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Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence

MEERA E. DEO*

Educational diversity has long been the only compelling state interest that satisfies strict scrutiny in affirmative action challenges absent prior institutional discrimination. However, as educational diversity may be losing favor, it is time to consider viable alternatives. This Article provides empirical support for the benefits of educational diversity and proposes three additional compelling state interests for courts to consider. Support for these compelling state interests comes directly from detailed quantitative and qualitative analyses of data collected from an empirical study of students at the University of Michigan Law School, relating to their preferences for diversity, perceptions of campus climate, and professional aspirations. Study findings indicate that educational diversity should remain a compelling state interest, and that courts should also consider the importance of (1) avoiding racial isolation, (2) promoting service to underserved communities, and (3) facilitating diversity in American leadership.

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TABLE OF CONTENTS

INTRODUCTION.....	662
I. THE PATH TO <i>SCHUETTE</i>	666
A. THE LEGAL CHALLENGE TO MICHIGAN’S PROPOSAL 2	666
B. THE EVOLVING STRICT SCRUTINY STANDARD.....	668
II. STRUCTURAL DIVERSITY AT MICHIGAN LAW SCHOOL.....	673
A. DATA COLLECTION AND METHODOLOGY.....	673
B. THE PERSPECTIVES ON DIVERSITY SAMPLE.....	676
C. DIVERSITY WITHIN THE POD SAMPLE	676
1. <i>Immigrant Background and Language Usage</i>	677
2. <i>Academic Outcomes</i>	680
3. <i>Educational Debt</i>	682
4. <i>Scholarships and Fellowships</i>	684
III. EMPIRICAL SUPPORT FOR EDUCATIONAL DIVERSITY	686
A. PREFERENCE FOR GREATER DIVERSITY	686
B. BENEFITS OF EDUCATIONAL DIVERSITY.....	687
1. <i>Classroom Benefits</i>	688
2. <i>Career Benefits</i>	689
IV. ALTERNATIVE ONE: AVOIDING RACIAL ISOLATION	690
A. TROUBLING PERCEPTIONS OF CAMPUS CLIMATE	691
B. DRAWBACKS OF RACIAL ISOLATION	696
V. ALTERNATIVE TWO: REWARDING A DESIRE TO SERVE	699
VI. ALTERNATIVE THREE: FACILITATING LEADERSHIP DIVERSITY	702
CONCLUSION	705
APPENDIX.....	709

INTRODUCTION

On October 15, 2013, the Supreme Court heard oral arguments on a case involving affirmative action in higher education for the second consecutive year and the third time in ten years.¹ Though this case centers on the legality of a popular initiative process, the judicial focus has often been on diversity and whether the policy at issue is sufficiently narrowly tailored to survive strict scrutiny.² However, with educational diversity resting on shaky ground, we have reached the hour of both bolstering educational diversity and considering viable alternatives.³ This Article

1. See, e.g., *Coal. to Defend Affirmative Action v. Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), cert. granted *sub nom.* *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

2. See *Fisher*, 133 S. Ct. at 2419–21; *Grutter*, 539 U.S. at 309; *Gratz*, 539 U.S. at 252.

3. See *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time.”).

draws from empirical evidence to present support for educational diversity as well as alternatives to diversity as compelling state interests.

The Supreme Court is poised to rule on the constitutionality of an initiative process banning affirmative action in Michigan.⁴ While the parties debate whether a state constitutional amendment prohibiting affirmative action impedes or infringes on the political rights of people of color, and the Court wrangles with the correct level of “strictness” to emphasize in a strict scrutiny analysis, the students may get lost in the shuffle.⁵ Yet, students have the most to gain both in terms of educational access and (e)quality. Thus, findings from an empirical study of students attending the University of Michigan Law School are especially timely and relevant. By utilizing empirical data drawn directly from Michigan Law students, this Article informs the Court’s evolving affirmative action jurisprudence by sharing the current climate and student experience at the flagship law school affected by its decision. Results and findings can also be generalized to represent other students, especially those attending law schools without a high level of diversity.⁶

This Article highlights the student perspective, using data collected directly from students attending the University of Michigan Law School after a statewide ban on affirmative action.⁷ Thus, the data provide insight into classroom and campus effects at a post-affirmative action institution. This Article gives voice to Michigan Law students and proposes that advocates, academics, administrators, judges, and others take the actual experiences of law students into account when deciding their fate with regard to affirmative action. Because the student experiences discussed herein may be quite similar to those of students attending other law schools, future courts considering compelling state interests, strict scrutiny, and affirmative action may draw from this Article as well.⁸

4. See *Coal. to Defend Affirmative Action*, 701 F.3d 466, cert. granted sub nom. *Schuette*, 133 S. Ct. 1633.

5. See, e.g., *Coal. to Defend Affirmative Action*, 701 F.3d 466; Transcript of Oral Argument, *Schuette*, 133 S. Ct. 1633.

6. In other words, most American law schools. See, e.g., *A Disturbing Trend in Law School Diversity*, Soc’y of Am. Law Teachers & Columbia Univ. Sch. of Law, <http://blogs.law.columbia.edu/salt> (last visited Mar. 12, 2014). Historically Black law schools are a notable exception. See *Most Diverse Law Schools*, NAT’L JURIST (Mar. 15, 2011) <http://www.nationaljurist.com/content/breaking-news/most-diverse-law-schools> (“The schools with the largest populations of African Americans are those whose historic mission is to serve black students.”).

7. Note that roughly 44% of the Michigan Law School class of 2010 (third-year law students at the time of data collection for the Perspectives on Diversity (“POD”) study) was admitted before Proposal 2 went into effect. The remaining 56% of the class of 2010, along with 100% of participants graduating in 2011 and 2012, was admitted under a race-blind admissions system. See E-mail from Dean Sarah Zearfoss, Univ. of Mich. Law Sch., to Author (July 22, 2013) (on file with Author) (regarding admissions following Proposal 2).

8. Findings presented here are consistent with those of scholars studying diversity and the law student experience using a national, longitudinal, representative dataset. See, e.g., Charles E. Daye et

Even though the Court may not reach the merits of affirmative action in *Schuette v. Coalition to Defend Affirmative Action*, the case currently before the Supreme Court, educational diversity remains the only recognized compelling state interest that supports it.⁹ Scholars have chronicled ways in which diversity benefits students on campus and in their professional careers.¹⁰ Through methodical analysis of the Perspectives on Diversity (“POD”) data, this Article carefully documents many of the benefits of diversity.¹¹ Yet, diversity has been under attack in past years and faces uncertainty in the future.¹² 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.¹³

Given this uncertainty, it is time to consider alternatives to diversity that may be compelling state interests.¹⁴ Three specific alternatives emerge

al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 RUTGERS RACE & L. REV. 75-S (2012); Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71 (2010); 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 (2010) [hereinafter Deo et al., *Paint by Number?*].

9. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–18 (2013) (discussing the goal of educational diversity as a justification for race considerations in higher education admissions practices). While the case is not explicitly about the merits of affirmative action, the Court and the attorneys of record did spend some time discussing educational diversity and other possible benefits of affirmative action. See generally Transcript of Oral Argument, *Schuette*, 133 S. Ct. 1633. In the *Schuette* oral arguments, for example, Justice Sotomayor stated “I thought that in *Grutter*, all of the social scientists had pointed out to the fact that all of these efforts [to achieve meaningful diversity without affirmative action] had failed.” *Id.* at 5. Justice Scalia, echoing a comment made by Chief Justice Roberts, stated that “it’s certainly a debatable question” whether affirmative action helps people of color. *Id.* at 51.

10. See Daye et al., *supra* note 8, at 573; Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 97 (2011); see also *The Compelling Need for Diversity in Higher Education*, UNIV. OF MICH. ADMISSIONS LAWSUITS (Sept. 5, 2012), <http://www.vpcomm.umich.edu/admissions/legal/expert>.

11. See *infra* Part II.C.1.

12. Plaintiffs in recent affirmative action cases have challenged diversity as a compelling state interest and Justice Thomas specified in his concurring opinion in *Fisher* that he did not believe educational diversity should be a compelling state interest. *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

13. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity].”); *Fisher*, 133 S. Ct. at 2420 (“[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, race-neutral alternatives do not suffice.”).

14. Some may say it is also time to consider larger structural inequalities that underlie current affirmative action jurisprudence whereby courts give the same weight to whites claiming “reverse” discrimination from policies intended to improve access and equality for people of color, as they do to African Americans seeking refuge under the Equal Protection Clause, specifically passed to provide former slaves equality under the law. Other scholars have begun a general conversation on this topic. See, e.g., Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245 (2007); Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV.

from a detailed analysis of the POD data that lie at the empirical heart of this Article.¹⁵ First, students of color experience high levels of racial isolation on campus that may affect their academic and professional outcomes. Avoiding racial isolation should be a compelling state interest. Second, students of color seem more likely than their white classmates to consider public interest work as part of their future practice.¹⁶ Service to underserved communities should be another compelling state interest worth exploring further. Finally, without affirmative action, the legal profession and leadership in America may grow increasingly white and male; courts should recognize diversifying the legal profession and American leadership as a compelling state interest.

Part I of this Article provides a synopsis of the Michigan initiative that bans public affirmative action in the state, and the resulting legal challenge. It also situates *Schuette* within the context of broader affirmative action jurisprudence. Part II presents the data, methods, and some brief descriptive statistics on the sample of students participating in the Perspectives on Diversity study of Michigan Law students. Part III provides analysis of the quantitative and qualitative POD data supporting educational diversity as a continued compelling state interest. Parts IV, V, and VI draw from the Michigan Law School data to propose three alternatives to diversity as compelling state interests. Specifically, courts should consider avoiding racial isolation, pursuing service, and diversifying leadership as independent compelling state interests that could sustain affirmative action even in the absence of educational diversity.

911, 919 n.24 (2010). Interestingly, this point came up just recently during oral arguments in *Schuette*. First, Justice Ginsburg noted that “strict scrutiny was originally put forward as a protection for minorities . . . against hostile disadvantageous legislation” and was expected to be used in cases where “the majority is disadvantaging the minority.” Transcript of Oral Argument at 23, *Schuette*, 133 S. Ct. 1633. She clarified further that under current Equal Protection doctrine, “the criterion is race,” so that regardless of whether “the disadvantage falls” on someone in the majority or minority, application of the doctrine is “just the same.” *Id.* Next, Justice Alito mentioned to Mr. Rosenbaum that he could “argue that strict scrutiny should only apply to minorities and not to students who are not minorities,” but that would not be a compelling argument—to which Mr. Rosenbaum replied that he was not making that argument. *Id.* at 31. Ms. Driver, representing the Coalition to Defend Affirmative Action, did make that argument, asking the Court “to bring the 14th Amendment back to its original purpose and meaning, which is to protect minority rights against majority.” *Id.* at 41. Future articles using the data presented here might contribute further to discussions of these larger structural inequalities.

15. While a broader argument challenging current affirmative action theory and jurisprudence is outside the scope of this Article, the three alternatives to diversity presented here could serve as the centerpiece for a novel method of affirmative action analysis that is focused on addressing broader structural inequalities.

16. For further discussion of interest in public interest careers, see *infra* Part V.

I. THE PATH TO *SCHUETTE*

Although the origins of affirmative action lie with the Executive branch,¹⁷ legislation created through the popular initiative process has been particularly effective in recent decades.¹⁸ Most of these initiatives have attempted to amend state laws in order to ban affirmative action in public education, employment, and contracting.¹⁹ Supporters of affirmative action have challenged each of these legislative efforts in court.²⁰ The most recent battleground state is Michigan.²¹

A. THE LEGAL CHALLENGE TO MICHIGAN'S PROPOSAL 2

In November 2006, Michigan voters passed Proposal 06-02, which amended the state Constitution to prohibit public officials from using race as a factor in educational, employment, or contracting decisions.²² Challengers to what became known as "Prop. 2" filed suit, alleging that the new law amounts to political restructuring in violation of the Fourteenth Amendment Equal Protection Clause.²³ Plaintiffs argue that Prop. 2 bans applicants of color from discussing their race or ethnic heritage in application materials, while whites are free to draw from all

17. Executive Order 11,246 is credited with starting affirmative action in the United States. Exec. Order No. 11,246, 30 C.F.R. 12319 (Sept. 24, 1965).

18. See, e.g., Meera E. Deo, *Ebbs and Flows: The Courts in Racial Context*, 8 *RUTGERS RACE & L. REV.* 167, 179–80 (2007); Adam Liptak, *Supreme Court Takes New Case on Affirmative Action, From Michigan*, *N.Y. TIMES*, Mar. 25, 2013, at A14. The media has also played a key role shaping societal attitudes toward affirmative action with debates taking place in many of the nation's most elite newspapers. See, e.g., *Room for Debate: Diversity Without Affirmative Action?*, *N.Y. TIMES* (May 13, 2013), <http://www.nytimes.com/roomfordebate/2013/05/13/can-diversity-survive-without-affirmative-action>.

19. See, e.g., *Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOV. 5, 1996 at 30–33 (outlining Proposition 209 which was later enacted as CAL. CONST. art. I, § 31); see also Part I.A (discussing Michigan Proposal 06-02). A pending measure in California, known as SCA-5, would overturn Prop. 209 to again allow for affirmative action in education. See Emil Guillermo, *Moving Beyond the Nasty in SCA-5, California's New Affirmative Action Debate*, *DIVERSE ISSUES IN HIGHER ED.* (Mar. 10, 2014), <http://diverseeducation.com/article/61124/>.

20. See, e.g., *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1991–92 (9th Cir. 2000) (challenging Washington State's Initiative 200); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696–97 (9th Cir. 1997) (challenging California's Proposition 209).

21. See generally *Coal. to Defend Affirmative Action v. Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), cert. granted sub nom. *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

22. See MICH. CONST. art. 1, § 26; see also Monica L. Rose, *Proposal 2 and the Ban on Affirmative Action: An Uncertain Future for the University of Michigan in its Quest for Diversity*, 17 *B.U. PUB. INT. L.J.* 309, 309–10 (2008) (explaining "Proposal 2" and Michigan voter's 2006 approval of the initiative).

