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RACE IN THE LIFE SCIENCES: AN EMPIRICAL ASSESSMENT, 1950–2000

Osagie K. Obasogie,* Julie N. Harris-Wai,** Katherine Darling,*** Carolyn Keagy**** & Michael Levesque*****

The mainstream narrative regarding the evolution of race as an idea in the scientific community is that biological understandings of race dominated throughout the nineteenth and twentieth centuries up until World War II, after which a social constructionist approach is thought to have taken hold. Many believe that the horrific outcomes of the most notorious applications of biological race—eugenics and the Holocaust—moved scientists away from thinking that race reflects inherent differences and toward an understanding that race is a largely social, cultural, and political phenomenon. This understanding of the evolution of race as a scientific idea informed the way that many areas of law conceptualize human equality, including civil rights, human rights, and constitutional law.

This Article provides one of the first large-scale empirical assessments of publications in peer-reviewed biomedical and life science journals to

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examine whether biological theories of race actually lost credibility in the life sciences after World War II. We find that biological theories of race transformed yet persisted in the dominant academic discourse up through modern times—a finding that contradicts the central narrative that the life sciences became "color-blind" or "post-racial" several decades ago. The continued salience of biological race in the life sciences suggests that more attention needs to be paid to the questionable assumptions driving this research on biological race and its potential spillover effects, i.e., how persisting claims of biological race in the scientific literature might reconstitute its significance in law and society in a manner that may be harmful to racial minorities.

INTRODUCTION ........................................................................................ 3090
I. RESEARCH QUESTION AND METHODS ............................................. 3093
II. RESULTS ............................................................................................ 3098
   A. Description of Dataset and Codes ............................................. 3098
   B. Qualitative Findings ............................................................... 3101
      1. Co-Occurrence of Multiple Concepts of Race .................. 3102
      2. The Search for Racial Purity ............................................... 3104
         a. Defining Racial Purity and Infiltration ......................... 3104
         b. Resisting Social Classifications ................................ 3106
      3. Leveraging Race and Disease ............................................. 3107
         a. Racial Origins of Genetic Disease ............................... 3108
         b. Racial Etiology of Multifactorial Disease .................. 3110
III. DISCUSSION OF QUALITATIVE FINDINGS .................................... 3112
IV. CONCLUSIONS .............................................................................. 3113

INTRODUCTION

The claim that race is a social construction—that is, a concept created by social and political forces rather than a natural division of human beings—has become accepted wisdom across many disciplines, including law, the social sciences, and the humanities. This consensus is based largely upon a narrative that theories of biological race dominated intellectual thought up until the mid-twentieth century but were eventually replaced by constructionist viewpoints after the gruesome nature of biological race's most notorious implementation (the Holocaust) was revealed to the world.1

This narrative arc has been central to the way that race has been

1. In one of the more influential books on the ebb and flow of race ideologies in the West in the twentieth century, Elazar Barkan begins by stating that "[t]he Nazi regime has compelled us all to recognize the lethal potential of the concept of race and the horrendous consequences of its misuse. After World War II the painful recognition of what had been inflicted in the name of race led to the discrediting of racism in international politics and contributed to the decline and repudiation of scientific racism in intellectual discourse." ELAZAR BARKAN, THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTIONS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS 1 (1992).
conceptualized in the modern era and has shaped the development of many areas of law, including civil rights, human rights, and Fourteenth Amendment equal protection law.

In demonstrating that race is a social system that does not reflect any inherent differences between people comes a moral authority that has motivated various postwar social and legal projects committed to equality and human liberation. As EvelynHammonds notes, "The consensus in the social sciences that race is a social concept grew so strong that by the end of the twentieth century it was rarely questioned."2 This agreement is often thought to specifically transcend the social and life sciences. Any lingering sensibility of race being biological is largely believed to be a remnant of nonscientific lay understandings of race perpetuated by an uninformed public. Residual ideas about race marking natural differences among groups are therefore thought to be distinct from the work of social and life scientists who are believed to have jointly rejected biological understandings of race and embraced a constructionist perspective decades ago.3

Yet, as sociologist Ann Morning observes, "The frequent sociological claim that scientists have abandoned racial essentialism is more often an assumption than an empirically documented finding."4 There have been historical evaluations providing evidence that complicates this narrative arc concerning the death of biological race and the acceptance of constructionist approaches. For example, Jenny Reardon's Race to the Finish provides an eloquent historical account of how post–World War II discussions of race did not reject prewar biological essentialisms.5 Instead, Reardon argues that a more nuanced negotiation ensued whereby scientists attempted to retain and redefine what was thought to be the underlying biological structure of racial differences through then-emerging techniques and technologies in a manner that separated the so-called fact of biological difference from the various social meanings that had attached to

---

3. Ann Morning writes:
   Sociologists often maintain . . . that the idea of race, as constructed, is widely shared across the disciplinary spectrum. In this view, both social and natural scientists have converged on a common interpretation of race as social and not biological in nature. . . . This depiction of an academic consensus on racial construction is routinely juxtaposed with a portrayal of the public as retaining essentialist beliefs—that is, the notion that races do in fact correspond to biologically distinct human groups. . . . The resulting picture is of a unified intellectual community that has debunked old notions of race, whereas "the public has adhered to a rather rigid belief in race as a biological fact."

5. See generally Jenny Reardon, Race to the Finish: Identity and Governance in an Age of Genomics (2005).
phenotypical differences over time.6 Nancy Stepan offers a similar historical critique, noting that although prewar understandings of biological race focused qualitatively on physical distinctions that were thought to signify inherent group differences, the postwar emphasis on the quantitative distribution of genes across population groups preserved an ongoing belief in biological difference that gets lost in the traditional constructionist narratives.7 And, in addition to these historical accounts, contemporary social science research with scientists and physicians has shown that social constructionist perspectives are a minority viewpoint in the profession.8

Morning’s critique is both apt and penetrating: the widely shared belief that the life sciences made a substantive shift from biological conceptions of race to constructionist perspectives has been accepted without much empirical scrutiny of the scholarly record. This Article attempts to address this observation by offering an empirical investigation into how race was conceived during the postwar period in two scientific disciplines (genetics and clinical medicine) to examine whether biological understandings of race dissipated after World War II.9 Part I provides further context, refines the research question, and lays out the methods used to pursue this investigation of the literature. Part II then discusses the results from our original research, assessing how race discourses developed in the decades following World War II. We then discuss these findings and offer an extended critique in Part III. Part IV concludes with a few thoughts on the significance of this research and how this and similar projects might be used to inform deeper social and political debates concerning racial equality.

6. Id. at 4–16.
7. Stepan provides an insightful look into how many conceptualized the difference between “old” and “new” theories of race before and after the war: The old and new biology offered a series of contrasts. The old science of race, for instance, had its disciplinary home in anatomy and morphology. . . . The new biology was based, instead, in experimental and theoretical genetics, and its institutional homes were the university departments of molecular biology rather than medicine, or in departments of biology and anthropology in which the new populational outlook dominated . . . . The fundamental unit of analysis in the old racial science was the human race or racial “type.” Races were defined anatomically and morphologically, in terms of the phenotype—that is, by detailed measurement of the shape of the skull, the dimensions of the post cranial skeleton, by stature, and by skin colour. The features measured were taken to be on the whole stable in character, and therefore a good indication of racial identity and affinity. The unit of analysis in the new biology was, by contrast, not the race but the “population,” defined not morphologically or behaviorally but genetically and statistically. To the new biologist, every individual in a population was genetically unique, owing to the independent assortment, recombination, and mutation of Mendelian genes controlling traits. Groups of individuals could, however, share a characteristic distribution of genes, and form a population which was statistically differentiated from another population.


9. For a different and more limited survey of how race was used in the research literature during the post–World War II period, see generally Snait B. Gissis, When Is ‘Race’ a Race? 1946–2003, 39 STUD. HIST. PHIL. BIOLOGY & BIOMED. SCI. 437 (2008).
I. RESEARCH QUESTION AND METHODS

Before moving forward, it is important to take a brief step back to highlight the extent to which traditional narratives concerning the emergence, dominance, and disappearance of biological race among scholars have, in some ways, overly simplified the many debates both within and between various fields during this period. To assume that a putative postwar shift away from biological race was a linear process would be a serious mistake; several books have detailed the discordant and uneven nature of this process.10 While this Article will not retell this history, it takes as its point of critique an important conceptual shift that emerged from this nonlinearity to motivate the traditional narrative arc concerning race in the academy during this period. This overarching conceptual shift drew distinctions between “old” theories of race that were driven by notions of racial typologies defined by exacting scrutiny of human anatomy and “new” postwar theories of race that focused on populations defined by the then-emerging statistical understandings of genes and genetic groupings.11 With this move, race “was given a new, genetic meaning [as] it was apparent that ‘race’ had in the process been transformed as a concept since the genetically defined populations did not correspond to the old anthropological idea of race.”12 Indeed, some population geneticists during this period of transformation thought that this new emphasis on populations was so different from the prewar emphasis of racial typologies that the word race was no longer useful in discussing human biology.13 This new postwar emphasis on populations and genetics also impacted the field of medicine, where “the new genetics . . . replac[ed] the old eugenical genetics with a new, much more sophisticated and ethically neutral genetic counseling.”14 This new emphasis on human heredity in the research literature was thought to also have moved medicine in a decidedly post-racial direction, as it was thought to have refocused biomedical and clinical understandings of race on treating individuals with specific hereditary diseases rather than understanding race as a social or political tool that subordinates or privileges certain groups in a manner that impacts their health outcomes.

These developments had the effect of redefining issues of race and human difference as quantitative, measurable, and therefore “objective” differences that were ostensibly free of the bias that characterized earlier periods of scientific racism and the eugenics movement. Consequently, this redefinition left the study of how racial stereotypes and ideologies attach to human differences—i.e., how race is socially constructed—as an endeavor

10. See generally Barkan, supra note 1; Daniel Kevles, In the Name of Eugenics: Genetics and the Uses of Human Heredity (1985); Stepan, supra note 7.
11. See supra note 7.
12. Stepan, supra note 7, at 177.
13. Id. at 177–78.
14. Id. at 181.
for social scientists interested in race relations. From this standpoint in the narrative arc, the life sciences became post-racial and color-blind in the sense that their work was thought to no longer be influenced by racial typologies or political ideologies concerning various races. Rather, their research on race and populations became seen as being driven purely by the scientific assessment of statistical data concerning the distribution of human population differences.

It is against this backdrop that we pose the following research question: Does an empirical examination of the post–World War II research literature support this claim that biological understandings of race of the “old” prewar variety disappeared in favor of a more constructionist sensibility that rejected the significance of racial typologies and morphology in understanding human difference and health outcomes? To answer this question, we looked at four preeminent academic medical and genetic journals from 1950 to 2000 to qualitatively assess the dominant discourse during this period with regard to how race was conceptualized in relation to issues of health, medicine, and population difference. The time period for this investigation roughly captures the era between the end of World War II and the completion of the first draft of the Human Genome Project. The Human Genome Project marks a useful endpoint as a moment where researchers provided the first “map” of the human genome (all of the genes in human beings), a development that shifted discussions on human heredity (and, consequently, biological understandings of race) in new and different directions.

