state interest.”²⁸

The vast majority of institutions of higher learning quickly followed Justice Powell’s lead, modeling their own affirmative action policies after the Harvard Plan identified in *Bakke*.²⁹ Yet, twenty years after *Bakke*, appellate courts were still debating the merits of educational diversity as a compelling state interest sufficient to bolster affirmative action.³⁰ One circuit court agreed that educational diversity was a compelling state interest that justified the use of race in admissions.³¹ Another determined both that Justice Powell’s opinion in *Bakke* was not binding precedent and that educational diversity was not a compelling state interest.³² This circuit split set the stage for another Supreme Court affirmative action showdown.³³

A half-century after *Bakke* was decided, the Supreme Court again took up the issue of affirmative action in higher education, granting certiorari in the twin University of Michigan cases *Grutter v. Bollinger*³⁴ and *Gratz v. Bollinger*.³⁵ In those cases, as in *Bakke*, unsuccessful white applicants (to the law school and undergraduate College of Literature, Science, and the Arts, respectively) “complained that including race as a factor in admissions discriminated against them in violation of the Constitution and other anti-discrimination laws.”³⁶ After successful interventions by student and community defendants in both cases,³⁷ a lengthy trial in the law school case,³⁸ a Sixth Circuit summary judgment decision, and a Sixth Circuit rehearing en banc,³⁹ the cases finally reached the Supreme Court. In upholding the law school’s policy in *Grutter*, the Supreme Court confirmed

27. *Id.* at 310.

28. Deo, *supra* note 8, at 669 (citing *Bakke*, 438 U.S. at 316).

29. For instance, the Sixth Circuit opinion in *Grutter* states, “[d]rafted to comply with *Bakke*, the [University of Michigan] Law School’s consideration of race and ethnicity does not use quotas and closely tracks the Harvard plan.” *Grutter v. Bollinger*, 288 F.3d 732, 746 (6th Cir. 2002) (en banc) (quoting law school’s policy), *aff’d*, 539 U.S. 306 (2003).

30. *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1200–01 (9th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932, 941–44, 948 (5th Cir. 1996).

31. *Smith*, 233 F.3d at 1200–01.

32. *Hopwood*, 78 F.3d at 941–44, 948.

33. *See* Deo, *supra* note 3, at 68 (“[F]ollowing a circuit split, the Court granted certiorari in *Grutter* in order to give a clear answer to the question of whether institutions of higher learning could rely on affirmative action to improve or maintain student body diversity.” (citing *Grutter*, 539 U.S. at 322 (“We granted certiorari, 537 U.S. 1043 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”))).

34. 539 U.S. 306 (2003).

35. 539 U.S. 244 (2003).

36. *See* Deo, *supra* note 8, at 670 (citing *Grutter*, 539 U.S. at 317).

37. *See* Deo, *supra* note 3, at 70 n.35 (“Student and community intervenors joined the lawsuit to defend affirmative action on grounds of equality and justice rather than rely on the Law School’s more traditional defense of diversity as a compelling state interest.”).

38. *See* Rachel F. Moran, *The Heirs of Brown: The Story of Grutter v. Bollinger*, in RACE LAW STORIES 451, 460–73 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

39. *Id.* at 473–78.

that educational diversity was a compelling state interest justifying the use of race in admissions decisions in higher education.⁴⁰ The Court also held that the law school's affirmative action policy was sufficiently narrowly tailored to withstand strict scrutiny while the undergraduate policy was not.⁴¹

In the past two years, the Supreme Court has issued two additional opinions relating to affirmative action in higher education. In *Fisher v. University of Texas at Austin*,⁴² decided in 2013, the Court determined that institutions of higher education in Texas could rely on affirmative action to achieve greater educational diversity, along with an existing state program guaranteeing admission to state universities to the top 8–10 percent of students from each high school graduating class.⁴³ Although the “Top 10% Program,” as it became known, “itself produced some student diversity by drawing from highly segregated high schools around the state,”⁴⁴ the Court determined that the university could also assert its interest in educational diversity through direct affirmative action measures, so long as its policy was narrowly tailored to achieve that goal.⁴⁵

Just last year, the Court ruled on *Schuetz v. Coalition to Defend Affirmative Action*,⁴⁶ a challenge to Michigan's Proposal 2 (“Prop. 2”).⁴⁷ Prop. 2 is a Michigan Constitutional Amendment banning public officials from using race as a factor in higher education admissions, as well as in decisions involving hiring and contracting.⁴⁸ When Prop. 2 appeared on the state ballot in 2006, Michigan became the newest battleground to debate affirmative action policy through the popular initiative process.⁴⁹ By then, the modern affirmative action debate had spread beyond the judicial branch.⁵⁰

40. See *Grutter*, 539 U.S. at 325 (“[S]tudent body diversity is a compelling state interest that can justify using race in university admissions.”).

41. See *Gratz*, 539 U.S. at 275 (“[B]ecause the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.”); see also *Grutter*, 539 U.S. at 343 (finding that the “Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body” is not prohibited by the Equal Protection Clause).

42. 133 S. Ct. 2411 (2013).

43. *Id.* at 2414.

44. Deo, *supra* note 8, at 672.

45. See *Fisher*, 133 S. Ct. at 2421 (remanding the case to the Fifth Circuit with a directive that “the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity”).

46. 134 S. Ct. 1623 (2014).

47. *Id.* at 1629; see also MICH. CONST. art. I, § 26.

48. See *Schuetz*, 134 S. Ct. at 1629 (“Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities.”).

49. For a thorough history of the process by which groups and individuals sought to ban affirmative action through the popular initiative process, see generally Meera E. Deo, *Ebbs and Flows: The Courts in Racial Context*, 8 RUTGERS RACE & L. REV. 167 (2007).

50. *Id.*

Using the popular initiative process as a tool against affirmative action originated in California.⁵¹ Affirmative action became a topic of public conversation in earnest in 1996 when the California Civil Rights Initiative was placed on the state ballot as Proposition 209 (“Prop. 209”).⁵² Prop. 209 proposed a state constitutional amendment, which was styled as a “Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities,” and it sought to eliminate race-conscious decision making in public education, employment, and contracting decisions.⁵³ In November 1996, Prop. 209 became law with the support of the majority of California voters.⁵⁴ The constitutional amendment survived legal challenges and went into effect, inspiring a number of other states to consider similar measures.⁵⁵

When Michigan voters passed Prop. 2, supporters of affirmative action quickly responded in court, “alleging that the new law amounts to political restructuring in violation of the Fourteenth Amendment Equal Protection Clause.”⁵⁶ In April 2014, in its majority opinion in *Schuette*, the Court did not directly address the benefits of educational diversity, but it held that Michigan’s voter initiative passed constitutional muster and could go into effect.⁵⁷ Thus, the *Schuette* Court left educational diversity untouched, allowing it to remain good law, while chipping away at affirmative action more broadly.

C. *The Current State of Educational Diversity*

The compelling state interest of educational diversity gives institutions of higher learning the freedom to determine how to optimize student learning through their admissions processes.⁵⁸ Many institutions are forthright about their belief that attracting, admitting, and enrolling a diverse student body

51. *See id.* at 179.

52. Don Lattin, *Clergy Denounces Prop. 209: CCRI Called ‘Deep Lie’ Created to Kill Affirmative Action*, S.F. CHRON., Oct. 22, 1996, at A15.

53. *See, e.g.*, CAL. BALLOT PAMPHLET: GEN. ELEC. NOV. 5, 1996, PROPOSITION 209: PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES 30–33, available at http://librarysource.uchastings.edu/ballot_pdf/1996g.pdf (outlining Prop. 209 which was later enacted as CAL. CONST. art. I, § 31).

54. Jerome Karabel & Lawrence Wallack, *Proponents of Prop. 209 Misled California Voters*, CHRISTIAN SCI. MONITOR, Dec. 5, 1996, at 19. For more on the history and process surrounding passage of Prop. 209, see Deo, *supra* note 49, at 179–80.

55. Deo, *supra* note 49, at 180.

56. Deo, *supra* note 8, at 666.

57. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2013) (“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.”).

58. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (explaining that “some, but not complete, judicial deference is proper” because institutions of higher education deserve academic freedom with regard to the particular goals and mission of the institution).

improves learning outcomes.⁵⁹ The Supreme Court has asserted that educational diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”⁶⁰ In addition, the Court has asserted that increased campus diversity results in better in-class learning because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when students have “the greatest possible variety of backgrounds.”⁶¹

In spite of these assertions, empirical legal scholarship has shown that structural diversity—for instance, having sufficient numbers of students of color on campus—is only a necessary condition for the anticipated improved learning outcomes of educational diversity.⁶² Structural diversity is not sufficient to create the enhanced classroom experience that courts and faculty members expect will result. While meaningful numbers of students of color on campus are *necessary* for cross-racial conversations to occur in the classroom or elsewhere on campus, the numbers alone are not *sufficient* to produce the expected benefits of educational diversity.⁶³ To achieve those results, facilitators must foster positive cross-racial conversations and experiences between those diverse students, “where individuals interact as equals in a mutually respectful environment;” this will maximize the benefits of structural diversity in the classroom.⁶⁴ Given these findings, one would expect greater emphasis on educational diversity in courts and in classrooms, as administrators, educators, and policy makers strive to make the most out of whatever structural diversity exists on campus.

Yet, educational diversity as a legal justification for affirmative action is itself in a precarious position.⁶⁵ Even in *Grutter*, which confirmed that universities could act on their commitment to educational diversity through affirmative action policies, the Court mentioned its expectation “that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity].”⁶⁶ The Court in *Fisher* more recently made clear that “strict scrutiny imposes on the university the ultimate

59. Even the Law School Admissions Council reports that “[l]aw schools want diverse, interesting classes, representative of a variety of backgrounds.” See *How Law Schools Select Applicants*, LSAC, <http://www.lsac.org/jd/choosing-a-law-school/canadian/law-schools-select-applicants> (last visited Apr. 23, 2015).

60. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (alteration in original).

61. *Id.*

62. Deo, *supra* note 3, at 77 (citing studies finding that “[t]o reap the maximum benefits from educational diversity, students from diverse backgrounds must engage in ‘meaningful interaction’ that is both frequent and of a high quality”).

63. *Id.* at 73 (“Simply admitting students of color in raw numbers (even numbers sufficient to constitute a welcoming atmosphere for those students) is no guarantee that the interactions and classroom conversations the *Grutter* Court anticipated will actually take place.”).

64. *Id.* at 63, 83–84, 84 n.133 (citing Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW & SEXUALITY REV. 133, 171 (1991)).

65. See, e.g., Deo, *supra* note 8, at 662 (“Educational diversity [is] resting on shaky ground.”).

66. See *Grutter*, 539 U.S. at 343.

burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”⁶⁷ Plaintiffs have not been complacent as recent affirmative action challenges have directly attacked educational diversity as a compelling state interest. At least one Supreme Court Justice has made clear that he personally does not believe that educational diversity should continue to be a compelling interest.⁶⁸ As I have written in an earlier article, “with educational diversity resting on shaky ground, we have reached the hour of both bolstering educational diversity and considering viable alternatives.”⁶⁹ This Article draws from empirical data to bolster diversity, contributing the faculty perspective to existing theoretical and empirical investigations into this last remaining non-remedial compelling state interest.

II. EMPIRICAL SCHOLARSHIP ON EDUCATIONAL DIVERSITY

A. Student Attitudes

The past decade has seen an explosion of research on student diversity, especially scholarship utilizing empirical data drawn from students themselves.⁷⁰ Understanding the student perspective on diversity is a critical part of the puzzle. Yet, these pieces alone cannot complete the picture. This Article builds on existing scholarship investigating how students in higher education, and law students in particular, navigate diversity through an examination of law faculty perspectives on diversity.

Research with law students makes clear that “students from all race/ethnic backgrounds not only appreciate diversity, but [also] would prefer greater diversity on campus in order to improve their learning of legal concepts and benefit them in their future careers.”⁷¹ In fact, one study of the law student experience drawing on surveys from over 8000 entering law students across the country discovered that “a whopping 88% of all law student respondents in the national sample support diversity.”⁷²

In terms of the reasons that students give for supporting diversity, the “vast majority” of students in the national sample believe that “diversity enhances their learning environment.”⁷³ A case study of University of Michigan Law School students reveals that those students specifically prefer diversity on campus.⁷⁴ The study cites a number of educational

67. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

68. *Id.* at 2424–29 (Thomas, J., concurring).

69. Deo, *supra* note 8, at 662.

70. See, e.g., Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002); Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71, 77 (2010); Deo, *supra* note 3, at 66.

71. Deo, *supra* note 8, at 690.

72. Deo et al., *supra* note 70, at 81–82.

73. *Id.* at 89.

74. See Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 298 (2001) (“The majority of respondents (68 percent) stated a

benefits of diversity, including that “a) greater structural diversity leads to increased classroom diversity and improved learning; b) classroom diversity results in open minds and engaging classroom conversations; and c) more structural diversity leads to greater participation and less tokenism.”⁷⁵

In addition to appreciating diversity, students also appreciate and seek out *diversity discussions* in class.⁷⁶ Diversity discussions are “classroom conversations regarding race, gender, and/or sexual orientation,” brought up by either faculty or students that are often used to augment lectures on black letter law.⁷⁷ Interestingly, it is not only students of color who appreciate diversity discussions in class; rather:

students from all racial and ethnic backgrounds (89% of White respondents, 82% of Latino respondents, 78% of API respondents, 77% of Other respondents, 75% of Native American respondents, and 73% of Black respondents) agree that they themselves are supportive “when faculty include discussions of race, gender, or sexual orientation in the classroom.”⁷⁸

Many of these students appreciate how including “social context may help [explain] complex issues of law by making them come alive through personal experiences.”⁷⁹ In fact, a majority of law students from all racial/ethnic backgrounds “not only appreciate diversity discussions, but also wish that they were included more often as a standard part of the first-year curriculum.”⁸⁰ While students of all backgrounds appreciate and benefit from diversity discussions, these conversations may be especially important for students of color, who are less likely to be comfortable sharing their personal experiences in the classroom and often uncomfortable drawing from past experience to elucidate particular points of law.⁸¹ In part, this hesitation comes from students of color being underrepresented on

preference for studying with students of diverse racial backgrounds when preparing for examinations.”).

75. Deo, *supra* note 3, at 97.

76. *Id.* at 95.

77. *Id.* Research in this area indicates that law faculty of color and female faculty may be more adept at facilitating diversity discussions in class than their white male colleagues, thus serving the students both what they desire and an arguably more nuanced understanding of the law. See Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANO-LATINO L. REV. 1, 17 (2010) (“Data reveal a pattern based on race and gender such that female faculty and faculty of color are more likely to engage in these discussions, while white male faculty not only are more likely to disregard the racial/gender context of the law but may even be insensitive to diversity issues, contributing to a more challenging environment for some students of color and female students.”).

78. Deo, *supra* note 3, at 95.

79. *Id.*

80. Deo et al., *supra* note 77, at 31.

81. See, e.g., Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 19 (2012) (discussing a lack of engagements from students of color who feel marginalized in class).

campus, which feeds into alienation and marginalization on predominantly white campuses.⁸²

In addition to classroom benefits of diversity, many law students “also see significant benefits to their future careers that are based on the benefits of educational diversity in law school.”⁸³ In large part, “diversity in higher education prepares students for interaction in an increasingly globalized workplace.”⁸⁴

Student perspectives are clearly relevant here as empirical research with students can reveal benefits or drawbacks of student diversity, as well as ways to elicit more meaningful cross-racial interaction in the classroom.⁸⁵ In addition to the law student experience, law faculty perspectives also offer unique insights into educational diversity, both in terms of educational benefits and professional benefits, as faculty generally lead classroom conversations and are in tune with whatever level of structural diversity they have in each class.

B. Faculty Preferences

While “[i]t may be no surprise that students from all racial/ethnic backgrounds support diversity and prefer greater levels of diversity on campus,” law faculty perspectives of educational diversity have never been systematically examined.⁸⁶ Law students have offered their perspectives on law faculty, appreciating the benefits they receive from faculty mentorship⁸⁷ and the ways in which nontraditional faculty include diversity discussions in class.⁸⁸ Yet, until now, researchers have never conducted a parallel investigation into law faculty perspectives on law student diversity.

This omission is largely due to the fact that no formal, empirical, comprehensive analysis has been conducted with law faculty at all points of the professional spectrum, at geographically diverse schools, and including racial, ethnic, and gender diversity. A few recent studies have begun to fill this surprising hole in the literature by illuminating some aspects of the law faculty experience. For instance, *Presumed Incompetent* is a recently published anthology of scholars from various disciplines revealing a pattern of challenges facing women of color academics.⁸⁹ Many of these barriers stem from the external assumption of incompetence facing these nontraditional (i.e., nonwhite and non-male) academics even before they begin formal teaching, scholarship, or service on campus.⁹⁰

82. Deo, *supra* note 3, at 77.

83. Deo, *supra* note 8, at 688.

84. *Id.* at 689.

85. Allen & Solórzano, *supra* note 74; Deo, *supra* note 3, at 73; Gurin et al., *supra* note 70, at 333.

86. Deo, *supra* note 8, at 687.

87. Deo, *supra* note 70, at 86–88.

88. Deo, *supra* note 3, at 95; Deo et al., *supra* note 77, at 17.

89. PRESUMED INCOMPETENT: THE INTERACTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs et al. eds., 2012).

90. *Id.*

Another ongoing study utilizes empirical data gathered from tenured law faculty to investigate the tenure process specifically.⁹¹ That study discovered that “despite significant progress toward more diversity, women and scholars of color face continued difficulties” in the law school setting.⁹² In fact, when evaluating satisfaction with the tenure process, the study discovered a “much higher percentage of female professors of color reporting the tenure process as unfair (35%) as compared to white males (12%).”⁹³ The authors also reference studies showing ongoing “disparities in terms of pay, tenure denials, and employment at the most elite law schools, in addition to double standards in assessing identical credentials.”⁹⁴

New scholarship on the law faculty experience also draws from the same dataset explored in this Article to show how law faculty experiences differ by race and gender.⁹⁵ For instance, while faculty overall describe interactions with colleagues as cordial, many women of color law faculty members see beyond a mask of civility to underlying hostility from many of their colleagues; this in turn breeds distrust.⁹⁶ Both white women and women of color complain of silencing during faculty meetings, where male colleagues often hold court.⁹⁷ Even more common is the phenomenon of “mansplaining,” where female faculty contributions are literally unheard unless and until a male colleague repeats and takes credit for her ideas.⁹⁸ Direct student confrontations against professors in the classroom—primarily verbal challenges to authority—are aimed almost exclusively at female professors,⁹⁹ as are negative teaching evaluations commenting on personal style (e.g., dress and hair) over substance (e.g., teaching effectiveness).¹⁰⁰ There are also documented barriers to entry blocking nontraditional candidates from entering legal academia, as well as challenges preventing women of color from assuming formal administrative leadership positions.¹⁰¹ While implicit bias may account for many of these negative experiences and outcomes, overt discrimination also contributes to the many challenges facing nontraditional law faculty members.¹⁰²

As outlined above, there is a growing body of scholarship investigating the law faculty experience, much of which comes from the same dataset

91. Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 512 (2012).

92. *Id.*

93. *Id.* at 511.

94. *Id.* at 512.

95. For details on DLA, see *infra* Part II.C.

96. See Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. (forthcoming 2015).

97. See *id.*

98. *Id.* (describing mansplaining).