23. Complaint at 3, *Cantrell v. Granholm*, No. 2:06-15637 (E.D. Mich. Dec. 19, 2006) available at http://www.diversity.umich.edu/legal/filings/show_case_doc-29.pdf (last visited Mar. 12, 2014) (alleging that Prop. 2 creates a "fundamental change in the rules of political engagement" placing undue burdens on political participation for people of color). Another group of plaintiffs filed a similar challenge in *Coalition to Defend Affirmative Action v. Granholm*, No. 2:06-15024, 2006 WL 3953321 (E.D. Mich. Dec. 19, 2006), and the two cases were consolidated.

elements of their personal background and experience.²⁴ Applicants of color can only challenge the policy by attempting to amend the state Constitution, though changing other admissions policies would require no such lengthy or costly measures.²⁵ This, the challengers argue, places “an unconstitutional burden on protected groups’ ability to protect their rights.”²⁶ Though the district court sided with the state, the Sixth Circuit overturned that decision,²⁷ and later affirmed en banc that Prop. 2 was unconstitutional.²⁸ In March 2013, the Supreme Court granted certiorari in the case, now called *Schuette v. Coalition to Defend Affirmative Action*.²⁹ While the case centers on affirmative action, it also involves political rights and access to justice more broadly.³⁰

In oral argument before the Court, for example, the attorney seeking to overturn Prop. 2 on behalf of the Cantrell plaintiffs spent most of his time wrangling with the Justices on whether *Schuette* could be distinguished from *Hunter v. Erickson*³¹ and whether the new law involves a racial classification at all.³² However, Shanta Driver, who also argued against Prop. 2 but on behalf of the Coalition to Defend Affirmative Action, brought up much deeper arguments related to equality and representation.³³ For example, she noted that following passage of Prop. 2, the schools of higher education in Michigan endured “a precipitous drop in underrepresented minority enrollment,” warning that Court approval of Prop. 2 could signal a return “to the resegregation of those schools because of the elimination of affirmative action.”³⁴ The Court briefly questioned whether affirmative action truly benefits people of color³⁵ and expressed surprise when asked “to bring the 14th Amendment back to its original purpose and meaning, which is to protect minority rights against majority.”³⁶

24. Complaint, *supra* note 23, at 2.

25. *Id.*

26. *Id.* at 1.

27. *Coal. to Defend Affirmative Action v. Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

28. *Id.*

29. *See generally* Liptak, *supra* note 18.

30. For more on the procedural aspects of litigation challenging Michigan’s Proposal 2, see Rose, *supra* note 22, at 324–29.

31. 393 U.S. 385 (1969).

32. *See* Transcript of Oral Argument at 25–40, *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (No. 12-0682).

33. *See id.* at 41–52.

34. *Id.* at 49–50.

35. To which Ms. Driver replied that the question had been settled in *Grutter*, which noted the many benefits of diversity for all students. *Id.* at 41.

36. *Id.*

As the Court touches on issues of affirmative action, diversity, and the political process, it should also consider the perspectives of the students who will be most directly affected by *Schuette*. Students in the POD dataset discussed in this Article joined the University of Michigan Law School after Prop. 2 went into effect.³⁷ Therefore, their perceptions of the campus climate, experiences with diversity, and professional aspirations are all shaped on a campus devoid of affirmative action. Drawing from these data points, this Article not only provides additional support for educational diversity, but also proposes three alternative compelling state interests for courts to consider when evaluating affirmative action policies.

B. THE EVOLVING STRICT SCRUTINY STANDARD

Parties defending affirmative action policies walk a challenging road. Equal Protection challenges based on race trigger strict scrutiny, which requires defendants to prove that their policies are in pursuit of a compelling state interest and are narrowly tailored to meet that goal.³⁸ In the context of higher education, educational diversity is the only non-remedial compelling state interest that courts have sanctioned to date.³⁹ Some proposed compelling state interests, such as widespread societal discrimination, have been explicitly rejected;⁴⁰ others, such as service to underserved communities, remain underexplored.⁴¹ Recently, courts have given much more attention to the second prong of strict scrutiny: narrow

37. Note that roughly 44% of the Michigan Law School class of 2010 (third-year law students at the time of data collection for the POD study) was admitted before Proposal 2 went into effect. The remaining 56% of the class of 2010, along with 100% of participants graduating in 2011 and 2012, was admitted under a race-blind admissions system. See E-mail, *supra* note 7.

38. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state or governmental actor, . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”). As Justice Scalia noted during the *Schuette* oral argument, “I thought the whole purpose of strict scrutiny was to say that if you want to talk about race, you have a much higher hurdle to climb than if you want to talk about something else.” Transcript of Oral Argument at 31, *Schuette*, 133 S. Ct. 1633.

39. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–14 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Courts would also uphold affirmative action policies based on the desire to remedy specific institutional discrimination, though schools are naturally reluctant to bring up their own historical discrimination even as a means to preserve affirmative action. See Memorandum of Law in Support of Motion to Intervene at 18–19, *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich. Mar. 26, 1998), 1998 WL 35235440. In other contexts, institutions have been required to remedy direct discrimination by way of formal consent-decree-style remedies. See, e.g., Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1161–62 (1996) (discussing *United States v. Paradise*, 480 U.S. 149 (1987), in which the Court upheld a federal court order requiring that “every time a white was hired or promoted, a qualified black had to be hired or promoted until the effects of the past discrimination were eradicated”).

40. Given previous decisions, direct reliance on the need for role models or the need to address widespread societal discrimination may be insufficient to establish compelling state interests. See, e.g., *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Grutter*, 539 U.S. 306.

41. See *Bakke*, 438 U.S. at 373.

tailoring. In *Grutter*, the Court allocated only “a few short paragraphs” to educational diversity, followed by “an exhaustive discussion” of narrow tailoring.⁴² The Court provided even greater detail on narrow tailoring in *Fisher* after glossing over its discussion of educational diversity.⁴³

This evolving strict scrutiny standard began its affiliation with affirmative action forty years ago, when a white male applicant named Allan Bakke sued the University of California (“U.C.”) Regents after a number of failed attempts to gain admission to U.C. Davis Medical School.⁴⁴ He alleged that the university’s admissions policy violated the Fourteenth Amendment’s Equal Protection Clause and Title VI of California’s Civil Rights Act of 1964 by reserving a certain number of seats in the class for underrepresented minorities.⁴⁵ In an opinion written by Justice Powell, the Supreme Court agreed that race-based quotas were unconstitutional, but stated that educational institutions could include race as a “plus” factor in holistic admissions decisions.⁴⁶ Pursuit of educational diversity was thereby singled out as a worthy state interest.⁴⁷

While lower courts followed Justice Powell’s lead in *Bakke* for many years, the Fifth Circuit decision in *Hopwood v. Texas*⁴⁸ created some uncertainty. *Hopwood* struck down the affirmative action policy at the University of Texas, Austin, holding that diversity was not a compelling state interest and suggesting that Justice Powell’s decision in *Bakke* did not represent a majority of the Justices.⁴⁹ Soon after, the Ninth Circuit followed *Bakke*, determining that diversity was a compelling interest that justified the use of race in admissions.⁵⁰

42. Deo, *supra* note 10, at 68–69.

43. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419–21 (2013). In the *Schuetz* oral argument, the Court only briefly discussed educational diversity (i.e., when Justice Sotomayor noted that “in *Grutter*, all of the social scientists had pointed to the fact that all of those efforts” to achieve meaningful diversity without affirmative action had failed; when Bursch acknowledged that “we can all agree that diversity on campus is a goal that should be pursued;” Rosenbaum making clear that in *Schuetz*, “the objective was to obtain diversity,” not remedy societal discrimination; and Driver’s assertion that affirmative action is “the only way to achieve racial diversity and integration at the University of Michigan”) and all but ignored narrow tailoring. Transcript of Oral Argument at 5, 17, 26, 49, *Schuetz*, 133 S. Ct. 1633.

44. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 270 (1978).

45. *Id.*

46. *Id.* at 315–17.

47. *Id.* at 316. The university 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. *See id.* at 310. For further discussion on service to underserved communities, see *infra* Part V.

48. 78 F.3d 932 (5th Cir. 1996).

49. *Id.* at 948, 941–44.

50. *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1200–01 (9th Cir. 2000).

This circuit split primed the Supreme Court to take up the issue of affirmative action in higher education just three years later, and twenty-five years after *Bakke*, when it granted certiorari in *Grutter v. Bollinger* and *Gratz v. Bollinger*.⁵¹ In these twin cases, unsuccessful white applicants to the University of Michigan Law School and the university's 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.⁵² The Court took this opportunity to reaffirm educational diversity as a compelling state interest that admissions officers could pursue through affirmative action using narrowly tailored means.⁵³ To satisfy narrow tailoring, the Court insisted on holistic review, whereby each candidate was evaluated along with all others and race was simply one factor among many in the evaluative process.⁵⁴ In *Grutter*, the Court determined that the University of Michigan Law School did conduct a thorough and holistic review of all applicants, where race was not given undue significance.⁵⁵ In *Gratz*, the Court found that the numeric point system used by University of Michigan's undergraduate institution did not satisfy narrow tailoring and therefore failed strict scrutiny.⁵⁶ Thus, the Court upheld the Law School's policy while invalidating the undergraduate affirmative action process then in use.⁵⁷

Parents Involved in Community Schools v. Seattle School District No. 1 continued the narrowing from *Gratz*, hinting at a future of race-blind school selection.⁵⁸ The Court held that the primary and secondary schools involved could not continue to use race as a factor in student allocation with the policy in place at the time.⁵⁹ Chief Justice Roberts, joined by three other Justices, wrote that "[t]he way to stop discriminating on the basis of race is to stop discrimination on the basis of race," suggesting that affirmative action itself was a form of racial discrimination.⁶⁰ However, Justice Kennedy's opinion, which provided the crucial fifth vote to overturn the race-conscious policies at issue, noted that where

51. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

52. *Grutter*, 539 U.S. at 317; *Gratz*, 539 U.S. at 252. Again, white plaintiffs relying on the Equal Protection Clause and other anti-discrimination laws to protect themselves from what some call "reverse discrimination" is worthy of greater scholarly attention.

53. *Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 268.

54. *Grutter*, 539 U.S. at 340 ("The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.").

55. *Id.* at 336 (finding that Michigan Law School used race as one of many different "plus" factors).

56. *Gratz*, 539 U.S. at 270-72 (suggesting that the point system at use in Michigan's undergraduate institution did not provide sufficient "individual consideration" of each applicant).

57. *Id.* at 333-34.

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

59. *Id.* at 731-33.

60. *Id.* at 748.

race is only indirectly implicated in a selection or admissions process, the policies may not be subject to the strict scrutiny standard. He stated:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.⁶¹

Thus, the ruling did not affect magnet programs or other efforts aimed at diversifying primary and secondary schools.⁶² Nevertheless, following *Parents Involved*, it is likely that “school districts will be hesitant to allocate students to schools while taking account of race through voluntary integration.”⁶³

When the Court granted certiorari in *Fisher*, brought by a white applicant denied admission to the University of Texas, Austin,⁶⁴ many wondered if the case would signal the end of affirmative action.⁶⁵ The University of Texas, Austin had followed a dual system of admissions, utilizing both a “Top 10%” system and a traditional admissions process that directly took account of race.⁶⁶ Over 75% of its entering freshman class consisted of students who placed in the top 8 to 10% of their high school class.⁶⁷ These high-achieving high school students received automatic admission to the state university of their choice, including the flagship Austin campus.⁶⁸ The remaining 25% of the entering class was admitted through a complex calculation of “personal achievement” and the standard academic index—generally, the applicant’s performance on the SAT or a comparable exam, plus high school grade point average

61. *Id.* at 789 (Kennedy, J., concurring).

62. The Author thanks Charles E. Daye for illuminating discussions on this observation.

63. Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 46 (2012).

64. See, e.g., Jonathan W. Rash, Note, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict Scrutiny*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 25, 27 (2012); Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1.

65. See generally *id.*; Kathryn Alfisi, *Diversity in Higher Education: Is Affirmative Action Nearing its End?*, WASH. LAWYER (Dec. 2012), <http://www.dcb.org/bar-resources/publications/washington-lawyer/articles/december-2012-affirmative-action.cfm>.

66. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2414–15 (2013).

67. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224, 246 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

68. *Id.* at 224.

(“GPA”).⁶⁹ The challenge before the Court was to evaluate the holistic admissions system in light of the 10% Plan, which itself produced some student diversity by drawing from highly segregated high schools around the state.⁷⁰

Abigail Fisher filed suit against the University of Texas, alleging that the race-conscious portion of their admissions policy violated the Fourteenth Amendment Equal Protection Clause.⁷¹ The District Court and the Fifth Circuit upheld the University policies, finding that educational diversity was a compelling state interest and the admissions policies at issue were narrowly tailored to fit that interest.⁷² Writing for the Court, Justice Kennedy began by affirming yet again that educational diversity remains a compelling state interest.⁷³ Justice Kennedy expounded on the benefits of diversity, “including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”⁷⁴ However, the Court found that the Fifth Circuit deferred excessively to the University with regard to narrow tailoring.⁷⁵ Educational 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.”⁷⁶ Academic freedom allows institutions of higher learning some latitude to make admissions decisions that further their educational mission, such that “some, but not complete, judicial deference is proper” with regard to a determination that educational diversity is important to the institution.⁷⁷ However, courts should not defer to a university’s determination that their policies are narrowly tailored to achieve their goals.⁷⁸ 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.⁷⁹ Thus, *Fisher* held that while educational diversity remains a compelling state interest, courts

69. *Fisher*, 133 S. Ct. at 2415–16.

70. *Id.* at 2416–17.

71. *Id.* at 2417. Again, a white plaintiff seeks protection from the 14th Amendment.

72. *Id.* at 2417.

73. *Id.* (“We take [*Bakke*, *Gratz*, and *Grutter*] as given for purposes of deciding this case.”).