Our research team inductively developed a codebook and analyzed a sample of articles from four peer-reviewed medical and genetics journals. These journals were chosen on the basis of their reputation and impact in these fields and because their archives spanned the decades between 1950 and 2000. We reviewed two biomedical journals, *Journal of the American Medical Association* (JAMA) and *New England Journal of Medicine* (NEJM), and two genetics journals, *American Journal of Human Genetics* (AJHG) and *Annals of Human Genetics* (ANHG). To be sure, these journals do not reflect the entirety of diverse conversations concerning race, health, and population difference that occurred across many fields during this period. Nevertheless, the prominent nature of these journals provides a useful dataset that captures important—indeed, influential—discourses that were accepted and circulated among those engaged in biomedical, clinical, and genetic research on race in the postwar era.

To examine trends across each decade, we sampled articles every five years starting in 1950 and ending in 2000 in each of the four journals (i.e.,

15. Stepan notes that “once it was realized that racial prejudice was a function not of biological race or innate racial antipathy, but of social, economic and psychological factors in society, the study of race relations became an important subfield of sociology, economics, political science, and psychology.” *Id.* at 182.

our dataset was formed by articles published in 1950, 1955, 1960, etc.). We employed different criteria for selecting the initial article dataset. In the genetics journals, we analyzed all articles published in those journals for the specified year. In the medical journals, we conducted a key word search\textsuperscript{17} to identify our initial set of articles. To the extent that our research question attempts to understand whether the ostensible postwar shift from typological to population concepts of race led to biological race’s demise, we initially imposed these criteria on the biomedical journals because they contained fewer articles focused on genetics and were published more frequently than the genetics journals. The initial dataset contained 3354 articles (AJHG (n=1654); ANHG (n=370); JAMA (n=434); NEJM (n=896)).

Each article in the initial dataset was also subjected to qualitative examination to determine whether it qualified for inclusion in our analysis.\textsuperscript{18} We briefly reviewed each article in the initial sample and applied additional selection criteria to identify articles that examined race/ethnicity in the context of health or genetics. To be included, the article had to: (1) include a population of African ancestry either in the introduction, methods, or conclusions section of the paper\textsuperscript{19} and (2) include a discussion or analysis of at least one population. We defined population broadly as anything more than a single individual; authors could define their study population ethnically, socially, biologically, et cetera. Our final dataset included empirical studies, editorials, and review articles and excluded case studies and empirical studies investigating only a single individual’s data. This allowed the data to reflect the broadest sense of the different scholarly outlets in which relevant race concepts were discussed and debated during this period. Our final coding dataset included 291 articles (AJHG (n=165); ANHG (n=30); JAMA (n=35); NEJM (n=61)). The inclusion rate for articles from the initial sample set was between 6.8

\textsuperscript{17} The keywords used to identify the initial articles for inclusion were: “genet* OR gene OR congenit* OR heritab* OR heredit* OR inherit* OR kindred OR inbreed* OR pedigree OR lineage.”

\textsuperscript{18} A note on inter-rater reliability: in order to determine reliability between the two coders, twenty articles were selected from the included articles and were coded by both coders. After each round of coding, reliability was calculated for each code by using percent agreement and once a reliability level of at least 80 percent was established, reliability testing ceased. Inter-rater reliability ranged from 83 percent for the biological essence code to 100 percent for the social construction code. All articles were given a unique three digit identifier and then randomly assigned to one of the two coders.

\textsuperscript{19} We restricted our sample to papers that discussed populations of African descent for two reasons. First, Western race relations have largely been driven by black/white conceptions of race, so we were particularly interested in if, how, and in what ways these particular ideologies persisted in the postwar era. This isn’t to say that this is the only or even most important racial dynamic during this period. But, it does have historical and social significance worth isolating and considering. The second reason is administrative. Developing adequate search terms that were useful in teasing out how a single population has been treated in the literature over fifty years has its challenges. Attempting to do this for multiple racial groups (along with reviewing, coding, and analyzing) would have presented difficulties of a higher order of magnitude with potentially very little return given our specific research question on whether biological notions of race persisted after World War II—a question that can be just as meaningfully answered by focusing on one group.
percent (JAMA) and 10 percent (AJHG). Thus, articles coded for this study represent a small group of articles published in these journals. Furthermore, the coding dataset of 291 articles was dominated by articles from AJHG.

We analyzed a small subset of articles to develop preliminary codes for characterizing the articles and the concepts of racial difference represented in the article. We identified seven general categories that scientists used to describe racial differences and/or to justify the use of race in their studies. The following codes were developed: biological frequency (n=139); disease frequency (n=127); biological essence (n=143); geographic origin (n=176); social status (cultural or historical) (n=75); descriptor only (n=40); and social construction (n=1). These codes characterize multiple distinct but related concepts of race that co-occur and interact within an article.

20. We developed two codes to reflect how racial differences were expressed in statistical or quantitative terms: biological frequency and disease frequency. These statements quantified the difference between racially labeled groups, often using quantitative statements about racial difference to buttress categorical differences (e.g., the difference between Caucasians and African Americans). “Biological frequency” statements described racial difference as a frequency or expressed quantitative differences between groups by using a likelihood or rate of a gene or physical trait.

21. Closely related to biological frequency, the code “disease frequency” captured passages that compared racially labeled groups in terms of the incidence, prevalence, or risk of disease. Passages coded to disease frequency expressed racial differences in the frequency, likelihood, or rate of disease, for example by describing the rate of sickle cell disease in African or African American populations.

22. The “biological essence” code captured statements that reflected assumptions about race as a bounded category of individuals or subgroups that share a particular or unique biological characteristic. We developed a broad definition of biological essence that was flexible enough to encompass the historical variation in how biological essence was described within the initial set of code development articles. Statements coded as biological essence reflected racial difference as a qualitative statement about typological, essential, or categorical differences between racial groups.

23. Racial differences expressed in geographic terms were coded as “geographic origin.” Within these statements racial groups were bounded by national, continental, or regional borders. These statements reflected race as a bounded population composed of people who are currently in or have originated from a particular place or region.

24. This code captured passages that made references to culture, social, or historical factors that characterize the different racial groups, or distinguish these groups. In these passages, race was bounded by shared socioeconomic status (SES) and cultural beliefs. These included references to “self-identified” race, links between socioeconomic status and race (including efforts to distinguish SES from race as an epidemiological construct), and shared cultural practices surrounding food, marriage, or language. Passages that included only information about population migrations without reference to social or historical forces that caused or precipitated population movements were not included here but rather were coded as “geographic origin.”

25. These articles used race as a simple descriptor without giving any elaboration of the meanings of race or the inferences that could be drawn from racial designations. These articles included, for example, epidemiological studies that described their study populations in racial terms, but did not further describe race in any way.

26. Social constructionist statements include any discussions of the idea that race is a historically contingent and socially produced category; the notion that race is not biologically real; that race is the product of ideology and functions as ideology; or that racial labels reflect complex identities or histories.
After the codebook was developed and inter-coder reliability was established, the articles were randomly assigned to one of two primary coders who read and analyzed the articles. They recorded passages that exemplified each concept of racial difference used by authors and developed semi-structured analytic memos for each article. The coders identified passages about racial difference, recorded the passage, and determined which concept of racial difference was reflected in the passage. Each passage described differences in racial groups or elaborated the meaning or definition of a racial group, for example by comparing African Americans and Caucasians or by defining a group through their migration history. In general, concepts of racial difference were reflected in passages about the boundaries of racial groups or categories, comparisons between groups, defining characteristics of groups, or definitional statements about groups. These codes were largely applied to passages within each sampled article, meaning that coders assessed the presence of the (often multiple) concepts of race within the article and provided examples of the code(s) from within the text. The coders identified, collected, and documented passages that substantiated their application of the code(s) within each article. These passages also enabled a close textual analysis of concepts of race, their usages, and the distinct racial discourses that resulted. These findings are discussed in Part II.B.

The number of articles published and the conceptualization of race that was espoused were measured and compared to one another, both journal by journal and as a collective dataset, as a means to understand how race ideas developed in these journals during this period. All descriptive statistics were produced with SPSS version 21, and all graphs with MATLAB version R2014a.

The qualitative analysis focused on the variation within the seven concepts of racial difference and the relations among the use of these concepts within the rhetorical arc of the scientific articles. We did not focus on historical trends across any one concept of racial difference, preferring to read the complete dataset as a whole unit with strong lines of historical continuity. Codes were not considered mutually exclusive; articles often reflected multiple conceptions of race and were coded accordingly. Articles were initially sorted by their dominant orientation/code (e.g., social historical, biological essence) and read together. Each analyst read the memos pertaining to these sets of articles and described subthemes and dynamics of arguments, focusing not only on elaborating the variation within different racial concepts but also on examining the relationships among the different concepts of race within the article.

Through reading these full sets of coded passages, the analysts generated subcodes and themes and then came together to develop a final list of codes. These included subcodes within each concept of race, dynamics of arguments, and code-code relationships. These were documented in memos that included the coders’ analysis and quoted citations as exemplars. These memos were intended to answer key questions about how and why particular concepts of race were being used in each article and to document
dynamics that persisted across the journals and the historical period under study. For example, the coders focused on conceptualizations of essence and its relation to other concepts of race, as well as the role of essentialist reasoning within the articles’ overall arguments. We identified three central themes or dynamics within the articles published during this period: (1) the co-occurrence of multiple understandings of race, where biological race persists in the postwar period by intertwining with other conceptions of race; (2) “the search for racial purity;” and (3) the leveraging of race to understand disease. All results are detailed in the next part.

II. RESULTS

A. Description of Dataset and Codes

Table 1 describes the final number of articles that met inclusion criteria by year and journal. Overall, there were 291 articles that were included in the dataset for in-depth, textual analysis. Nearly two-thirds of the articles were published in genetics journals (n=195) and one-third were published in medical journals (n=96). Table 1 also provides a measure of the total number of racial conceptualization codes applied to articles and the mean number of codes applied to an article for each year and within each journal type (as well as for the overall sample). The number of different concepts of racial difference applied to a publication is a crude measure of the code density. As described in detail in Part II.B, a minority of articles contained only one discernible concept of race. Most articles demonstrated a complex lattice of racial conceptions that was woven throughout scientific experiments, discourses, and arguments. Each article was coded for approximately 2.41 different concepts of racial difference and differed across medical (mean=1.79) and genetics journals (mean=2.71).