99. See *id.*

100. See Meera E. Deo, *A Better Tenure Battle*, 28 COLUM. J. GENDER & L. (forthcoming 2015).

101. See Meera E. Deo, *Trajectory of a Law Professor*, MICH. J. RACE & L. (forthcoming 2015).

102. See Deo, *supra* note 96; Deo, *supra* note 100.

presented in this Article.¹⁰³ Yet, none of the existing literature touches on law faculty perspectives regarding student diversity. This Article incorporates the law faculty experience into the broader educational diversity conversation. Doing so provides much-needed empirical support for diversity as a compelling state interest from the very individuals in the best position to offer it. Since law faculty are the ones leading classrooms, they are best able to determine the effectiveness of including diversity discussions in class, express the benefits of engaging with diverse students who draw from personal experience to illuminate the law, and facilitate respectful conversations among students from different backgrounds so that they can truly learn from the diversity in their midst.

C. *The Diversity in Legal Academia Project*

The empirical data presented in this Article are drawn from the Diversity in Legal Academia (DLA) project. DLA provides empirical data on a range of issues related to the personal and professional lives of law faculty members. As the principal investigator of the DLA project, I not only personally conducted all ninety-three one-on-one interviews with legal academics, but I also maintain responsibility for all ongoing elements of the project from data collection to coding, analysis, and dissemination.¹⁰⁴ DLA includes survey and interview data from ninety-three legal academics around the United States who are diverse according to a number of different *domains*, including: race/ethnicity, gender, tenure status, leadership, location/region of school, and institutional selectivity. DLA participants are tenured and tenure-track faculty employed at AALS-member¹⁰⁵ and ABA-accredited law schools.¹⁰⁶ The *core sample* of DLA is women of color (nonwhite women), including sixty-three female law faculty members who are Black, Latina, Asian American, Native American, Middle Eastern, and multiracial.¹⁰⁷ The study also incorporates perspectives from a *comparative*

103. See, e.g., PRESUMED INCOMPETENT, *supra* note 89; Barnes & Mertz, *supra* note 91. For additional articles drawing from DLA data, see Deo, *supra* note 101; Deo, *supra* note 100.

104. For a primer on these aspects of mixed-methods research design and operationalization, see JOHN W. CRESWELL & VICKI L. PLANO CLARK, DESIGNING AND CONDUCTING MIXED METHODS RESEARCH 1 (2007); ABBAS TASHAKKORI & CHARLES TEDDLIE, MIXED METHODOLOGY: COMBINING QUALITATIVE AND QUANTITATIVE APPROACHES 5 (1998).

105. The Association of American Law Schools (AALS) is a 501(c)(3) nonprofit association currently consisting of 178 member law schools, including “most of the nation’s law students [which] produce the majority of the country’s lawyers and judges, as well as many of its lawmakers.” *About*, ASS’N OF AM. LAW SCH., <http://www.aals.org/about/> (last visited Apr. 23, 2015).

106. Clinical, legal writing, and library faculty are excluded from participation in DLA, consistent with other empirical and theoretical research on law faculty, because their experiences tend to differ substantially from those of other law faculty members. For more on why these faculty members are not included and for a list of other scholarship differentiating between faculty by status, see Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 377 n.167 (2014).

107. Race is a fluid concept, which often defies easy characterization or categorization. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on*

sample of thirty white women, white men, and men of color. Table 1 provides details on DLA participants by race/ethnicity and gender.

Table 1: DLA Participants, by Race and Gender, DLA 2013 (N=93)

		Male	Female	Total
Black	N	4	21	25
	%	16.00%	84.00%	100.00%
Asian/Pacific Islander	N	3	15	18
	%	16.67%	83.33%	100.00%
Latino/Latina	N	2	13	15
	%	13.33%	86.67%	100.00%
Native American	N	1	5	6
	%	16.67%	83.33%	100.00%
Middle Eastern	N	1	2	3
	%	33.33%	66.67%	100.00%
Multiracial	N	1	7	8
	%	12.50%	87.50%	100.00%
White	N	7	11	18
	%	38.89%	61.11%	100.00%
Total	N	19	63	93

Data collection for DLA followed a *target sample* approach. Target sampling is a variation of *snowball sampling*, a common methodological tool pioneered by statisticians and also used by scholars in the social sciences.¹⁰⁸ Target sampling provides greater structure and representativeness than a standard snowball sample through constant monitoring and direct intervention of the dataset throughout the data collection period.¹⁰⁹

Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (drawing on research from various fields to “repudiate the idea that race is a fixed essence and instead locate[s] races within the cartography of other social constructions”). DLA uses self-identification of participants in both the survey and interview. The terms “African American” and “Black” are used interchangeably throughout the Article to refer to those who self-identified using those terms. Participants who identified as “API,” “Asian,” “Asian American,” or within one of the pan-ethnic Asian-American identities are identified as “Asian American,” while those who self-identified as “Latino” or “Hispanic” are referred to as “Latino.” Those who identified only as “white” are identified as such in the Article. Multiracial participants are those who self-identified as having two or more racial/ethnic backgrounds. These racial/ethnic categories were chosen because they are the ones used by AALS in their statistics.

108. See, e.g., Leo A. Goodman, *Snowball Sampling*, 32 ANNALS MATHEMATICAL STAT. 148, 148 (1961).

109. See Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174, 175 (1997) (explaining the potential biases affecting snowball sampling); John K. Watters & Patrick Biernacki, *Targeted Sampling: Options for the Study of Hidden Populations*, 36 SOC. PROBS. 416, 420 (1989)

Target sampling specifically begins with a *seed group* of participants that is carefully selected to be broadly representative of the larger population; in this case, the population is law faculty members who are diverse with regard to each of the domains mentioned above.¹¹⁰ In the DLA study, seed participants completed a survey asking broad demographic, attitudinal, and experiential questions before continuing on to personal one-on-one interviews with me, the principal investigator of DLA. The penultimate question on the survey followed standard protocol for snowball and target sampling by asking seed group participants to nominate others they thought might be interested in joining the study.¹¹¹ By carefully reviewing existing representation of the sample, I then selected from among those nominated to maintain representation in the final sample along all of the domains mentioned.¹¹² In this way, target sampling is “an ongoing and interactive process in which data are constantly analyzed and used to adjust the recruitment and sampling techniques.”¹¹³ Any oversampling of a particular group (e.g., three Black female professors from the Midwest) can easily be corrected in the final sample by drawing more from areas that are underrepresented (e.g., one additional Black female professor from the East Coast) as the study continues.

Thus, just as a snowball grows by rolling through snow that sticks to and enlarges the original collection of snow, so the sample grows by adding research subjects drawn from names suggested by prior participants. The target approach allows for careful calibration of the sample to ensure that it remains representative throughout the process and especially in final form.¹¹⁴

Target sampling is an especially useful and effective data collection method when the target population is hidden or vulnerable, making these individuals otherwise unlikely or unable to participate in formal empirical projects.¹¹⁵ The methodological approach utilized for this study focused on women of color law faculty members because this group is also surprisingly hard to identify¹¹⁶ and disinclined to participate in formal empirical studies emphasizing their nontraditional status in legal academia.¹¹⁷

(defining targeted sampling as “a purposeful, systematic method by which controlled lists of specified populations within geographical districts are developed and detailed plans are designed to recruit adequate numbers of cases within each of the targets”).

110. Watters & Biernacki, *supra* note 109.

111. *Id.* at 420.

112. Again, the tracked domains are race/ethnicity, gender, tenure status, leadership, location/region of school, and institutional selectivity.

113. *Id.* at 421.

114. *Id.* at 420.

115. *Id.* (explaining that snowball sampling is often used in studies of homeless youth, those infected with HIV, and with other populations that are difficult to identify or not inclined to participate in formal empirical studies).

116. To start, there is little reliable data on law faculty. The data we have on law faculty members, disaggregated by race/ethnicity and gender, is from 2008 to 2009; if I used that data for the DLA study, I would essentially exclude most assistant professors. AALS also publishes a directory of law professors, and members can opt in to a “Minority Law Professor” listing, though faculty are not identified by race/ethnicity or gender in that listing.

I personally conducted each interview for the DLA study, either in person or by telephone. Each interview was digitally audiotaped and transcribed before coding and analysis began.¹¹⁸ The interview protocol includes experiential questions (i.e., regarding interactions with colleagues and students), attitudinal questions (i.e., regarding perspectives on diversity and institutional values), and more personal demographic questions (i.e., regarding work/life balance and the participant's professional trajectory).

A comprehensive codebook guides data coding and analysis.¹¹⁹ Following emerging theme analysis, I began identifying patterns while data collection was ongoing.¹²⁰ Codes were then developed to more systematically identify patterns throughout the data.¹²¹ For instance, most mothers in the DLA sample discussed challenges balancing professional and personal obligations, even when partners were very involved in childcare. Thus, I began coding for childcare specifically. Additional codes were also developed using the interview protocol (the list of actual interview questions) as a guide. For instance, because each participant was asked about work/life balance generally, I also created a coding scheme related to balancing personal and professional obligations.¹²²

Formal qualitative coding and analysis for this project utilizes ATLAS.ti, a qualitative coding software program that facilitates organization of the data.¹²³ Quantitative data were analyzed with Stata and Excel for basic

Visual identification of faculty to determine race/ethnicity (through researcher-identified race/ethnicity based on characterization of an online picture associated with each faculty member's institutional biography) would be highly problematic, as race/ethnicity is such a fluid concept, and it would perhaps be problematic for gender identification as well. See, e.g., Aliya Saperstein & Andrew M. Penner, *Beyond the Looking Glass: Exploring Fluidity in Racial Self-Identification and Interviewer Classification*, 57 SOC. PERSPS. 186 (2014).

117. As noted in a previous article laying the methodological and other foundations for DLA:

The Introduction to *Presumed Incompetent* includes an entire section explaining that many women were uncomfortable publishing their stories, and therefore did not participate by submitting non-anonymous narratives to the anthology. Some of these women were too emotionally exhausted to think critically about their experiences and share them publicly; many others feared professional repercussions of "outing" their negative experiences and the institutions in which those experiences occurred.

See Deo, *supra* note 106, at 380 n.180 (citing PRESUMED INCOMPETENT, *supra* note 89, at 10–14).

