

# The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective

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## I. INTRODUCTION

My contribution to this symposium on “The Future of Legal Education” sketches one dean’s thoughts on the case for the importance of diversity in law schools.<sup>1</sup> Let me begin with two questions. In these times, can a truly excellent law school have a homogenous student body and faculty? Can we truly—and do we want to—imagine a top-twenty-five law school comprised of predominantly white men?

Law-school deans at virtually each and every turn receive direction and guidance on how to achieve a more diverse student body and faculty.<sup>2</sup> Before being selected for the job, most law deans, as well as most other campus leaders, will have had a career in which they were conditioned to express their deep and enduring commitment to diversity. Despite this oft-stated commitment, the racial diversity of law-school student bodies and faculties leveled off in the early twenty-first century.<sup>3</sup>

Before becoming a dean, I firmly believed—and continue to believe—that racial, socioeconomic, and other kinds of diversity among students and faculty is critically important to ensure excellence at any law school. In my estimation, for reasons outlined in this Essay, diversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any law school worth its salt.

In an increasingly diverse nation and integrated global political economy, who would want to be a dean assigned the unenviable task of defending homogeneity within a law school to the public, faculty, and students? To the contrary, I have advocated that both student and faculty diversity should be factored into the multivariable formula employed by the

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1. I presented this paper at a February 2011 symposium organized by the *Iowa Law Review* on “The Future of Legal Education.” UC Davis law students Joanna Cuevas Ingram, Janet Kim, and Aida Macedo provided helpful research and editorial assistance. Some of the thoughts presented in Parts II and III were adapted from Vikram David Amar & Kevin R. Johnson, *Why U.S. News and World Report Should Include a Diversity Index in Its Ranking of Law Schools*, FINDLAW (Mar. 12, 2010), <http://writ.news.findlaw.com/amar/20100312.html> [hereinafter Amar & Johnson, *Student Diversity*], and Vikram David Amar & Kevin R. Johnson, *Why U.S. News and World Report Should Include a Faculty Diversity Index in Its Ranking of Law Schools*, FINDLAW (Apr. 9, 2010), <http://writ.news.findlaw.com/amar/20100409.html>. In 2010, I served as chair of the Association of American Law Schools (“AALS”) Committee on the Recruitment and Retention of Minority Law Teachers and Students. Portions of this paper were presented at the AALS 2011 Annual Meeting on a program sponsored by this Committee, which included law deans discussing the challenges of diversifying law faculties.

2. See, e.g., AM. BAR ASS’N, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS? 17–24 (2010).

3. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 870 (2010 ed. 2009) [hereinafter ABA-LSAC OFFICIAL GUIDE] (presenting data of total law-school minority enrollment from 1987–88 through 2008–09).

much-watched *U.S. News & World Report* rankings of law schools.<sup>4</sup> Those rankings, for better or worse, have a profound influence on the decisions made by law schools as well as the existing incentives for law-school administrators.<sup>5</sup>

This Essay builds on the premise that diversity is highly relevant to evaluating the quality of a law school and the education of its student body. It sketches the arguments for a multitude of diversities—racial, socioeconomic, gender, and more—in order for U.S. law schools in their student bodies and faculties to best achieve their educational mission. Borrowing liberally from the Supreme Court's rejection of a constitutional challenge to the University of Michigan Law School's race-conscious admissions program in *Grutter v. Bollinger*,<sup>6</sup> Part II of this Essay considers the educational benefits offered by a diverse law-school student body. Part III outlines the similar, yet somewhat different, teaching and scholarship benefits that a diverse law faculty brings to a high-quality legal education. Part IV outlines the educational importance of diversity among law students and faculty based on a wide array of experiences, characteristics, and knowledge other than race, and summarizes some of the legal restrictions law schools face in achieving greater diversity. Part V of this Essay discusses the limited incentives for deans and law schools engaged in the active pursuit of diversity among students and faculty.

## II. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY

The arguments in favor of the benefits of a diverse student body to a legal education are familiar to most lawyers, law professors, students, and university administrators. This Part of the Essay outlines those benefits, with Part III building on that foundation to extend the rationale to faculty.

4. See *infra* Part V. I admittedly am far from the only law-school dean truly committed to diversity among students and faculty. See, e.g., Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011 (2009).

5. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009) (attributing increasing law-school fees in part to increased competition for higher rankings among law schools); MICHAEL SAUDER & WENDY ESPELAND, LAW SCH. ADMISSION COUNCIL, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS (2009), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>; Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105 (2006). But see Rachel F. Moran, Commentary, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383 (2006) (questioning the influence of the *U.S. News* rankings on legal education).

6. 539 U.S. 306 (2003).

## A. GRUTTER V. BOLLINGER

As the U.S. Supreme Court has proclaimed, a diverse student body provides a richer learning environment than a homogeneous one for students, who will then be better prepared to succeed and thrive in the incredibly diverse real world of lawyers and clients that is the modern United States, as well as the world. University educators have embraced the dominant modern justification invoked for affirmative action that diversity, racial and otherwise, provides tangible and concrete educational benefits to students. As discussed in this section, this justification served as the basis on which the Supreme Court in 2003 rejected a constitutional challenge to an elite public law school's engaging in carefully crafted race-conscious affirmative action in admissions. The diversity rationale for affirmative action contrasts with the remedial justification for affirmative action—that is, that race-conscious affirmative action is necessary to remedy past discrimination against racial minorities by governmental actors.<sup>7</sup>

In the landmark decision of *Grutter v. Bollinger*,<sup>8</sup> the Supreme Court, in an opinion written by Justice Sandra Day O'Connor, addressed the constitutionality of the University of Michigan Law School's race-conscious affirmative-action program. The Court found "compelling" the law school's stated goals of having a diverse student body, stating that "[the law-school defendants] assert only one justification for their use of race in the admissions process: *obtaining 'the educational benefits that flow from a diverse student body.'* . . . The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by [the defendants] and their *amici*."<sup>9</sup>

The Court lauded the "substantial" educational benefits that flow from a diverse student body.<sup>10</sup> A diverse student body facilitates "cross-racial

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7. For in-depth analysis of the differences between the two separate and distinct justifications for affirmative action, as well as their relative significance, see Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907 (2010). The diversity rationale sees a diverse student body as benefiting the legal education of all—including nonminority—students. See David Kow, *The (Un)compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*, 20 LA RAZA L.J. 157 (2010). This rationale is separate and distinct from the claim that affirmative action should be employed to "remedy" past discrimination against racial minorities and thus to benefit those minorities. See, e.g., Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (contending that past discrimination justifies remedial affirmative action by the University of California); Richard Delgado, *Why Universities Are Morally Obligated To Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165 (1997) (making the same basic arguments for the University of Colorado).

8. 539 U.S. 306 (2003).

9. *Id.* at 328 (emphasis added) (citation omitted).

10. *Id.* at 330. For a study on the benefits of diversity to higher education, see Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002). See also Chris Chambers Goodman, *Retaining Diversity in the Classroom:*

understanding,’ helps to break down [enduring] racial stereotypes,” and leads to “classroom discussion [that] is livelier” and “more enlightening and interesting.”<sup>11</sup> In addition, a diverse student body “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>12</sup> Moreover, the “skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.”<sup>13</sup>

Put simply, the Supreme Court concluded that diversity among the students in a law school generally contributes to a better legal education than that offered by a more homogeneous student body. This has become the conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today.<sup>14</sup>

Few could, or do, seriously claim that student diversity can somehow be viewed as an impediment to a high-quality legal education. Even opponents of race-conscious affirmative action tend not to wholly disregard the benefits of diversity but instead generally focus on criticizing the means—the consideration of race and deviation from so-called “color blind” standards<sup>15</sup> and “merit”<sup>16</sup>—employed by some law schools in an effort to achieve racially diverse student bodies and faculties.<sup>17</sup> Along these lines, opponents of race-conscious admissions often tend to pit student quality against diversity as either/or propositions, rather than attempt to integrate diversity into the definition of the overall excellence of a student body (and thus of a law school).<sup>18</sup>

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*Strategies for Maximizing the Benefits That Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663 (2008) (articulating ways in which law schools can maximize the educational benefits of a diverse student body).