There are several additional points to glean from the data in Table 1. First, there are fewer articles from the 1950s that met the inclusion criteria. Second, articles from genetics journals dominate the dataset within and across all decades. Third, the number of articles included for each five-year timepoint generally increases over time (with a notable exception in 1970). Thus, the final dataset is heavily weighted toward articles from genetics journals and articles from later years (1990–2000).
Table 1: Total Number of Articles, Codes, and Average Number of Articles per Code Presented by Journal Type and Year

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<th>Year</th>
<th>Total # Articles (%)</th>
<th>Total # Codes</th>
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<th>Total # Articles (%)</th>
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The overall number and frequency of each of the seven different codes for racial difference is shown in Table 2 by journal type and across all journals. It is important to note that ideas concerning biological race—demonstrated by the prevalence of biological frequency (n=139), disease frequency (n=127), and biological essentialism (n=143)—were the dominant codes in the dataset, rivaled only by geographic origin (n=176). These figures provide evidence against the widely shared narrative that theories of biological race dwindled during this period. In fact, these three codes concerning biological race account for 58.2 percent of all codes applied to articles.
While this Article is focused on an in-depth qualitative, textual analysis of journal publications, it is important to provide sufficient context for examining the strengths, limitations, and potential biases inherent in our dataset. Graph I illustrates the number of articles per code for each year across all journals. Though we did not conduct a detailed quantitative analysis of the trends in code use over time or between journals, this plot provides a general overview of how and when different codes were used. There are two important trends to consider here. First, all codes (with the exception of social construction and descriptor only) tend to increase across the timeframe, which is not surprising given the small number of articles included in the dataset from the earlier part of the twentieth century. Second, there is a consistently upward trend for several codes beginning around 1985; most notably, geographic origin, biological essence, and social status codes were increasingly applied in this timeframe. One would need to conduct a detailed quantitative analysis of trends over time controlling for other variables (such as an increase in the overall number of articles published) to accurately interpret this trend. Nevertheless, this data usefully responds to our main research question by demonstrating the

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presence and viability of biological understandings of race in the postwar era.

Graph 1: Codes for Concepts of Race
Illustrated over Time Across All Journals (n=291)

B. Qualitative Findings

Through qualitative analysis of the articles, we identified three significant themes that persisted in the sampled literature during this period. First, while social scientists describe a growing scientific consensus around a largely singular understanding of race during this time period (i.e., social constructionist), we found multiple distinct concepts of race that were used in a manner that supported each other and were not mutually exclusive. The co-occurrence and mutual support of distinct concepts of racial difference—including biological race—are reflected and embodied within each of the other two themes that we have identified. This layering of racial discourses ultimately sustained biological concepts of race throughout this period, enabling them to endure and persist in current scientific thinking and practices. In detailing our qualitative findings below, we discuss how co-occurring racial discourses maintained biological race throughout the sample.

We termed the second theme that emerged from this research “the search for racial purity.” These articles were typically concerned with explaining and investigating biological differences between racial groups and/or the identification of a “pure” or isolated racial/ethnic group. In these articles, researchers drew on biological, sociohistorical, and geographic

27. See, e.g., Eliane Azevêdo, Subgroup Studies of Black Admixture Within a Mixed Population of Bahia, Brazil, 44 ANNALS HUM. GENETICS 55, 60 (1980) (using genetic, anthropological, and medical research to support and study black admixture within a population).
understandings of race to examine human genetic diversity and population admixture. Researchers working within this domain relied on the latticing of these racial discourses to frame their investigations of racial purity and admixture in studies of colonialism, migration, and racial classification.28

The third theme that we identified involves leveraging or employing race to understand and give meaning to certain disease characteristics or demographics. These articles used concepts of racial difference akin to "old" notions of racial typology to understand disease. As scientists sought to disentangle the causes of racial differences in health or trace the racial origins of disease, different concepts of race commingled within medical discourses.29 These co-constructions often reified the boundary between the biological and the social, and ultimately reinforced prevailing racial hierarchies in the name of public health.

1. Co-Occurrence of Multiple Concepts of Race

As indicated in the description of the dataset and codes, concepts of racial difference rarely existed in isolation. Almost all of the articles analyzed under this theme contained multiple racial codes that co-occurred within the same article, which demonstrates the complicated nature of race within the post–World War II genetics and medical literature. We argue that notions of biological race survived in the post–World War II period through commingling with other concepts of racial difference, including those rooted in social, cultural, and geographic understandings of difference.

Co-occurrence is a means of life support; as biological race was experiencing its political demise after World War II, its pairing with other conceptions kept the conceptual flame alive. This is particularly clear in articles where both biological and geographic notions of race were used together. In these articles, geographic distances take on biological significance through the examination of racial differences. Racial differences, here conceptualized at the level of continent-specific polymorphisms, become powerful tools “for inferring the ethnic and geographic origin of modern and ancient humans.”30 Social categories such as race and ethnicity take on biological significance when brought into dialog with geography. These authors utilize multiple racial discourses to follow the dispersal of humans throughout the globe, and thus create a


29. Buran Kurdi-Haidar et al., Origin and Spread of the Glucose-6-Phosphate Dehydrogenase Variant (G6PD-Mediterranean) in the Middle East, 47 AM. J. HUM. GENETICS 1013, 1013–14 (1990) (examining the co-occurrence of geographic, cultural, and biologically essentialist notions of race within the study of disease, where modern nation-state boundaries and ancient/essentialist notions of Greek civilization come together to explain G6PD deficiency).

genetic history of human populations. Racialized understandings of disease also supported biologically essentialist notions of race. In much the same way that continent-specific polymorphisms were thought to be able to stand in for one's racial origin, the occurrence of disease in a population could also serve to mark one's racial heritage. For example, in a 1965 *American Journal of Human Genetics* article, the researchers investigated "the presence of G6PD deficiency in these two unrelated and supposedly 'pure' Indian[]" groups in Mexico to determine whether this disease was the result of environmental pressure or through "admixture with Negroes" who lived near this native population. While the results were unclear, the authors argued that "[t]he most likely explanation is that the variable frequencies of both anomalies are due to variable degrees of Negro admixture in the four cities examined." In both of the above examples, biologically essentialist notions of race are supported through the use of other conceptions of race. However, what remains unclear is why sociological understandings of race as a social construction did not take hold during this period. The only article in our sample to directly address this issue was a 1970 editorial published in *NEJM* by Nicholas M. Nelson. In this editorial, Nelson defends using the category of race in medical research primarily on the grounds that if scientists reject the possibility that race is a biological category for political reasons, then advances in scientific knowledge would be delayed. Nelson argues that in order to maintain the development of scientific knowledge, there must be a separation between "secular" political pressures and the "cathedral of scientific truth." Furthermore, Nelson also argues that attempts to restrict the investigation of race as a biological category elicit "a sociologist's and a socialist's delight" by grounding the explanation of racial disparities in social, economic, and political inequalities instead of fundamental biological differences between racial groups. Thus Nelson's argument for the continued use of biological understandings of race serves as both a defense of science and a defense of status quo racial ideologies against politics. By actively critiquing sociological understandings of racial difference and instead defining these differences primarily in medical and

31. E.g., Luis G. Carvajal-Carmona et al., *Strong Amerind/White Sex Bias and a Possible Sephardic Contribution Among the Founders of a Population in Northwest Colombia*, 67 *AM. J. HUM. GENETICS* 1287, 1287 (2000) (examining a "population [that] was established in the 16th–17th centuries through the admixture of Amerinds, Europeans, and Africans and grew in relative isolation until the late 19th century").

32. Ruben Lisker et al., *Studies on Several Genetic Hematological Traits of the Mexican Population. VIII. Hemoglobin S, Glucose-6-Phosphate Dehydrogenase Deficiency, and Other Characteristics in a Malarial Region*, 17 *AM. J. HUM. GENETICS* 179, 179 (1965).

33. Id. at 184.


35. Id.

36. Id. at 594.
genetic terms, Nelson breathed life back into the idea that demonstrably social categories of race have a decidedly biological significance.

Further examples regarding the co-occurrence of racial understandings are discussed in the two other themes explored in this section. Yet, it is important to highlight that co-occurrence is not only a means through which these other themes are articulated but is an independent theme in its own right, as it reflects a substantive (not simply methodological) mechanism that allows biological understandings of race to flourish at the very moment that social scientific discourses suggested their demise.

2. The Search for Racial Purity

Longstanding ideological investment in racial purity is present throughout the sample. In these articles (n=96), researchers were interested in studying racial differences and purity, generally in the form of specific biological traits or genetic markers. These articles brought together sociohistorical narratives, geographic origin stories, trait frequency data, and genetic analyses to collect and study bodies. These specimens and populations were said to demonstrate racial purity and admixture. Rather than using sociohistorical narratives of race to examine the social construction of racial categories, researchers used historical narratives as a means to investigate the spread of racialized genetic information across space and time. This use of racial concepts permeates the sample and can be seen in two central scientific discourses: (1) conversations of racial purity and infiltration and (2) discourses that defined racial misclassification as a social error that was contrasted with biological facts.

a. Defining Racial Purity and Infiltration

In these articles, researchers used phenotypic or genetic markers as a means to search for and identify racial purity, sometimes interpreted as a type of racial “origin” or stock. For example, in a 1955 ANHG article, Blood Groups of the Northern Nilotes, the researchers used cultural and physical similarity to group these people together as a unique population. At the end of the article these authors argued that the Nilotes may “be surviving representatives of an ancient African stock,” thus engaging in notions of purity. The authors argued:

It has been implied that an early race with high cDe frequency and no sickling provided a major component of the present-day population of Africa. The study of their blood groups has suggested that the Bushmen are one remnant of such a race; the present survey suggests that the Northern Nilotes, long, and to-day markedly, distinct from the Bushmen,

38. Id. at 153.
may be another relatively undiluted remnant of this hypothetical ancestral stock.39

In this example, Bushmen and Northern Nilotes are presented as living genetic fossils of distinct primordial African ancestral stocks, relatively undiluted from the genetic infiltration of other groups, even within Africa itself. The authors leverage the concept of race—here conceptualized in terms of frequency and as essence—to make claims about the historical and genetic origins and, hence, the purity of African populations.