118. This is standard practice for mixed-method empirical research. See CRESWELL & CLARK, *supra* note 104, at 1; TASHAKKORI & TEDDLIE, *supra* note 104, at 5.

119. This is standard practice for mixed-method empirical research. See CRESWELL & CLARK, *supra* note 104, at 1; TASHAKKORI & TEDDLIE, *supra* note 104, at 5.

120. See ROBERT M. EMERSON, CONTEMPORARY FIELD RESEARCH PERSPECTIVES AND FORMULATIONS 284 (2d ed. 2001) (explaining the rationale behind using emerging theme analysis).

121. This is standard practice for mixed-method empirical research. See CRESWELL & CLARK, *supra* note 104, at 1; TASHAKKORI & TEDDLIE, *supra* note 104, at 5.

122. This is standard practice for mixed-method empirical research. See CRESWELL & CLARK, *supra* note 104, at 1; TASHAKKORI & TEDDLIE, *supra* note 104, at 5.

123. ATLAS.TI, <http://www.atlasti.com/index.html> (last visited Apr. 23, 2015); see also CHRISTINA SILVER & ANN LEWINS, USING SOFTWARE IN QUALITATIVE RESEARCH (2d ed.

cross-tabulations of the data as well as more advanced analyses not presented in this Article.¹²⁴ Dissemination of preliminary and formal findings has been ongoing through presentations at numerous academic conferences and various invited speaking engagements.¹²⁵

Past publications utilizing DLA data have focused on the ways in which race/ethnicity and gender create or lead to different experiences for various law faculty. For instance, women of color endure significant verbal and physical confrontations in the classroom from students, though these tend to be absent in classrooms taught by white men.¹²⁶ In addition, a set of individual and structural barriers often prevent nontraditional faculty from assuming formal administrative leadership positions in legal academia, though white men rarely face these hurdles.¹²⁷

This Article, unlike others using DLA data, explores law faculty as a group, highlighting their common support for educational diversity. Thus, while the race/ethnicity and gender of participants is included in the findings presented in this Article, there is little variation in terms of preferences based on race/ethnicity and gender.¹²⁸ Law faculty members, both men and women who are white, Black, Latino, Asian American, Middle Eastern, Native American, and multiracial, express a preference for educational diversity and provide surprisingly common rationales and experiences to support their leanings. Thus, the findings presented in the next part are grouped by theme rather than by the race/ethnicity of the participant, highlighting the educational and professional benefits of diversity as expressed by law faculty members from various backgrounds. Names used throughout this Article are pseudonyms to protect the anonymity of DLA participants.¹²⁹ The qualitative data presented are the actual words of the law faculty participants in the DLA project to give voice to their actual experiences, attitudes, and preferences.

2007) (step-by-step guide explaining the functions of the major software programs that are generally used in studies of this kind, including ATLAS.ti).

124. Stata is a statistical software package developed and sold by StataCorp. See STATA, <http://www.stata.com> (last visited Apr. 23, 2015); see also ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA (4th ed. 2014) (providing an introduction to Stata for researchers working in psychology, social sciences, and other fields that require quantitative analysis).

125. For instance, I have made presentations drawing from DLA data at the AALS Annual Meetings in 2013, 2014, and 2015; as the Neil Gotanda Awardee in Berkeley, California, in 2014; and as an invited speaker at O'Melveny & Myers LLP in Los Angeles, California, in 2014.

126. Deo, *supra* note 96.

127. Deo, *supra* note 101, at 29–30.

128. See *infra* Part III for these empirical findings.

129. This is standard practice for mixed-method empirical research. See CRESWELL & CLARK, *supra* note 104, at 1; TASHAKKORI & TEDDLIE, *supra* note 104, at 5.

III. EMPIRICAL FINDINGS OF LAW FACULTY SUPPORT FOR DIVERSITY

A. Support for Diversity

Quantitative findings from the DLA study are instructive in order to gauge law faculty perspectives on educational diversity. The DLA survey asked participants to rank on a scale of one to five their agreement with a set of statements, providing response options that follow a traditional Likert-scale presentation ranging from Strongly Agree (=5) to Strongly Disagree (=1).¹³⁰ Answers to four questions that are specifically about student diversity and classroom conversations are presented and discussed in this section, disaggregated by race/ethnicity and gender.¹³¹

One question asked law faculty members to rate their level of agreement with the following statement: “My law school student body is as diverse as I expected it to be.” The results, displayed in Table 2, show that many law faculty members are not surprised by the student diversity on their campus—regardless of whether their campus was highly diverse or less so. There are some disparities by race. For instance, 81 percent of Black women, 64 percent of Asian Americans, 58 percent of Latinas, and 60 percent of Native Americans report that their campus is not as diverse as they expected, either disagreeing or strongly disagreeing with the statement. In other words, the majority of women of color in the sample see their school as less diverse than expected. White women have somewhat similar responses, with 45 percent reporting disagreement with the statement. In contrast, only 36 percent of men of color and 27 percent of white men note that existing diversity does not match their expectations. This could mean many things. White men and men of color may be better informed about actual diversity statistics at their schools and so are not surprised by a lack of diversity if they see one. Women as a whole—including women of color and white women—may be more in tune to issues of diversity, making them more likely to consider their expectations as they begin a new position and noting less diversity than expected if that is the case.

130. “Response options commonly referred to as ‘Likert scales’ are used extensively in the social sciences, economics, and other fields to determine respondent attitudes and opinions through their level of agreement with various assertions.” Deo, *supra* note 8, at 686 n.128 (citing Rensis Likert, *A Technique for the Measurement of Attitudes*, 22 ARCHIVES PSYCHOL. 5, 5–6 (1932)).

131. The responses of the core sample of women of color are disaggregated by the race/ethnicity of respondents, including Black, Asian American, Latina, Native American, Middle Eastern, and multiracial women. The comparative samples of white men, white women, and men of color are presented next.

Table 2: Agreement that Student Body Meets Diversity Expectations, by Race/Ethnicity and Gender, DLA 2013 (N=91)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black Female	N	1	3	0	11	6	21
	%	4.76%	14.29%	0.00%	52.38%	28.57%	100.00%
Asian/Pacific Islander Female	N	1	4	0	8	1	14
	%	7.14%	28.57%	0.00%	57.14%	7.14%	100.00%
Latina	N	0	5	0	5	2	12
	%	0.00%	41.67%	0.00%	41.67%	16.67%	100.00%
Native American Female	N	0	2	0	2	1	5
	%	0.00%	40.00%	0.00%	40.00%	20.00%	100.00%
Middle Eastern Female	N	0	0	0	2	0	2
	%	0.00%	0.00%	0.00%	100.00%	0.00%	100.00%
Multiracial Female	N	0	1	0	3	3	7
	%	0.00%	14.29%	0.00%	42.86%	42.86%	100.00%
White Men	N	0	3	3	2	0	8
	%	0.00%	37.50%	37.50%	25.00%	0.00%	100.00%
White Female	N	0	3	3	5	0	11
	%	0.00%	27.27%	27.27%	45.45%	0.00%	100.00%
Men of Color	N	0	4	3	3	1	11
	%	0.00%	36.36%	27.27%	27.27%	9.09%	100.00%
Total	N	2	25	9	41	14	91
	%	2.20%	27.47%	9.89%	45.05%	15.38%	100.00%

As noted earlier, many law faculty members make efforts to include diversity discussions in class.¹³² The DLA study sought to gauge how faculty members perceive student interest in these conversations about race, gender, and sexual orientation. Earlier research has documented that law students tend to be supportive of diversity discussions, recognizing how they help bring the law to life.¹³³ But no prior study has asked law faculty members whether they thought that students preferred these conversations in the classroom. Specifically, the DLA survey asked participants to rate their level of agreement with the following statement: “My students seem

132. See *supra* Part II.A.

133. Deo et al., *supra* note 77, at 17 (explaining that “students, regardless of race or gender, tend to prefer the approach most often used by female faculty and faculty of color, who actively involve diversity discussions in their law teaching”).

supportive when I include discussions of race, gender, or sexual orientation in the classroom.” Table 3 presents results by race/ethnicity and gender.

Responses to this question indicate differences in how faculty of color and white faculty perceive student interest in diversity discussions. For example, 100 percent of white men and 82 percent of white women believe their students are supportive when they themselves bring diversity discussions into the classroom.¹³⁴ In contrast, only 55 percent of men of color agree that students appreciate when they bring up diversity discussions in class, 27 percent are neutral on the subject, and only 18 percent disagree. Women of color from various racial/ethnic groups are much more likely to disagree with the statement, with roughly 40 percent of Black women, Asian American women, Latinas, and Native American women believing that students are *not* supportive when they bring up issues of race, gender, or sexual orientation in class. Interpreting this finding, however, is tricky. It could mean that white men and white women (and to some extent men of color) are better able to gauge student interest in diversity discussions, recognizing how students appreciate their inclusion in class. More likely, based on biases documented in other scholarship examining the experience of women of color law faculty,¹³⁵ it could mean that students respond differently to inclusion of diversity discussions depending on the race and gender of the faculty member bringing up these sensitive topics. Qualitative DLA data also indicates that students may be more responsive and receptive to white faculty members initiating these conversations than to nonwhite faculty members and especially women of color who bring them up.¹³⁶

Table 3: Perceptions of Student Support for Diversity Discussions, by Race/Ethnicity and Gender, DLA 2013 (N=91)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black	N	1	11	0	9	0	21
	%	4.76%	52.38%	0.00%	42.86%	0.00%	100.00%
Asian/Pacific Islander	N	2	6	0	6	0	14
	%	14.29%	42.86%	0.00%	42.86%	0.00%	100.00%
Latino/Latina	N	2	5	0	4	1	12
	%	16.67%	41.67%	0.00%	33.33%	8.33%	100.00%
Native American	N	0	3	0	2	0	5
	%	0.00%	60.00%	0.00%	40.00%	0.00%	100.00%

134. Interestingly, only one white participant in the DLA sample (a woman) was “neutral” on this question, with neutrality suggesting that the law faculty member may not bring up diversity discussions herself at all.