11. *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

12. *Id.* (quoting Brief for American Educational Research Ass’n et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

13. *Id.* The Court also noted that educational researchers, military and corporate leaders, and others had filed amici curiae briefs in support of the Michigan Law School’s claim that the affirmative-action program promoted a compelling state interest by furthering these educational benefits. *Id.* at 330–31.

14. See, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998).

15. For the classic critique of color-blindness as a remedy to the legacy of racial discrimination in the United States, see Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN. L. REV. 1 (1991).

16. For critical analysis of the concept of merit, see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449 (1997).

17. See sources cited *infra* note 82.

18. See Anderson, *supra* note 4, at 1035–36; Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 602 (2009); Elizabeth Rindskopf Parker, *A Dean’s Dilemma or Lessons in Diversity*, 37 U. TOL. L. REV. 117, 119–20 (2005).

### B. POLICY ARGUMENTS AGAINST RACE-CONSCIOUS ADMISSIONS SCHEMES

The Supreme Court's decision in *Grutter v. Bollinger* in no way ended the public debate over the propriety of reliance on race in the admissions decisions of colleges and public universities, a subject returned to in Part IV of this Essay. The Court simply held that a carefully crafted, individualized admissions scheme that employs race as one factor among many in an individualized, holistic review of the applications is constitutional.

Universities, of course, are in no way compelled to adopt a race-conscious admissions scheme and can decide for legitimate reasons not to consider race in the admission of students. At least for the time being, the Supreme Court's decision in *Grutter* shifted the place of the debate from the courts to the political arena and the court of public opinion.<sup>19</sup>

As a policy matter, a heated debate continues over whether colleges and universities should engage in race-conscious affirmative action even if it is constitutionally permissible. In a much-publicized law-review article, Professor Richard Sander, for example, published a study that he contended showed that affirmative action in operation results in a "mismatch" of the qualifications of African-American students and the rest of the student body at the law school to which they are admitted and enroll.<sup>20</sup> The end result, Sander claimed, is that African Americans are less successful academically than they would be if they had attended law schools in which their qualifications were better "matched" to those of their classmates. The corollary of this finding is that black law students, even if they don't know it, would be better off without affirmative action. The Sander study provoked nothing less than a firestorm of controversy, with many informed observers vociferously criticizing the study and its conclusions.<sup>21</sup>

Similar to the assertion that affirmative action allows for the admission and enrollment of minorities less qualified than the general student body, one persistent concern expressed about affirmative action is that the consideration of race in the admissions process stigmatizes racial minorities among their peers as both unqualified and undeserving and thus injures, rather than assists, minority students. U.S. Supreme Court Justice Clarence Thomas, who is African American, has repeatedly, and quite forcefully, voiced this concern.<sup>22</sup>

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19. See *infra* Part IV.A.

20. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371, 449–53 (2004).

21. See, e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1 (2005).

22. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) ("The majority of blacks are admitted to the [University of Michigan] Law School because of discrimination, and because of this policy all are tarred as undeserving,

The claim that affirmative action stigmatizes minority students is hotly disputed. A 2010 study concluded that “[u]nderrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.”<sup>23</sup> Another study similarly concludes that affirmative action does not stigmatize minority students, but rather that preexisting racial bias stigmatizes them as undeserving and unworthy of admission.<sup>24</sup>

Responding to policy-based and other concerns, a number of states, including Michigan, California, and Washington, have prohibited the consideration of race in the admissions schemes of their respective public colleges and universities.<sup>25</sup> The future vitality of *Grutter v. Bollinger*—and affirmative action generally—also has been the subject of lively discussion.<sup>26</sup> Part of that debate has centered on Justice O’Connor’s optimistic suggestion that colleges and universities might not need to utilize race-conscious affirmative action to achieve diverse student bodies in another twenty-five years.<sup>27</sup>

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This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. . . . The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”); Christine Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT'L BLACK L.J. 1, 62–68 (2010) (reviewing the stigma argument against affirmative action); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1812 (2006) (arguing that the external stigma of affirmative action contributes to higher attrition rates among African-American associates at law firms).

23. Deidre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) (emphasis omitted).

24. See Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 (2008).

25. See Bowen, *supra* note 23, at 1202.

26. See, e.g., Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577 (2009). Some of the scholarly criticism of *Grutter* has been harsh. See, e.g., Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705 (2008); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633 (2005).

27. See *Grutter*, 539 U.S. at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” (citation omitted)). For critical analysis of Justice O’Connor’s judicially created twenty-five-year time limit on affirmative action, see Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006); Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004); see also Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 193 (2004) (“Justice O’Connor’s timetable for eliminating race-conscious affirmative action is unrealistic. Racial inequality in conventional measures of merit will persist into the foreseeable future, because this inequality is

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Importantly, a relatively diverse student body does not necessarily mean that during law school, the experiences of women and minorities will be identical to those of white male students.<sup>28</sup> The same, of course, is true for minority and women law-faculty members.<sup>29</sup> This should not be surprising in light of the fact that different racial groups and women have radically different experiences than white men in just about every other facet of American social life.

Obviously, law schools must be vigilant and make continuing efforts to improve the quality of the learning environment for all students.<sup>30</sup> Even with a diverse student body, vigilance by law-school administrators is necessary to create and maintain a nurturing, inclusive community and overall supportive learning environment for all students and faculty. Along these lines, one commentator has contended that the diversity rationale of *Grutter v. Bollinger* requires a careful analysis of the entire law-school curriculum to ensure that it incorporates and reinforces notions of inclusiveness, and thus maximizes the educational benefits of a diverse student body.<sup>31</sup>

In the end, the Supreme Court in *Grutter v. Bollinger* confirmed what had become the conventional wisdom—although one that is not without its critics—that a racially diverse student body contributes to a better learning environment for students and a higher-quality legal education.

### III. EDUCATIONAL BENEFITS OF FACULTY DIVERSITY

At least as far back as the long struggle for integration in the public schools that culminated in *Brown v. Board of Education*,<sup>32</sup> the United States has been preoccupied with diversity within student bodies. There has been a parallel, often overlapping, discussion and debate of more recent origin about the benefits of diversity within law faculties.

One rather obvious question is whether the rationale for diversity among the student body endorsed by the Supreme Court in *Grutter v.*

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part of a much larger dynamic process that produces persistent racial inequality in many areas.”).

28. See Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1278–79 (2005) (finding, based on a survey of law students at UC Davis School of Law, that experiences of women and minority students were significantly more negative than those of white men).

29. See *infra* Part III.C.1 (discussing the need for a “critical mass” of diverse law faculty).

30. See Cassman & Pruitt, *supra* note 28, at 1282–84 (discussing the need for increased diversity among students and faculty to achieve a supportive educational environment).

31. See Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 Hous. L. Rev. 1, 19 (2006) (“Classroom features that maximize diversity make use of the diverse student body in order to enhance interaction and learning.”).

32. 347 U.S. 483 (1954) (finding that de jure segregation of African Americans in public schools is unconstitutional); see *Sweatt v. Painter*, 339 U.S. 629 (1950) (addressing a constitutional challenge to the University of Texas Law School’s discrimination against blacks).

*Bollinger* applies with equal force to law-school faculties.<sup>33</sup> In essence, does a diverse law faculty promote a better learning environment for students? I believe that it does.

Among other things, a diverse faculty both (1) measurably benefits the education, broadly defined, of law students, and (2) contributes to rich, cutting-edge legal scholarship. Both of these are important goals that obviously should be included in any law school's pursuit of academic excellence.

#### A. THE BENEFITS OF FACULTY DIVERSITY TO TEACHING

Although it is somewhat cliché to say it, law students want and need role models.<sup>34</sup> This is especially the case for women and minority students, two groups that historically have been systematically excluded from law schools and the legal profession in the United States. A full representation of women in law-school faculties, for example, confirms in the eyes of women law students that they can be effective lawyers, can succeed, and do belong in the legal profession.<sup>35</sup> It also can provide similar lessons to women generally, men (including but not limited to other students), and the general public.