The search for purity can also be seen in investigations of genetic “infiltration.” For example, a 1965 article by Salzano and Steinberg employed notions of racial purity and infiltration through the examination of “non-Indian” genes in a “full blood” Indian population.40 The authors argued that “the introduction of non-Indian genes . . . has as a consequence not only the presence of genes like Gmb and Gmabc, which perhaps were not present before the contact with whites and Negroes, but also another noteworthy feature, the increase in frequency of gene GMab.”41 The presence of non-Indian genes within an individual serves to demonstrate the infiltration of white and “Negro” genes into previously pure or original groups.42 In this example the examination of racial purity once again draws on biological notions (biological essence) of race to frame and interpret the spread of genetic information across space and time. This can be seen even more explicitly in another article in which the population of Brazil is described as containing “48% Caucasian, 34% Negro, and 18% Indian genes.”43

As mentioned above, authors drew on multiple racial discourses to explore the dispersal of humans throughout the globe primarily in genetic terms, and thus created a genetic history of human populations.44 This research agenda uses racial categories to frame and interpret the spread of genetic information. This can also be seen in examinations of the “genetic story of colonization” which brings together geographic, sociohistorical, and biological notions of race to examine the flow of racialized genetic information across various time periods and geographies.45 Histories of colonial exploitation and domination are transformed into analyses of “sexual asymmetries in the direction and extent of gene flow among [native populations] and more recent immigrants from Europe and Africa” so as to better understand the genetic “contributions” that these groups have made to

39. Id. (citation omitted).
41. Id. at 274–75.
42. See id. at 277.
44. Carvajal-Carmona et al., supra note 31.
native gene pools.\textsuperscript{46} Through the identification of "the effects of European and African genetic infiltration over the past 500 years," other researchers working within this field were able to "retribalize" the Amerindian gene pools by isolating which genes do not belong.\textsuperscript{47} Through this process of retribalization, researchers were able to make claims about the "true" genetic makeup of South American populations. For example, Alves-Silva and her colleagues found that "white" Brazilians had an "an astonishingly high matrilineal contribution of Amerindians and Africans" suggesting that "[p]resent-day Brazilians... still carry the genetic imprint of the early-colonization phase: the pioneer-colonial population typically had Amerindian ancestry—and, after few generations, increasingly African ancestry—in the maternal line but Portuguese ancestry in the paternal line."\textsuperscript{48} In this way, racialized notions of genetic purity and infiltration often go hand in hand with resisting social classifications of race and redefining racial categories primarily through genetic terms.

\textbf{b. Resisting Social Classifications}

In these articles, authors argued that social classifications of race are inadequate and that categories based on genetics are more accurate. These articles tend to challenge the assumed racial classification of a group and put their racial identity "in quotes." These passages referenced the possibility of biased, wrong, or misclassified racial designations, and pointed to the limitations of quotidian or commonsense racial classifications, even going so far as to imply that racial classifications are culturally relative. However, while misclassification is derived from messy social processes and the biases of cultural relativity, these passages were often closely bound to claims about proper, precise, and scientific classifications of race. For example, the authors of a 1965 ANHG article explained:

During the medical examination, each subject was assigned a racial classification based on pigmentation of the abdomen, hair colour and type, and conformation of the nose and lips. The examining physician was herself a native of Bahia and her judgements, although necessarily subjective, were based on a lifetime of personal experience. The classes were assigned code numbers from 0 (most caucasoid) to 8 (most negroid), and this crude measure was used to test for various racial effects. \textit{Here we shall use gene frequencies to determine more exactly the composition of each racial class}.\textsuperscript{49}

\textsuperscript{46} Id.
\textsuperscript{47} Ramiro Barrantes et al., \textit{Microevolution in Lower Central America: Genetic Characterization of the Chibcha-Speaking Groups of Costa Rica and Panama, and a Consensus Taxonomy Based on Genetic and Linguistic Affinity}, 46 AM. J. HUM. GENETICS 63, 68 (1990).
\textsuperscript{49} H. Krieger et al., \textit{Racial Admixture in North-Eastern Brazil}, 29 ANNALS HUM. GENETICS 113, 115–16 (1965) (emphasis added) (citation omitted).
This example highlights the role that gene frequencies played in determining the “exact” composition of racial groups outside of the messy and “subjective” social system of categorization. Hence, the use of morphology to assess racial traits—a key aspect of pre–World War II racial biology—found expression in 1965 as an evidentiary backdrop from which to refine scientific understandings of racial difference.

Another ANHG article published in 1980 described the author’s concerns about social classification of races biasing results:

Following the advances of technical laboratory procedures for biological measurements, man’s ability to evaluate partially subjective variables has been somewhat neglected in scientific investigations. In physical anthropology and genetics, which were initially based on measurements and numbers, the usefulness of subjective assessment is often questioned. Curiously, Linnaeus was able to classify mankind into racial groups, whilst twentieth-century scientists are unable to recognize the existence of quantitative boundaries between races. Consequently, the subjective identification of major races and racial groups is the only choice available today for population studies seeking to avoid excessive heterogeneity.50

Another example of resisting social classification in the search for racial purity can be seen in the 2000 AJHG article, Y Chromosomes Traveling South: The Cohen Modal Haplotype Origins of the Lemba.51 In this paper the authors attempted to determine whether an African group truly had Jewish ancestry.52 The authors argued that the evidence provided by the oral and cultural traditions of the Lemba in relation to the genetic data regarding the group’s Jewish origins is not conclusive.53 While the study did reveal that the Lemba’s oral history was consistent with “an origin in a Jewish population outside Africa and male-mediated gene flow from other Semitic immigrants,” it is important to note how genetics, rather than social categorization, once again served as the arbitrator of the true racial origin.54

3. Leveraging Race and Disease

These articles used concepts of racial difference to understand disease, often leveraging distinct hypotheses about the causes of racial difference and disparity across populations. In the 110 articles coded to this theme, racial differences, patterns, and comparisons were used to frame and interpret observed differences in disease prevalence and etiology. This occurred when scientists mustered biological explanations to explain away social differences and processes. While theories about the cause of the diseases evolved during this period, multiple concepts of race commingled and mutually reinforced each other. Concepts of race were readily enrolled

50. Azevêdo, supra note 27, at 59 (citation omitted).
52. Id.
53. Id. at 684–85.
54. Id. at 685.
in the scientific and biomedical project of understanding disease epidemiology and biology. As social and biological categories came together, racial categories and etiological differences in disease became intelligible, knowable, and seemingly "real."

We identified two central strategies scientists used to connect race and disease: First, they sought to pinpoint the genetic cause of disease by identifying the racial origins of populations and uncovering genetic disease traits across histories of population migrations. Second, they sought to use biological and social concepts/explanations about the causes of racial differences to disentangle the multiple factors that lead to complex diseases. Within both of these strategies, several concepts of race were explicitly woven together as an explanatory force, as scientists continually sought to use multiple, distinct concepts of race to understand disease.

a. Racial Origins of Genetic Disease

Scientists sought to use racial difference in order to distinguish disease or risk genotypes as belonging to or originating from particular racialized groups. Race is generally talked about in these articles in essentialist terms and is used as a marker for disease risk. In the project of seeking racial origins for disease, individuals are seen as being possible genetic carriers for particular "racialized" illnesses. Examples of this include, but are not limited to: G6PD deficiency for Middle Easterners, ovalocytosis for South-East Asians, and phenylketonuria among Latin Americans. Articles within this theme were generally concerned with notions of purity/admixture, risk, and understanding the disease within the context of racially structured populations. Several of these articles discussed primarily genetic explanations of disease or of risk for disease by, for example, investigating specific genes involved in hypertension or sickle cell disease. For example, after presenting studies indicating a greater frequency of hypertension for "American Negroes," a 1970 NEJM article argued that these data, combined with the association between other "genetically determined characteristics" and blood pressure, "suggest[] that a gene or genes, probably of African origin, may be involved in blood

60. Ronald L. Nagel et al., Hematologically and Genetically Distinct Forms of Sickle Cell Anemia in Africa: The Senegal Type and the Benin Type, 312 NEW ENG. J. MED. 880, 884 (1985).
pressure elevation.\textsuperscript{61} These articles also often discussed particular genetic variants associated with disease or risk in connection to proposed or suspected racial or geographic origins. For example, a 1980 NEJM article discussed findings from competing authors on the racial origins of increased DRw antigens linked to diabetes.\textsuperscript{62} The practice of tracing the racial origins of disease therefore emphasizes how genetic explanations of disease implicate family history in ways that show the deep and tense relationship between familial and racial relations.

Sickle cell disease and G6PD deficiency provide paradigmatic examples of the ways that the scientists associated racial difference and racialized geography with the ancestral or genetic origins of disease. For example, a 1960 study of sickle cell prevalence described its subjects as “putatively full blood Indians” but acknowledged the possibility that “a few genes have been introduced from other populations.”\textsuperscript{63} The authors continued: “The question of racial purity always arises in population surveys of this sort.”\textsuperscript{64} Citing the population’s “essentially Negroid characteristics,” the authors hypothesized these disease-causing genes were introduced by “Negro ancestors.”\textsuperscript{65} Articles such as this highlight how the practice of tracing racial origins links questions about the causal or biological underpinnings of disease and the “racial origins” of disease genes.

Notions of admixture often created the possibility for (1) race to become a marker of disease and (2) disease to become a marker of race. For example, the authors of a 1955 article about sickle cell disease noted that “investigators have stated emphatically that the presence of sickling is undeniable proof of Negro ancestry.”\textsuperscript{66} They go on to explain that the “[o]ccasional reports of sickle-cell disease in Caucasians almost invariably come from areas where admixture with Negro blood is quite likely.”\textsuperscript{67} Arguments along this line exemplify how disease is used to “mark” race, to the extent that the presence of disease betrays one’s “true” race or at least encourages scientists to thoroughly investigate. Thirty years later, a 1985 editorial in JAMA shows that medical scientists continued to discuss the sickle cell trait and its role in human evolution. There, Dr. Roth pointed out how “most physicians believe incorrectly that sickle cell problems are limited to persons of acknowledged African ancestry.”\textsuperscript{68} He argued that because sickle cell genes “traveled widely,” they can even be found in a “person who believes himself or herself to be of European origin” and may

\textsuperscript{61} Long, supra note 59, at 709.
\textsuperscript{62} Michel R. Neufeld et al., HLA in American Blacks with Juvenile Diabetes, 303 NEW ENG. J. MED. 111, 111–12 (1980).
\textsuperscript{63} H. Eldon Sutton et al., Distribution of Haptoglobin, Transferrin, and Hemoglobin Types Among Indians of Southern Mexico and Guatemala, 12 AM. J. HUM. GENETICS 338, 339 (1960).
\textsuperscript{64} Id. at 344.
\textsuperscript{65} Id.
\textsuperscript{66} Amoz I. Chernoff, The Human Hemoglobins in Health and Disease (Continued), 253 NEW ENG. J. MED. 365, 367 (1955).
\textsuperscript{67} Id.
\textsuperscript{68} Eugene Roth, Jr., The Sickle Cell Gene in Evolution: A Solitary Wanderer or a Nomad in a Caravan of Interacting Genes, 253 J. AM. MED. ASS'N 2259, 2259 (1985).
"indeed, morphologically appear[] to be so." Again, fascination with the potential of disease diagnoses to track with imaginary concepts of racial admixture and racial purity thus persisted within medical literature long into the dawn of genomic science. When disease was tied to racial difference through claims such as these, the scientific project of pursuing or searching for racial purity was itself justified by medical or epidemiological necessity.

b. Racial Etiology of Multifactorial Disease

Racial etiology describes articles that use concepts of racial difference as one factor to understand or disentangle the causes of disease. These articles most often focused on multifactorial or “complex” diseases like cancer or diabetes and were sub-coded as using a “gene-environment” understanding of disease. Accordingly, these articles considered multiple risk factors including diet, socioeconomic status, or cultural difference, as well as concepts of race. Throughout these articles, racial differences in disease rates or outcomes led investigators to hypothesize about possible genetic explanations for these patterns.