135. Deo, *supra* note 96; *see also* Deo, *supra* note 100.

136. *See infra* at Part III.B.

Middle Eastern	N	0	0	0	2	0	2
	%	0.00%	0.00%	0.00%	100.00%	0.00%	100.00%
Multiracial	N	0	3	0	3	1	7
	%	0.00%	42.86%	0.00%	42.86%	14.29%	100.00%
DLA Women	N	1	7	0	0	0	8
	%	12.50%	87.50%	0.00%	0.00%	0.00%	100.00%
DLA White Females	N	5	4	1	1	0	11
	%	45.45%	36.36%	9.09%	9.09%	0.00%	100.00%
DLA Men of Color	N	2	4	3	1	1	11
	%	18.18%	36.36%	27.27%	9.09%	9.09%	100.00%
Total	N	13	43	4	28	3	91
	%	14.29%	47.25%	4.40%	30.77%	3.30%	100.00%

In addition to asking participants about their perceptions of student support for diversity discussions, the DLA survey also asked participants to rate their level of agreement with the following statement about their colleagues: “Most of my fellow faculty are supportive when faculty include discussions of race, gender, or sexual orientation in the classroom.” The findings, presented in Table 4, suggest that the overwhelming majority of whites (100 percent of white men and 73 percent of white women) believe that their colleagues support faculty inclusion of diversity discussions in class, just as they believe their students do. In contrast, smaller percentages of faculty of color agree, with roughly equivalent statistics for men and women. Roughly 40 percent of Black and Asian American women, 55 percent of men of color, and roughly 60 percent of Latinas and Native American women feel that their colleagues support their inclusion of these conversations in class. This likely says more about challenging faculty interactions than about diversity discussions themselves, as women of color faculty tend to have fraught relationships with colleagues, most of whom are white and often male.¹³⁷

Table 4: Perceptions of Faculty Support for Diversity Discussions, by Race/Ethnicity and Gender, DLA 2013 (N=91)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black	N	2	6	0	13	0	21
	%	9.52%	28.57%	0.00%	61.90%	0.00%	100.00%
Asian/Pacific Islander	N	3	3	0	7	1	14
	%	21.43%	21.43%	0.00%	50.00%	7.14%	100.00%

137. For more on challenging faculty interactions, see Deo, *supra* note 96, at 22–45.

Latino/Latina	N	2	5	0	4	1	12
	%	16.67%	41.67%	0.00%	33.33%	8.33%	100.00%
Native American	N	1	2	0	1	1	5
	%	20.00%	40.00%	0.00%	20.00%	20.00%	100.00%
Middle Eastern	N	1	0	0	1	0	2
	%	50.00%	0.00%	0.00%	50.00%	0.00%	100.00%
Multiracial	N	1	4	0	2	0	7
	%	14.29%	57.14%	0.00%	28.57%	0.00%	100.00%
DLA Women	N	1	7	0	0	0	8
	%	12.50%	87.50%	0.00%	0.00%	0.00%	100.00%
DLA White Females	N	5	3	0	2	1	11
	%	45.45%	27.27%	0.00%	18.18%	9.09%	100.00%
DLA Men of Color	N	4	2	1	3	1	11
	%	36.36%	18.18%	9.09%	27.27%	9.09%	100.00%
Total	N	20	32	1	33	5	91
	%	21.98%	35.16%	1.10%	36.26%	5.49%	100.00%

All DLA participants also reported on their satisfaction with existing student diversity on campus. Specifically, they responded to a question on the survey asking them to rate their level of agreement with the following statement: “I would prefer that there were more student diversity at my law school.” In spite of various differences by race/ethnicity with regard to other questions about student diversity and inclusion of diversity discussions, there is relative uniformity across race/ethnicity and gender in response to this question. A full 95 percent of Black women agree with the statement, along with 87 percent of Asian American women, 75 percent of Latinas, and 80 percent of Native American women. When we compare women of color to other groups, the vast majority of white men, white women, and men of color also agree. Thus, Table 5 shows that the vast majority of law professors—virtually everyone included in the DLA sample—prefers greater student diversity at their law school. While various interpretations are available for this finding as well, the qualitative data presented in the next two sections perhaps explain it best; the next section covers multiple benefits to diversity in the educational and professional context as well as the challenges associated with a lack of student diversity on campus.

Table 5: Preference for Greater Student Diversity, by Race/Ethnicity and Gender, DLA 2013 (N=91)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black	N	15	4	0	1	0	20
	%	75.00%	20.00%	0.00%	5.00%	0.00%	100.00%
Asian/Pacific Islander	N	10	3	0	2	0	15
	%	66.67%	20.00%	0.00%	13.33%	0.00%	100.00%
Latino/Latina	N	7	2	0	3	0	12
	%	58.33%	16.67%	0.00%	25.00%	0.00%	100.00%
Native American	N	3	1	0	1	0	5
	%	60.00%	20.00%	0.00%	20.00%	0.00%	100.00%
Middle Eastern	N	0	0	0	0	2	2
	%	0.00%	0.00%	0.00%	0.00%	100.00%	100.00%
Multiracial	N	5	2	0	0	0	7
	%	71.43%	28.57%	0.00%	0.00%	0.00%	100.00%
White Men	N	2	5	0	0	0	7
	%	28.57%	71.43%	0.00%	0.00%	0.00%	100.00%
White Female	N	6	4	1	0	0	11
	%	54.55%	36.36%	9.09%	0.00%	0.00%	100.00%
Men of Color	N	4	6	1	0	0	11
	%	36.36%	54.55%	9.09%	0.00%	0.00%	100.00%
Total	N	52	27	2	7	2	90
	%	57.78%	30.00%	2.22%	7.78%	2.22%	100.00%

B. Benefits of Diversity

The quantitative data presented above frame the qualitative data discussed in this section, reporting actual quotations from in-depth interviews and revealing more nuanced perceptions and preferences of individual law faculty members. This section reports on benefits of diversity as experienced by law faculty members, most of whom see their own law schools as having a diverse student body. Three interrelated themes emerge: (1) educational diversity allows for a richer range of perspectives to be included in the classroom, (2) with personal context helping to illuminate black letter law, and (3) providing benefits that will reach into future legal practice.

1. Diverse Perspectives

“I think students learn from one another just as much as they learn from the professor.” — Imani

The most common student diversity pattern that emerges from the DLA law faculty data is that having a diverse student body leads to diverse perspectives being voiced in the classroom. While this may seem obvious, it is not necessarily a foregone conclusion that structural diversity leads to classroom diversity. In fact, one recent study has shown that even at institutions of higher learning where students have meaningful cross-racial interactions on campus generally, these interactions do not necessarily occur in the classroom.¹³⁸ Nevertheless, structural diversity—meaningful numbers of students of color on campus—is a prerequisite to classroom diversity: without diverse students admitted and enrolled, it is impossible for there to be meaningful conversations where students draw on their race/ethnicity, gender, sexual orientation, class, and other identity characteristics to inform classroom conversations and help their peers learn the law.¹³⁹ As Ryan, a Black male faculty member, says, “[Student diversity] makes the classroom conversation more diverse, brings in more perspectives, allows students to learn from others as opposed to learning from people with the same background as themselves, makes for richer interactions, and builds a wonderful community.” A white female law professor named Jordan agrees that “student diversity is a great thing.” For her, “the best thing it adds is just diversity of the dialogues and perspectives in the classroom setting.” Kayla, a Black female law professor, has an especially rich diversity of students in her Property class, which she notes “is a large lecture” class, but nevertheless enjoys incredible discussion drawing from diverse student backgrounds and experiences. Kayla states:

I teach a Property evening class, a large lecture, and I mean every row is just like sprinkled with queer students, students of color, Asian, Indian, Black, you know, it’s just so amazing. The benefit of [diversity] is [that] I think it, for me, helps to bring the different perspectives in the classroom. I know that sounds cliché but it really does.

Like Kayla, most DLA participants are clear that the myriad perspectives that result from student body diversity go beyond race/ethnicity and gender. Imani, a Black woman, provides a representative response, saying, “Well, I mean, I think the perspectives that diverse students bring—and by diversity, [I mean] not just racial and ethnic and gender diversity, but also socioeconomic diversity—and seeing people from different socioeconomic classes and statuses I think really helps to broaden people’s perspective.” She mentions one particular seminar she teaches where “out of sixteen

138. Deo, *supra* note 3, at 63.

139. For a discussion of the ways in which educational diversity may be considered problematic because it puts students of color in a position where they are seeking an education themselves while also being expected to educate their peers, see *id.* See also Deo, *supra* note 8, at 691.

students, eight of them are African American and eight of them are white.” The critical mass of students of color in that class, where their numeric representation mirrors that of their white peers in a way that it rarely does in other classes or even in communities, improves the classroom environment for everyone.¹⁴⁰ Imani notes that as a result of this diversity:

the conversations that we’ve had have just been exceptional and the fact that everyone’s eyes have been opened by hearing about the experiences of those who may not have the same background as them has been tremendous. And I think those benefits, you definitely don’t get those when you don’t have a diverse student body.

While broader diversity and inclusion of perspectives from Latino, Asian American, Native American, and other underrepresented students could only expand perspectives further, Imani sees her diverse classroom as a good start.