Put simply, women faculty members can serve as positive role models to women law students. In that vein, the confirmation to the U.S. Supreme Court of Justices Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, the first women on the High Court (and all added since 1981), sent powerful messages to women lawyers, as well as law students, women generally, and men, about the possibility for women to rise to the highest echelons of the legal profession.<sup>36</sup>

33. See L. Darnell Weeden, *Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 BERKELEY J. EMP. & LAB. L. 511 (2005).

34. See Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1991); Enrique R. Carrasco, *Collective Recognition as a Communitarian Device: Or, Of Course We Want To Be Role Models!*, 9 LA RAZA L.J. 81 (1996); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991); see also Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 871 (1995) ("The visible competence of minority group members may reduce outsiders' negative stereotypes and reinforce positive ones about the group as a whole."); Antoinette Sedillo Lopez, *Latinas in Legal Education—Through the Doors of Opportunity: Assimilation, Marginalization, Cooptation or Transformation?*, 13 AM. U. J. GENDER SOC. POL'Y & L. 109 (2005) (highlighting the importance of role models for women of color in law-school faculties). Admittedly, the role-model rationale for affirmative action has been criticized. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

35. See Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 352 (2003) (emphasizing the significance of representation and support by women and people of color for newcomers when entering professions dominated by white males).

36. See Judith S. Kaye, *A Life in the Law*, 30 SETON HALL L. REV. 752 (2000) (discussing the significant impact of Justice Sandra Day O'Connor's appointment to the Supreme Court from the perspective of the Chief Judge of the Court of Appeals of New York); Susan A. Berson, *Making Herstory*, A.B.A. J., Mar. 2010, at 28 (commenting on the difficulties that women in

The role-model principle applies to minority law students as well. African-American, Latina/o, Asian-American, and Native-American students often clamor for more role models on their law-school faculties and consistently press for more diverse faculties at law schools across the country.<sup>37</sup> The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively “teaches” them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, scholars, judges, and policy makers. For similar reasons, the appointment of the first African-American Justices, Justices Thurgood Marshall<sup>38</sup> and Clarence Thomas,<sup>39</sup> and the first Latina, Sonia Sotomayor,<sup>40</sup> to the U.S. Supreme Court figuratively told African-American and Latina/o students—as well as students, lawyers, and the public at large—something important about the ability of African Americans and Latina/os to ascend to the pinnacle of the legal profession.<sup>41</sup>

For a number of years, law-school administrators and faculties have recognized the need to increase the number of minorities on law-school

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leadership positions experience); Danielle E. Reid, *6 Who Have Made a Difference: Mentors and Role Models for Women Lawyers*, N. J. LAW., Aug./Sept. 1995, at 11 (describing the adversity faced by women in leadership positions and the need for women in power to serve as mentors to other women).

37. See generally Carrasco, *supra* note 34 (commenting on how role models provide “proof that the equal opportunity principle really works,” which in turn motivates minority students to attend law school).

38. See Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 163 (2000) (demonstrating that pioneers like Justice Thurgood Marshall set an example of advocacy and visibility not only for people of color, but also for gay-rights advocates); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 3–7 (2002) (discussing the powerful message sent to the African-American community with the confirmation of Justice Marshall to the Supreme Court).

39. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 482 (2000) (contending that Justice Clarence Thomas was confirmed as a Supreme Court Justice because of his status as a conservative role model to many whites: “[A]s a role model, Thomas presented an alluring image to many white Americans. Thomas offered the promise that if other blacks simply would persevere, and leave behind concerns about racism, they could go as far as Thomas had gone in his meteoric rise to High Court nominee.”).

40. See Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice of the U.S. Supreme Court: The Assimilation Demand at Work*, CHICANA/O-LATINA/O L. REV. (forthcoming 2011); see also Johnson, *supra* note 38, at 7 (“As Thurgood Marshall’s appointment did for African Americans, the addition of the first Latina/o to the Supreme Court could have significant impacts for the greater Latina/o community, as well as to the Court and the nation as a whole.”); Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 549 (2010) (arguing that pioneers in a field must be more than mere cosmetic symbols to further ideals of true diversity and progress).

41. Cf. *supra* text accompanying notes 35–36 (discussing the importance of having more women on law faculties and courts).

faculties and, to a certain extent, have made efforts to hire more of them.<sup>42</sup> Many law schools aggressively recruit minority faculty candidates, with the competition especially keen for those with the most elite credentials.

The persistent lament of law schools that a “pool problem”<sup>43</sup> exists for minority faculty due to a dearth of “qualified” minorities in the legal profession carries weight. Relatively few minority graduates possess the stratospheric credentials that are most coveted by law schools, such as a degree from the very best law schools (defined quite—some would say unduly—narrowly by some schools) and a coveted clerkship for a Supreme Court Justice, with diversity among Supreme Court clerks nearly nonexistent.<sup>44</sup> The persuasiveness of the “pool problem” excuse, however, has markedly declined since the 1950s as law-school student bodies have slowly but surely become more diverse. With respect to women, few could dispute that, in these times, with women comprising approximately one-half of all law students,<sup>45</sup> there are plenty of well-qualified women law-school graduates in the pool of potential law professors.

There are other benefits to having a diversity of backgrounds represented among teachers in law-school classrooms. For example, might it

42. See Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 455 (2000) (arguing that the benefits of a diverse faculty in clinical education are similar to those of a diverse student body, including the benefits of enhanced perspectives and the “robust exchange of ideas” (quoting Jonathan Alger, *When Color-Blind Is Color Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL’Y REV. 191, 199 (1999))); Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 769 (2010) (referring to the substantial progress in the hiring of faculty members of color in law schools since 1995). This is not to say that further work to diversify law faculties is not necessary. See Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235 (2008) (highlighting the need for increased hiring of Latina/o law faculty).

43. See Anjali Chavan, *The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 528 (2010) (describing the “pool problem” as the idea that law schools are producing relatively few minority students to meet the demands of law firms seeking to hire minority attorneys); Akshat Tewary, *Legal Ethics as a Means To Address the Problem of Elite Law Firm Non-Diversity*, 12 ASIAN AM. L.J. 1, 8 (2005) (criticizing the claim of law firms of a “pool problem” as explaining the lack of diversity because of a small number of qualified minority law graduates in the applicant pool; the percentage of minorities attending elite schools far exceeds the percentages at top law firms).

44. See Tony Mauro, *U.S. Court Justices Grilled over Lack of Diversity Among Clerks*, N.J. L.J., Mar. 20, 2000, at 11 (reporting on a congressional hearing concerning the paucity of minority law clerks selected by Supreme Court Justices); Joan Biskupic, *Two Justices Defend Lack of Minority Court Clerks*, WASH. POST, Mar. 16, 2000, at A25; Michael A. Fletcher, *As Term Opens, Lack Of Diversity Is Decried*, WASH. POST, Oct. 6, 1998, at A3.

45. See ABA-LSAC OFFICIAL GUIDE, *supra* note 3, at 870; see also Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 544 (1988) (arguing that the alleged difficulty that law schools experience in finding qualified minority and female faculty candidates is exaggerated); Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 98 n.68 (1995) (contending that there is an adequate pool of qualified women in the top ten percent of their law schools and women therefore should be adequately represented among U.S. Supreme Court clerks).

not be possible—some would contend probable—that a woman teaching the law of rape, abortion, or employment discrimination might present the law to students in different ways, with different perspectives, experiences, and—at a most fundamental level—knowledge than her male counterparts.<sup>46</sup> Recall, for instance, Justice Sandra Day O'Connor's pivotal role in preserving the right to abortion access in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>47</sup> Similarly, Justice Ruth Bader Ginsburg reportedly swayed several of her male colleagues on the Supreme Court, who appeared unconvinced at oral argument, in the 2009 decision holding that a strip search of a middle school woman, incorrectly thought to be concealing an over-the-counter pain medication, violated the Fourth Amendment.<sup>48</sup>

Similarly, an African-American man might understandably bring an entirely different set of perspectives, experiences, and knowledge to bear on the classroom discussion of the phenomenon of racial profiling by police in a criminal-law or criminal-procedure course than the average white colleague might be able to offer.<sup>49</sup> Harvard professor Charles Ogletree, who is African American (or, for that matter, Harvard's Henry Louis Gates, Jr., whose racially charged encounter with the Cambridge, Massachusetts, police in the summer of 2009 made the national news, with President Obama even entering the fray),<sup>50</sup> might teach criminal law and criminal procedure differently than, say, Wayne LaFave, who is white.<sup>51</sup> This is true even though

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46. See, e.g., SUSAN ESTRICH, REAL RAPE (1987) (critically analyzing the prosecution of the crime of rape of women in the United States); see also Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1 (2010) (analyzing the impact of race and gender of faculty on issues covered in first-year law-school classes).