Several articles used various conceptions of “biological essence” as a way of explaining racial differences, or hypothesized that the differences across racial groups were due to genetic differences by race and not other causes of disease. For example, a 2000 paper that used data from an “international collaborative study of hypertension in blacks” genotyped people they described as Afro-Caribbean in addition to a comparative sample of “individuals of European descent.” As part of their genetic analysis, the authors also collected what they called “sociocultural variables” but did not engage in any extended discussion of these factors or discuss social determinants of black-white inequalities in cardiovascular outcomes. They instead turned their focus to a racial analysis of the distribution of genetic polymorphisms associated with elevated angiotensin I-converting enzyme, and they described their study as demonstrating the “advantages of using diverse ethnic groups” to help “dissect the genetic bases of phenotypic traits.” Similarly, in a commentary published in NEJM in 1980, investigators contested the hypotheses of their colleagues who had argued that diabetes mellitus “among American blacks was due to the interaction of non-HLA-associated diabetogenic genes from the white genome with DRw3 and DRw4 genes of black origin.” They instead propose that increases in HLA types in black patients with diabetes in the United States were due to “mixture with HLA-associated diabetogenic genes from whites.” Across these examples, published twenty years apart, investments in biological essentialism indicated “African genes” or

69. Id.
71. Id.
72. Id. at 1151.
73. Neufeld et al., supra note 62, at 111.
74. Id. at 112.
hypothesized innate racial differences in susceptibility to complex diseases such as diabetes and cardiovascular disease.

Arguments about racial origins of multifactorial disease did not always explicitly draw on notions of racial difference in terms of a statistical frequency but sometimes drew together ideas about shared geographic origin and gene frequency compared across categorically labeled groups. There was significant variation in how authors understood race within their efforts to disentangle multiple causes of disease. Articles such as these illustrate a more nuanced understanding of racial categories and their relationship to various diseases. For example, a 1955 NEJM article about multiple sclerosis noted that it is the most common disease of the central nervous system but also observed the condition's "rarity in the tropics and sub-tropics." The authors concluded that "[n]o selectivity for race or nationality within any particular area was observed" and that "importance of a genetic factor . . . is equivocal." Racial differences were also often integral to understanding epidemiological patterns. A 1995 review article concerning gastric cancer began by describing the epidemiological patterns of the disease, noting that while the disease was on the decline in many industrialized nations, the nation-level rates varied substantially. They observed that "[i]n the United States, African Americans, Hispanic Americans, and Native Americans are 1.5 to 2.5 times more likely to have gastric carcinoma than are whites." Highlighting the "Genetic and Environmental Risk Factors" that contribute to the disease, they noted that risk was "inversely associated with socioeconomic status" and that decreasing rates in industrialized countries "suggest[] that environmental exposures, which can vary over time, play an important part in the pathogenesis of the disease." They elaborated on this point by citing studies demonstrating a "substantial environmental influence" where "people emigrated from areas of high risk to areas of low risk."

In their attempts to disentangle the racial etiology of disease, scientists considered multiple risk factors including diet, socioeconomic status, or cultural difference, as well as biologically essentialist concepts of race. Articles early in the sample were concerned with identifying "racial susceptibility" while more recent articles posited that differential disease rates were due to racial/ethnic "genes" or "admixture." Across this period, however, articles consistently used various conceptions of "biological essence" as a way of explaining the extent to which racialized patterns of disease or differences across racial groups were due to seemingly natural biological distinctions that vary by race.

75. Leonard T. Kurland et al., Multiple Sclerosis and Amyotrophic Lateral Sclerosis (Concluded): Etiologic Significance of Recent Epidemiologic and Genetic Studies, 252 NEW ENG. J. MED. 697, 702 (1955).
76. Id.
78. Id.
79. Id. at 34.
80. Id.
III. DISCUSSION OF QUALITATIVE FINDINGS

As described in detail in Part II, we identified three central themes within our sample. These themes overlap and were intertwined in ways that revealed the close connections between the medical and scientific searches for the ideal body and for racial purity. This connection between the search for purity and the search for the cause of disease persisted throughout the sample period between World War II and the Human Genome Project. Articles of this genre were also found in each decade after 1970. We have shown how ideas of biologically essential or “pure” races were integrated into various hypotheses, study designs, and conclusions about disease. We have also demonstrated how articles that explicitly linked the practices of searching for racial purity with a science of disease posited that miscegenation, “interracial crossing,” and admixture were fundamental to this endeavor and to the larger project of genetic science. Geneticists themselves therefore articulated deep connections between bodily purity and racial purity, and understood these projects to be intertwined in ways that enabled one to sustain the other during this time.

In addition to distinguishing and enforcing the boundaries of the social and the biological within their work, scientists also took the nature-culture divide itself as a more direct object of inquiry. That is, in addition to doing work that assumed the social could be distinguished from the biological, researchers directly used culture to uncover the biological or to make a cut between culture and biology. Culture was not simply positioned as an obstacle in the way of science or as messy bias that obscures a biological reality. Instead, culture—along with language and social norms—was more directly embedded in a scientific project aiming to study racial difference. In this way, culture became an object of scientific inquiry.

One of the most prominent ways that geneticists conceptualized race as defined by social and historical factors was through their investigation of the “genetic story of colonization.” In these articles, scientists provided detailed attention to historical facts and the details of colonial domination in so far as these accounts lead them to a true “genetic story.” These claims embody attempts to use scientific inquiry to convert historical power dynamics into an intercontinental flow of genes. These scientists attempted to uncover and resurrect colonial relations through genetic markers by, for example, tracing European and Amerindian genes through Brazil to show how present day populations “carry the genetic imprint of early-colonization.” These accounts privileged the long arm of human migration, emphasizing this timescape over other sociohistorical developments like longstanding policies of racial segregation in the United States. The premise of searching for a genetic trail is also deeply allied

82. Seielstad, supra note 45.
83. Alves-Silva et al., supra note 48.
with the impulse to locate biological or genetic essences (e.g., "African genes") within defined territories and populations.

IV. CONCLUSIONS

Contrary to the social constructionist narrative that biological race was no longer accepted or prevalent in science and medicine after World War II, this Article offers initial empirical evidence that biological understandings of racial difference and disparities persisted in the mid- to late-twentieth century. Put bluntly, biological race never went away. It simply left the "prime time" stage afforded to it by certain political movements and embedded itself into post–World War II genetics and medical research. This research shows that other theories of race—historical, geographical, etcetera—were just as prevalent (as a numerical matter) during this period. But what characterizes post–World War II race research is the co-occurrence of competing conceptualizations, whereby biological race and other frameworks were not seen as mutually exclusive. In other words, biological race was still legitimate at this time. But so were other conceptions and uses. Thus, there appears to be a diversification of how race was conceptualized, with biological race still playing a notable role in research practices and scientific knowledge.

The data revealed in this Article are important for understanding how and why theories of biological race remain salient in contemporary times. Often, those who accept that race is a social construction are confused when they hear modern articulations of biological race. For example, how is it possible that the Food and Drug Administration approved BiDil—a drug with a race-specific indication for treating black people suffering from heart failure? How is it possible that commercial genetic ancestry tests can tell people that an analysis of their genes can reveal what race they really are? And how is it that certain aspects of DNA forensic analyses suggest that a visual profile—including the race of an unknown suspect—can be drafted simply by an analysis of a biological sample left at a crime scene? While this confusion may be legitimate as a substantive matter, it is important to understand that these modern articulations of biological race are connected to recent and ongoing research in medicine and genetics despite consistent findings that social categories of race do not map discretely onto human difference. The answer revealed by the research presented in this Article is both simple and sobering: biological theories of race persist because they and the troublesome ideologies of human difference that they support were never fully flushed out of the sensibilities of those doing research on race.

These findings may also have important policy implications. To the extent that modern aspirations for racial equality are premised in large part

84. See generally Jonathan Kahn, Race in a Bottle: The Story of BiDil and Racialized Medicine in a Post-Genomic Age (2012).
86. See Andrew Pollack, Building a Face, and a Case, on DNA, N.Y. TIMES, Feb. 24, 2015, at D1.
on the standard social constructionist narrative that biological understandings of race lost legitimacy after World War II, the persistence of biological race in the life sciences poses a particular threat to racial minorities. This Article provides an empirical basis for biomedical and social scientists to take stock of how and why such a dangerous idea has remained and the "work" that it has and continues to do in preventing a full recognition of the social rather than biological determinants of various outcomes, from health to education to crime. This is not to say that all scientific conversations discussing the biological implications of racial categories and categorization are inherently flawed; some of the papers reviewed in this Article provide useful and promising insight into human population differences and patterns of disease. Nevertheless, the latent and reemerging discourse on using social categories of race to mark ostensibly natural boundaries of human difference often serves to place the blame of various racial disparities on group inferiority rather than the social conditions and historical inertia that produce such outcomes. It is this particular dynamic that deserves greater attention and self-reflection in health sciences research. Biological race, as it plays out in this manner, is linked to the maintenance of racial subordination, and racial equality cannot be achieved unless and until such pernicious and unfounded theories of difference and disparity are put to rest.
Twice in the past two years, the U.S. Supreme Court has approved educational diversity as a compelling state interest that justifies the use of race in higher education admissions decisions. Nevertheless, it remains on somewhat shaky ground. Over the past decade, the Court has emphasized that its acceptance of diversity stems from the expectation that a diverse student body will enhance the classroom environment, with students drawing on their diverse backgrounds during classroom conversations that ultimately bring the law to life. Yet, the Court provides no support for its assumption that admitting and enrolling diverse students actually result in these educational benefits. In fact, empirical research on law students indicates that structural diversity (i.e., diversity in numbers) does not lead automatically to interactional diversity (i.e., meaningful interaction among diverse students) or classroom diversity (i.e., meaningful diverse interaction in the classroom specifically); instead, these enhanced classroom experiences depend on adept facilitation by faculty and mutual respect among diverse students.

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

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

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* Associate Professor of Law, Thomas Jefferson School of Law. The author thanks the many supporters of the Diversity in Legal Academia (DLA) project, from inception through current dissemination. Kale Sopoaga, Brittany Nobles, Jillian Kates, and Eva Kobi provided outstanding research assistance. Thanks are especially due to the ninety-three law faculty members whose perspectives are included in this Article as DLA findings. This Article is part of a larger symposium publishing articles from the Critical Race Theory and Empirical Methods Conference held at Fordham University School of Law in November 2014. For an overview of this symposium, see Kimani Paul-Emile, Foreword: Critical Race Theory and Empirical Methods Conference, 83 FORDHAM L. REV. 2953 (2015).
backgrounds not only appreciate the many benefits of diversity, but they also recognize the educational and professional challenges associated with the lack of diversity currently plaguing many law schools. Courts, administrators, and others should rely on these findings to provide additional support for affirmative action through educational diversity, especially to bolster it while it is under attack.