74. *Id.* at 2418. While Justice Kennedy explicitly mentions “the lessening of racial isolation,” he touts it as a benefit of educational diversity, not a compelling state interest in and of itself. This Article extends the argument further, noting how the pursuit of educational diversity and the avoidance of racial isolation go hand-in-hand at enhancing classroom conversations and improving learning outcomes. See *infra* Part IV.

75. *Fisher*, 133 S. Ct. at 2421.

76. *Id.* at 2420 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)).

77. *Id.* at 2419.

78. *Id.* at 2420 (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”).

79. *Id.* (“[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”).

should not defer to universities with regard to narrow tailoring.⁸⁰ This narrows defendants' ability to satisfy narrow tailoring, making strict scrutiny even stricter than it was before. In fact, *Fisher* explicitly recognizes the extra challenge that the Court's evolving framework adds to institutions defending affirmative action, noting that while "[s]trict scrutiny must not be 'strict in theory, but fatal in fact,' . . . the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact."⁸¹

II. STRUCTURAL DIVERSITY AT MICHIGAN LAW SCHOOL

With a firm grasp of the relevant affirmative action caselaw and the applicable strict scrutiny standard, we can now turn our attention to the empirical data that can inform this jurisprudence further. This Part presents quantitative and qualitative empirical data to inform affirmative action jurisprudence, as courts continue to grapple with the evolving strict scrutiny standard. It begins with an overview of the procedures for data collection and the methodological approach for coding and analysis of the Perspectives on Diversity data. Selected descriptive analyses of the POD sample follow.

A. DATA COLLECTION AND METHODOLOGY

The POD project is a multi-method study of diversity and the law school experience involving students enrolled at the University of Michigan Law School during the 2009-2010 academic year.⁸² A total of 505 law students participated in the study. All participants completed an online survey that asked respondents to report on their family background, college interactions, law school experiences, and future plans. The survey also collected attitudinal data on a range of issues that sought to gauge participants' preferences and opinions.⁸³ The survey was live online for the month of March 2010. Participation was incentivized by a raffle drawing for an iPod Shuffle and iPod gift cards.

In addition to completing the online survey, a sub-sample of ninety-seven students participated in focus groups consisting of between one

80. *Id.* at 2421–22. Some commentators predicted such a change in the Court's deference to schools, at least when matters of race were at issue. *See, e.g.*, Deo, *supra* note 10, at 69 n.29 (citing Preston C. Green et al., Parents Involved, *School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503 (2011)).

81. *Fisher*, 133 S. Ct. at 2421 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

82. What follows in this Part is an overview of the data used in this Article and the methods used to analyze the data. For a more detailed summary of data and methods from the Perspectives on Diversity project, see Deo, *supra* note 10, at 86–118; *see also* Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL'Y 83, 89–96 (2013).

83. All survey and focus group questions reported on in this Article are reproduced in the Appendix, *infra*.

and seven students led by a facilitator who was specifically trained in qualitative methods.⁸⁴ The focus group sessions were held on the University of Michigan Law School campus in Ann Arbor. Students were organized into racially homogenous focus groups with a same-race facilitator whenever possible. The goal of this exhaustive selection and assembly process was to facilitate discussion of sensitive racial topics within a safe and welcoming space to maximize validity of the data gathered.⁸⁵ The POD study is ideally suited to a mixed-method design—a combination of quantitative survey research and qualitative focus group analysis—to assess both broad trends on campus through survey research and gain a more detailed understanding of the student experience through use of participants’ own words expressed in focus groups.⁸⁶ Mixed methodological analysis also allows for triangulation of the data, which strengthens the findings through independent assessment.⁸⁷

The quantitative data were analyzed using both Excel and Stata software, standard tools for statistical analyses in the social sciences.⁸⁸ All Tables presented in this Article are cross-tabulations of the data, a “two-variable analogue of a frequency distribution.”⁸⁹ Cross-tabulations allow for presentation of the frequency distribution of particular questions asked on the survey, to clarify overall responses as well as identify inter-group variation.⁹⁰ Thus, most findings, Tables, and discussions that follow involve comparisons of responses to separate survey and focus group questions, often grouped by the race of respondents. This allows for examination of how African Americans as a group respond to certain questions and comparison to responses by whites, Latinos, and Asian/Pacific Islanders,

84. The Author thanks the Educational Diversity Project (“EDP”) and co-principal investigators of that project, Walter Allen, A.T. Panter, Charles E. Daye, and consultant Linda Wightman. The study design used for POD was adapted and modified from EDP. For more information on EDP, see THE EDUCATIONAL DIVERSITY PROJECT, <http://www.unc.edu/edp> (last visited Mar. 12, 2014).

85. This research study received institutional review board (“IRB”) approval from Western IRB. Certification is on file with the Author.

86. See Deo, *supra* note 10, at 86 n.145 (“The mixed-method data collection and analysis utilized in this study was specifically chosen to provide a holistic assessment of diversity and the law school experience at the University of Michigan Law School.”).

87. See JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING AND CONDUCTING MIXED METHODS RESEARCH I* (2007); ABBAS TASHAKKORI & CHARLES TEDDLIE, *MIXED METHODOLOGY: COMBINING QUALITATIVE AND QUANTITATIVE APPROACHES* 5 (1998).

88. See EARL R. BABBIE ET AL., *ADVENTURES IN SOCIAL RESEARCH* (6th ed. 2007).

89. *Statistics (Science): Tabular Methods*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/144205/cross-tabulation> (last visited Mar. 12, 2014) (“Another tabular summary, called a relative frequency distribution, shows the fraction, or percentage, of data values in each class. The most common tabular summary of data for two variables is a cross tabulation, a two-variable analogue of a frequency distribution.”); see also BABBIE ET AL., *supra* note 88.

90. BABBIE ET AL., *supra* note 88.

for example.⁹¹ At times, the findings section also groups together students of color as a whole and compares that group to whites.⁹²

Qualitative data are used primarily to further discussion of the trends and patterns identified in the survey data. The qualitative data come from responses by and conversations between the ninety-seven focus group participants. Researchers assigned a pseudonym to each participant to protect anonymity. Focus group sessions were recorded and later transcribed and reviewed for error and clarity before coding and analysis began.

Analyzing the qualitative data involved creating a comprehensive codebook developed specifically for the POD project. The first step was development of a preliminary list of codes drawing from the questions included in the survey instrument and the focus group protocol.⁹³ The codebook was continuously updated based on ongoing review and coding of the data so that emerging themes could be included in future coding and analysis.⁹⁴ Transcripts were then analyzed using ATLAS.ti software, a standard tool in the social sciences for effectively organizing and interpreting qualitative data.⁹⁵ The quotes are effective representations of the data, which elaborate on and add detail to the quantitative findings.

91. Responses from these four groups are the primary ones analyzed in this Article. While Native Americans and “Others” also participated in the study, the sample size is relatively small—eight Native American respondents and thirteen who identify as some “Other” race/ethnic group. The “Other” group itself is an aggregated group, as it likely represents various groups that do not fit the traditional race/ethnic categories utilized in the study.

92. Terminology used to characterize race and ethnicity is imprecise, at best, given the complex nature and social construction of race as a whole. See generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Yet, some definitions are in order. Participants in the POD sample self-identified their race/ethnicity and gender on the survey and during focus group sessions. In this Article, the term “African American” is used to refer to those who characterized themselves in the study as “Black” or “African American.” The terms “Latino” and “API” are used as well, referring to those who self-identified as Hispanic/Latino and Asian/Pacific Islander, respectively. Though both Latinos and APIs are pan-ethnic groups, representing individuals from a multiplicity of ethnic and national backgrounds, YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY; BRIDGING INSTITUTIONS AND IDENTITIES* (1992), they are often grouped together for political and research purposes. This Article follows that convention. Students who identified themselves as white (non-Hispanic) in the study are identified as white in this Article. When referring to the empirical data from the POD sample, this Article uses “students of color” to refer broadly to African American, API, and Latino student participants. When used otherwise, “students of color” refers more broadly to all non-white students.

93. See ROBERT EMERSON, *CONTEMPORARY FIELD RESEARCH: PERSPECTIVES AND FORMULATIONS* 291–95 (2d ed. 2001); BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH I* (1967).

94. See GLASER & STRAUSS, *supra* note 93, at 1.

95. For more information regarding the software, see generally ATLAS.TI. *QUALITATIVE DATA ANALYSIS*, <http://www.atlasti.com> (last visited Mar. 12, 2014).

B. THE PERSPECTIVES ON DIVERSITY SAMPLE

There are a total of 505 participants in the POD study, representing 47% of the Michigan Law School student body.⁹⁶ All 505 participants completed the online survey. Survey respondents are 53% female.⁹⁷ The race/ethnicity of the sample includes 70% whites, 7% African Americans, 4% Latinos, 16% Asian Pacific Islanders (“APIs”), 2% Native Americans, and 3% who identify as some other race/ethnic group; this breakdown roughly parallels the racial/ethnic background of enrolled Michigan Law students from 2009 to 2010.⁹⁸ Almost all participants entered law school to pursue a J.D. between 2007 and 2009, and thus at the time of data collection were in their first, second, or third years of study at the University of Michigan Law School.⁹⁹ The vast majority of students in the sample were admitted under the restrictions of Proposal 2, which bans the consideration of race in admissions.¹⁰⁰

The qualitative sub-sample is 66% female. A total of 56% of the participants are white, 12% African American, 6% Latino, 25% API, and 1% Native American. The overwhelming majority of the sub-sample includes J.D. students in their first, second, or third year of study.

C. DIVERSITY WITHIN THE POD SAMPLE

The POD data reveal interesting racial differences among the students at Michigan Law School. This Subpart introduces the sample by highlighting racial similarities and differences in immigrant status, academic outcomes, student debt, and receipt of scholarships and fellowships.

96. Though a 47% response rate is relatively low, it is within the acceptable range for studies of this kind. *See, e.g.,* Deo, *supra* note 10, at 89 n.151 (“Moran’s study of University of California Berkeley Boalt Hall received a 35% response rate. . . . The highest response rate of a law school empirical study may be 55% response rate.” (citations omitted)). Nevertheless, as roughly half of enrolled students did not participate in the study, their perspectives are not definitively represented. The broad range of opinions captured in the data somewhat alleviates concerns regarding selection bias.

97. The University of Michigan Law School provides diversity statistics on its website for its student body according to expected graduation date. These were confirmed with the Law School’s Admissions Office via email and are reproduced in the Appendix for comparative purposes. *See* E-mail, *supra* note 7.

98. This Article follows other socio-legal scholars in using “race/ethnicity” as one cohesive term. *See* Bowman, *supra* note 14, at 919 n.24 (“While the two terms are often conflated, historically we have used ‘race’ to refer to immutable characteristics and ‘ethnicity’ to refer to shared culture. My choice to use both is based on the understanding that they are separate concepts which both come into play in tangled ways.”).

99. A few student participants are those pursuing joint-degrees or LL.Ms.

100. Note that roughly 44% of the Michigan Law School class of 2010 (third-year law students at the time of data collection for the POD study) was admitted before Proposal 2 went into effect. The remaining 56% of the class of 2010, along with 100% of participants graduating in 2011 and 2012, was admitted under a race-blind admissions system. *See* E-mail from Dean Sarah Zearfoss, Univ. of Mich. Law School, regarding admissions following Proposal 2 (on file with Author).

I. Immigrant Background and Language Usage

The POD survey asked students about their immigrant background, the background of their parents, and language usage during childhood. Specifically, the survey asked whether the respondent was an immigrant and whether either parent was an immigrant. It also asked whether a language other than English was spoken in the home during the respondent's childhood and about the frequency of use compared to English.¹⁰¹

As displayed below in Table 1, only 14% of white student respondents attending the University of Michigan Law School have an immigrant parent. In contrast, significantly higher percentages of students of color (22% of African American students, 90% of APIs, and 63% of Latinos) have at least one immigrant parent. Even more dramatic is the difference in nativity of respondents themselves. Table 2 shows that 9% of African Americans, 38% of APIs, and 21% of Latinos were born outside of the United States, as compared to only 6% of white students.¹⁰²

101. For the full question from the survey regarding language usage in the home, see *infra* Appendix.

102. Though straightforward, the findings are somewhat complicated through consideration of the broader context. Recall that only 4% of Michigan Law students are Latino and only 5% are African American. See *infra* Appendix (listing Michigan Law School diversity statistics). The high immigrant population of African American students as documented in Tables 1 and 2 indicate that many are likely not native African Americans. What does it mean for African American representation on campus to consist largely of immigrant African Americans? See, e.g., Pamela R. Bennett & Amy Lutz, *How African American is the Net Black Advantage? Differences in College Attendance Among Immigrant Blacks, Native Blacks, and Whites*, 82 Soc. EDUC. 70 (2009). Similarly, research indicates that the 4% of Latino students at Michigan Law School are likely neither Mexican nor Puerto Rican, two Latino ethnic groups that have faced significant societal discrimination and structural inequality in various facets of American life. See, e.g., Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 178 (2004). What does it mean when privileged students of color are represented at elite institutions but the less-privileged are not? See, e.g., Kevin Brown & Tom I. Romero, II, *The Social Reconstruction of Race and Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1164-66 (discussing how socio-economic and other differences within a major ethnic group (Latinos) can result in educational disparities between the sub-populations of that ethnicity).