Many faculty members also draw on their own backgrounds to help students master the material.¹⁴¹ Yet, as Imani says, “I think students learn from one another just as much as they learn from the professor.” While there is only so much one faculty member can do to bring in various perspectives, Imani has “seen it firsthand where students had not thought of a particular perspective until that perspective was raised by either a student of a diverse background or a faculty member from a diverse background.” By students bringing up these “personal experiences,” classmates learn that sometimes even when “everything on its face seems one way, [] that’s not always the way it is in practice.” April, a Black law professor, notes that there are frequently conversations about race without racial minorities present. “It would be like talking about a pay equity case, a gender equity case, and having no women in the room.” While she thinks that would be obviously problematic, “[i]t happens all the time with respect to race. There are no minorities in the room, so when we look at a case, the only one who can talk about the minority perspective or what might be different, the sensitivity you might need, would be me. And nobody wants to hear me.” As a result, she is confident that “the classroom could be richer if we had more voices.” Since she can only work with the racial/ethnic diversity that exists in the classroom, she suggests students find other ways to diversify their experiences with learning the law outside of class. April continues:

So even in study groups when I counsel students and I talk to them about forming study groups, I suggest to them that they find people who they are not like because if you all come from the same place, you will see the

140. Perhaps conversation would be even more fulfilling with greater racial/ethnic diversity from Latinos, Asian Americans, and others who could contribute beyond the Black/white binary. See generally Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

141. See *supra* Tables 2–3 and accompanying discussion (discussing law faculty members’ perspectives of how students and colleagues view their decision to include diversity discussions in class); see also *infra* Part III.B.2 (discussing additional detail on how having students, rather than faculty members, initiate these discussions is preferable for learning).

problem in the same way, you will begin your analysis from the same point. You have to pick somebody who can see it differently because that challenges your conviction, your belief. It's true in terms of race, class, gender, sexuality. It's true. We all approach things from where we come from, from how life has informed us. It doesn't mean that the diverse voice is more knowledgeable or has a deeper insight or a better ability to judge and determine what's right, what I'm saying is they have a different lens, which can help you challenge your own view as the majority person.

In addition, widespread participation and sharing personal experiences in class breaks down stereotypes between people from different backgrounds who may not have had many prior opportunities for meaningful interaction. White students come to understand that their student of color classmates are just as intelligent, qualified, and capable as they are, while students of color realize that their white classmates may have endured challenges in their own lives too. Matt, a white male law professor, also appreciates the students of color in his classes who draw from personal experience to help their fellow classmates understand a different perspective. Matt says, "I think it's just important for [both] minority and nonminority students to realize the capability of everyone in their cohort and get different perspectives of folks in their cohort." One way he maximizes participation and the sharing of experiences drawing from personal background is simple: "I also teach Criminal Procedure and I ask for a show of hands of students or people they know, so I don't single students out, of people who have been stopped and frisked." The results do not surprise him, though they "may be surprising to some of the students" because the overwhelming majority of students of color raise their hands, as do some whites.

In these ways, white law faculty as well as faculty of color tend to bring up diversity discussions in class, as referenced earlier in this Article.¹⁴² Ellen, a white female, provides some insight into the disparities between how faculty of color and white faculty perceive their efforts at including conversations about race/ethnicity, gender, and sexual orientation in the classroom. She says, "[A]s a white faculty member, I feel that I can more easily engage issues of race than my colleagues of color." Faculty of color may get pushback from students who see them as promoting a race-based agenda or confusing their personal experiences with their professional obligations as law professors.¹⁴³ This helps explain why higher percentages of white faculty than faculty of color believe students appreciate when they bring in diversity discussions.¹⁴⁴ Because Ellen feels she can comfortably bring up these conversations in class without pushback from students, and she sees the value in doing so, noting, "I try to do that [even though] it's

142. See *supra* Tables 2–3 and accompanying discussion (discussing law faculty members' perspectives of how students and colleagues view their decision to include diversity discussions in class).

143. In fact, in anonymous student evaluations, many students accuse faculty of color and female faculty in particular of doing just this. For more on this issue, see Deo, *supra* note 100.

144. See *supra* Table 3 and accompanying discussion.

awkward to do that in a lot of ways,” because she cannot herself put forth multiple theoretical perspectives as persuasively as those who have actually lived them.¹⁴⁵

2. Personal Context

Diversity “opens the doors for a great conversation.” — Ryan

In fact, this opportunity for students to learn from the personal experiences of their classmates is one of the main benefits of educational diversity, as observed by law faculty in the DLA study. Many explain how they can draw on students’ backgrounds to provide personal context that elucidates complex black letter law. Erin, a Native American law professor, says, “I teach Property this semester and I have a Hispanic man in my Property class. And we taught this *State v. Shack*¹⁴⁶ case and it’s about some immigrant workers working on a farm and the right of entry, well it’s going into the right to exclude.” While Elaine could clearly lecture about the substantive area of law without discussing the immigrant experience or the human element of the parties to the case, she notes that including this personal context plays a huge part in classroom learning. She says of the student who spoke up in class that “it was really nice to have him in class because he was willing to talk about the immigrant workers and his family’s background in that.” In other words, he made it personal, which brought the law to life for everyone else. She continues: “I think he gave his classmates a lot more insight than they otherwise would have because they wouldn’t have had experience with that.” In this way, one student’s personal experience became informative for his classmates’ learning.

This has happened in a Latina law professor named Camila’s classes as well. She recounts one example of a young Black male student, who has since “gone on to be a very, very successful person . . . in the corporate world,” discussing the early desegregation cases in her Constitutional Law class. While working toward the recent affirmative action cases, Camila started the class with early litigation efforts to desegregate public facilities, including swimming pools. This particular Black student “said something about, ‘You know, come on, it really all came down to white parents not wanting to have their little white girls in pools with young Black guys.’” Years later, recounting this experience as part of her DLA interview, Camila still recalls how this one student’s rationale for anti-desegregation efforts, drawing from his own experiences as a Black man, galvanized discussion in the class. She shares, “[A]ll I can tell you is that was an electrifying moment for that class, everybody in that class. Everybody in that class got it.” She makes clear how personal context helps students better understand the law as a whole: “It’s not that it elucidated a fine point of law, because there was no fine point; but all of a sudden people saw what

145. See *infra* Part III.B.2 for more on how students initiating these discussions is preferable for learning than faculty members doing so.

146. 277 A.2d 369 (N.J. 1971).

that case was about in a way that I couldn't [have explained through simply lecturing on the court opinion]." A Native American professor named Jennifer agrees, explaining, "We have a lot of very privileged white students here and when they hear their own classmates say something like, 'Well, I've been stopped, you know, [just because I am] a person of color,' [it broadens their perspective]." Regardless of how many ways she explains recent lawsuits regarding "stop and frisk," for her students "to be able to hear that in the classroom from a peer is much more powerful than if I were to make that observation."

Similarly, a Latina law professor named Marisol says, "I've been lucky that I've actually had some immigrants in class where the other students had no idea" how someone from an immigrant family would have different experiences from their own. It is especially informative when her students are forthright about their own trajectory to the United States, through legal means or not, and expose their classmates to the reasons for their sometimes perilous journeys and the challenges they encountered along the way. She says that the most powerful classroom conversations follow a student "saying, 'My parents were undocumented and I came in as an undocumented person.'" Though some students may initially believe "you're breaking the law," Marisol can see their perspective change as the conversation progresses, because "the next thing you know they're sitting next to someone who was in that experience and [learning] what that experience was like." She has also had a situation where a former refugee spoke up in class about how her "parents . . . came in as very educated and they had to mop floors" because no other jobs were available. Even "just being able to share the experience of what it's like being in the refugee camp for three years [makes] people really realize like, 'Wait a minute. [I've been] taking [a lot] for granted [and] it's not that easy.'"

Ryan, a Black law professor, shares similar experiences in both his Criminal Law and Criminal Procedure courses. There, gender diversity becomes instructive for student learning. He notes: "[W]hen I teach Criminal Law and when we talk about rape in class, the students—particularly the male students—have an opportunity to really listen to their female colleagues and understand what rape is." Especially in the current culture of ongoing campus challenges regarding sexual assault,¹⁴⁷ he notes that it is important for the men in his classroom to think more critically about "[w]hat constitutes good sexual conduct, what constitutes sexual harassment, what's crossing the line, things of that nature." Some of his female students have worked in rape crisis centers and are "willing to share the work they do with people who are suffering from these experiences." Those pieces of information "shed light on the subject and conversation,"

147. For instance, "55 colleges and universities nationwide [are] under scrutiny by the U.S. Department of Education for [their] handling of reported sex crimes on campus." See Jack Flynn, *Amherst College, Responding to Federal Title IX Probe, Cites Major Improvements in its Handling of Sexual Assault Complaints*, MASS LIVE (May 2, 2014, 10:02 AM), http://www.masslive.com/news/index.ssf/2014/05/amherst_college_responding_to.html.

especially for the male students in class who may have less context for understanding or even thinking critically about these issues. Hearing from their female classmates thus informs their own understanding of these laws.

In Ryan's Criminal Procedure course, his students of color "talk about being stopped [by the police]. They talk about racial profiling, they talk about even [being harassed by security] sometimes right outside the law school late at night." Because race in the United States has always been more than a Black-white paradigm,¹⁴⁸ true diversity matters most in terms of having a multiplicity of backgrounds represented. Ryan's Black students talk about being stopped by the police; but his Middle Eastern and South Asian students "share about their experience and why they think they got targeted for an additional screening [at the airport]." In response, the white students "are actually very open to it." They likely are curious, interested, and even recognize how understanding and applying these personal situations will help them become more familiar with the legal concepts they are studying. Thus, the white students "listen, they engage, [they] sometimes even ask questions, [like], 'Well what did you do? Do you think you did anything wrong? What do you think it was about you that made you a victim of racial targeting?'" This back and forth among the students, Ryan believes, is the best way for them to learn the law and perhaps even learn more about people who are different from themselves in the process. He says, "[I]t opens the doors for a great conversation between the two groups."¹⁴⁹

As mentioned earlier, the perspectives that diverse students bring to these classroom conversations go beyond race/ethnicity and gender. Immigrant status already has been discussed as relevant in many classes. Socioeconomic class is important, too. When asked to reflect on diversity discussions in class, a Latina professor named Carla says, "I can think of a recent one this semester. We were covering nuisance and at the time the port of Los Angeles was being sued by the local community for nuisance." She was using that ongoing lawsuit to illustrate an older one, "the *Boomer* case,¹⁵⁰ which involves cement dust, [which is now] known to cause asthma, heart [problems, and other negative] effects." One particular student contribution stood out to her and the other students in class, and stands out to her even now:

One student was from an area like that and he raised his hand and he had worked with the California legislature on this and that related to emissions and he gave an impassioned speech about the perpetuation of poverty and how this kind of pollution perpetuates poverty and it makes people sick.