INTRODUCTION........................................................................................ 3116
I. STRICT SCRUTINY IN THEORY AND PRACTICE ................................... 3118
   A. The Constitutional Standard............................................................. 3118
   B. Statewide Initiatives and Court Challenges................................. 3119
   C. The Current State of Educational Diversity ............................... 3122
II. EMPIRICAL SCHOLARSHIP ON EDUCATIONAL DIVERSITY ............. 3124
   A. Student Attitudes .................................................................... 3124
   B. Faculty Preferences ................................................................. 3126
   C. The Diversity in Legal Academia Project ................................. 3128
III. EMPIRICAL FINDINGS OF LAW FACULTY SUPPORT FOR DIVERSITY 3133
   A. Support for Diversity ............................................................... 3133
   B. Benefits of Diversity................................................................. 3138
      1. Diverse Perspectives ............................................................ 3139
      2. Personal Context .................................................................. 3142
      3. Professional and Career Advantages................................. 3146
   C. Missed Opportunities ............................................................... 3147
      1. Holes in the Conversation..................................................... 3147
      2. Less Fulfilling Discussions .................................................. 3149
      3. Being a Spokesperson .......................................................... 3150
CONCLUSION ........................................................................................... 3152

INTRODUCTION

From the days of Grutter v. Bollinger, legal scholars as well as those in education, sociology, and related fields have lavished considerable attention on understanding, discussing, and dissecting educational diversity. Legal scholars have examined theoretical bases of the diversity rationale, suggesting that by "drawing on their experiences and contributing their unique viewpoints," students improve classroom learning. Social science experts have conducted empirical research on structural, interactional, and classroom diversity, noting that while numeric representation does not lead automatically to meaningful interaction between diverse students in the classroom or elsewhere on campus, it is a prerequisite for those eagerly
sought-after enhanced classroom conversations where students rely on personal experience to illuminate discussions of substantive law.\textsuperscript{3}

Courts have acknowledged the growing body of scholarship supporting the many benefits of educational diversity. The U.S. Supreme Court has agreed that diversity creates “substantial” benefits for students in the law school context.\textsuperscript{4} These range from “more spirited” classroom discussions\textsuperscript{5} to “the lessening of racial isolation and stereotypes.”\textsuperscript{6} The Court specifically predicts that educational diversity yields an “enhanced classroom dialogue” that is so compelling that universities may pursue them through well-crafted affirmative action policies.\textsuperscript{7}

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

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

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


\textsuperscript{4} See Grutter, 539 U.S. at 330.

\textsuperscript{5} See id.

\textsuperscript{6} See Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418 (2013).

\textsuperscript{7} See id.

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

\textsuperscript{9} See id. at 664 (“Yet, diversity has been under attack in past years and faces uncertainty in the future. Justice O’Connor suggested in Grutter v. Bollinger that the educational diversity rationale may have a limited shelf life, and Fisher v. University of Texas recently narrowed strict scrutiny further.”).
flip side: a narrow set of perspectives, few fulfilling conversations about the context of the law, and alienation of the few students of color in class.

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

I. STRICT SCRUTINY IN THEORY AND PRACTICE

A. The Constitutional Standard

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

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

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

11. Id.
12. Deo, supra note 8, at 673.
14. Deo, supra note 8, at 672 (quoting Fisher, 133 S. Ct. at 2420).
15. Id.
16. See id. at 664 ("[D]iversity has been under attack in past years and faces uncertainty in the future. Justice O'Connor suggested in Grutter v. Bollinger that the educational diversity rationale may have a limited shelf life, and Fisher v. University of Texas recently narrowed strict scrutiny further.").
communities\textsuperscript{17} to addressing widespread societal discrimination.\textsuperscript{18} Additional potential compelling state interests, including minimizing racial isolation and diversifying American leadership, have appeared in the academic literature, drawing from empirical data on law students.\textsuperscript{19} Yet, the Supreme Court has authorized only one non-remedial compelling state interest as justifying the use of race in admissions decisions: educational diversity.\textsuperscript{20}

B. Statewide Initiatives and Court Challenges

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

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


\textsuperscript{19} Deo, \textit{supra} note 8, at 690–98, 702–05.

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

\textsuperscript{21} 438 U.S. 265 (1978).

\textsuperscript{22} See \textit{id.} at 270.

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

\textsuperscript{24} \textit{Bakke}, 438 U.S. at 319–20 (majority opinion).

\textsuperscript{25} See \textit{id.} at 315–17.

\textsuperscript{26} See \textit{id.} at 321 (app.).
\end{footnotesize}
interests, 27 "[p]ursuit of educational diversity was . . . singled out as a worthy state interest." 28

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

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

27. Id. at 310.
28. Deo, supra note 8, at 669 (citing Bakke, 438 U.S. at 316).
30. Smith v. Univ. of Wash., 233 F.3d 1188, 1200–01 (9th Cir. 2000); Hopwood v. Texas, 78 F.3d 932, 941–44, 948 (5th Cir. 1996).
31. Smith, 233 F.3d at 1200–01.
32. Hopwood, 78 F.3d at 941–44, 948.
33. See Deo, supra note 3, at 68 ("[F]ollowing a circuit split, the Court granted certiorari in Grutter in order to give a clear answer to the question of whether institutions of higher learning could rely on affirmative action to improve or maintain student body diversity.").
35. 539 U.S. 244 (2003).
36. See Deo, supra note 8, at 670 (citing Grutter, 539 U.S. at 317).
37. See Deo, supra note 3, at 70 n.35 ("Student and community intervenors joined the lawsuit to defend affirmative action on grounds of equality and justice rather than rely on the Law School's more traditional defense of diversity as a compelling state interest.").
39. Id. at 473–78.
that educational diversity was a compelling state interest justifying the use of race in admissions decisions in higher education. The Court also held that the law school’s affirmative action policy was sufficiently narrowly tailored to withstand strict scrutiny while the undergraduate policy was not.

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

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

40. See Grutter, 539 U.S. at 325 (“[S]tudent body diversity is a compelling state interest that can justify using race in university admissions.”).
41. See Gratz, 539 U.S. at 275 (“[B]ecause the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.”); see also Grutter, 539 U.S. at 343 (finding that the “Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body” is not prohibited by the Equal Protection Clause).
42. 133 S. Ct. 2411 (2013).
43. Id. at 2414.
44. Deo, supra note 8, at 672.
45. See Fisher, 133 S. Ct. at 2421 (remanding the case to the Fifth Circuit with a directive that “the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity”).
47. Id. at 1629; see also Mich. Const. art. I, § 26.
48. See Schuette, 134 S. Ct. at 1629 (“Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities.”).
49. For a thorough history of the process by which groups and individuals sought to ban affirmative action through the popular initiative process, see generally Meera E. Deo, Ebbs and Flows: The Courts in Racial Context, 8 Rutgers Race & L. Rev. 167 (2007).
50. Id.
Using the popular initiative process as a tool against affirmative action originated in California. Affirmative action became a topic of public conversation in earnest in 1996 when the California Civil Rights Initiative was placed on the state ballot as Proposition 209 ("Prop. 209"). Prop. 209 proposed a state constitutional amendment, which was styled as a "Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities," and it sought to eliminate race-conscious decision making in public education, employment, and contracting decisions. In November 1996, Prop. 209 became law with the support of the majority of California voters. The constitutional amendment survived legal challenges and went into effect, inspiring a number of other states to consider similar measures.

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

C. The Current State of Educational Diversity

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

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51. See id. at 179.
55. Deo, supra note 49, at 180.
56. Deo, supra note 8, at 666.
57. See Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1630 (2013) ("The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.").
58. See Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (explaining that "some, but not complete, judicial deference is proper" because institutions of higher education deserve academic freedom with regard to the particular goals and mission of the institution).
improves learning outcomes. The Supreme Court has asserted that educational diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" In addition, the Court has asserted that increased campus diversity results in better in-class learning because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when students have "the greatest possible variety of backgrounds."

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

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

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61. Id.
62. Deo, supra note 3, at 77 (citing studies finding that “[t]o reap the maximum benefits from educational diversity, students from diverse backgrounds must engage in ‘meaningful interaction’ that is both frequent and of a high quality”).
63. Id. at 73 (“Simply admitting students of color in raw numbers (even numbers sufficient to constitute a welcoming atmosphere for those students) is no guarantee that the interactions and classroom conversations the Grutter Court anticipated will actually take place.”).
64. Id. at 63, 83–84, 84 n.133 (citing Gregory M. Herek, Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research, 1 LAW & SEXUALITY REV. 133, 171 (1991)).
65. See, e.g., Deo, supra note 8, at 662 (“Educational diversity [is] resting on shaky ground.”).
66. See Grutter, 539 U.S. at 343.
burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."67 Plaintiffs have not been complacent as recent affirmative action challenges have directly attacked educational diversity as a compelling state interest. At least one Supreme Court Justice has made clear that he personally does not believe that educational diversity should continue to be a compelling interest.68 As I have written in an earlier article, "with educational diversity resting on shaky ground, we have reached the hour of both bolstering educational diversity and considering viable alternatives."69 This Article draws from empirical data to bolster diversity, contributing the faculty perspective to existing theoretical and empirical investigations into this last remaining non-remedial compelling state interest.

II. EMPIRICAL SCHOLARSHIP ON EDUCATIONAL DIVERSITY

A. Student Attitudes

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

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

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

67. See Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013).
68. Id. at 2424–29 (Thomas, J., concurring).
69. Deo, supra note 8, at 662.
71. Deo, supra note 8, at 690.
72. Deo et al., supra note 70, at 81–82.
73. Id. at 89.
74. See Walter R. Allen & Daniel Solórzano, Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School, 12 BERKELEY LA RAZA L.J. 237, 298 (2001) ("The majority of respondents (68 percent) stated a
benefits of diversity, including that “a) greater structural diversity leads to increased classroom diversity and improved learning; b) classroom diversity results in open minds and engaging classroom conversations; and c) more structural diversity leads to greater participation and less tokenism.”

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

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

Many of these students appreciate how including “social context may help [explain] complex issues of law by making them come alive through personal experiences.” In fact, a majority of law students from all racial/ethnic backgrounds “not only appreciate diversity discussions, but also wish that they were included more often as a standard part of the first-year curriculum.”

While students of all backgrounds appreciate and benefit from diversity discussions, these conversations may be especially important for students of color, who are less likely to be comfortable sharing their personal experiences in the classroom and often uncomfortable drawing from past experience to elucidate particular points of law. In part, this hesitation comes from students of color being underrepresented on

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75. Deo, *supra* note 3, at 97.
76. Id. at 95.
77. Id. Research in this area indicates that law faculty of color and female faculty may be more adept at facilitating diversity discussions in class than their white male colleagues, thus serving the students both what they desire and an arguably more nuanced understanding of the law. See Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANO-LATINO L. REV. 1, 17 (2010) (“Data reveal a pattern based on race and gender such that female faculty and faculty of color are more likely to engage in these discussions, while white male faculty not only are more likely to disregard the racial/gender context of the law but may even be insensitive to diversity issues, contributing to a more challenging environment for some students of color and female students.”).
78. Deo, *supra* note 3, at 95.
79. Id.
80. Deo et al., *supra* note 77, at 31.
campus, which feeds into alienation and marginalization on predominantly white campuses. 82

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

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

B. Faculty Preferences

While "[i]t may be no surprise that students from all racial/ethnic backgrounds support diversity and prefer greater levels of diversity on campus," law faculty perspectives of educational diversity have never been systematically examined. 86 Law students have offered their perspectives on law faculty, appreciating the benefits they receive from faculty mentorship 87 and the ways in which nontraditional faculty include diversity discussions in class. 88 Yet, until now, researchers have never conducted a parallel investigation into law faculty perspectives on law student diversity.