Table 1: Respondents with Immigrant Parent, by Race.
Perspectives on Diversity Study, 2010 (n=501)

		No	Yes	Total
Black	N	25	7	32
	%	78.13%	21.88%	100.00%
API	N	8	69	77
	%	10.39%	89.61%	100.00%
Latino	N	7	12	19
	%	36.84%	63.16%	100.00%
Native Am.	N	6	2	8
	%	75.00%	25.00%	100.00%
White	N	301	49	350
	%	86.00%	14.00%	100.00%
Other	N	5	10	15
	%	33.33%	66.67%	100.00%
Total	N	352	149	501
	%	70.26%	29.74%	100.00%

Table 2: Respondents Born Abroad, by Race.
Perspectives on Diversity Study, 2010 (n=500)

		No	Yes	Total
Black	N	29	3	32
	%	90.63%	9.38%	100.00%
API	N	48	29	77
	%	62.34%	37.66%	100.00%
Latino	N	15	4	19
	%	78.95%	21.05%	100.00%
Nat. Am.	N	7	1	8
	%	87.50%	12.50%	100.00%
White	N	328	21	349
	%	93.98%	6.02%	100.00%
Other	N	8	7	15
	%	53.33%	46.67%	100.00%
Total	N	435	65	500
	%	87.00%	13.00%	100.00%

A rich literature in the social sciences reveals the many ways in which the immigrant experience differs substantially from traditional

white American culture.¹⁰³ Although alternate models of scholarship consider immigrant assimilation either as a linear or a segmented process, both schools of thought agree that immigrants begin life in America as separate from the norm, and that the educational and occupational success of immigrant communities often depends on their relative assimilation into middle-class white American culture.¹⁰⁴ Some widely documented differences between immigrant communities and native-born communities include cultural traditions, religious background, and instances of discrimination.¹⁰⁵ Thus, this finding from the POD data suggests that students of color—African Americans, APIs, and Latinos—are more likely than whites to bring an immigrant experience with them to law school.

One traditional marker of American immigrant households is language. Immigrants tend to speak their native language at home, often more comfortably than they speak English.¹⁰⁶ Variations by race are also evident when considering the household language of Michigan Law students. When asked about languages spoken at home when they were growing up, 10% of white students report speaking a language other than English at home, compared to 13% of African Americans, 79% of APIs, and 47% of Latinos (see Table 3). Again, the data highlight another difference in the life experience of students of color as compared to their white peers at the University of Michigan Law School.

103. See, e.g., Min Zhou, *Growing up American: The Challenge Confronting Immigrant Children and Children of Immigrants*, 23 ANN. REV. SOC. 63 (1997).

104. See MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* 71–83 (1964); HARRY H. L. KITANO, *JAPANESE AMERICANS: THE EVOLUTION OF A SUBCULTURE* (2d ed. 1976); Ruben G. Rumbaut, *Assimilation and Its Discontents: Between Rhetoric and Reality*, 31 INT'L MIGRATION REV. 923 (1997); Ruben G. Rumbaut & Alejandro Portes, *Ethnogenesis: Coming of Age in Immigrant America*, in ETHNICITIES: CHILDREN OF IMMIGRANTS IN AMERICA 1–19 (Ruben G. Rumbaut & Alejandro Portes eds., 2001). *But see generally* MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* (1999) (discussing how West Indian assimilation into American culture may lead to downward mobility for that particular group).

105. See, e.g., CAROLA SUAREZ-OROZCO & MARCELO M. SUAREZ-OROZCO, *CHILDREN OF IMMIGRATION* 91 (2001) (“The conventional wisdom has long been that immigrants can move from their marginal position only by assimilating as quickly as possible. Immigrants have long been urged to speak English with their children, to leave behind traditions, and to incorporate habits of mainstream Americans.”); Min Zhou, *Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation*, 31 INT'L MIGRATION REV. 975, 982 (1997) (discussing discrimination against Mexican American youth).

106. See Min Zhou, *Social Capital in Chinatown: The Role of Community-Based Organizations and Families in the Adaptation of the Younger Generation*, in BEYOND BLACK AND WHITE: NEW FACES AND VOICES IN U.S. SCHOOLS 181 (Maxine Seller & Lois Weis eds., 1997); see also Min Zhou & Xi-Yuan Li, *Ethnic Language Schools and the Development of Supplementary Education in the Immigrant Chinese Community in the United States*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT: UNDERSTANDING THE SOCIAL WORLDS OF IMMIGRANT YOUTH 57–73 (Carola Suarez-Orozco & Irina L. G. Todorova eds., 2003).

To the extent that we can rely on these varied experiences to contribute to diversity, it seems that race continues to matter. There are variations by race, even when we compare the immigrant background of African Americans and whites, and even greater differences when we include APIs and Latinos, who are more likely to be immigrants themselves and to have immigrants in their immediate family.¹⁰⁷

Table 3: Household Language Other Than English, by Race.
Perspectives on Diversity Study, 2010 (n=501)

		No	Yes	Total
Black	N	28	4	32
	%	87.50%	12.50%	100.00%
API	N	16	61	77
	%	20.78%	79.22%	100.00%
Latino	N	10	9	19
	%	52.63%	47.37%	100.00%
Nat. Am.	N	8	0	8
	%	100.00%	0.00%	100.00%
White	N	316	34	350
	%	90.29%	9.71%	100.00%
Other	N	5	10	15
	%	33.33%	66.67%	100.00%
Total	N	383	118	501
	%	76.45%	23.55%	100.00%

2. Academic Outcomes

The POD survey asked students to report their law school grades. Table 4 shows that the grades of student participants do differ by race. To start, only five participants out of 449 respondents have 4.0 GPAs—and they are all white.¹⁰⁸ Looking across the spectrum at grades shows that the majority of students from all race/ethnic backgrounds fall into the 3.0–3.4 range, including 63% of African Americans, 74% of APIs, 63% of Latinos, and 53% of whites. However, a higher percentage of African Americans than whites fall below 3.0.

107. For instance, as of 2010, the foreign-born population originating in Africa and currently residing in the United States is only 1607, as compared to 11,284 individuals born in Asia and 21,224 born in Latin America and the Caribbean. THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, U.S. CENSUS BUREAU, DEP'T OF COMMERCE at 2 (May, 2012).

108. Adding an interesting gender element, three of these are women and two are men.

Table 4: Law School GPA, by Race.
 Perspectives on Diversity Study, 2010 (n=449)

		4.0	3.5-3.9	3.0-3.4	2.5-2.9	2.0-2.4	<2.0	Total
Black	N	0	3	19	7	1	0	30
	%	0.00%	10.00%	63.33%	23.33%	3.33%	0.00%	100.00%
API	N	0	11	49	5	1	0	66
	%	0.00%	16.67%	74.24%	7.58%	1.52%	0.00%	100.00%
Latino	N	0	4	10	1	1	0	16
	%	0.00%	25.00%	62.50%	6.25%	6.25%	0.00%	100.00%
Nat. Am.	N	0	2	5	1	0	0	8
	%	0.00%	25.00%	62.50%	12.50%	0.00%	0.00%	100.00%
White	N	5	120	167	21	3	0	316
	%	1.58%	37.97%	52.85%	6.65%	0.95%	0.00%	100.00%
Other	N	0	0	11	2	0	0	13
	%	0.00%	0.00%	84.62%	15.38%	0.00%	0.00%	100.00%
Total	N	5	140	261	37	6	0	449
	%	1.11%	31.18%	58.13%	8.24%	1.34%	0.00%	100.00%

In short, the grades of African American and Latino students are slightly lower than their white and API peers. The vast majority of students in the sample were admitted under the race-blind system instituted at the University of Michigan Law School after the passage of Prop. 2 in November 2006.¹⁰⁹ These successful applicants did not receive a “plus” for their race, as school officials could not legally include race as a factor in admissions. If we assume then that student LSAT scores and undergraduate GPAs are roughly similar across race,¹¹⁰ and that LSAT performance and undergraduate GPA are indicators of law school performance,¹¹¹ we would expect an even distribution of grades by race. In other words, if LSAT and GPA determined admission, and these are used to predict law school success, grades should be evenly distributed across race. Yet, the difference in grades—with underrepresented students of color performing at lower rates than their white classmates—

109. Michigan Law School changed its admissions policy to no longer take account of race after Proposal 2 went into effect in December 2006. See E-mail, *supra* note 7.

110. The POD survey did not directly collect respondents' LSAT scores or undergraduate GPA.

111. Many have disputed whether LSAT and undergraduate GPA are meaningful indicators of law school success, or even if they suggest a likelihood of Bar passage or successful future practice. See, e.g., Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000); see also Robert M. Hendrickson, *Rethinking Affirmative Action: Redefining Compelling State Interest and Merit in Admission*, 76 PEABODY J. EDUC. 117 (2001).

indicates that something aside from academic ability or preparation may be at play in producing racial disparities in academic outcomes.

One law professor suggests that students of color, and particularly African American students, may be out of their league in elite institutions that accepted them in part based on affirmative action.¹¹² Although he anticipates that African American students would have better academic outcomes at less-elite institutions or at institutions that do not use affirmative action, that prediction does not play out for African American students at the University of Michigan Law School, most of whom were admitted under the restrictions of Prop. 2.¹¹³ Instead, racial isolation might be to blame for these depressed academic outcomes.¹¹⁴

3. *Educational Debt*

The POD study asked students to report on their total estimated debt from law school, including tuition, living expenses, and other costs.¹¹⁵ As we see from Table 5, 22% of students expect to graduate with little to no law school debt. While most of these (n=62) are white students, the percentage breakdown by race shows rough racial equivalency. Table 6 shows that 18% of African American, 20% of APIs, 25% of Latinos, and 21% of whites report that law school will result in debt of \$50,000 or less. Findings are similar if we look at the far end of the spectrum, with an average of 22% of students overall reporting law school debt exceeding \$150,000, with little variation by race/ethnicity.¹¹⁶ The majority of students from all racial/ethnic backgrounds fall into the middle two categories, with 56% of the total student population owing between \$50,000 and \$150,000 upon graduation, again with little variation by race.¹¹⁷ At the high end of the spectrum, more than 26% of students of color report that they will graduate with \$150,000 or more in debt, as compared to less than 20% of white students.

¹¹² Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370 (2004).

¹¹³ *Id.* at 449–54.

¹¹⁴ Racial isolation is discussed in greater detail in Part IV, *infra*.

¹¹⁵ The Appendix, *infra*, contains the full question from the POD survey regarding law school debt.

¹¹⁶ Four students reported debt in excess of \$200,000 ranging from \$210,000 to \$300,000. Of these, two are white females, one is a white male, and one is an African American male.

¹¹⁷ Sixty-one percent of African American students, 47% of APIs, 44% of Latinos, and 59% of whites fall into the \$50,000–100,000 range.

Table 5: Racial Variation of Law School Debt, by Total Population.
Perspectives on Diversity Study, 2010 (n=414)

		\$0– 50,000	\$50,001– 100,000	\$100,001– 150,000	\$150,001– 200,000	Total
Black	N	5	10	7	6	28
	%	5.49%	9.09%	5.69%	6.67%	26.94%
API	N	12	14	14	19	59
	%	13.19%	12.73%	11.38%	21.11%	58.41%
Latino	N	4	3	4	5	16
	%	4.40%	2.73%	3.25%	5.56%	15.93%
Nat. Am.	N	4	3	1	0	8
	%	4.40%	2.73%	0.81%	0.00%	7.94%
White	N	62	80	92	57	291
	%	68.13%	72.73%	74.80%	63.33%	278.99%
Other	N	4	0	5	3	12
	%	4.40%	0.00%	4.07%	3.33%	11.79%
Total	N	91	110	123	90	414
	%	21.98%	26.57%	29.71%	21.74%	100.00%

Table 6: Law School Debt, by Race.
Perspectives on Diversity Study, 2010 (n=414)

		\$0– 50,000	\$50,001– 100,000	\$100,001– 150,000	\$150,001– 200,000	Total
Black	N	5	10	7	6	28
	%	17.86%	35.71%	25.00%	21.43%	100.00%
API	N	12	14	14	19	59
	%	20.34%	23.73%	23.73%	32.20%	100.00%
Latino	N	4	3	4	5	16
	%	25.00%	18.75%	25.00%	31.25%	100.00%
Nat. Am.	N	4	3	1	0	8
	%	50.00%	37.50%	12.50%	0.00%	100.00%
White	N	62	80	92	57	291
	%	21.31%	27.49%	31.62%	19.59%	100.00%
Other	N	4	0	5	3	12
	%	33.33%	0.00%	41.67%	25.00%	100.00%
Total	N	91	110	123	90	414
	%	21.98%	26.57%	29.71%	21.74%	100.00%

The lack of racial/ethnic variation may be somewhat surprising based on research regarding existing disparities in education,

employment, and income. For instance, research shows that African Americans earn and save less money than whites, even when working in similar positions.¹¹⁸ In fact, when we consider wealth (as opposed to earnings), racial disparities are even more dramatic, especially between African Americans and whites.¹¹⁹ Yet, there are not dramatic racial differences in debt at the University of Michigan Law School, suggesting greater equivalency than exists in the broader U.S. population.¹²⁰

4. *Scholarships and Fellowships*

One explanation for the lack of disparities in debt between African American and Latino students as compared to white students may be the number of scholarships and fellowships awarded to students of color. The POD survey asked students to indicate whether they had been awarded any scholarships or fellowships in law school and, if so, to specify the award names and amount of each award.¹²¹ Table 7 presents the findings on scholarships and fellowships. Most students (67%) earn awards in law school. However, while many APIs (58%) and whites (67%) receive awards, their percentages lag far behind African American (82%) and Latino (88%) students. In other words, underrepresented students of color are incredibly successful in earning scholarships and fellowships, with the vast majority of African American and Latino students securing awards to support them through school.

118. See generally MELVIN L. OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006); see also Shankar Vedantam, *Being in the Minority Can Cost You and Your Company*, NAT'L PUB. RADIO (July 24, 2013, 3:04 AM), <http://www.npr.org/blogs/codeswitch/2013/07/24/204898755/wage-gap-research>.

119. See generally OLIVER & SHAPIRO, *supra* note 118.

120. This may indicate a priority for privileged students of color over others. See generally Brown & Romero, II, *supra* note 102. This theme should be developed further in a separate piece.