148. See generally FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2003); Perea, *supra* note 140.

149. When asked directly how he thinks his classes would be different if they were less diverse, Ryan says he would attempt to bring up many of those issues on his own, but does not think it would be nearly as effective because "when it comes from me, it sounds as if I'm trying to provide my own opinion or own view about police as opposed to coming from peers" whom students are more likely to believe.

150. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970).

He himself was physically ill from these kinds of emissions, something he had to carry, and this was an externality and we were talking about externalities.

She recalls how much this student sharing his personal and professional experience with exposure to a toxic substance helped his classmates understand the issue better, noting that “it was so right on, you know, and so honest” that his peers were bound to remember the legal rule she sought to convey through the case, recognize the importance of the case for people personally affected, and see how the law could help make injured people whole.

Similarly, a white male law professor named Adam recalls a student who had “lived outside the U.S. [who] said, ‘You know, not everyone views the United States as a world hero in world activities. I knew a lot of people [when I lived abroad] who felt like the U.S. was destroying our culture.’” Adam thought that was “an amazing statement to say.” Primarily, his class consists of “people who have lived their whole life in the U.S. and only seen one side [of this global power], which is the side that makes them safe.” Because of their American-focused perspective, Adam thought it was “really powerful” for them to also hear from someone who has seen it from another side, “a side that threatens.”

Madison, a white female law professor, has “been pleasantly surprised at how well it has worked” when she encourages students to draw on their personal experience to help illustrate legal concepts. She recalls a case from “this week in Civil Procedure” regarding a police chase involving officers who “ended up doing a maneuver to run [the suspect] off the road and he crashed into a telephone pole.” In that case, *Scott v. Harris*,¹⁵¹ the main “[legal] question is, looking at the video from the car chase, can a reasonable jury decide this officer was doing anything other than protecting public safety?” The case also touches on “other questions about who is on a reasonable jury? What kinds of life experience do they bring? Is that a decision we want judges to make?” In class, Madison “talked about the law first and then we watched the video itself. And then we had a discussion where we first looked at [it] from a legal perspective, if you’re arguing for one way on summary judgment or if you’re arguing the other way.” Thus, the focus in class was on the black letter law, understanding summary judgment, and when a judge should assume no reasonable jury could find for the nonmoving party.¹⁵² Throughout the discussion, which “was entirely volunteer, I had a tremendous amount of participation . . . from a wide range of students of different races and ethnicities as well as life experience.” Perhaps most instructive was participation from a student who was a “former police officer who now trains people in that maneuver itself, and was able to explain [how it should work in practice].” What made the conversation the most satisfying for Madison, and likely for her students, is

151. 550 U.S. 372 (2007).

152. For more on the standard for summary judgment, see FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES & MATERIALS* (11th ed. 2013).

that “it was not only a discussion that helped [illuminate] the legal points about what summary judgment is, but I think [the students] did a really good job about articulating their own ideas about the case and policy concerns as well.” Drawing from so many personal experiences, the students are likely to better understand the legal standard and remember the law in action as well.

3. Professional and Career Advantages

“[S]tudents will become better lawyers and better serve their clients by having a more diverse law school experience.” — Carolina

A Latina law professor named Laura makes clear that there is “no downside to diversity at all.” She sees it as “enriching” the classroom environment, especially for those students who have not experienced much diversity until law school. While lauding the educational benefits of diversity, Laura sees professional benefits as the primary advantage, noting that students “won’t be able to work in the world without these experiences in law school.” She provides an example: “If you don’t learn how to interact with a woman authority figure and you leave [law school] and you find a woman judge and you never had an experience with that interaction,” the new lawyer is likely to be “marginalized” in the courtroom and beyond. She herself has “been on that end, hiring [for a prestigious position] in D.C.,” so she knows “it’s really important for people to have those experiences, because working with new lawyers, you can tell what kind of experiences they’ve had.”

A white female law professor named Jordan sees diverse classroom interactions as especially important “in a law school setting where so much is driven based on discussion and expanding your understanding or your ability to interact with others.” Especially for students who did not have many opportunities for cross-racial interaction prior to law school, “it just brings a whole phenomenal widening of your mind [that creates a] great advantage.” Ellen, a white law professor, agrees that diversity in the classroom is important because it will likely mirror students’ future workplace environments; thus, diversity is important not only because it “enhances the discussion” in the classroom, but also because “the dynamic is much more representative of the reality they will be working in,” likely in the very near future.

Preparation for the increasingly globalized profession of legal practice is a benefit that many DLA participants discuss. Michelle, a Black professor, adds that student diversity in law school is “crucial,” in large part because “it’s a global world” where it is increasingly important not only to “get along with, but [also to] actively collaborate with people who are different.” Without those skills, new lawyers “are going to be disadvantaged in the future world, that’s just the way it is.” She believes that “every elite institution these days understands that you can’t do excellence without diversity.”

A Latina named Carolina echoes many of the comments presented earlier on educational benefits, noting that student diversity “brings richness to the law school [including] a broader range of experiences, greater cultural competency, [and] training opportunities for the entire student body.” She also agrees with Michelle that as the workplace becomes “increasingly globalized,” it becomes “increasingly important to experience and value diversity.” Having diversity in many forms, “in terms of race, gender, sexual orientation, socioeconomic status, whether people come from rural or urban environments, I think all of that helps people understand that we have a broad range of experiences and we can’t assume that our experience represents everyone’s experience.” The primary benefit of engaging with diverse perspectives is that “students will become better lawyers and better serve their clients by having a more diverse law school experience.”

C. Missed Opportunities

Of course, not all participants in the DLA study hail from richly diverse law schools. Many recognize their own campuses as either relatively homogenous, or at least lacking a critical mass of students of color. In this section, law faculty members from less diverse schools lament the lack of diversity on campus, recognizing some obvious gaps in their classroom conversations, less fulfilling discussions overall, and unique challenges for the few students of color at non-diverse schools who are either silenced or risk being seen as spokespeople for their group.

1. Holes in the Conversation

“[My Black students] feel like chocolate chips in vanilla ice cream in class.” — Michael

Without diversity, many law faculty members identify a discernable gap in classroom discussion, a gaping hole in the conversation that could be filled with a critical mass of students of color.¹⁵³ John, a white male law professor, says that at his law school, “we have a minimally diverse student body, similar to our faculty.”¹⁵⁴ Instead of having a critical mass of students of color, who would likely be more comfortable adding their perspectives in class, at John’s law school, he says, “We have a handful of minority students. I wouldn’t characterize it as particularly diverse.” He sees this as a clear drawback for his students and their learning potential, noting that “the classroom experience would benefit from multiplicity of backgrounds and viewpoints and diversity.” None of the conversations that

153. The *Grutter* Court defined “critical mass” as “meaningful numbers or meaningful representation . . . that encourages underrepresented minority students to participate in the classroom and not feel isolated;” in other words, “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” *Grutter v. Bollinger*, 539 U.S. 306, 318–19 (2003) (internal quotation marks omitted). This Article utilizes this same definition.

154. For more on law faculty diversity and especially cross-racial interactions between law faculty members, see Deo, *supra* note 96, at 53–56.

characterize the richly diverse classes discussed earlier in this Article (for example, covering stop and frisk or the reasonable person) occur with regard to race in John's classes.

Similarly, a white male law professor named Ian notices the drawbacks of a lack of diversity in his class of primarily white students when discussing "the affirmative action cases." The holes in the conversation are often obvious, as when one of his white students "very self-consciously celebrates the importance of [educational diversity, saying,] 'You know, I'm from rural Montana. I did not encounter a Black student or Black person until I went to college,' [talking] very from the heart." While Ian appreciates the student's candor, he also wonders, "[W]hat do you do with that?" He is in a teaching situation "where there may not even be [any] or only one or two Black students at all in the room." While a critical mass of Black students could likely contribute to a healthy and vigorous debate about affirmative action, whether there are zero, one, or two African Americans in class, there is likely to be little conversation even if a classmate brings it up in a positive way. This is because when there are only one or two members of an identity group present, they may be uncomfortable speaking up.¹⁵⁵ Their silencing is thus akin to there being no minorities present at all.¹⁵⁶ As a result, the students who have had little exposure to meaningful cross-racial interaction before law school will remain disadvantaged because their few classmates of color are often uncomfortable speaking up in a setting where they are so singled out.

Michael, a Black law professor, speaks to this directly. He knows firsthand what it is like to be the only Black man in a room full of others. Thus, he identifies with his students of color who are uncomfortable speaking up in class, even when their perspectives would be valued or appreciated by their classmates. Michael acknowledges that it would help to have "a critical mass [for them to] feel more comfortable. They wouldn't feel like chocolate chips in vanilla ice cream in class." Standing out in such an obvious way, starkly visible in contrast to the traditional white students all around them, many students of color thus do not voice their perspectives; the unfortunate result is that everyone misses the opportunity to learn from one another.¹⁵⁷

155. For more on how tokenization can lead to silencing, see *infra* Part III.C.3.

156. The *Grutter* Court specifically noted the challenges associated with speaking up in class for members of underrepresented groups; it determined that a critical mass of students would add sufficient "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319 (internal quotation marks omitted).

157. For more on tokenization and silencing, see *infra* Part III.C.3, especially Natalie's example of her one Black student in class.