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

82. Deo, supra note 3, at 77.
83. Deo, supra note 8, at 688.
84. Id. at 689.
85. Allen & Solórzano, supra note 74; Deo, supra note 3, at 73; Gurin et al., supra note 70, at 333.
86. Deo, supra note 8, at 687.
87. Deo, supra note 70, at 86–88.
88. Deo, supra note 3, at 95; Deo et al., supra note 77, at 17.
89. PRESUMED INCOMPETENT: THE INTERACTIONS OF RACE AND CLASS FOR WOMEN IN ACADemia (Gabriella Gutierrez y Muhs et al. eds., 2012).
90. Id.
Another ongoing study utilizes empirical data gathered from tenured law faculty to investigate the tenure process specifically. That study discovered that "despite significant progress toward more diversity, women and scholars of color face continued difficulties" in the law school setting. In fact, when evaluating satisfaction with the tenure process, the study discovered a "much higher percentage of female professors of color reporting the tenure process as unfair (35%) as compared to white males (12%)." The authors also reference studies showing ongoing "disparities in terms of pay, tenure denials, and employment at the most elite law schools, in addition to double standards in assessing identical credentials."

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

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

92. Id.
93. Id. at 511.
94. Id. at 512.
95. For details on DLA, see infra Part II.C.
97. See id.
98. Id. (describing mansplaining).
99. See id.
102. See Deo, supra note 96; Deo, supra note 100.
yet, none of the existing literature touches on law faculty perspectives regarding student diversity. This Article incorporates the law faculty experience into the broader educational diversity conversation. Doing so provides much-needed empirical support for diversity as a compelling state interest from the very individuals in the best position to offer it. Since law faculty are the ones leading classrooms, they are best able to determine the effectiveness of including diversity discussions in class, express the benefits of engaging with diverse students who draw from personal experience to illuminate the law, and facilitate respectful conversations among students from different backgrounds so that they can truly learn from the diversity in their midst.

C. The Diversity in Legal Academia Project

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

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

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

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

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

107. Race is a fluid concept, which often defies easy characterization or categorization. See, e.g., Ian F. Haney López, The Social Construction of Race: Some Observations on
sample of thirty white women, white men, and men of color. Table 1 provides details on DLA participants by race/ethnicity and gender.

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

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>4</td>
<td>21</td>
<td>25</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>3</td>
<td>15</td>
<td>18</td>
</tr>
<tr>
<td>Latino/Latina</td>
<td>2</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>Native American</td>
<td>1</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Middle Eastern</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Multiracial</td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>White</td>
<td>7</td>
<td>11</td>
<td>18</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>19</td>
<td>63</td>
<td>93</td>
</tr>
</tbody>
</table>

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

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


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

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

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

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

110. Watters & Biernacki, supra note 109.
111. Id. at 420.
112. Again, the tracked domains are race/ethnicity, gender, tenure status, leadership, location/region of school, and institutional selectivity.
113. Id. at 421.
114. Id. at 420.
115. Id. (explaining that snowball sampling is often used in studies of homeless youth, those infected with HIV, and with other populations that are difficult to identify or not inclined to participate in formal empirical studies).
116. To start, there is little reliable data on law faculty. The data we have on law faculty members, disaggregated by race/ethnicity and gender, is from 2008 to 2009; if I used that data for the DLA study, I would essentially exclude most assistant professors. AALS also publishes a directory of law professors, and members can opt in to a "Minority Law Professor" listing, though faculty are not identified by race/ethnicity or gender in that listing.
I personally conducted each interview for the DLA study, either in person or by telephone. Each interview was digitally audiotaped and transcribed before coding and analysis began. The interview protocol includes experiential questions (i.e., regarding interactions with colleagues and students), attitudinal questions (i.e., regarding perspectives on diversity and institutional values), and more personal demographic questions (i.e., regarding work/life balance and the participant’s professional trajectory).

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

Formal qualitative coding and analysis for this project utilizes ATLAS.ti, a qualitative coding software program that facilitates organization of the data. Quantitative data were analyzed with Stata and Excel for basic...
cross-tabulations of the data as well as more advanced analyses not presented in this Article.\textsuperscript{124} Dissemination of preliminary and formal findings has been ongoing through presentations at numerous academic conferences and various invited speaking engagements.\textsuperscript{125}

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

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

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

\textsuperscript{124.} Stata is a statistical software package developed and sold by StataCorp. See \textsc{Stata}, http://www.stata.com (last visited Apr. 23, 2015); see also Alan C. Acock, A Gentle Introduction to \textsc{Stata} (4th ed. 2014) (providing an introduction to Stata for researchers working in psychology, social sciences, and other fields that require quantitative analysis).

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

\textsuperscript{126.} Deo, \textit{supra} note 96.

\textsuperscript{127.} Deo, \textit{supra} note 101, at 29–30.

\textsuperscript{128.} See \textit{infra} Part III for these empirical findings.

\textsuperscript{129.} This is standard practice for mixed-method empirical research. See Creswell & Clark, \textit{supra} note 104, at 1; Tashakkori & Teddlie, \textit{supra} note 104, at 5.
III. EMPIRICAL FINDINGS OF LAW FACULTY SUPPORT FOR DIVERSITY

A. Support for Diversity

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

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

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

\textsuperscript{131} The responses of the core sample of women of color are disaggregated by the race/ethnicity of respondents, including Black, Asian American, Latina, Native American, Middle Eastern, and multiracial women. The comparative samples of white men, white women, and men of color are presented next.
Table 2: Agreement that Student Body Meets Diversity Expectations, by Race/Ethnicity and Gender, DLA 2013 (N=91)

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

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

132. See supra Part II.A.

133. Deo et al., supra note 77, at 17 (explaining that “students, regardless of race or gender, tend to prefer the approach most often used by female faculty and faculty of color, who actively involve diversity discussions in their law teaching”).
supportive when I include discussions of race, gender, or sexual orientation in the classroom." Table 3 presents results by race/ethnicity and gender.

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

\begin{center}
\textbf{Table 3: Perceptions of Student Support for Diversity Discussions, by Race/Ethnicity and Gender, DLA 2013 (N=91)}
\end{center}

\begin{tabular}{|l|c|c|c|c|c|}
\hline
 & Strongly & Agree & Neither & Disagree & Strongly \\
 & & & & & Disagree \\
 & Total & & & & \\
\hline
Black & N & 1 & 11 & 0 & 9 & 0 & 21 & 100.00\% \\
& \% & 4.76\% & 52.38\% & 0.00\% & 42.86\% & 0.00\% & \\
\hline
Asian/Pacific Islander & N & 2 & 6 & 0 & 6 & 0 & 14 & 100.00\% \\
& \% & 14.29\% & 42.86\% & 0.00\% & 42.86\% & 0.00\% & \\
\hline
Latino/Latina & N & 2 & 5 & 0 & 4 & 1 & 12 & 100.00\% \\
& \% & 16.67\% & 41.67\% & 0.00\% & 33.33\% & 8.33\% & \\
\hline
Native American & N & 0 & 3 & 0 & 2 & 0 & 5 & 100.00\% \\
& \% & 0.00\% & 60.00\% & 0.00\% & 40.00\% & 0.00\% & \\
\hline
\end{tabular}

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

\(^{135}\) Deo, supra note 96; see also Deo, supra note 100.

\(^{136}\) See infra at Part III.B.
In addition to asking participants about their perceptions of student support for diversity discussions, the DLA survey also asked participants to rate their level of agreement with the following statement about their colleagues: “Most of my fellow faculty are supportive when faculty include discussions of race, gender, or sexual orientation in the classroom.” The findings, presented in Table 4, suggest that the overwhelming majority of whites (100 percent of white men and 73 percent of white women) believe that their colleagues support faculty inclusion of diversity discussions in class, just as they believe their students do. In contrast, smaller percentages of faculty of color agree, with roughly equivalent statistics for men and women. Roughly 40 percent of Black and Asian American women, 55 percent of men of color, and roughly 60 percent of Latinas and Native American women feel that their colleagues support their inclusion of these conversations in class. This likely says more about challenging faculty interactions than about diversity discussions themselves, as women of color faculty tend to have fraught relationships with colleagues, most of whom are white and often male.137

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

<table>
<thead>
<tr>
<th>Race/Ethnicity and Gender</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neither</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>2</td>
<td>6</td>
<td>0</td>
<td>13</td>
<td>0</td>
<td>21</td>
</tr>
<tr>
<td>%</td>
<td>9.52%</td>
<td>28.57%</td>
<td>0.00%</td>
<td>61.90%</td>
<td>0.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>7</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>%</td>
<td>21.43%</td>
<td>21.43%</td>
<td>0.00%</td>
<td>50.00%</td>
<td>7.14%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

137. For more on challenging faculty interactions, see Deo, supra note 96, at 22–45.
All DLA participants also reported on their satisfaction with existing student diversity on campus. Specifically, they responded to a question on the survey asking them to rate their level of agreement with the following statement: “I would prefer that there were more student diversity at my law school.” In spite of various differences by race/ethnicity with regard to other questions about student diversity and inclusion of diversity discussions, there is relative uniformity across race/ethnicity and gender in response to this question. A full 95 percent of Black women agree with the statement, along with 87 percent of Asian American women, 75 percent of Latinas, and 80 percent of Native American women. When we compare women of color to other groups, the vast majority of white men, white women, and men of color also agree. Thus, Table 5 shows that the vast majority of law professors—virtually everyone included in the DLA sample—prefers greater student diversity at their law school. While various interpretations are available for this finding as well, the qualitative data presented in the next two sections perhaps explain it best; the next section covers multiple benefits to diversity in the educational and professional context as well as the challenges associated with a lack of student diversity on campus.