47. 505 U.S. 833 (1992). For discussion of Justice O'Connor's role in the Supreme Court's reaffirmation of *Roe v. Wade*, 410 U.S. 113 (1973), see Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373, 389–92 (2006).

48. See Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009); Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A; Adam Liptak, *Strip Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, N.Y. TIMES, June 26, 2009, at A16.

49. See M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 110 (2009) (addressing “the unique problems of teaching racialized issues of criminal justice in racially homogeneous classrooms”); see also Deo, Woodruff & Vue, *supra* note 46; cf. Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 11–22 (2004) (summarizing how judges of diverse backgrounds enhance the perspectives among judges and benefit the judicial decision-making process).

50. See CHARLES OGLETREE, THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA 9–13 (2010).

51. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (discussing the contention of a law professor, based on his experience as a federal prosecutor and as an African American, that juries should refuse to convict African Americans of drug crimes); Deo, Woodruff & Vue, *supra* note 46, at 18–19 (identifying in a case study of first-year criminal-law classes the tendency of white male professors to sidestep

few would seriously dispute that Professor LaFave is one of the leading criminal-procedure scholars of his generation.<sup>52</sup>

Along similar lines, Latina/o and Asian-American law professors, with direct or indirect experience with, and knowledge of, how their communities are affected, might bring entirely different perspectives to bear on immigration law and enforcement than even brilliant colleagues of different backgrounds could be expected to offer.<sup>53</sup> Similarly, a Native-American faculty member might have an entirely different perspective on, as well as knowledge of, federal Indian law than other professors would be in a position to provide.<sup>54</sup> Perhaps rather obviously in light of the events of the first decade of the twenty-first century, Arab or Muslim law professors might hold wholly different perspectives on the plethora of measures the U.S. government put into place in the name of security after September 11, 2001, than faculty members from different backgrounds.<sup>55</sup>

And these are only the most obvious examples. Importantly, this difference of perspective is not limited to particular subject matters that directly implicate race or gender—it might also be expected to apply to a wide variety of legal topics. Professor Patricia Williams, for example, famously discussed the importance of formality to a black woman in contract negotiations and formation as a means of establishing her credibility,

discussions of diversity); Dubin, *supra* note 42, at 455–60 (analyzing the enhanced multiperspective and cross-cultural education that professors of color may bring into the classroom).

52. See generally WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2008); WAYNE LAFAVE, CRIMINAL LAW (5th ed. 2010).

53. Latina/os and Asian Americans are overrepresented among law professors who teach immigration law. Their backgrounds, along with attracting them to the field, might influence their scholarly analysis, for example, of the role of race in immigration law and enforcement. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 552–54; Bill Ong Hing, *Asian Americans and Immigration Reform*, 17 ASIAN AM. L.J. 83 (2010).

54. See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL (Jo Carrillo ed., 1998); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

55. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002). The same is true with respect to analysis of the long-standing political conflict in the Middle East. See George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994); George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 DENVER J. INT'L L. & POL'Y 41 (2009).

autonomy, and legitimacy as a commercial actor.<sup>56</sup> Along similar lines, I have highlighted the importance of discussing race in the teaching of the core civil-procedure course for first-year students, a course that focuses generally on the civil-litigation process.<sup>57</sup>

#### B. THE BENEFITS OF FACULTY DIVERSITY TO LEGAL SCHOLARSHIP

Nor is the classroom the only place where the diversity of a law faculty matters. Differences of perspective, experience, and knowledge can influence legal scholarship just as they can affect teaching. Even if one feels uneasy over the concept of a “voice of color,”<sup>58</sup> it is an unquestionable truth that, as in teaching,<sup>59</sup> members of different minority groups in the aggregate bring different life experiences, perspectives, and knowledge to bear on the analysis of the law and legal doctrine than their white counterparts.

Consider the many unique contributions to legal scholarship offered by Critical Race Theory and Critical Latina/o Theory,<sup>60</sup> established genres of legal scholarship that abound with minority scholars. The same is true for women legal scholars.<sup>61</sup> It would be startling, moreover, if the different backgrounds of these scholars did not influence their scholarship to a certain degree.

Of course, not all members of minority groups or women will add new, unique, or different perspectives to the mix. My claim is significantly more limited in scope. A law faculty with a robust diversity of perspectives, experiences, and knowledge can help enrich law teaching and legal

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56. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146–48 (1991). For other examples, see Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545 (2006) (book review); Samantha A. Moppett, *Acknowledging America’s First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267 (2010); Laura Spitz, *I Think, Therefore I Am; I Feel, Therefore I Am Taxed: Descartes, Tort Reform, and the Civil Rights Tax Relief Act*, 35 N.M. L. REV. 429 (2005); Jennifer B. Wiggins, *Damages in Tort Litigation: Thoughts on Race and Remedies*, 1865–2007, 27 REV. LITIG. 37 (2007).

57. See Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242, 243–45 (2004).

58. See Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

59. See *supra* text accompanying notes 46–57.

60. For examples of leading Critical Race Theory contributions, see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 2d ed. 2010); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Robert W. Gordon & Margaret Jane Radin eds., 1993). *But see* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (questioning in detail the intellectual rigor and scholarly contribution of Critical Race Theory as a body of legal scholarship). For critical analysis of the scholarly and other contributions of LatCrit theory, see Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151 (2008).

61. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (1999) (discussing the influence of feminism on legal doctrine since the 1970s).

scholarship. In turn, the products of a racially and gender-diverse faculty can contribute to the excellence of a law school.

Bedrock premises of the U.S. legal system fully embrace the understanding that a diverse set of perspectives makes a difference in decision-making. For instance, the highest courts in the federal and state systems, as well as intermediate appellate courts, have a group of justices, rather than a single one, deciding cases. Similarly, U.S. courts opt not for a single judge as decision maker but require juries that decide civil and criminal cases to be comprised of a number of jurors (ordinarily twelve) pulled from a cross-section of the community.<sup>62</sup> Based on similar reasoning, the commitment to diversity makes perfect sense in law teaching and scholarship as well.

There is also good reason to consider the diversity of faculties in evaluating the quality of law schools. There, too, one can expect a multiplicity of perspectives to improve the quality of debate and deliberation on contentious, as well as ordinary, issues, which positively impacts both law teaching and legal scholarship.

#### *C. PRACTICAL PROBLEMS IN MEASURING FACULTY DIVERSITY*

Once one concludes that a diverse faculty provides educational value to law students, faculty, and the law school generally, the questions then turn to the practical. This section considers some practical questions raised by efforts to recruit and retain diverse faculty members.

##### 1. How Much Diversity? The Need for a “Critical Mass”

Perhaps most importantly, a “critical mass” of minority faculty members—not just one or two—on a law-school faculty is good for both the teaching and scholarly missions of the law school.<sup>63</sup> This is precisely the same for faculty as the Supreme Court recognized it to be for student bodies.<sup>64</sup> True diversity, not tokenism, should be the goal for a school with respect to its faculty as well as its students.

A meaningful number of minority and female faculty will ensure that students are exposed to a diversity of law professors possessing different experiences, perspectives, and knowledge bases. This diversity will, in turn, provide students with a richer learning environment—one that more likely

62. See 28 U.S.C. § 1861 (2006) (declaring that juries be “selected at random from a fair cross section of the community in the district or division wherein the court convenes”); see also *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

63. See *supra* Part III.A–B.

64. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”).

mirrors the diversity of lawyers, judges, and clients (and their perspectives) that the students will encounter as practicing lawyers.

In contrast, a “token” minority professor teaching a few classes clearly will not have nearly as significant a positive impact on the educational experience of law students as having a greater variety of minority and women teachers.<sup>65</sup> Indeed, seeing and experiencing the diversity of opinion within members of a minority group, and among women, teaches students volumes about racial and gender diversity in and of itself.

As this discussion suggests, a “critical mass” of faculty of color will help to ensure that minority faculty members do not feel as if they represent little more than lip service to diversity. It also will minimize the potential that a minority faculty member will feel that she is looked to by students and colleagues to offer the law school’s “minority perspective,” an uncomfortable predicament for a faculty member. Unfortunately, many minority law professors feel precisely this way,<sup>66</sup> as tokens rather than as representing a true and meaningful commitment to diversity and inclusion.