121. The Appendix, *infra*, contains the full question from the POD survey regarding law school debt.

Table 7: Law School Scholarships and Fellowships, by Race.
Perspectives on Diversity Study, 2010 (n=441)

		No	Yes	Total
Black	N	5	23	28
	%	17.86%	82.14%	100.00%
API	N	27	38	65
	%	41.54%	58.46%	100.00%
Latino	N	2	14	16
	%	12.50%	87.50%	100.00%
Nat. Am.	N	2	6	8
	%	25.00%	75.00%	100.00%
White	N	103	208	311
	%	33.12%	66.88%	100.00%
Other	N	6	7	13
	%	46.15%	53.85%	100.00%
Total	N	145	296	441
	%	32.88%	67.12%	100.00%

Although a few awards are purely honorary with no financial value attached, most include some monetary benefit, including some that intend to cover full tuition and living expenses.¹²² Thus, the non-dramatic character of racial disparities in educational debt may be due more to students of color earning scholarships and fellowships to defray the costs of their law school education than to parity with regard to family income or wealth.¹²³ Note that some of the awards listed are offered by Michigan Law School (e.g., Student Funded Fellowship¹²⁴); others are external grants (e.g., Teach For America alumni scholarship). In addition, some awards listed seem tailored toward particular racial/ethnic groups (e.g., Finnish-American Society Scholarship) while others seem more generic (e.g., Dean's Scholarship).

Thus, the POD sample as a whole is quite diverse, with students representing various racial/ethnic backgrounds, all years of study, and both genders. When looking at racial variation, debt burdens are surprisingly stable, though there are differences based on immigration, GPA, and awards.

122. Additional analyses of this survey question are on file with the Author.

123. Perhaps there are greater racial variations in socioeconomic status of family/parents after all.

124. The Student Funded Fellowship (the "SFF") is awarded to students undertaking public interest jobs for the summer and paid for through an auction of products, services, and events purchased primarily by other students, faculty, and staff. For more details on the SFF, see UNIVERSITY OF MICHIGAN LAW SCHOOL STUDENT FUNDED FELLOWSHIPS, <http://umichsff.org> (last visited Mar. 12, 2014).

III. EMPIRICAL SUPPORT FOR EDUCATIONAL DIVERSITY

Earlier publications using the POD data have documented strong student commitment to diversity, showing that the majority of students from all racial/ethnic backgrounds appreciate cross-racial interaction on campus and “diversity discussions” in class.¹²⁵ Yet, there are many missed opportunities for meaningful classroom diversity, with few exchanges occurring during class time that draw from personal experiences to elucidate complex or abstract legal concepts.¹²⁶ This Article presents additional data showing Michigan Law students not only support diversity, but also would prefer greater diversity than exists currently. The data presented in this Part provides additional support for educational diversity as a compelling state interest by documenting ways in which students benefit from diversity today and expect to continue to benefit in their future legal practice.

A. PREFERENCE FOR GREATER DIVERSITY

One question on the POD survey sought to gauge participant preferences regarding current levels of diversity on campus. Specifically, the question included the statement, “I would prefer that there were more diversity at my law school.”¹²⁷ Students were asked to respond using a 5-point Likert scale indicating strong agreement (=1) to strong disagreement (=5) with the statement.¹²⁸

An analysis of responses, reported in Table 8 below, shows that the majority of Michigan Law students are unsatisfied with the level of diversity on campus, with students from all racial/ethnic backgrounds preferring greater diversity. The data reveal little variation by gender, with the majority of both men and women expressing preferences for greater diversity (see Table 9). Interestingly, the racial background of respondents is not highly relevant to their preference for more diversity, as whites, African Americans, Latinos, and APIs all express a preference for greater campus diversity. In fact, higher percentages of whites (59%) than African Americans (47%) agree overall that they would prefer greater diversity on campus, although higher percentages of African Americans (23%) than whites (19%) “Strongly Agree” with the statement.

125. See Deo, *supra* note 10, at 95–97. Diversity discussions are “classroom conversations regarding race, gender, and/or sexual orientation.” *Id.* at 95 (citing Deo et al., *Paint by Number?*, *supra* note 8, at 9).

126. *Id.* at 103–09.

127. For the relevant question on preference for greater diversity, see *infra* Appendix.

128. 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. See Rensis Likert, *A Technique for the Measurement of Attitudes*, 22 ARCHIVES PSYCHOL. 5, 5–6 (1932).

Table 8: Preference for Greater Diversity, by Race.
Perspectives on Diversity Study, 2010 (n=442)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black	N	7	7	5	6	5	30
	%	23.33%	23.33%	16.67%	20.00%	16.67%	100%
API	N	18	34	4	6	3	65
	%	27.69%	52.31%	6.15%	9.23%	4.62%	100%
Latino	N	3	7	1	6	0	17
	%	17.65%	41.18%	5.88%	35.29%	0.00%	100%
Nat. Am.	N	1	4	1	1	1	8
	%	12.50%	50.00%	12.50%	12.50%	12.50%	100%
White	N	55	127	47	70	10	309
	%	17.80%	41.10%	15.21%	22.65%	3.24%	100%
Other	N	2	8	2	0	1	13
	%	15.38%	61.54%	15.38%	0.00%	7.69%	100%
Total	N	86	187	60	89	20	442
	%	19.46%	42.31%	13.57%	20.14%	4.52%	100%

Table 9: Preference for Greater Diversity, by Gender.
Perspectives on Diversity Study, 2010 (n=438)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Male	N	42	83	26	42	11	204
	%	20.59%	40.69%	12.75%	20.59%	5.39%	100%
Female	N	43	102	33	47	9	234
	%	18.38%	43.59%	14.10%	20.09%	3.85%	100%
Total	N	85	185	59	89	20	438
	%	19.41%	42.24%	13.47%	20.32%	4.57%	100%

B. BENEFITS OF EDUCATIONAL DIVERSITY

It may be no surprise that students from all racial/ethnic backgrounds support diversity and prefer greater levels of diversity on campus. The educational benefits of diversity are well-documented and far-reaching.¹²⁹ An analysis of the POD qualitative data builds on existing scholarship to show how benefits of diversity include improved learning for all students through an opportunity to hear and learn from people

129. Deo, *supra* note 10, at 97–103.

with viewpoints that may differ from their own.¹³⁰ Students also see significant benefits to their future careers that are based on the benefits of educational diversity in law school.

I. Classroom Benefits

A South Asian American student named Dolly emphasizes that “talking to people of different backgrounds is always helpful in broadening your perspectives.” Unfortunately, there are few examples of ways in which educational diversity has been a benefit at Michigan Law School because the students mainly lament a lack of diversity overall and a lack of participation in the classroom in particular.¹³¹ As an API man named Jim states: “[I]f you’re talking about racial profiling and you have no African American in class, then there’s a perspective missing.”

Many students do talk wistfully about the benefits of diversity that they feel are missing overall but that they catch glimpses of in a few of their classes. For instance, an API man named Wali adds that he appreciates the opportunity to learn from diverse classmates, “especially in classroom discussions [when] you really do get a lot of different viewpoints from people who’ve had experiences that you didn’t have.” His white classmate Hermione adds that her Criminal Law class is currently engaged in “a lively discussion” of rape that is also “pretty balanced because there are plenty of women in the room” and full representation of “both sides of any given argument. So, there is a healthy debate there.” That sort of “healthy debate” may be the ideal that the *Grutter* and *Fisher* Courts had in mind when sanctioning educational diversity as a compelling state interest.¹³²

Unfortunately, as an API student named Nancy notes, “in classes like Criminal Law and classes like Constitutional Law, we suffer a huge disadvantage because we don’t have a more diverse class that can talk deeply about all sides of the debate.” Rob, a white student, agrees that “more diversity yields more diverse discussion.” He adds, however, that a lack of student diversity places a high burden on the few students of color who are expected to contribute. He believes that his “majority Caucasian” classes “sort of quash the conversations we might have if we had greater diversity.” Again, that means that “there’s a lot of things like in Constitutional Law that just didn’t come up,” because some students of color, underrepresented on campus and in the classroom, may not

130. Focus group protocol questions analyzed for this Subpart are reproduced in the Appendix, *infra*.

131. For more on the lack of classroom diversity and the many missed opportunities for diversity discussions in class, see Deo, *supra* note 10, at 96.

132. This “healthy debate” is also facilitated by the overall representation—as opposed to isolation—of women in the class.

have felt comfortable speaking up.¹³³ A white student named Emily elaborates on how a lack of classroom diversity makes it challenging to apply abstract legal theory to the real world. She says, “[W]hen you have people with the same kind of background and who don’t have a lot of experience, it becomes really hard to have some sort of a good discussion about what happens in the real world.”¹³⁴

2. Career Benefits

Career benefits of diversity parallel earlier research documenting how diversity in higher education prepares students for interaction in an increasingly globalized workplace.¹³⁵ Erin, a white student, ties diversity in law school directly to employment, stating “The world is a diverse place and if education is supposed to prepare you for the world, then you need to learn the interaction skills that you’ll need later on.”¹³⁶ Dolly, a South Asian American student, suggests that it may be especially useful for legal professionals to examine issues from multiple angles since attorneys must “identify with your client or whoever you’re helping,” even, or perhaps especially, when parties differ from you; plus, “in adversarial cases, understand[ing] the other side” is critically important. Her white classmate Odette agrees that diversity provides for “[b]etter understanding between cultures for future employment [and] professional opportunities.”

Josh, a white male student, reflects on how student diversity in his clinical experience provides him a professional edge:

I find it very beneficial to see different ways that I and my colleagues approach things [based on] a different knowledge of cultures and interactions. Most of our clients are overseas and sometimes it’s more difficult for me to relate . . . whereas some of my colleagues—for example, one who is Chinese—was able to get me up to speed on some subtleties of how to present things to the clients.

Put differently by Sherie, an African American female student, “I met a lot of [students] from ‘Smalltown, Ohio’ who had never had to work with someone Black before and that’s something you should learn before you

133. This touches on the problems associated with racial isolation discussed in detail *infra* in Part IV.

134. Jim, an API student, provides vivid imagery for the lack of diversity he has experienced: “The white male population is so pronounced. I still remember my first day in my section. I turned around and there’s this sea of white men between 22 and 24, wearing baseball hats and flip flops and polo shirts and it was the strangest thing I’ve ever seen.”

135. See, e.g., Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. ISSUES 595 (2005).

136. In contrast, a South Asian student named Amer laughingly suggests that being surrounded by whites in his law school classrooms would “help me in the future because I’m probably going to go into private practice and that’s the way a law practice looks. That’s how I benefit from the opposite effect of diversity [laughing].”

get into the real world.” Patty, who describes herself as a “conservative” white student, sums it up best, stating that interacting with diverse groups of people has provided her with “an increased sensitivity to where other people are coming from” making apparent the reasoning behind their decisions and actions that will continue to serve her well in practice.

Thus, the POD data reveal that the vast majority of students from all race/ethnic backgrounds not only appreciate diversity, but would prefer greater diversity on campus in order to improve their learning of legal concepts and benefit them in their future careers.

IV. ALTERNATIVE ONE: AVOIDING RACIAL ISOLATION

A lack of diversity clearly creates a disadvantage for white students who attend more homogenous institutions and miss the benefits of diverse exchanges.¹³⁷ Students of color are doubly disadvantaged, as many miss out on classroom diversity while also experiencing racial isolation and tokenism on campus and in the classroom.¹³⁸ Thus, racial isolation is related to educational diversity, but would be a novel compelling state interest to independently satisfy strict scrutiny.

In fact, Justice Kennedy has noted that avoiding racial isolation could be an independent compelling state interest.¹³⁹ He has also specifically named “the lessening of racial isolation” as an expected benefit of educational diversity.¹⁴⁰ Yet, pursuing educational diversity does not automatically lead to the avoidance of racial isolation. The data presented in this Part show that there is racial isolation on the Michigan Law School campus. Singling out the avoidance of racial isolation as its own compelling state interest could ensure sufficient representation on campus such that the true benefits of educational diversity may be realized.

Of course, people who share certain identity characteristics do not all have the same experiences or perspectives. Yet, having a critical mass of students of color provides an opportunity for a group’s majority perspective to be included while also allowing for inter-group diversity and even opposition to what others from within the racial/ethnic group

137. For more on how increasing numbers of underrepresented students of color on predominantly white campuses will improve the experience for white and API students by providing inter-group exposure, see Kevin Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 740–43 (2008).

138. At least since litigation efforts were underway in *Brown v. Board of Education*, individuals and groups have debated whether segregation caused more problems for the white students who lacked exposure to diverse people and ideas or for the students of color who were denied access to education. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Deo, *supra* note 63, at 16–21.

139. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (Kennedy, J., concurring) (“A compelling interest exists in avoiding racial isolation.”).

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

express.¹⁴¹ Racial isolation has the opposite effect: because of their paltry numbers, students of color are tokenized, treated as spokespeople for their race, and not expected to deviate from what others believe the racial “norm” to be.¹⁴² Many of these marginalized students feel as if they are in the spotlight on campus, with other students anticipating their failure or considering them an exception to the rule if they succeed. Avoiding racial isolation is thus related to critical mass and educational diversity, but should be an especially compelling interest that stands on its own.

A. TROUBLING PERCEPTIONS OF CAMPUS CLIMATE

The POD survey presented students with the following statement: “The campus climate at my law school is one that supports diversity.” Students then reported their level of agreement with the statement on a 5-point Likert scale ranging from “Strongly Agree” (=1) to “Strongly Disagree” (=5).¹⁴³

While the majority of students from all racial/ethnic backgrounds believe that their campus climate is supportive of diversity, there are significant variations by race, displayed below in Table 10. For instance, although the overwhelming majority of whites (84%) agree that their campus supports diversity, only a slim majority (53%) of African Americans do. Put differently, almost half of African American students (47%) do not see their campus as supportive of diversity, though almost all whites (84%) do. Other students of color fall between African Americans and whites, with 60% of APIs and 65% of Latinos agreeing that the campus climate supports diversity. If we aggregate the preferences of students of color as a whole, the data show that a small majority (59%) of students of color see their campus as supportive of diversity, as compared to the overwhelming majority (84%) of whites.

141. See, e.g., *ESPIRITU*, *supra* note 92. In *Grutter*, the Court followed the District Court’s interpretation of “critical mass” as referring to “‘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, 319 (2003) (quotations omitted). This Article follows suit in applying this definition.

142. See Kenneth B. Nunn, *Diversity as a Dead-End*, 35 *PEPP. L. REV.* 705, 725 (2008) (“[I]t should be obvious that the token importation of a relatively few, powerless, people of color into a predominantly white institution can do little to change the existing power or cultural dynamics in that institution.”).

