

ARTICLE

ASSESSING AFFIRMATIVE ACTION'S DIVERSITY RATIONALE

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Ever since Justice Lewis Powell's opinion in Regents of the University of California v. Bakke made diversity in higher education a constitutionally acceptable rationale for affirmative action programs, the diversity rationale has received vehement criticism from across the ideological spectrum. Critics on the right argue that diversity efforts lead to "less meritorious" applicants being selected. Critics on the left charge that diversity is mere "subterfuge." On the diversity rationale's legitimacy, then, there is precious little diversity of thought. In particular, prominent scholars and jurists have cast doubt on the diversity rationale's empirical foundations, claiming that it rests on an implausible and unsupported hypothesis.

To assess the diversity rationale, we conduct an empirical study of student-run law reviews. Over the past several decades, many leading law reviews have implemented diversity policies for selecting editors. We investigate whether citations to articles that a law review publishes change after it adopts a diversity policy. Using a dataset of nearly 13,000 articles published over a sixty-year period, we find that law reviews that adopt diversity policies see median citations to their volumes increase by roughly 23% in the ensuing five years. In addition to exploring the effect

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of diversity policies on median citations, we also explore the effect of diversity policies on mean citations. When doing so, our estimates are consistently positive, but they are largely not statistically significant at conventional levels.

These findings have widespread implications. If diverse groups of student editors perform better than nondiverse groups, it lends credibility to the idea that diverse student bodies, faculties, and groups of employees generally perform better. We thus view these results as empirically supporting the much-derided diversity rationale—support that could prove critical as affirmative action confronts numerous threats.

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INTRODUCTION

Debate about the relative quality of various law review volumes is usually confined to student editors' offices. On rare occasions, such discussion may spill over into the faculty lounge. But, in 2008, as then-Senator Barack Obama began his bid for the White House, the comparative merits of legal scholarship improbably became the subject of national news. *Politico* published an extensive article noting that Obama's presidency of the *Harvard Law Review* "has generated a . . . dust-up in the blogosphere."¹ In 1990, Obama became the first Black person elected to lead the *Harvard Law Review* in its century-long history.² That event generated a tremendous amount of celebratory coverage at the time.³ But eighteen years later, some observers suggested that Obama had presided over a notoriously weak volume of legal scholarship. One commenter on a legal blog counted the total number of citations to Obama's volume and to the adjacent volumes and concluded that "Obama's [Volume] 104 is the least-cited volume of the *Harvard Law Review* in the last 20 years."⁴ Another commenter went further, stating that Obama "presided over a general 'dumbing down'" of the *Review's* standards.⁵

Though it went unstated, the subtext of these remarks was clear: In selecting a Black student as president of the *Harvard Law Review*, the editors who ran that journal had sacrificed quality at the altar of diversity. The implication was that Obama's volume garnered low citations not just by random chance, or because his skills lay more with politics than with selecting law review articles, but because he had been awarded the position in part due to his race. There was, of course, zero evidence that race aided Obama's membership on the law review or his ascension to its presidency.⁶

1. Jeffrey Ressler & Ben Smith, Obama Kept Law Review Balanced, *Politico* (June 23, 2008), <https://www.politico.com/story/2008/06/obama-kept-law-review-balanced-011257> [<https://perma.cc/G3XY-XSCM>].

2. *Id.*

3. See, e.g., Fox Butterfield, First Black Elected to Head Harvard's Law Review, *N.Y. Times* (Feb. 6, 1990), <https://www.nytimes.com/1990/02/06/us/first-black-elected-to-head-harvard-s-law-review.html> (on file with the *Columbia Law Review*); Tammerlin Drummond, Barack Obama's Law: Personality: Harvard Law Review's First Black President Plans a Life of Public Service. His Multicultural Background Gives Him Unique Perspective., *L.A. Times* (Mar. 12, 1990), <https://www.latimes.com/archives/la-xpm-1990-03-12-vw-74-story.html> (on file with the *Columbia Law Review*).

4. Ressler & Smith, *supra* note 1 (quoting LawStatMan, Comment to Barack Obama and the *Harvard Law Review*, Volokh Conspiracy (Feb. 6, 2008), <https://web.archive.org/web/20080207110749/http://volokh.com/posts/1202117776.shtml> (on file with the *Columbia Law Review*)).

5. *Id.* (quoting Ferry Pellwock, Comment to Barack Obama and the *Harvard Law Review*, Volokh Conspiracy (Feb. 5, 2008), <https://web.archive.org/web/20080207110749/http://volokh.com/posts/1202117776.shtml> (on file with the *Columbia Law Review*)).

6. Here is Obama on the question in 2000:

I have no way of knowing whether I was a beneficiary of affirmative action either in my admission to Harvard or my initial election to the

But the idea that there might be a tradeoff between “merit” and diversity was by then so well-ingrained into the public consciousness that the accusation had force even without evidence.⁷

A decade later, similar accusations resurfaced, this time in the form of a lawsuit. In early October 2018, groups of students, faculty, and alumni filed lawsuits against the *Harvard Law Review* and the *New York University Law Review* opposing practices that, they claimed, had “subordinated academic merit to diversity considerations.”⁸ The lawsuits claimed that the law reviews’ policies to diversify their editorial boards have reduced the quality of the articles that the law reviews published by ensuring that articles “are judged by less capable students” and by “dilut[ing] the quality of the students who edit an author’s” work.⁹

Review . . . If I was, then I certainly am not ashamed of the fact, for I would argue that affirmative action is important precisely because those who benefit typically rise to the challenge when given an opportunity. Persons outside Harvard may have perceived my election to the presidency of the *Review* as a consequence of affirmative action, since they did not know me personally.