In addition, a single minority faculty member<sup>67</sup> is more likely to leave a law school for greener (i.e., more diverse) pastures elsewhere. Who, to use Dean Rachel Moran’s vivid phrase, wants to be a “Society of One”? Many minority faculty members have bittersweet memories of being just such a society at various—indeed, sometimes many—stages of their lives. Thus, the retention of minority faculty members will depend in part on the ability of a law school to maintain a “critical mass” of diversity on its faculty.

## 2. Who Counts?

In evaluating the racial diversity of law faculties, it seems relatively clear that we should consider faculty members who are African American, Latina/o, and Native American, all groups that are severely underrepresented in legal education and the legal profession.<sup>68</sup> However, some might immediately ask whether Asian Americans, who are richly represented on college and university campuses across the United States,

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65. See Dubin, *supra* note 42, at 455 (arguing that the benefits of a diverse faculty include enhanced perspectives and “robust exchange of ideas” (quoting Jonathan Alger, *When Color-Blind Is Color Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL’Y REV. 191, 199 (1999) (internal quotation marks omitted))).

66. See Delgado, *supra* note 34, at 1226–31.

67. See Rachel F. Moran, Commentary, *The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 513 (1986) (“[F]ewer [minorities and women] will fall and more will endure successfully as Societies of One, until larger numbers of minorities and women make it possible to create Societies of Two, Three, and more. It takes courage and principle to stand as a Society of One and to preserve the dream deferred until it becomes a community dream.”).

68. See, e.g., Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259, 260 (2010) (“Very few African American males complete the long and daunting journey to enter and advance in the legal profession.”).

should be counted in evaluating the racial diversity of a law faculty.<sup>69</sup> (For now, I will not touch the thorny issues that persons of mixed racial backgrounds raise, which hit close to home.<sup>70</sup>)

Importantly, as in evaluating the diversity of a student body, the benefits of a diverse law faculty accrue with or without societal (or university) underrepresentation of a particular group.<sup>71</sup> A remedial-based rationale for diversifying a law faculty based on a school's past discrimination might lead to a different result.<sup>72</sup> The goal of a diverse faculty including Asian Americans is not premised on the need to remedy past discrimination against Asian Americans, even though such discrimination has been documented as existing at various times by different institutions in U.S. history,<sup>73</sup> but to ensure diversity among law faculties for educational reasons, namely for the benefit of students, faculty, and legal scholarship.

The fact of the matter is that Asian Americans historically have been severely underrepresented in the field of law in the United States and remain so today. Societal and other pressures, including but not limited to enduring racial stereotypes, have historically tracked many Asian Americans into the study of math and the sciences.<sup>74</sup> Some commentators also have claimed that law faculties have based hiring decisions on stereotypes of the so-called "passive" or "quiet" Asian to argue that Asian-American faculty

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69. See Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 136–42 (2008) (discussing support in the 1970s from Asian-American advocacy groups for the UC Davis School of Medicine admissions program that included Asian-American applicants); Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545, 569 (2005) ("[C]ourts, including the United States Supreme Court, erroneously view Asian Americans as a uniform, successful group. If judges and courts do not distinguish between the 'overrepresented' and 'underrepresented' Asian Americans, they may continue overlooking the needs of Asian Americans in equal protection jurisprudence.").

70. See generally KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* (1999) (analyzing, from an autobiographical perspective, the identity issues faced by a person of mixed Anglo/Latino ancestry).

71. For a discussion of how Asian Americans remain underrepresented in the humanities, social sciences, and law, see Lee, *supra* note 69, at 149, and also see Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39, 49 & n.29 (1996), for a discussion of how Asian Americans are underrepresented on law-school faculties and how they are often stereotypically perceived as competent in technical acumen but lacking in social skills.

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

73. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990* (1993) (analyzing the historical impact of discriminatory U.S. immigration laws on the Asian-American community in the United States); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998) (analyzing history of discrimination against Asian Americans in the United States).

74. See Lee, *supra* note 69, at 149; Yen, *supra* note 71, at 49 & n.29.

candidates with strong academic credentials nevertheless would not cut it as teachers.<sup>75</sup>

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In essence, the relative excellence of law schools rests in part on the diversity of their law faculties as well as of their student bodies. Both should be considered in any legitimate attempt to measure the quality of a law school. A diverse faculty benefits a law school's teaching and scholarship missions. A "critical mass" of diverse law faculty will contribute to a true community among law faculty (as opposed to a "Society of One"), and a law school will be more likely to recruit and retain minority and women faculty.

#### IV. THE IMPORTANCE OF A BROAD CONCEPTION OF DIVERSITY TO A LEGAL EDUCATION

To this point, this Essay has focused on racial minorities and gender in considering the benefits of diverse student bodies and law faculties. In addition to racial diversity, however, diversity of background, experience, and knowledge among law students and faculties also may have positive impacts on the teaching, scholarship, and overall community of a law school. Socioeconomic status,<sup>76</sup> ideology, sexual orientation,<sup>77</sup> disability, and religion, to name a few characteristics, can be important ingredients of a truly diverse educational environment.

The list above is clearly not exhaustive. My intentionally modest point here is that diversity among students and faculty is not limited to racial diversity. Rather, diversity on a great many different dimensions can contribute to a positive and well-rounded learning environment. Along these lines, the Supreme Court in its affirmative-action decisions has consistently recognized the benefits of a robust and broad conception of diversity in a student body.<sup>78</sup>

##### A. BROAD NOTIONS OF DIVERSITY IN BAKKE AND GRUTTER

In the landmark decision of *Regents of University of California v. Bakke*, Justice Lewis Powell, writing for a plurality of the Supreme Court, emphasized that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element."<sup>79</sup> In rejecting what

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75. See, e.g., Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 40–41 (1994).

76. See generally RICHARD D. KAHLINBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996) (advocating class-based affirmative-action systems as alternatives to race-conscious ones).

77. See Kelly Strader et al., *An Assessment of the Law School Climate for GLBT Students*, 58 J. LEGAL EDUC. 214, 214 (2008).

78. See *infra* Part IV.A.

79. 438 U.S. 265, 315 (1978) (plurality opinion).

the Court viewed to be a rigid—and unconstitutional—quota system, he specifically endorsed the vigorous quest for heterogeneity among students along many different dimensions pursued by the admissions process then in place at Harvard College.<sup>80</sup> Indeed, Justice Powell included the Harvard College Admissions Program as an appendix to his opinion to serve as an example of good practices.<sup>81</sup> Few modern observers dispute the benefits of a broad notion of diversity.<sup>82</sup>

Similarly, besides seeking to enroll a critical mass of minority students, the Michigan Law School admissions system upheld by the Supreme Court in *Grutter v. Bollinger* demonstrated a commitment to pursue diversity of many different types in its student body; indeed, “the Law School engage[d] in a *highly individualized, holistic review* of each applicant’s file, giving serious consideration to *all the ways* an applicant might contribute to a diverse educational environment.”<sup>83</sup>

As the Court acknowledged, “[l]ike the Harvard plan, the [Michigan] Law School’s admissions policy [in place at the time] ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, *and to place them on the same footing for consideration, although not necessarily according them the same weight.*’”<sup>84</sup> The Court concluded that “the Law School’s race-conscious admissions program adequately ensures that *all factors that may contribute to student body diversity* are meaningfully considered alongside race in admissions decisions.”<sup>85</sup>

In defending its robust conception of diversity, the University of Michigan Law School offered examples of many different characteristics and experiences that might contribute to a rich learning environment, including students who:

- “have lived or traveled widely abroad”;
- “are fluent in several languages”;
- “have overcome personal adversity and family hardship”;
- “have exceptional records of extensive community service”; and
- “have had successful careers in other fields.”<sup>86</sup>

80. See *id.* at 316–18.

81. See *id.* at 321–24.

82. But see Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1900–10 (1996); Lino A. Graglia, “Affirmative Action,” Past, Present, and Future, 22 OHIO N.U. L. REV. 1207, 1214 (1996); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2076 (1996).

83. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (emphasis added).

84. *Id.* (emphasis added) (quoting *Bakke*, 438 U.S. at 317).

85. *Id.*

86. *Id.* at 338.