2. Less Fulfilling Discussions

“[I]t was just like you were teaching to somebody on Mars about race issues.” — Martha

In addition to there being fewer perspectives shared in class, a non-diverse classroom also creates less fulfilling conversations overall. Natalie, a multiracial professor, sums it up succinctly: “[Y]ou cannot have a rich discussion of the way Criminal Law works if there are no Black people [present].” Camila, a Latina, notes this problem in her classes as well, stating, “It has been difficult for me to think of having a meaningful conversation about race or gender in a non-diverse classroom.” Similarly, a Native American law professor named Erin recognizes that classes composed primarily—or perhaps exclusively—of privileged whites prevents meaningful conversations about numerous important legal topics. She notes:

I don’t think I had anybody that was racially diverse in the class. And that kind of made it really difficult when we got to the discussion about environmental justice because not only was it that they weren’t necessarily diverse, I got this sense that the majority of the students in the class really came from privileged backgrounds. And, so it was really difficult for them to understand, kind of, the impacts of pollution on communities when the communities don’t really have other options. So I think our discussion of environmental justice was not as full or interesting as a result. I certainly didn’t enjoy it as much.

The lack of diversity of racial/ethnic background as well as experience made for a relatively bland classroom discussion in Erin’s class, which was “not as full or interesting” as it could have been with more perspectives included.

In one particular school, a Latina professor named Martha “felt it was very tough . . . to teach Constitutional Law” because her students were “a bunch of white kids” with very limited exposure to people of color. When pressed on the challenges associated with teaching this particularly contextually dependent area of law to a racially homogenous group, Martha explains that her students “just had no appreciation of race. I mean it was just like you were teaching to somebody on Mars about race issues [A]bsolutely it makes a big difference to have a racially diverse classroom.”

Isabella, a white female professor, is more specific about what has been missing from her classes. She chooses religion in her First Amendment class as an example of a course that blooms when filled with students from diverse religious backgrounds, but falls flat when all students share a similar religious background. Isabella says that especially in “First Amendment, it would be nice to have more religious diversity, maybe more Jewish, Muslim, and certainly the Eastern religions that I don’t see represented frequently.” The reason that religious representation matters, and why it is especially important to have minority religions represented, is to show students that their perspective is not the only one out there—a key

concept for budding lawyers to master. Isabella states: “I always make a joke that 97 percent doesn’t see any harm in issues that deal with religious minorities because you’re in the 97 percent. In my classroom, if I’ve got everybody in the 97 percent how can I help them understand?” Again, having just one or two religious minorities does not tend to improve the debate because those token individuals feel the pressure of being the “other.” Isabella continues:

And if there’s only one person in the minority religion that’s problematic because that’s not representative and might become a stereotype. If you had more Muslims, you would have more diversity. If you had more African American individuals, you’d have more diversity, but having small samples leads to stereotypical thinking and groupthink.

3. Being a Spokesperson

“If you don’t have that critical mass, I think it makes the few diverse students you have feel uncomfortable.” — Jordan

In addition to the many ways in which a lack of diversity creates missed opportunities for all students in the classroom, the DLA data make clear that it also clouds the experience of the few students of color in class. This finding, from the faculty perspective, triangulates existing data in this area showing that when there are only a few students of color in any given class, they tend to be alienated and sometimes disengage from learning.¹⁵⁸ Existing literature documenting the student perspective shows that when there are only limited numbers of students of color in a class, they are especially unlikely to speak up for fear that their comments will be taken as representing not their individual perspective, but instead the perspective of the group their peers believe they belong to.¹⁵⁹

In fact, the DLA data reinforce studies from the student perspective, documenting how faculty also recognize student alienation, disengagement, and especially an unwillingness to be seen as the spokesperson for their race when they are one of the few in class from a particular background. A white female law professor named Ellen notes that her best classes are those where there is a critical mass of students of color, so that they themselves can engage in meaningful dialogue and even disagreement with one another. In this way, they have an opportunity to demonstrate their individuality rather than being perceived as representing their group. Ellen says, “I like looking out over a large classroom and knowing that if a student of color speaks up, there are enough other students of color that they’re not designated as the spokesperson for their race.”

158. See, e.g., Deo, *supra* note 81, at 15.

159. It is altogether too common to confront “alienation and isolation for the few students of color who attend predominantly white schools, whether in high school, college, or beyond.” *Id.* at 18.

Many professors do not share Ellen's experience, even if they would like the high level of diversity she enjoys.¹⁶⁰ A white law professor named Marybeth acknowledges that a lack of diversity "can be a problem [especially] when you're talking about issues of diversity and race" and there are no or few students of color in class. When that happens, the white students in class are essentially "talking about an 'other' who's not in the class." Perhaps even more problematic is "when you have [only] one African American student, which happens many times; it's like the minute you bring up a race issue that person becomes the spokesperson." Though Marybeth is rarely in a situation where she is the racial minority in the room full of "others," she is nevertheless attuned to the alienation accompanying this situation for her students of color. She notes, "I feel very uncomfortable with that because it's not a position I would want to be in."

A white professor named Jordan agrees, emphasizing how tokenism leads to silencing in the classroom: "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." Natalie, a multiracial law professor, recalls a disappointing class discussion about criminal defendants that ended with "[the] one Black guy in the room" approaching her after class to say, "Professor, I disagree with what everybody says but I don't want to be [seen as] The Black Guy." She told the student immediately that she understood and, in order to not single him out, did not call on him during challenging classroom conversations covering poignant cases involving race. She told him specifically, "I just don't want you to be the representative of your race and the demographics of our law school have often put you in that position."

Ian, a white male law professor, suggests that having a meaningful number of students of color in class is connected to the likelihood of having valuable conversations that draw from personal background, "which goes to show that there is something to the critical mass discussion in *Grutter*."¹⁶¹ Ian personally enjoys a broad range of diversity in class, not only along racial/ethnic lines, noting, "I've had students every year that have spoken based on their background—whether Native American, African American, and mainly white military, veteran status—all of those perspectives are helpful." Yet, especially when issues of race are central to the case being discussed, "in teaching Con Law and talking about affirmative action, for example [and especially because we are] a public law school," meaningful conversations are less likely to occur because "there simply is not always a critical mass of certainly African American students, Latino students, and

160. See *supra* Table 5 and accompanying discussion (analyzing how most law professors would prefer greater diversity on campus than they currently encounter).

161. Ian is referring here to the Court's point in *Grutter* regarding critical mass, discussed *supra* note 153.

other such groups.” Ian sees the importance of including as many perspectives as possible and knows it is more likely that individuals will speak up and be seen as representing their own opinion—not their group’s opinion—when there is a critical mass; yet:

The idea of the critical mass—of having enough people in there so that no one feels like they are speaking for their group, whether its veteran, whether its environmentalist, or whether it’s a Native American student—is not something we can succeed at all the time given the demographics of our state and our school.

However, through affirmative action, at least he and his colleagues have the opportunity to teach a diverse group; the admissions officers at his school can take account of race when making decisions about the overall student population at the school because they can legally rely on affirmative action to help diversify the student body.

CONCLUSION

Affirmative action remains under attack. So does educational diversity, the only remaining non-remedial compelling state interest that courts have sanctioned to justify the consideration of race in higher education admissions decisions.¹⁶² While the Supreme Court has accepted educational diversity as a permissible goal for institutions of higher education to consider when determining the composition of their student body, the goal stands on shaky legal ground.¹⁶³ Empirical research should be used to bolster educational diversity in this time of need. The vast majority of research on educational diversity in higher education centers on the student experience and perspective.¹⁶⁴ Yet, faculty members may have the most useful contributions regarding the actual educational and career benefits of educational diversity, given their unique roles in the classroom as both teachers of substantive material and facilitators of relevant discussions.

This Article presents findings from the DLA project, revealing law faculty members’ insights into student diversity. Relying on law faculty experiences, it is clear that student diversity plays an important role in the legal education process. Law faculty members from all racial/ethnic backgrounds note the various ways in which student diversity is an integral part of student learning. For instance, many say that a diverse student body means that there are multiple perspectives in every classroom and an opportunity to draw from personal context to illuminate what is otherwise often abstract black letter law. Relevant context initiated and discussed by students is preferred to faculty lecturing on it, as students respond better to their own peers and colleagues raising personal experiences and observations. There are also myriad career advantages associated with educational diversity, for future lawyers who will be serving clients from

162. Deo, *supra* note 8, at 664.

163. *Id.* at 662.

164. *See, e.g.*, Deo et al., *supra* note 70; Gurin et al., *supra* note 70; Deo, *supra* note 3.

diverse backgrounds, those who might work internationally, and for any one of them who may one day come before a female judge.

The flip side of the benefits of educational diversity involves the drawbacks associated with a lack of diversity. A number of participants in the DLA study have experience with low student diversity and lament its many negative attributes and results. When no or few diverse students are present, there are obvious gaps in classroom conversations that law faculty members are not always equipped or able to fill. Many professors have lectured through the discomfort of covering police brutality, racial profiling, and deportation-as-punishment without African Americans, Muslims, or Latinos present. When the classroom lacks a critical mass of diverse students, many DLA participants note that the conversations as a whole tend to be bland rather than robust. Furthermore, many law faculty members recognize what students themselves have noted as research subjects participating in empirical research for years: when there is nobody else from their background in the classroom, students of color tend to carry the burden of representing their race, where their classmates expect them to be a spokesperson for their race. Perhaps for all these reasons, the quantitative data reveal that law faculty members from all racial/ethnic backgrounds and men and women alike tend to strongly support diversity in the classroom.

Educators, administrators, and admissions officers surely can rely on these findings to continue supporting diversity efforts at institutions around the country. When over 75 percent of law faculty from all backgrounds—including whites and nonwhites as well as men and women—support greater diversity on campus, it is clear that even greater efforts are needed to achieve it. Ironically, the courts may be gearing up to turn away from educational diversity altogether. Armed with this detailed empirical analysis from law faculty members, those fighting to preserve affirmative action and educational diversity may now be better equipped to detail to the courts not only the many benefits of educational diversity, but also the challenges and drawbacks associated with a lack of diversity. Without educational diversity as a compelling state interest, we may lose affirmative action altogether.¹⁶⁵ And without affirmative action, we may all be at institutions where racial/ethnic homogeneity impedes teaching and learning for us all.

165. For more on the legal doctrine associated with affirmative action, see Part I.A. *See also Deo, supra* note 8, at 668–73.