143. For the relevant question on campus climate, see *infra* Appendix.

Table 10: Perception of Campus as Supportive of Diversity, by Race.
Perspectives on Diversity Study, 2010 (n=443)

		Strongly Agree	Agree	Neither	Disagree	Strongly Disagree	Total
Black	N	5	11	7	6	1	30
	%	16.67%	36.67%	23.33%	20.00%	3.33%	100%
API	N	10	29	17	4	5	65
	%	15.38%	44.62%	26.15%	6.15%	7.69%	100%
Latino	N	3	8	5	0	1	17
	%	17.65%	47.06%	29.41%	0.00%	5.88%	100%
Nat. Am.	N	1	3	2	2	0	8
	%	12.50%	37.50%	25.00%	25.00%	0.00%	100%
White	N	86	173	27	18	6	310
	%	27.74%	55.81%	8.71%	5.81%	1.94%	100%
Other	N	1	9	1	2	0	13
	%	7.69%	69.23%	7.69%	15.38%	0.00%	100%
Total	N	106	233	59	32	13	443
	%	23.93%	52.93%	13.32%	7.22%	2.93%	100%

It is not surprising that students of color and white students perceive the campus climate differently.¹⁴⁴ Students of color are likely more attuned to issues of race and diversity and may take them more personally, especially in Michigan given the recent passage of Prop. 2 and the ensuing legal challenge and media scrutiny.¹⁴⁵ Daily “microaggressions,”¹⁴⁶ outright discrimination, and other racial challenges that people of color endure are often relatively invisible—at least to those who do not experience it themselves.¹⁴⁷ The difference of perception of the Michigan Law School campus indicates one way in which experiences and observations continue to vary by race. In other words, race matters. Scholarly works abound that suggest how and to

144. See Deo, *supra* note 10, at 96 (noting that while many Michigan Law students are themselves very supportive of diversity discussions, “respondents believed their peers were not as supportive [of diversity discussions] as they themselves were”).

145. There is little variation in responses by gender, with 78% of male students and 75% of female students agreeing that the campus supports diversity; a finding that may simply reflect white perspectives on the issue since 70% of the sample size is white.

146. Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 17 (2002) (“Microaggressions are subtle verbal and non-verbal insults directed toward non-Whites, often done automatically or unconsciously. They are layered insults based on one’s race, gender, class, sexuality, language, immigration status, phenotype, accent, or surname.”).

147. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 225 (2003).

what degree race continues to be a—some say “the”—salient marker in American life.¹⁴⁸ Because African American students are among the most racially isolated and underrepresented at the flagship school in a state with a significant African American population, they may be more sensitive to slights or disparaging remarks about race or diversity generally.¹⁴⁹ In the qualitative data analyzed below, students of color document the ways in which increasing structural diversity on campus could help them avoid racial isolation, leading them to feel less tokenized and more comfortable speaking up.

Structural diversity, which refers to numeric representation, is only the first step toward the meaningful exchange of opinions on campus and in the classroom.¹⁵⁰ Numerical representation may still be accompanied by marginalization or discomfort in the traditionally elite, white male space of law school, as evidenced by ongoing gender issues in spite of women joining law schools in record numbers.¹⁵¹ Comfort in the classroom and ability to speak as an individual (rather than carrying the burden of representing one’s entire race) are related to interactional and classroom diversity, which refer to meaningful cross-racial interaction generally and in the classroom specifically.¹⁵² Yet, many students of color, especially African American and Latino students, face racial isolation on predominantly white campuses.¹⁵³ White male students, who are in the majority at most law schools, are more likely to participate in classroom discussions than students of color.¹⁵⁴ Racial isolation in higher education correlates with depressed academic achievement, alienation from campus life, and isolation from the campus community.¹⁵⁵ In fact, racial isolation

148. See generally CORNEL WEST, RACE MATTERS (1993).

149. According to Michigan Law School diversity statistics, 5% of Michigan Law School is African American, see *infra* Appendix, and the state is 14% African American, see *State & Country QuickFacts: Michigan*, U.S. CENSUS BUREAU (2012), available at <http://quickfacts.census.gov/qfd/states/26000.html>.

150. For a comparative discussion on structural diversity, interactional diversity, and classroom diversity, see Deo, *supra* note 10, at 82–86.

151. See, e.g., LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 6, 12–17 (1997); Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA J.L. & PUB. POL’Y 11, 21–34 (2003).

152. See Deo, *supra* note 10, at 68.

153. See, e.g., *id.* at 76 (discussing alienation of students of color on predominantly white campuses).

154. See Dowd, *supra* note 151, at 23 (reporting that nonwhite students participate less in classroom discussions, whereas white male students react positively to the classroom setting); Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity” — Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 877–78, 886–87 (2004); Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1280 (2005).

155. See Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2268–69 (2000) (reporting that when people of color attended colleges

in law school has led to “many marginalized students [feeling] isolated and disengaged from the learning process” altogether.¹⁵⁶

Michigan Law School has been the site of a few studies of campus diversity and educational outcomes. In one pre-*Grutter* qualitative study of the law student experience, students of color reported that the climate included high levels of “racial separation, racial conflict and racial misunderstanding.”¹⁵⁷ Racially isolated students reported depressed academic outcomes based on their disengagement from learning in the classroom and on campus generally.¹⁵⁸ As one African American woman noted of her educational experience at Michigan Law School at the time, “It’s just isolation and just helplessness sometimes. Why even try, why even speak up?”¹⁵⁹

Other scholarship draws from the same data presented in this Article to investigate interactions and involvement in student organizations at Michigan Law School. In one recent article, POD data is used to investigate whether structural diversity leads automatically to interactional and classroom diversity.¹⁶⁰ The *Grutter* Court stated that it supported educational diversity in part because it “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races.”¹⁶¹ In addition, the Court and many others assumed that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”¹⁶² In fact, structural diversity—diversity in numbers—is only the first step toward ensuring those lively and illuminating classroom conversations.¹⁶³ For the benefits of diversity to come to full fruition, students from all backgrounds must feel welcome on campus and in the classroom, and be encouraged to participate and share their experiences.¹⁶⁴ Sadly, “meaningful exchanges

and universities in very small numbers, their achievement was depressed and they often became alienated and isolated from the rest of the student body); Buckner, *supra* note 154, at 886, 888.

156. Deo, *supra* note 10, at 75 (citing Moran, *supra* note 155, at 2268–69).

157. 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, 300 (2001). Note that this pre-*Grutter* study was conducted while Michigan Law School maintained a lawful affirmative action policy geared toward educational diversity, and students nevertheless reported racial isolation. Learning outcomes and campus engagement may have been better if admissions officers worked to both admit a diverse class and avoid racial isolation.

158. *Id.* at 286.

159. *Id.*

160. See Deo, *supra* note 10.

161. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

162. *Id.* (internal quotation marks omitted).

163. See Deo, *supra* note 10, at 85.

164. *Id.* at 111 (“If institutions of higher learning are truly interested in reaping the full benefits of structural diversity, they should consider how best to facilitate interactional and classroom diversity.”).

rarely occurred within the classroom” at Michigan Law School,¹⁶⁵ in spite of student interest in learning from “diversity discussions”¹⁶⁶ in class.¹⁶⁷ Students report that they have frequent interaction with diverse peers on and off campus,¹⁶⁸ and that most of these cross-racial interactions are positive.¹⁶⁹ Yet, this structural and interactional diversity has not translated into classroom diversity at Michigan Law School.¹⁷⁰ Racial isolation, as evidenced by their negative perceptions of the campus climate, likely inhibits many students from participating fully in the classroom.

Another article relies on data from the POD study to consider how race/ethnic-specific student organizations offer members a safe space “buffer” from the predominantly white campus.¹⁷¹ That article suggests that, by maintaining a separate space, these organizations provide members with the support they need to survive and sometimes even thrive in law school.¹⁷² The data show that “the vast majority of students of color at the University of Michigan Law School participate in race/ethnic-specific groups,” in addition to participating in mainstream organizations.¹⁷³ The overwhelming majority of these students report that membership in what are sometimes referred to as affinity groups provides them with support.¹⁷⁴ In fact, the racial isolation they face elsewhere on campus may be an especially powerful incentive for them to join these welcoming and nurturing organizations.¹⁷⁵ The high levels of

165. *Id.* at 110.

166. Diversity discussions are “classroom conversations regarding race, gender, and/or sexual orientation.” Deo, *supra* note 10, at 95 (citing Deo et al., *Paint by Number?*, *supra* note 8, at 9).

167. *See* Deo, *supra* note 10, at 95–96 (“Roughly three-quarters of students from all racial and ethnic backgrounds . . . are supportive ‘when faculty include discussions of race, gender, or sexual orientation in the classroom.’”).

168. *Id.* at 91 (reporting that Michigan Law “students have high levels of interaction with peers from their same racial or ethnic background, as well as with students from different backgrounds”). Preliminary analyses indicate that these cross-racial interactions occur between members of mainstream student organizations, at home with roommates, in study groups, and at social gatherings. Nevertheless, they do not occur frequently in the classroom.

169. *Id.* at 93 (“Overall, students have positive, friendly interactions with peers from diverse backgrounds.”).

170. *Id.* at 110.

171. *See* Deo, *supra* note 82, at 123 (“[R]ace/ethnic-specific law student organizations do a great deal to foster community and create a ‘safe space’ buffer between otherwise marginalized students of color and the larger campus environment.”).

172. *Id.* at 101–03, 123 (discussing race/ethnic-specific organizations as “Safe Space Havens”).

173. *Id.* at 97.

174. *Id.* at 100 (noting that only 10% of African American students and 12% of Latinos report no support from membership in student organizations, as compared to 22% of APIs and 26% of whites).

175. For more on the various forms of social capital associated with membership in law student organizations, see Meera E. Deo, *Bolstering Bonds and Building Bridges: Social Capital in Law*

support for greater diversity reported by APIs and whites may come from their recognition of how much they have to gain by having a diversity of experiences expressed in the classroom from their traditionally underrepresented and often silent peers.¹⁷⁶

B. DRAWBACKS OF RACIAL ISOLATION

The qualitative data highlight the many drawbacks of racial isolation for law students generally and students of color in particular. Raven, an African American woman, emphasizes how greater diversity would allow for her classmates to see “greater complexities within various minority groups;” for instance, “the Black conservative perspective” would be more apparent and “people [would] no longer make generalizations about what groups believe.”¹⁷⁷ Tammy, a fellow African American student, makes clear that when there are only ten African American students, those students are “in survival mode all the time,” and feel as if “we’ve got to stick together no matter what,” whereas “if there’s a hundred of us, we’re not going to have a problem” comfortably expressing differing, divergent, and even opposing viewpoints. Currently, she and her fellow African American students are “used to being tokens a lot of times. It gets tiring after a while.” Her African American classmate Melissa concurs, adding that “if you have enough Black people, then it’s not ‘the Black people’s opinion,’ it just becomes Tammy’s opinion and Melissa’s opinion, [which would be] a major advantage.” Josephine recounts how her own experience of being “different” and racially isolated, as an African American woman at a predominantly white institution, hampers her own personal learning:

I remember sitting in a Crim Law class about a week ago and we were asking whether or not people should take into consideration various aspects of a person’s background and how they act in certain situations. The general consensus [was no]. But that’s easy to say when it’s your background that is set as the standard and everyone is being judged to the standard that is you.

Other law students of color share Josephine’s concern, believing that they are different from the norm and that this difference is neither valued nor appreciated. A South Asian American student named Hari believes “that you need a sufficient body of minority students so that

Student Organizations (May 8, 2009) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with the Author).

176. Other research has also made clear that white students appreciate the opportunity that affirmative action provides for them to hear diverse perspectives expressed in the classroom and on campus more generally. *See, e.g.,* Dowd et al., *supra* note 151, at 25–26.

177. In fact, to distinguish herself as an individual rather than a representative of her race, Raven employs the following strategy, which she says receives mixed results: “I always try to preface my comments [with], ‘I am Raven. I am not representing the Black community.’”

people don't feel alienated." Patty, a white student, recognizes how it may be "difficult" for "the one Black person in a room full of white people, which I think happens a lot here." In fact, with only token numbers of students of color, the opportunity for meaningful diverse interaction—one of the expected benefits of educational diversity—becomes quite challenging. As a Native American student named Sebastian notes, "the problem is that if you feel like there's [only] two of you, you don't want to feel like you're the spokesperson for your race." Igor, a white classmate, explicitly notes the distinction between speaking for yourself and speaking for your group: "I think the more people that you have of any given background, the less pressure there is on the members of that group to speak for that group." Instead, with greater diversity and a lack of racial isolation, those individuals could speak as individuals. Or, they could choose not to speak at all without their silence being deafening. As one API student named Rebekah says:

I think one shortcoming of the lack of diversity [happens during discussions of] cases that have to do with race, [because] the person who represents that race feels the pressure to have to say something. . . . And it's a tremendous pressure if he or she is the only one in the class of that race.

Due to the "very small population of racially diverse students," at Michigan Law School, an African American man named Alberto also feels "a lot of pressure . . . to perform 'on point' all the time" because he gets the sense that in his classmates' eyes, he is "often held as a model for [his] race."¹⁷⁸ Thus, while pursuing his education, Alberto is also "performing" as a model African American man for his peers.¹⁷⁹

Research has documented that a challenging campus climate often contributes to lower academic outcomes for students of color.¹⁸⁰ Racial isolation may be playing a role in whites achieving higher academic

178. Sometimes the requirement for particular students of color to "perform" as a model representing their race was explicit, as Alberto recounts: "I had one professor in my first year, who whenever we would read a case about a particular racial group would then call on a member of the racial group to talk about the case. 'Oh, so-and-so, you're Black. You should talk about this case.' And so, if it was more diverse, I guess there would be more of a greater area for not doing that." Similarly, a white student named Alex recalls: "[W]e had a professor [who] literally called on the one noticeably African American student and said, 'You're Black, what do you think?' And that's really inappropriate." For more on how the race/ethnicity, gender, and background experience of faculty members affects diversity discussions in class, see generally Deo et al., *supra* note 8, *Paint by Number?*.