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>N</th>
<th>%</th>
<th>%</th>
<th>%</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latino/Latina</td>
<td>12</td>
<td>16.67%</td>
<td>41.67%</td>
<td>0.00%</td>
<td>33.33%</td>
</tr>
<tr>
<td>Native American</td>
<td>5</td>
<td>20.00%</td>
<td>40.00%</td>
<td>0.00%</td>
<td>20.00%</td>
</tr>
<tr>
<td>Middle Eastern</td>
<td>2</td>
<td>50.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Multiracial</td>
<td>7</td>
<td>14.29%</td>
<td>57.14%</td>
<td>0.00%</td>
<td>28.57%</td>
</tr>
<tr>
<td>DLA Women</td>
<td>8</td>
<td>12.50%</td>
<td>87.50%</td>
<td>0.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>DLA White Females</td>
<td>11</td>
<td>45.45%</td>
<td>27.27%</td>
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<td>18.18%</td>
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<td>18.18%</td>
<td>9.09%</td>
<td>27.27%</td>
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<tr>
<td>Total</td>
<td>91</td>
<td>21.98%</td>
<td>35.16%</td>
<td>1.10%</td>
<td>36.26%</td>
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</table>
Table 5: Preference for Greater Student Diversity, by Race/Ethnicity and Gender, DLA 2013 (N=91)

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Neither</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
<th>Total</th>
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<tr>
<td>Black</td>
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<td>20</td>
</tr>
<tr>
<td>%</td>
<td>75.00%</td>
<td>20.00%</td>
<td>0.00%</td>
<td>5.00%</td>
<td>0.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
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<td>2</td>
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<tr>
<td>%</td>
<td>66.67%</td>
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<td>0.00%</td>
<td>13.33%</td>
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<tr>
<td>Latino/Latina</td>
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</tr>
<tr>
<td>%</td>
<td>58.33%</td>
<td>16.67%</td>
<td>0.00%</td>
<td>25.00%</td>
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</tr>
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<td>Native American</td>
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<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>%</td>
<td>60.00%</td>
<td>20.00%</td>
<td>0.00%</td>
<td>20.00%</td>
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</tr>
<tr>
<td>Middle Eastern</td>
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<td>2</td>
</tr>
<tr>
<td>%</td>
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<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>%</td>
<td>28.57%</td>
<td>71.43%</td>
<td>0.00%</td>
<td>0.00%</td>
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<td></td>
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<td>White Female</td>
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<td>1</td>
<td>0</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>%</td>
<td>54.55%</td>
<td>36.36%</td>
<td>9.09%</td>
<td>0.00%</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Men of Color</td>
<td>N 4</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>%</td>
<td>36.36%</td>
<td>54.55%</td>
<td>9.09%</td>
<td>0.00%</td>
<td>100.00%</td>
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</tr>
<tr>
<td>Total</td>
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<td>27</td>
<td>2</td>
<td>7</td>
<td>2</td>
<td>90</td>
</tr>
<tr>
<td>%</td>
<td>57.78%</td>
<td>30.00%</td>
<td>2.22%</td>
<td>7.78%</td>
<td>2.22%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

B. Benefits of Diversity

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

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

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

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

I know that sounds cliché but it really does.

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

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138. Deo, supra note 3, at 63.
139. For a discussion of the ways in which educational diversity may be considered problematic because it puts students of color in a position where they are seeking an education themselves while also being expected to educate their peers, see id. See also Deo, supra note 8, at 691.
students, eight of them are African American and eight of them are white." The critical mass of students of color in that class, where their numeric representation mirrors that of their white peers in a way that it rarely does in other classes or even in communities, improves the classroom environment for everyone. Imani notes that as a result of this diversity:

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

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

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

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

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

141. See supra Tables 2–3 and accompanying discussion (discussing law faculty members’ perspectives of how students and colleagues view their decision to include diversity discussions in class); see also infra Part III.B.2 (discussing additional detail on how having students, rather than faculty members, initiate these discussions is preferable for learning).
problem in the same way, you will begin your analysis from the same point. You have to pick somebody who can see it differently because that challenges your conviction, your belief. It’s true in terms of race, class, gender, sexuality. It’s true. We all approach things from where we come from, from how life has informed us. It doesn’t mean that the diverse voice is more knowledgeable or has a deeper insight or a better ability to judge and determine what’s right, what I’m saying is they have a different lens, which can help you challenge your own view as the majority person.

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

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

142. See supra Tables 2–3 and accompanying discussion (discussing law faculty members’ perspectives of how students and colleagues view their decision to include diversity discussions in class).
143. In fact, in anonymous student evaluations, many students accuse faculty of color and female faculty in particular of doing just this. For more on this issue, see Deo, supra note 100.
144. See supra Table 3 and accompanying discussion.
awkward to do that in a lot of ways," because she cannot herself put forth multiple theoretical perspectives as persuasively as those who have actually lived them.145

2. Personal Context

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

In fact, this opportunity for students to learn from the personal experiences of their classmates is one of the main benefits of educational diversity, as observed by law faculty in the DLA study. Many explain how they can draw on students’ backgrounds to provide personal context that elucidates complex black letter law. Erin, a Native American law professor, says, “I teach Property this semester and I have a Hispanic man in my Property class. And we taught this State v. Shack146 case and it’s about some immigrant workers working on a farm and the right of entry, well it’s going into the right to exclude.” While Elaine could clearly lecture about the substantive area of law without discussing the immigrant experience or the human element of the parties to the case, she notes that including this personal context plays a huge part in classroom learning. She says of the student who spoke up in class that “it was really nice to have him in class because he was willing to talk about the immigrant workers and his family’s background in that.” In other words, he made it personal, which brought the law to life for everyone else. She continues: “I think he gave his classmates a lot more insight than they otherwise would have because they wouldn’t have had experience with that.” In this way, one student’s personal experience became informative for his classmates’ learning.

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

145. See infra Part III.B.2 for more on how students initiating these discussions is preferable for learning than faculty members doing so.
146. 277 A.2d 369 (N.J. 1971).
that case was about in a way that I couldn’t [have explained through simply lecturing on the court opinion].” A Native American professor named Jennifer agrees, explaining, “We have a lot of very privileged white students here and when they hear their own classmates say something like, ‘Well, I’ve been stopped, you know, [just because I am] a person of color,’ [it broadens their perspective].” Regardless of how many ways she explains recent lawsuits regarding “stop and frisk,” for her students “to be able to hear that in the classroom from a peer is much more powerful than if I were to make that observation.”

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

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

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

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

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

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

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

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

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

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

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

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

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152. For more on the standard for summary judgment, see FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES & MATERIALS (11th ed. 2013).
that "it was not only a discussion that helped [illuminate] the legal points about what summary judgment is, but I think [the students] did a really good job about articulating their own ideas about the case and policy concerns as well." Drawing from so many personal experiences, the students are likely to better understand the legal standard and remember the law in action as well.

3. Professional and Career Advantages

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

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

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

Preparation for the increasingly globalized profession of legal practice is a benefit that many DLA participants discuss. Michelle, a Black professor, adds that student diversity in law school is “crucial,” in large part because “it’s a global world” where it is increasingly important not only to “get along with, but [also to] actively collaborate with people who are different.” Without those skills, new lawyers “are going to be disadvantaged in the future world, that’s just the way it is.” She believes that “every elite institution these days understands that you can’t do excellence without diversity.”
A Latina named Carolina echoes many of the comments presented earlier on educational benefits, noting that student diversity "brings richness to the law school [including] a broader range of experiences, greater cultural competency, [and] training opportunities for the entire student body." She also agrees with Michelle that as the workplace becomes "increasingly globalized," it becomes "increasingly important to experience and value diversity." Having diversity in many forms, "in terms of race, gender, sexual orientation, socioeconomic status, whether people come from rural or urban environments, I think all of that helps people understand that we have a broad range of experiences and we can't assume that our experience represents everyone's experience." The primary benefit of engaging with diverse perspectives is that "students will become better lawyers and better serve their clients by having a more diverse law school experience."

C. Missed Opportunities

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

1. Holes in the Conversation

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

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

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

154. For more on law faculty diversity and especially cross-racial interactions between law faculty members, see Deo, supra note 96, at 53–56.
characterize the richly diverse classes discussed earlier in this Article (for example, covering stop and frisk or the reasonable person) occur with regard to race in John’s classes.

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

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

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

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

157. For more on tokenization and silencing, see infra Part III.C.3, especially Natalie’s example of her one Black student in class.
2. Less Fulfilling Discussions

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

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

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

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

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

Isabella, a white female professor, is more specific about what has been missing from her classes. She chooses religion in her First Amendment class as an example of a course that blooms when filled with students from diverse religious backgrounds, but falls flat when all students share a similar religious background. Isabella says that especially in “First Amendment, it would be nice to have more religious diversity, maybe more Jewish, Muslim, and certainly the Eastern religions that I don’t see represented frequently.” The reason that religious representation matters, and why it is especially important to have minority religions represented, is to show students that their perspective is not the only one out there—a key
concept for budding lawyers to master. Isabella states: "I always make a joke that 97 percent doesn’t see any harm in issues that deal with religious minorities because you’re in the 97 percent. In my classroom, if I’ve got everybody in the 97 percent how can I help them understand?" Again, having just one or two religious minorities does not tend to improve the debate because those token individuals feel the pressure of being the "other." Isabella continues:

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

3. Being a Spokesperson

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

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

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

158. See, e.g., Deo, supra note 81, at 15.
159. It is altogether too common to confront "alienation and isolation for the few students of color who attend predominantly white schools, whether in high school, college, or beyond." Id. at 18.
Many professors do not share Ellen's experience, even if they would like the high level of diversity she enjoys. Marybeth acknowledges that a lack of diversity "can be a problem [especially] when you're talking about issues of diversity and race" and there are no or few students of color in class. When that happens, the white students in class are essentially "talking about an 'other' who's not in the class." Perhaps even more problematic is "when you have [only] one African American student, which happens many times; it's like the minute you bring up a race issue that person becomes the spokesperson." Though Marybeth is rarely in a situation where she is the racial minority in the room full of "others," she is nevertheless attuned to the alienation accompanying this situation for her students of color. She notes, "I feel very uncomfortable with that because it's not a position I would want to be in."

A white professor named Jordan agrees, emphasizing how tokenism leads to silencing in the classroom: "If you don't have that critical mass, I think it makes the few diverse students you have feel uncomfortable; maybe they are not going to voice opinions." Instead, her goal would be "to have that critical mass where everyone feels comfortable, and it enables everyone to broaden the discussion and bring a variety of perspectives to the classroom conversation." Natalie, a multiracial law professor, recalls a disappointing class discussion about criminal defendants that ended with "[the] one Black guy in the room" approaching her after class to say, "'Professor, I disagree with what everybody says but I don't want to be [seen as] The Black Guy.'" She told the student immediately that she understood and, in order to not single him out, did not call on him during challenging classroom conversations covering poignant cases involving race. She told him specifically, "'I just don't want you to be the representative of your race and the demographics of our law school have often put you in that position.'"

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

160. See supra Table 5 and accompanying discussion (analyzing how most law professors would prefer greater diversity on campus than they currently encounter).
161. Ian is referring here to the Court's point in Grutter regarding critical mass, discussed supra note 153.
other such groups.” Ian sees the importance of including as many perspectives as possible and knows it is more likely that individuals will speak up and be seen as representing their own opinion—not their group’s opinion—when there is a critical mass; yet:

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

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

CONCLUSION

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

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

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162. Deo, supra note 8, at 664.
163. Id. at 662.
164. See, e.g., Deo et al., supra note 70; Gurin et al., supra note 70; Deo, supra note 3.
diverse backgrounds, those who might work internationally, and for any one of them who may one day come before a female judge.

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

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

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