Moreover, “[t]he Law School seriously considers each ‘applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.’”<sup>87</sup> After reviewing the record, the Court in *Grutter v. Bollinger* concluded that the University of Michigan Law School, in practice, actually considered diversity other than race—rather than embracing a broad notion of diversity simply as window dressing to obscure overreliance on race in the admissions decision—that an applicant might bring to the law school.<sup>88</sup>

As *Bakke* and *Grutter* suggest, the Supreme Court takes seriously its endorsement of a broad conception of diversity in admission programs. In a companion case to *Grutter*, the Court found that a race-conscious undergraduate admissions plan at the University of Michigan, as a practical matter, made race the decisive factor in admissions decisions—and thus in operation was the antithesis of individualized review—and therefore violated the Equal Protection Clause of the Fourteenth Amendment.<sup>89</sup>

Similarly, the Court just a few years later in a controversial decision struck down local-school-district plans that relied exclusively on race in an “nonindividualized, mechanical’ way” in an attempt to achieve racial balance in public elementary and secondary schools.<sup>90</sup> Race was not merely one factor in the school assignment process at issue in that case. In the estimation of a plurality of the Court, race was “decisive by itself” and did not provide for “meaningful individualized review,”<sup>91</sup> as required by Supreme Court precedent.

Put simply, the Supreme Court has placed its imprimatur on diversity of many sorts in evaluating—and, in the case of *Grutter v. Bollinger*, rejecting—constitutional challenges to the consideration of race in public-college and -university admission systems. Although race unquestionably is a critical contributor to diversity in a student body, most experienced teachers will tell you that it is not the *only* form of diversity that enhances the educational environment for students and faculty. Diversity of class, gender, and many other characteristics and experiences can also contribute positively to the education of the student body, both inside and outside the classroom.

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87. *Id.*

88. *See id.* at 334–35, 339.

89. *See Gratz v. Bollinger*, 539 U.S. 244, 274–75 (2003).

90. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality opinion) (quoting *Gratz*, 539 U.S. at 276, 280 (O’Connor, J., concurring)). The Court’s decision in *Parents Involved* has been much criticized. *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Pamela S. Karlan, Lecture, *What Can Brown® Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009); Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 311 (2007).

91. *See Parents Involved*, 551 U.S. at 723 (quoting *Gratz*, 539 U.S. at 275, 276, 280 (2003) (O’Connor, J., concurring)) (internal quotation marks omitted).

### B. DIVERSITY IN TIMES OF (RACIAL) LIMITS

Importantly, a number of states, as a policy matter,<sup>92</sup> prohibit the use of race-conscious affirmative action. California public colleges and universities, for example, are constrained by Proposition 209, an initiative passed by the state's voters in 1996 that bans the consideration of race in the admissions process.<sup>93</sup>

In recent years, affirmative action has come under attack in the political arena. For example, a few years ago, the American Bar Association ("ABA"), the mainstream national bar association, urged greater diversity at law schools. This step provoked critical scrutiny by, surprisingly enough, the U.S. Commission on Civil Rights; like the administration of President George W. Bush, the Commission expressed skepticism about race-conscious affirmative action.<sup>94</sup> In addition, the ABA, prodded by the Bush administration, imposed law-school-accreditation requirements for bar passage rates despite forceful opposition, contending that such a change might have a detrimental impact on law schools with the largest minority enrollments.<sup>95</sup>

After the Supreme Court's decision in *Grutter v. Bollinger*, political movements opposed to race-conscious admissions blossomed. Today, Proposition 209 in California, as well as similar measures in other states, including Michigan and Washington, prohibit the consideration of race in the admission of students.<sup>96</sup> Although voters passed Proposition 209 several years before the Court decided *Grutter*, the initiative served as a model for some anti-affirmative-action advocates after the decision to ban the consideration of race in university admissions.

Unfortunately, Proposition 209 had serious adverse impacts on minority enrollment, especially of African Americans and Latina/os, in the

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92. See *supra* Part II.B (examining policy arguments against race-based admissions).

93. See CAL. CONST. art. I, § 31(a); see generally Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (analyzing the purposes and assumptions of, and arguments for and against, Proposition 209); Karen Miksch, *Widening the River: Challenging Unequal Schools in Order To Contest Proposition 209*, 27 CHICANA/O-LATINA/O L. REV. 111 (2008) (criticizing Proposition 209 and arguing in favor of race-conscious admission practices).

94. See generally U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS (2007) (reviewing the legal and policy implications of affirmative action in law-school admissions and providing recommendations for future action).

95. See Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 756–57 (2010) (discussing how the Bush administration pressured the ABA to end its push for racial diversity in law-school admissions); Jodie G. Roure, *Achieving Educational Equity and Access for Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CRV. RTS. L. REV. 31, 40 (2009) ("[S]tudents of color generally have lower bar passage rates than Caucasian students. Lower bar passage rates for students of color result in fewer diverse attorneys in the legal profession, which in turn cripples the legal community, especially communities of color.").

96. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 94, at 177 n.176.

California public-college and -university systems.<sup>97</sup> Nevertheless, other states followed suit and banned race-conscious affirmative action.<sup>98</sup>

Consequently, although almost every university and college administrator claims devotion to, and often makes statements endorsing the benefits of, a racially and otherwise diverse student body, race is the only factor eliminated wholesale in a number of states from the admissions decisions of public colleges and universities. And while many observers and activists—at times aggressively—demand more racially diverse law-school student bodies, law schools in the states in which race-conscious admissions are prohibited are handicapped in their efforts to achieve that goal.

Besides barring the consideration of race in admissions, public colleges and universities, unlike their private counterparts, cannot target minority students for scholarships in anti-affirmative-action jurisdictions.<sup>99</sup> Private schools can and do, however, aggressively compete for minority students through financial assistance and, in my experience, have been increasingly successful in luring them away from public law schools.

In the states that prohibit the consideration of race in the admissions process, there have been efforts to ensure socioeconomic and other diversity, without race-conscious affirmative action, among public-college and -university student bodies. For example, the “10% plan” adopted by the Texas legislature guarantees that the top ten percent of the graduating class of every high school in the state is eligible for admission to a Texas public university.<sup>100</sup> In addition, “pipeline” programs like those funded by the Law School Admission Council<sup>101</sup> are designed to increase the numbers of

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97. See generally Jennifer M. Chacón, *Race as a Diagnostic Tool: Latina/os and Higher Education in California*, Post-209, 96 CALIF. L. REV. 1215 (2008) (focusing on the underrepresentation of Latina/os in higher education in California).

98. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1139 (2008); Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives*, 13 MICH. J. RACE & L. 461, 464 (2008).

99. See Chacón, *supra* note 97, at 1219 (“The implementation of Proposition 209 has done nothing to address the disadvantages faced by underrepresented minorities in California’s primary and secondary education system. Instead, Proposition 209 simply has taken away one tool . . . that could have remediated some of those inequalities.”).

100. See William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL’Y REV. 185, 185 (1999). The Texas plan was a response to the court of appeals’ decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which held that the University of Texas law school’s race-conscious admission plan violated the Equal Protection Clause. For a study concluding that the Texas plan has not resulted in the hoped-for positive impacts on the enrollment and retention of minority students, see Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 ECON. EDUC. REV. 1110 (2010); see also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546 (2002) (contending that percentage plans adopted in several states to try to bring diversity to college campuses have had limited success).

101. See Jose Perez, *Cultivating Latino Leaders of Tomorrow*, in DIVERSITY IN LAW PRACTICE 2010: STRATEGIES AND BEST PRACTICES FOR CHALLENGING TIMES 55, 58 (PLI Corporate Law & Practice, Course Handbook Ser. No. B-1795, 2010) (describing “LAWbound,” a Law School

students of diverse backgrounds in the undergraduate pipeline for law school. However, such measures arguably are not as direct or as effective at ensuring racial diversity at law schools as race-conscious admission schemes.<sup>102</sup>

Reminiscent of the Michigan Law School's admissions scheme, but without the consideration of race, the UC Davis School of Law's admissions criteria, for example, instruct applicants about the topics that might be discussed in personal statements submitted in the application process:

The statement may discuss any of a variety of factors, including academic promise, background information and any discrepancies in [grade-point average] and/or [Law School Admission Test] score; growth, maturity and commitment to law study as evidenced, for example, by extracurricular activities, community service, employment experience and advanced study; severe economic disadvantage or physical disability; other factors relating to diversity, including bilingual skills and unusual accomplishments, skills or abilities relevant to the legal profession.<sup>103</sup>

The flexibility of a broad-based, multifaceted approach to diversity allows for an individualized, multifactored assessment of each application, much like that endorsed by the Supreme Court in *Bakke* and *Grutter v. Bollinger*.<sup>104</sup> Although race cannot be a factor in the assessment of applicants in California's public colleges and universities,<sup>105</sup> other forms of diversity can be weighed in the admissions decisions. Consequently, a law school in a

Admission Council program designed to provide support for Latina/o undergraduates interested in the study of law); Charles R. Calleros, *Enhancing the Pipeline of Diverse K-12 and College Students to Law School: The HNBA Multi-Tier Mentoring Program*, 58 J. LEGAL EDUC. 327, 327–28 (2008) (discussing how the Law School Admission Council collaborated to host and fund a national pipeline diversity conference entitled “Embracing the Opportunities for Increasing Diversity into the Legal Profession: Collaborating to Expand the Pipeline (Let’s Get Real)”). At UC Davis, the King Hall Outreach Program strives to provide education and support for undergraduates from socioeconomically disadvantaged backgrounds and those who are first-generation university students to better compete for admission into law school. See *KHOP—King Hall Outreach Program*, UC DAVIS SCH. OF LAW, <http://www.law.ucdavis.edu/prospective/outreach/KHOP.html> (last visited May 8, 2011).