179. Though it is beyond the scope of this Article to pursue racial authenticity in depth, others have explored it in various contexts. See, e.g., Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002); Nancy Wang Yuen, *Performing Race, Negotiating Identity: Asian American Professional Actors in Hollywood*, in *ASIAN AMERICAN YOUTH: CULTURE, IDENTITY, AND ETHNICITY* 251 (Jennifer Lee & Min Zhou eds., 2004).

180. See, e.g., VINCENT TINTO, *LEAVING COLLEGE: RETHINKING THE CAUSES AND CURES OF STUDENT ATTRITION* (2d ed. 1993).

outcomes than students of color at Michigan Law School.¹⁸¹ In fact, GPAs track underrepresentation with 27% of African Americans and 13% of Latinos earning under a 3.0, as compared to 9% of APIs and 8% of whites. Additionally, the benefits of educational diversity cannot come to full fruition while students of color remain tokenized. When students are not comfortable voicing their personal opinion in class, we are not likely to see the improved classroom environment that the *Grutter* Court expects to result from educational diversity.¹⁸²

Thus, avoiding racial isolation is related to educational diversity, but goes beyond it. In fact, Justice Kennedy recognized in *Parents Involved* that avoiding racial isolation could be a compelling interest independent of educational diversity, stating unambiguously “A compelling interest exists in avoiding racial isolation,”¹⁸³ based in part on the “moral and ethical obligation” of the United States to promote “an integrated society that ensures equal opportunity for all of its children.”¹⁸⁴ Six years later in *Fisher*, however, Justice Kennedy backtracked slightly, suggesting that the “lessening of racial isolation” was an anticipated by-product of educational diversity.¹⁸⁵ Instead, it may be that both educational diversity and the lessening of racial isolation could be used in tandem to achieve what educational diversity cannot achieve on its own. Igor, a white male student explains why educational diversity alone may not be sufficient:

It’s very easy for me as a white guy to sit here and say, “Oh, I really love diversity and I want more diverse people here,” but that sort of sees those people who are contributing diversity less as people and more as perspectives that I can get. [When] the emphasis is on diversity, if we’re discussing race in a class, it’s like, “Well, what do the four Black kids here think about what we’re saying?”

Recall that race was not a factor in admissions for the vast majority of Michigan Law students represented in the POD sample; yet, racial disparities in educational outcomes persist.¹⁸⁶ Those disparities may be based on the racial isolation endured by many underrepresented students of color. Research has shown that simply admitting token numbers of students of color does not yield “livelier, more spirited, and simply more enlightening and interesting”¹⁸⁷ classrooms, or even lead to the

181. See *supra* Part II.C.2.

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

183. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–98 (2008) (Kennedy, J., concurring). However, Justice Kennedy went on to say that the relevant policies would have to be examined to determine whether they were narrowly tailored so that “crude measures” would not “reduce children to racial chits valued and traded according to one school’s supply and another’s demand.” *Id.*

184. *Id.* at 797.

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

186. See E-mail, *supra* note 7.

187. *Grutter*, 539 U.S. at 330.

“enhanced classroom dialogue”¹⁸⁸ that the Supreme Court expects. Avoiding racial isolation, providing students with a supportive network of their same-race peers and an environment conducive to their learning, should be coupled with educational diversity and considered as an independent compelling state interest.¹⁸⁹

V. ALTERNATIVE TWO: REWARDING A DESIRE TO SERVE

The POD survey sought to gauge students’ post-graduate aspirations by asking directly about professional objectives. Participants could select only one choice for their ultimate career goal among ten different options detailing various ways individuals use their law degrees.¹⁹⁰ Table 11 outlines responses by race.

Table 11: Ultimate Career Goal, by Race.
Perspectives on Diversity Study, 2010 (n=437)

		Public Interest Non-Profit	Law Professor	Govern- ment	Public Interest Firm	Judge	Business Exec.	Politician	Corp. Law Firm	Other Law Job	Other Non-Law Job	Total
Black	N	5	2	4	2	0	2	3	5	4	2	29
	%	17.24%	6.90%	13.79%	6.90%	0.00%	6.90%	10.34%	17.24%	13.79%	6.90%	100%
API	N	10	4	10	3	0	7	1	21	3	5	64
	%	15.63%	6.25%	15.63%	4.69%	0.00%	10.94%	1.56%	32.81%	4.69%	7.81%	100%
Latino	N	4	2	2	0	0	1	2	3	2	1	17
	%	23.53%	11.76%	11.76%	0.00%	0.00%	5.88%	11.76%	17.65%	11.76%	5.88%	100%
Nat. Am.	N	2	0	0	0	1	0	1	2	1	1	8
	%	25.00%	0.00%	0.00%	0.00%	12.50%	0.00%	12.50%	25.00%	12.50%	12.50%	100%
White	N	52	15	67	15	21	18	11	69	27	11	306
	%	16.99%	4.90%	21.90%	4.90%	6.86%	5.88%	3.59%	22.55%	8.82%	3.59%	100%
Other	N	2	2	2	0	0	1	0	4	1	1	13
	%	15.38%	15.38%	15.38%	0.00%	0.00%	7.69%	0.00%	30.77%	7.69%	7.69%	100%
Total	N	75	25	85	20	22	29	18	104	38	21	437
	%	17.16%	5.72%	19.45%	4.58%	5.03%	6.64%	4.12%	23.80%	8.70%	4.81%	100%

Students from only two race/ethnic groups selected “Corporate law firm attorney” as their most popular choice—23% of whites and 33% of

188. *Fisher*, 133 S. Ct. at 2418.

189. Preliminary analyses of additional POD data (available on file with Author) indicate that in spite of racial isolation, students of color fully appreciate the opportunity to attend this elite school, as 100% of African American students, 96% of APIs, 94% of Latinos, and 98% of whites say that they are “completely certain” that they will graduate from the University of Michigan Law School. In addition, the vast majority of students, including 70% of African American students, 77% of APIs, 77% of Latinos, and 84% of whites, would recommend their law school to others who share their race/ethnic and gender background. Perhaps there is not such a mismatch after all.

190. The Appendix, *infra*, contains the full question and the list of available response options.

APIs.¹⁹¹ For African Americans and Latinos, the most popular career goal is to work as a public interest attorney, with almost one-quarter of African Americans (24%) and Latinos (23%) selecting that as their preferred choice.¹⁹² The second most popular choice for whites (22%) is a tie between government and public interest. Interestingly, while 14% of African Americans and 12% of Latinos selected “Government attorney” as their ultimate career goal, none of the students from these racial/ethnic backgrounds aspire to become judges.

The high percentage of African American and Latino students—almost one-quarter of the total—who aspire to public interest careers provides support for further research into whether there should be a recognized compelling state interest geared toward public service. Though many students at Michigan Law School indicate their interest in working in public interest, government, and related fields of service, African American and Latino students specifically seem most interested in giving back through future work as public interest attorneys.¹⁹³ This research lays the groundwork for re-examining the idea of service as a compelling state interest. If service is recognized as a compelling state interest, greater numbers of African American and Latino students could be admitted into law school and go on to help communities in need, thereby benefitting not only the individual future attorneys admitted into law school, but also the underserved communities they will serve in the future.¹⁹⁴

Recall that the overall racial disparity in educational debt among Michigan Law students is not vast; yet, this becomes more complicated when coupled with future career goals.¹⁹⁵ This debt might create roadblocks for those many African Americans and Latinos—almost one-

191. As a point of comparison, the University of Michigan Law School reports that 57.7% of its most recent class of graduates is employed by law firms. *Comprehensive Employment Statistics*, MICHIGAN LAW, <http://www.law.umich.edu/careers/classstats/Pages/employmentstats.aspx> (last visited Mar. 12, 2014).

192. The category of “public interest” aggregates two response options: public interest nonprofit attorney and public interest law firm attorney. Public interest is popular among Michigan law students overall, with 22% of respondents selecting that choice. Again, for comparative purposes, Michigan Law School reports that 12.7% of 2012 graduates are employed in the public interest sector. *Id.*

193. Because African American and Latino students in the POD sample are only slightly more likely than others to select public interest positions as their ultimate career goal, this finding does not offer substantive proof that all African American and Latino lawyers are more likely to serve in underserved communities. However, the data indicate that there may be a preference worthy of further study that could satisfy the compelling state interest prong of strict scrutiny.

194. The devil is in the details for such a plan, of course. For a discussion of some suggestions regarding implementation, see *infra* Conclusion. One possible model to build on is the University of Hawaii’s innovative Ka Huli Ao program, which promotes service to the Native Hawaiian community. See *Ka Huli Ao Center for Excellence in Native Hawaiian Law*, WILLIAM S. RICHARDSON SCHOOL OF LAW, <https://www.law.hawaii.edu/ka-huli-ao-center-excellence-native-hawaiian-law> (last visited Mar. 12, 2014).

195. See *supra* Part II.C.3.

quarter of the total—who aspire to become public interest attorneys. For these two racial/ethnic groups, another popular job choice is government service, with a significant percentage of African American (14%) and Latino (12%) students hoping to work as future government attorneys.¹⁹⁶ Even government service might be challenging when carrying significant educational debt.

For students who aspire to work in public service in any form, carrying a burden of over \$150,000 in debt might hamper their goals.¹⁹⁷ Taking debt into account, it becomes even more important to recognize service as a compelling state interest. Doing so would encourage students of color to pursue their ultimate professional objectives and serve the needs of those who often lack access to justice, rather than choose better paying positions in order to pay off their loans. Many states are enduring what has been called a “civil justice crisis,” with decreased judicial funding and fewer services available to serve the growing needs of low-income communities and others.¹⁹⁸ Admitting and graduating greater numbers of students who are committed to public interest might help address this need and avert greater crisis.

This finding may be useful as an alternative to educational diversity as a compelling state interest. In *Bakke*, the U.C. Davis Medical School argued that service to underserved areas could be a compelling state interest.¹⁹⁹ The *Bakke* Court did not dismiss their argument outright, but instead suggested that there was insufficient evidence in the record to support this conclusion.²⁰⁰ Today, we have more concrete data indicating that law students of color are more interested in public interest law as their ultimate professional objective. The findings presented here suggest that underrepresented students of color may be more likely to pursue public interest jobs, many of which service underserved populations. Additional research on the connection between the racial/ethnic background of lawyers and their decision to work in underserved

196. In addition, relatively large percentages of students from underrepresented backgrounds are interested in public service through the political process, with 10% of African American students and 12% of Latinos selecting “Politician” as their ultimate career goal. Though “Politician” as a career option is discussed as a leadership selection in Part VI, *infra*, it also indicates interest in public service through the political process.

197. This includes students who selected any one of the following choices as their ultimate career goal: law professor, government attorney, judge, business executive, and politician.

198. See CAL. COMM’N ON ACCESS TO JUSTICE, 2011 REPORT OF ACCOMPLISHMENTS, available at <http://www.calbar.ca.gov/Portals/0/documents/accessJustice/2011%20Access%20Commission%20Annual%20Report.pdf>.

199. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978).

200. *Id.* at 311 (“Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better healthcare delivery to deprived citizens.”).

communities would be useful to provide additional support for recognizing and rewarding a desire for service as a compelling state interest.

VI. ALTERNATIVE THREE: FACILITATING LEADERSHIP DIVERSITY

Underrepresented students of color are also much more likely than whites to aspire to leadership in a variety of forms. For instance, 10% of African American students and 12% of Latinos see “Politician” as their ultimate career goal, as compared to only 4% of whites (see Table 11, *supra*). An additional 7% of African Americans, 6% of Latinos, and 11% of APIs aspire to become business executives—leaders in the corporate sector (see Table 11, *supra*).

If we recognize the importance of diversifying American leadership generally, we would do well to consider the many law students of color who list some position of leadership as their ultimate professional goal. The *Grutter* Court recognized that “cultivat[ing] a set of leaders with legitimacy in the eyes of its citizenry,” is directly tied to diversity in leadership through open access.²⁰¹ Just as with the lessening of racial isolation, the Court saw successful development of leaders as tied to educational diversity;²⁰² yet empirical evidence suggests that it could stand on its own as an independent compelling state interest.

While they might share some similarities, a focus on cultivating diverse leaders is an interest separate and apart from providing role models, an interest the Supreme Court has ruled cannot satisfy the first prong of the strict scrutiny standard.²⁰³ An interest in diversifying American leadership places the focus squarely on the individual who will go on to be a future leader, and is tied directly to democracy, legitimacy, and representation; a reliance on a role model rationale, on the other hand, is more about a symbolic position for the purpose of inspiring others.²⁰⁴

Thinking broadly about positions of power and leadership makes findings from the POD data regarding leadership diversity even more dramatic. Grouping together various response options related to leadership reveals that 24% of African Americans, 19% of APIs, and

201. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

202. *Id.*

203. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (rejecting the argument that a school system should take race into consideration for teacher layoffs because African American teachers serve as role models of academic success for African American students).

204. For instance, in *Wygant*, the African American teachers facing layoffs put forward the role model rationale to indicate that their own academic success may inspire their African American students to succeed. *Id.* at 273. In contrast, diversifying leadership is not about inspiring others, but is about the individual leader herself and the system in general.

29% of Latinos aspire to some form of professional leadership.²⁰⁵ In other words, roughly one-quarter of the students of color at Michigan Law School aspire to professional leadership. The figures would increase even more if we included those who aspire to become leaders within their individual fields in the public interest sector, the corporate law firm arena, as government attorneys, and in other non-legal professions.²⁰⁶

Diverse law schools are necessary for a diverse profession; in addition, they are an avenue for diversification of American leadership generally.²⁰⁷ Other research has shown that “[l]aw school graduates indeed heavily occupy leadership positions in a range of fields, whether in the government, private, or public sectors.”²⁰⁸ Even the Supreme Court has affirmed that law schools are a “training ground for a large number of our Nation’s leaders.”²⁰⁹ In fact, it may be under-inclusive to suggest that one-quarter of students of color aspire to future leadership, as many who pursue other full-time, non-leadership choices in their professional careers will nevertheless become leaders in various other ways.²¹⁰

The POD sample represents twenty-nine African Americans, sixty-four APIs, and seventeen Latinos, as compared to 306 whites; this roughly parallels diversity on the Michigan Law School campus.²¹¹ Assume for a moment that everyone’s dreams were to come true—that abilities, resources, opportunities, and access were equal regardless of race and that these students went on to fulfill their professional aspirations.²¹² We can roughly approximate the Michigan Law School population by doubling the sample size of the POD study.²¹³ With these rough calculations, given

205. The four responses grouped together to represent aspirations for leadership are: business executive, politician, judge, and law professor.

206. Future leaders who did not select careers specifically associated with leadership could include corporate law firm attorneys who become managing partners at their firm, government attorneys who are also on the boards of local or national organizations, and those in non-legal jobs who are also civic, religious, or community leaders.

207. Many civil, political, and corporate leaders are lawyers before taking on additional leadership responsibilities. See, e.g., Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 359–63 (2009).

208. Rebecca K. Lee, *Implementing Grutter’s Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL’Y 133, 145 (2011).

209. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

210. See Lee, *supra* note 208, at 157–58 (discussing the likelihood of students of color becoming leaders even for those choosing other professional goals).

211. Michigan Law School diversity statistics are reproduced in the Appendix, *infra*.

212. Obviously, people of color face significant hurdles outside of the educational environment as well, ranging from outright discrimination to subtle microaggressions. See, e.g., Allen & Solórzano, *supra* note 157, at 300. Many of these would likely be hurdles on the path to realizing dreams of leadership for African American, Latino, and API students, regardless of an ideal law school experience.

213. This is a rough estimate given only to model how increasing the numbers of African American and Latino students on campus would yield greater leadership diversity down the line.

the exceedingly small number of students of color on the campus today, Michigan Law School would graduate only six African American and four Latino future politicians out of the more than 1000 students enrolled; this compares to twenty-two white politicians, even though over 10% of African American and Latino students aspire to become political leaders, as compared to just 4% of whites. With greater numbers of students of color enrolling in our institutions of higher learning, diversity in American leadership would undoubtedly see parallel gains in diversity.

Research suggests that the quality of leadership improves with diversity as well, as institutions and organizations may be better able to inspire employees when a diverse leadership corps encourages diversity at all levels of employment.²¹⁴ By recognizing diversification of the legal profession and of American leadership as a compelling state interest, law schools could admit more students of color through affirmative action and thereby improve leadership overall. The *Grutter* Court gave great weight to an amicus brief filed by military leaders detailing the importance of diversity in the leadership ranks of the armed forces.²¹⁵ The deference to their “assertion that a national security interest demands the maintenance of diversification of the officers corps through affirmative action” indicates a willingness to go beyond educational diversity to support affirmative action.²¹⁶ Diversifying American leadership has not been a matter of national security in the United States in the same way that diversifying the armed forces has; yet, a lack of leadership diversity has historically and recently been a source of uprising internationally.²¹⁷ The Court should now

214. See, e.g., Lee, *supra* note 208, at 146–47 (“In pursuing core diversity, leaders must increase diversity at the leadership levels and establish a culture of learning in their organizations,” and for minorities’ and women’s perspectives to be heard and have sway at the highest levels, “it is additionally vital that [they] step into [more] positions of formal leadership.”).

215. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’”) (quoting Consolidated Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (2003) (No. 02-241) 2003 WL 1787554, at *5); see Deo, *supra* note 10, at 71; Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1093 (2004).

216. Deo, *supra* note 10, at 71; see also Joshua M. Levine, *Stigma’s Opening: Grutter’s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 527 (2006) (suggesting that the *Grutter* Court already reached beyond educational diversity to embrace other compelling state interests).

217. See, e.g., Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT’L L.J. 1, 1–2 (2013) (“[W]hat some have termed the Arab Spring of 2011–2012 . . . in Tunisia, Egypt, Libya, Yemen, and Syria [was in part motivated by a need for] relatively free and genuine participation in governmental processes and the standard of legitimacy for governments.”); Geneive Abdo, *The New Sectarianism: The Arab Uprisings and the Rebirth of the Shi’a-Sunni Divide 2* (Saban Ctr. for Middle East Policy at Brookings, Paper No. 29, 2013) (“The U.S. invasion of Iraq and the accompanying overthrow of Saddam Hussein, which allowed the Shi’a to attain power in

go beyond educational diversity to recognize diversifying leadership as a compelling state interest.

CONCLUSION

Dozens of scholars have documented the ways in which race remains a salient feature of American life.²¹⁸ An African American President notwithstanding, most scholarship suggests that we do not live in a post-racial society.²¹⁹ Race continues to shape life events for many Americans, including those attending Michigan Law School. The data show that race correlates highly with “life experience” for Michigan Law students. Race is salient with regard to many personal experiences and attitudes, including, as examples, immigrant status and language use.²²⁰

Law school experiences differ by race as well, especially with regard to academic outcomes, scholarships, and fellowships. Most students in the POD sample were admitted to Michigan Law School after Proposal 2 went into effect, and therefore did not receive a “plus” for bringing racial diversity to campus.²²¹ In spite of likely parallel achievement scores on entry-level merit identifiers, African American and Latino non-affirmative action admittees have lower academic outcomes than their white peers. The academic literature suggests that the negative campus climate contributes to less-than-optimal academic outcomes for students of color, many of whom might be marginalized and disengaged from the academic environment.²²² One similarity shows debt as relatively constant across race/ethnicity, though this is based in part on the ability of the vast majority of African American and Latino students to secure scholarships and fellowships to help defray the cost of their legal education.

These varied experiences highlight the ongoing diversity at Michigan Law School. Though the structural and interactional diversity on campus rarely makes its way into the classroom, students from all race/ethnic backgrounds recognize the benefits of diversity and prefer that there were more. The qualitative data document that students from all race/ethnic backgrounds recognize how greater diversity would improve their classroom experience. They also see its potential to improve their future

one of the region’s leading states, has now been eclipsed by a growing Sunni bid for ascendancy in both the religious and political realms.”).

218. See, e.g., WEST, *supra* note 148.

219. See generally Ian F. Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

220. Debt seems relatively evenly distributed across race, though this may be due in part to the extraordinary ability of underrepresented students of color to secure awards.

221. See *supra* note 7 and accompanying text.

222. See Solórzano et al., *supra* note 146, at 18.

practice. Yet, a surprising lack of classroom diversity prevents educational diversity from fully living up to its expectations in terms of enhancing the law school experience, in the ways that the *Grutter* and *Fisher* Courts predicted.²²³

In fact, educational diversity alone may not be an ideal rationale to support affirmative action. Relying exclusively on educational diversity as a rationale for affirmative action is somewhat ironic: though most assume that students of color admitted through race-conscious policies are the (only) beneficiaries of affirmative action, the diversity rationale actually suggests that whites may be the primary beneficiaries.²²⁴ If the purpose of affirmative action is educational diversity, then applicants of color are given a “plus” not because of their promise or potential or the assumption that they have overcome adversity or discrimination; rather, that “plus” is for the purpose of improving the learning experience for all of the other admitted students.²²⁵

Instead, courts and university officials should add the compelling state interest of avoiding racial isolation to the existing goal of educational diversity. Because of racial isolation, the alienation and tokenization that ensues when students of color are severely underrepresented on predominantly white campuses, these students of color often do not fully engage in law school learning, thereby impeding their own success and failing to contribute to the classroom environment. Since structural diversity (meaningful representation) is only the first step in creating optimal learning outcomes, coupling that goal with an interest in avoiding racial isolation could facilitate the optimal learning outcomes that many have expected of educational diversity alone.²²⁶

Today, almost half (47%) of African American students at Michigan Law School do not see their campus climate as supportive of diversity, though almost all (84%) white students do. Once students of color are meaningfully represented on campus, once they feel supported and nurtured rather than tokenized, once the focus goes beyond critical mass to the avoidance of racial isolation, they will be more likely to engage in

223. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013).

224. In fact, although particular students of color (i.e., African American and Latino students) are generally seen as the primary beneficiaries of affirmative action, even the attorney defending Proposal 2 during oral arguments in *Schuetz* noted that the diversity resulting from affirmative action is “supposed to benefit the campus as a whole.” Transcript of Oral Argument at 4, *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (No. 12-0682).

225. This, in part, drove the intervening-defendants in *Grutter* to include integration and equality as central arguments in their right to preserve affirmative action. See Memorandum of Law in Support of Motion for Intervention at 22, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928) (“[Intervenors’] interests . . . imbricate questions of entrenched educational and social inequality and the effect of existing racism and sexism on students.”).

226. See Deo, *supra* note 10, at 82–86.

meaningful cross-racial interaction in the classroom and elsewhere on campus.²²⁷ Interestingly, the majority of whites may prefer greater diversity on campus specifically because they realize that if students of color enjoyed greater representation, they would participate more in class, share their unique and sometimes conflicting perspectives, and thereby enhance the learning environment for all.²²⁸

If the Court determines in the near future that educational diversity is no longer a compelling state interest, then the goal of providing service to underserved communities might be poised to take its place. Since the most popular career goal for underrepresented students is public interest law, pursuit of service could be an alternative avenue for courts to recognize the unique contributions that students of color make to institutions of higher learning and ways in which they will continue to serve communities in need through their legal practice. Additional research should be done to determine whether and how underrepresented students of color may be more likely to enter public service and to contemplate the best policies for rewarding this preference among applicants.²²⁹

Another alternative or addition to educational diversity as a compelling state interest is the interest in diversifying the profession, with related positive effects on diversifying American leadership and accompanying legitimacy. In fact, the Court has touched on these interests already. The *Grutter* Court relied extensively on a military leaders' amicus brief citing the need for a diversified officer corps as a national security necessity, in part to instill confidence and a sense of legitimacy in the system.²³⁰ That reliance might provide a new opening for an equality rationale generally, as an extension of the basic diversity rationale geared toward diversifying leadership positions and inspiring legitimacy by creating increased opportunities for people of color.²³¹

227. See generally Deo, *supra* note 10.

228. APIs, at 12% of the Michigan Law School population, seem to have escaped the worst of racial isolation. They also might strongly support greater diversity on campus with hopes that other groups can similarly avoid racial isolation.

229. Admissions officers could follow various options, or some combination of the following: law school applicants could identify their interest in public service and thereby receive a plus on their application; applicants interested in public interest could be required to provide documentation of past public service or letters of recommendation indicating their interest; all students of color could receive a "plus" with the expectation that many would go on to public service; successful applicants could pledge to pursue public service as a condition of their acceptance. These examples are just a few possibilities though further attention and elaboration would be necessary to effectuate such a policy.

230. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

231. Again, these broader theoretical discussions of affirmative action are only introduced in this Article, though the data suggest they should be considered in greater detail.

When Michigan Law students reported on their experiences and preferences through the Perspectives on Diversity study, they provided data supporting educational diversity as well as three additional compelling state interests that may be just as valid. Courts should consider the student perspective, not only because these students are the ones most affected by ongoing uncertainty regarding affirmative action, but because their experiences can inform affirmative action jurisprudence through the creation of new compelling state interests that independently justify the use of race in admissions.

APPENDIX

Table 12: University of Michigan Law School Diversity Statistics
by Graduating Class and Race

Race	Expected Graduation Year			Average
	2012	2011	2010	
Black	5%	4%	6%	5%
API	13%	12%	12%	12%
Latino	4%	4%	5%	4%
Native Am.	2%	1%	2%	2%
White	61%	66%	57%	61%
No ID	15%	13%	18%	15%
Total	100%	100%	100%	100%

Table 13: University of Michigan Law School Diversity Statistics
by Graduating Class and Sex

Sex	Expected Graduation Year			Average
	2012	2011	2010	
Male	55%	57%	55%	56%
Female	45%	43%	45%	44%
Total	100%	100%	100%	100%

SELECTED POD SURVEY QUESTIONS

6. When you were growing up, was a language other than English spoken in your household? [Mark one.]
 No
 Yes, please specify language:
7. If yes, did your family speak it more or less often than they spoke English? [Mark one.]
 More
 About the same
 Less
8. Were you born outside the U.S.? [Mark one.]
 No
 Yes, please specify country:

9. Were either of your parents born outside the U.S.?
 No
 Yes, please specify country of origin and indicate father and/or mother:
30. What is your law school Grade Point Average?
 4.0
 3.5-3.9
 3.0-3.4
 2.5-2.9
 2.0-2.4
 Below 2.0
35. What is your ultimate career goal?
 Public interest nonprofit attorney
 Law professor
 Government attorney
 Public interest law firm attorney
 Judge
 Business executive
 Politician
 Corporate law firm attorney
 Other legal job (please describe below)
 Other non legal job (please describe below)
If you checked Other, please specify here:
36. What is the total of your estimated debt from law school (tuition, fees, living expenses, etc.)?
37. Have you been awarded any scholarships or fellowships during law school?
 No
 Yes, please list name(s) and monetary support associated with each award
38. To what extent do you agree or disagree with the following statements about law school?
- h. I would prefer that there were more diversity at my law school.
 Strongly Agree
 Agree
 Neither Agree nor Disagree
 Disagree
 Strongly Disagree

m. The campus climate at my law school is one that supports diversity

Strongly Agree

Agree

Neither Agree nor Disagree

Disagree

Strongly Disagree

SELECTED POD FOCUS GROUP PROTOCOL QUESTIONS

Do you think there are enough students like you at this law school to feel comfortable here? Being “like you” refers to people with a similar background and experiences.

What are the advantages and disadvantages to having a racially diverse student body in law school? Do you experience any of those here?

What, if anything, do you think would be different about your law school classes if they were more diverse? Less diverse?

How, if at all, do you think the diversity you experience in law school may help you after graduation?

Can you share some examples of classroom discussions regarding race, ethnicity, gender, sexual orientation, or socioeconomic status?

Can you think of any missed opportunities for these types of discussions in class? A few cases that may be relevant include: *People v. Goetz*, *Roe v. Wade*, *Plessy v. Ferguson*, *Loving v. Virginia*, *Brown v. Board of Education*, *Grutter v. Bollinger*, and *Lawrence v. Texas*.