102. See Greenberg, *supra* note 100, at 553; see generally Mex. Am. Legal Def. & Educ. Fund et al., *Blend It, Don’t End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 HARV. LATINO L. REV. 33 (2005) (arguing that racially neutral percent plans cannot replace race-conscious affirmative-action programs in terms of achieving racial diversity); Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1596 (2003) (acknowledging that although the Texas 10% Plan was designed to increase racial diversity in Texas undergraduate colleges, it did not operate in the same way for graduate or professional schools); Sara Hebel, “Percent Plans” Don’t Add Up, CHRON. HIGHER EDUC., Mar. 21, 2003, at A22 (same).

103. *J.D. Admissions: How to Apply*, UC DAVIS SCH. OF LAW, <http://www.law.ucdavis.edu/prospective/JD/how-to-apply.html> (last visited May 8, 2011).

104. See *supra* Part IV.A.

105. See *supra* note 93 and accompanying text.

jurisdiction like California still can strive for a diverse student body—at least with respect to characteristics other than race—through an individualized, holistic admissions process.

In recent years, a related issue touching on racial diversity in higher education has emerged. The access of undocumented immigrant students, who are not eligible for most federally insured loan and other programs, to public colleges and universities has become a deeply controversial issue.<sup>106</sup> This is not simply an issue of access to higher education but is inextricably entangled with the ongoing national debate over immigration reform.<sup>107</sup> The access of undocumented students to public colleges and universities has consequences for the diversity of the student bodies, given that many undocumented students initially came—some when they were young children—from Latin America and Asia and are people of color as we understand that term in the United States.<sup>108</sup>

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The endorsement of broad-based diversity is not the same as achieving it. There are significant impediments to achieving diversity of all different types. For example, the most influential law-school rankings system, which has a measurable impact on how law schools operate, allocate resources, and plan for the future, does not credit diversity of any sort among students and faculty.<sup>109</sup> All told, precious few incentives exist for law schools to strive to achieve diversity. Part V of this Essay offers some thoughts on the practical impediments to the pursuit of a diverse student body and faculty.

#### V. INCENTIVE SYSTEMS FOR LAW SCHOOLS AND DEANS, THE U.S. NEWS RANKINGS, AND THE QUEST FOR DIVERSITY

As anybody reading this Essay is no doubt well-aware, ensuring a diverse student body and faculty, racially and otherwise, is easier said than done. This part of the Essay identifies an oft-ignored, but very real, practical problem facing law schools striving to achieve a diverse student body and

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106. See Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1280–82 (2008). For a detailed analysis of the various bills designed to benefit undocumented college and university students, known collectively as the DREAM Act, see Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009). In December 2010, the latest version of the federal DREAM Act failed in the U.S. Senate. Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3.

107. See generally *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions*, 55 WAYNE L. REV. 1599 (2009) (addressing various issues of immigration reform).

108. See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (analyzing the disparate impacts of the operation of the U.S. immigration laws on poor and working people of color from the developing world).

109. See *infra* Part V.

faculty. Importantly, current reward structures for law schools—and law-school deans—do not reward schools that are truly committed to a diverse student body and faculty as concretely as they reward other outcomes.

Many observers extoll the virtues of diversity among students and faculty, and deans often receive advice on what must be done on this front.<sup>110</sup> However, internal and external reward systems provide minimal—some might even say little—concrete incentives for pursuit of diversity by law schools and law-school deans. Except for informal kudos and general statements of support, law-school deans ordinarily experience relatively few tangible rewards for enrolling a diverse student body or hiring and retaining a diverse faculty. Many university presidents, whom law deans customarily are directly or indirectly accountable to, generally endorse diversity but fail to tangibly reward law schools and administrators that achieve diverse results.

True, a more diverse law school may receive somewhat less pressure—and fewer protests and complaints—for a perceived lack of diversity from student and other groups than less diverse schools. And some faculty, students, alumni, and donors voice generalized support for the pursuit of diversity. However, my experience has been that few large donors—critical to the long-term success of any sitting dean, with development being an increasingly important task of a law dean in times of budgetary scarcity—express much interest in giving to a law school based on the relative success of the school in achieving a diverse student body and faculty.

In stark contrast, many donors and alumni pay close attention to a law school's track record in various law-school rankings, especially the *U.S. News & World Report* annual ranking of law schools.<sup>111</sup> Indeed, I have found that, year in and year out, talk of *U.S. News* rankings often dominates the discussions at virtually any alumni gathering. The *U.S. News* rankings, however, do not measure law-school quality by incorporating into the rankings formula any measure of the diversity of a law school's student body and faculty.<sup>112</sup> Nor, for that matter, do the *U.S. News* rankings expressly incorporate teaching quality or student satisfaction into the rankings, both of which unquestionably contribute to the quality of a law school, the law-school community, and a legal education.<sup>113</sup>

The *U.S. News & World Report* rankings of law schools are an elaborate, albeit by almost all accounts imperfect, rankings system that garners much attention among law-school watchers. Because of their prominence, the rankings also have a dramatic influence on the perceived prestige of a

<sup>110.</sup> See AM. BAR ASS'N, *supra* note 2, at 17–24.

<sup>111.</sup> See U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS: 2011 EDITION (2010).

<sup>112.</sup> See *id.*

<sup>113.</sup> See *id.*

school. Importantly, the rankings have impacts on the operation of law schools seeking to climb the rankings and, as is oft-repeated, “move to the next level.” Schools and administrators respond to the rankings and directly play to the variables factored into the rankings’ formula when making decisions about admissions, faculty hiring, curricular offerings, allocation of resources, and many other facets of the law-school program.

Currently, student *selectivity* factors heavily into the *U.S. News* rankings. The median score on the Law School Admission Test (“LSAT”), the standardized test employed for law-school admissions, accounts for one-half of the measure of a law school’s student selectivity.<sup>114</sup> As a result, law schools compete aggressively through scholarships and financial aid for the students with high LSAT scores, which has been referred to in a jocular way as the “LSAT ‘arms race.’”<sup>115</sup>

In contrast, student *diversity* is not considered at all in the *U.S. News* rankings of law schools. To remedy what I believe to be a serious failing, I have advocated integrating the diversity of law-school student bodies into the influential *U.S. News* rankings.<sup>116</sup>

As with student diversity, I am on record supporting the inclusion of faculty diversity in the formula employed by *U.S. News* for the ranking of law schools. I firmly believe that, for reasons similar to those that militate in favor of diverse student bodies,<sup>117</sup> the greater the diversity within a law faculty, the higher the quality of the legal education for the students and the better the law school.

Some proponents of diversity might reject any consideration of the *U.S. News* rankings as a measure of law-school quality, viewing them as a lost cause when it comes to encouraging law schools to enroll a more diverse student body and to strive for a truly diverse law faculty.<sup>118</sup> Indeed, most law-school deans invariably love to hate the *U.S. News* rankings and have registered powerful complaints; many thoughtful observers have offered

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<sup>114.</sup> See *id.* at 32.

<sup>115.</sup> William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 978 (2004).

<sup>116.</sup> See Amar & Johnson, *Student Diversity*, *supra* note 1. The California State Bar Board of Governors also has asked *U.S. News* to add a diversity category to its law-school-ranking methodology. See Diane Curtis, *Include Diversity in Law School Ratings, Bar Board Says*, CAL. B.J., Feb. 2011, <http://www.calbarjournal.com/February2011/TopHeadlines/TH5.aspx>. *U.S. News* currently includes a separate ranking of the diversity of law-school student bodies; however, this ranking receives relatively little attention. See Goodman, *supra* note 22, at 32 n.115; Espeland & Sauder, *supra* note 18, at 593. To test that assertion, can the reader with any degree of certainty identify which law school is at the top of the latest list of most diverse student bodies? Answer: Florida A&M. See U.S. NEWS & WORLD REPORT, *supra* note 111, at 35.

<sup>117.</sup> See *supra* Part II.

<sup>118.</sup> See Sam Kamin, Commentary, *How the Blogs Saved Law School: Why a Diversity of Voices Will Undermine the U.S. News & World Report Rankings*, 81 IND. L.J. 375, 378 (2006).

reasons why they should be ignored.<sup>119</sup> A few years ago, the deans of nearly all accredited law schools signed a letter that characterized ranking methodologies, such as that of *U.S. News*, as “inherently flawed.”<sup>120</sup> One law-school dean went so far as to flatly refuse to respond to the *U.S. News* survey of information used to rank a school and thus opted out of the rankings.<sup>121</sup>

At first glance, a simple boycott of the *U.S. News* rankings, which consider a great many factors but exclude any measure of student and faculty diversity, might appear to be the appropriate alternative for those schools and deans truly committed to diversity. A boycott, however, would not have much of an impact without mass participation, which seems unlikely; without such participation, a boycott by a school indeed might have negative impacts on a law school’s reputation and prestige if it falls completely out of the rankings.

Moreover, there is nothing like consideration of a factor in the *U.S. News* rankings to grab the attention of—and lead to concrete action by—law-school deans across the United States. Those rankings, for better or worse, have proven to be a critically important consideration—perhaps the most frequently relied upon indicator of law-school quality—by prospective students from all backgrounds when selecting a law school. Prospective faculty members are not much different, although hopefully they are more sophisticated in their decision-making about where to accept a faculty position.

Love them or hate them, it is unquestionably the case that the *U.S. News* law-school rankings have concrete impacts. They directly affect application numbers, yields on offers of admission, and overall law-school enrollment, to name a few measurable impacts. They also have an impact on faculty recruitment, as faculty candidates consider the rankings in deciding which law-school job offer to accept. In certain respects, the rankings can be a self-fulfilling prophecy, with present upward movement contributing to future upward movement as reputational surveys in the current year reflect ascendancy in the rankings in past years.

Moreover, as virtually any sitting law-school dean can tell you, the rankings have less tangible but deep, lasting, and meaningful impacts on the morale of faculty, students, alumni, donors and potential donors, and staff at

<sup>119.</sup> See, e.g., Ronald A. Cass, *So, Why Do You Want To Be a Lawyer? What the ABA, the AALS, and U.S. News Don’t Know That We Do*, 31 U. TOL. L. REV. 573 (2000); Russell Korobkin, *Essay, In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 404 (1998). But see Mitchell Berger, *Why the U.S. News and World Report Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001).

<sup>120.</sup> LAW SCH. ADMISSION COUNCIL, LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS 1 (2005), available at <http://replay.waybackmachine.org/20060209215746/http://www.lsac.org/pdfs/2005-2006/RANKING2005-newer.pdf>.

<sup>121.</sup> See Julie Kay, *Florida Law Dean Boycots ‘U.S. News’ Rankings Survey*, LAWJOBS.COM (May 3, 2010), <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202457535997&slreturn=1&hbxlogin=1>. For other criticisms of the rankings, see sources cited *supra* note 5.

just about any law school,<sup>122</sup> as well as how those constituencies perceive the quality of that school. All want to be affiliated with a school moving up, not sliding down, in the rankings. Put bluntly, people want to be associated with a winner; the rankings are one of the few objective indicators of being one.

As almost any dean whose law school has dipped in the rankings can attest, a law school's decline in the *U.S. News* rankings can mean an extremely long and unpleasant year for the dean. Indeed, law-school deans have reportedly left (some might say have been forced from) their jobs because of a fall in their schools' place in the *U.S. News* rankings.<sup>123</sup> Alternatively, a move upward in a school's ranking makes for a much cheerier group of faculty, students, staff, and alums—as well as campus administrators.

Indeed, the *U.S. News* rankings' methodology arguably penalizes schools seeking to promote diversity. A 2010 Report of the Special Committee on the *U.S. News* rankings by the Section of Legal Education and Admissions to the Bar concludes that, in its evaluation of law-school quality, the current *U.S. News* "methodology tends to reduce incentives to enhance the diversity of the legal profession."<sup>124</sup> In fact, by focusing, for example, on median LSAT scores as the predominant measure of student selectivity,<sup>125</sup> the *U.S. News* rankings arguably inhibit law schools from aggressively pursuing diversity among the student body.<sup>126</sup> At a minimum, the *U.S. News* rankings methodology requires law-school administrators to carefully weigh the ranking implications of any measures—such as less reliance on LSAT scores

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<sup>122</sup>. See Espeland & Sauder, *supra* note 18, at 588; Rachel J. Littman, *Training Lawyers for the Real World Part Two*, N.Y. ST. B.J., OCT. 2010, at 31, 37; Sauder & Lancaster, *supra* note 5, at 109–10.

<sup>123</sup>. See, e.g., Mónica Guzmán, *Dean of UH Law Center Resigning; Move Follows Criticism for Drop in National Ratings*, HOUS. CHRON., Apr. 18, 2006, at B1.

<sup>124</sup>. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON THE U.S. NEWS AND WORLD REPORT RANKINGS 3 (July 15, 2010) (emphasis added), available at <http://amlawdaily.typepad.com/files/f.usnewsfinal-report.pdf>. An ABA committee is currently considering whether to make the LSAT optional for law schools. See Debra Cassens Weiss, *LSAT Would Be Optional Under Possible ABA Accreditation Change*, A.B.A. J. (Jan. 13, 2011, 9:29 AM), [http://www.abajournal.com/news/article/lsat\\_would\\_be\\_optional\\_under\\_possible\\_aba\\_accreditation\\_change/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Daily+News&utm\\_content=Netvibes](http://www.abajournal.com/news/article/lsat_would_be_optional_under_possible_aba_accreditation_change/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Daily+News&utm_content=Netvibes).

<sup>125</sup>. See *supra* text accompanying notes 111–15.

<sup>126</sup>. See, e.g., Janice L. Austin, *LSAT, U.S. News and Minority Admissions*, 80 ST. JOHN'S L. REV. 289 (2006); Espeland & Sauder, *supra* note 18; Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006); Laura Rothstein, *The LSAT, U.S. News & World Report, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN'S L. REV. 257 (2006).

in admissions decisions—designed to increase diversity among the student body.<sup>127</sup>

In reality, my experience has been that few but the true believers seem to care much about—or at least pay more than lip service to—the importance of a racially diverse faculty and student body at a law school. This, perhaps, is too strong a statement. Nonetheless, it undoubtedly is the case that the incentives are less tangible than for other achievements of a law school, such as ascendance in the *U.S. News* rankings and large six-figure (and more) gifts.

From this dean's perspective, one is left to ponder whether a law school should pursue diversity simply because it is the right thing to do (and I firmly believe that it is) and produces concrete educational and scholarly benefits, even if, in the larger scheme of things, it is lightly rewarded in the law-school and decanal reward structure.

## VI. CONCLUSION

Racial diversity is one form of diversity among law students and faculty that may provide educational and other benefits to students, the faculty, and the law school generally. Socioeconomic diversity also can add benefits to a law-school education. Gender and other diversities undoubtedly can as well. This Essay has sketched some of the benefits from diversity in law-school student bodies and faculties.

This Essay also has sought to identify some of the practical challenges for law schools and law-school deans pursuing racial and other forms of diversity in a time of increasing limitations on race-conscious admissions and growing competition for law students and faculty. Although I perhaps have raised more questions (or at least food for thought) than answers, these are important questions that law-school deans—especially those committed to student and faculty diversity—should consider.

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<sup>127.</sup> For a forceful argument for eliminating consideration of LSAT scores in law-school admissions, see Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001).