The First Black President of the *Harvard Law Review*, J. Blacks Higher Educ., Winter 2000–2001, at 22, 24 [hereinafter JBHE, First Black President].

7. See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 331 (2013) (Thomas, J., concurring) (“Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates.”); *Grutter v. Bollinger*, 539 U.S. 306, 371–72 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.”); Transcript of Oral Argument at 51–52, *Grutter*, 539 U.S. 306 (No. 02-241) (statement of Scalia, J.) (“The people you want to talk to are the high school seniors who have seen . . . people visibly less qualified than they are get into prestigious institutions where they are rejected.”); Melvin I. Urofsky, *The Affirmative Action Puzzle: A Living History From Reconstruction to Today* 467 (2020) (“Allowing less qualified people into college or professional school or jobs demeans the institutions themselves. How much faith can we have in the graduates of a medical school when we learn that its affirmative action admits had considerably lower qualifications than the norm?”).

8. Complaint at 6, Fac., Alumni & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev., No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018), 2018 WL 4899065 [hereinafter Complaint Against *NYULR*]; Complaint at 6, Fac., Alumni & Students Opposed to Racial Preferences v. Harvard L. Rev., No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018), 2018 WL 5148474 [hereinafter Complaint Against *HLR*].

9. Complaint Against *NYULR*, supra note 8, at 6; Complaint Against *HLR*, supra note 8, at 6. The lawsuits also make other claims, including that the law reviews give “preference to articles written by women and racial minorities.” Complaint Against *NYULR*, supra note 8, at 6; Complaint Against *HLR*, supra note 8, at 6. This Article focuses on policies aimed at increasing the diversity of the law review editors because it is that policy that more directly implicates the broader issue of diversity in higher education. For further discussion of the lawsuits, see Bob Van Voris, *Harvard Law Review Suit Opens New Front in Admissions-Bias Fight*, Bloomberg (Oct. 8, 2018), <https://www.bloomberg.com/news/articles/2018-10-08/harvard-law-review-suit-opens-new-front-in-admissions-bias-fight> (on file with the *Columbia Law Review*).

These allegations implicate longstanding criticisms of diversity initiatives. Ever since Justice Lewis Powell's 1978 opinion in *Regents of the University of California v. Bakke* made diversity in higher education a constitutionally acceptable rationale for affirmative action programs,¹⁰ critics of affirmative action have pitted diversity against ideals of merit. They have argued that efforts to attain diversity will necessarily lead to lower quality results, as "less meritorious" individuals are selected in place of people with ostensibly stronger qualifications.¹¹

Moreover, scholars and jurists who are critical of affirmative action have frequently cast doubt on the diversity rationale's empirical foundations. In 2014, Professor Peter H. Schuck of Yale Law School contended: "[T]he premises underlying the diversity rationale for race-based affirmative action are empirically tenuous and theoretically implausible."¹² That same year, scholar Abigail Thernstrom similarly asserted that "the entire edifice of [affirmative action] is built on a purely speculative promise that 'diversity' will bring educational benefits."¹³ Two years later, noted economist Thomas Sowell voiced a particularly acerbic version of this skepticism: "Nothing so epitomizes the politically correct gullibility of our times as the magic word 'diversity.' The wonders of diversity are proclaimed from the media . . . and confirmed in the august chambers of the Supreme Court of the United States. But have you ever seen one speck of hard evidence to support the lofty claims?"¹⁴

Such skepticism has made its way to the august chambers of the Supreme Court as well. In 2016, Justice Samuel Alito dissented in an opinion upholding affirmative action at the University of Texas at Austin. In doing so, Justice Alito expressed frustration that those "invoking 'the educational benefits of diversity'" had "not identif[ied] any metric that would allow a court to" assess whether the purported benefits were being realized.¹⁵ Even some supporters of affirmative action have doubted the quality of empirical evidence that has been marshaled to support the diversity rationale. For example, Professor Randall Kennedy of Harvard Law School wrote a book defending affirmative action, titled *For Discrimination*, in which he confessed: "I remain doubtful about social scientific 'proof' of diversity's values; much of that [research] seems exaggerated and predetermined with litigation in mind."¹⁶

10. 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.).

11. See *infra* section I.B.

12. Peter H. Schuck, *Assessing Affirmative Action*, 20 *Nat'l Affs.* 76, 76 (2014).

13. Abigail Thernstrom, *Questioning the Rationale for Affirmative Action*, 16 *Virtual Mentor* 495, 495 (2014).

14. Thomas Sowell, *The 'Diversity' Fraud, Creators* (Dec. 20, 2016), <https://www.creators.com/read/thomas-sowell/12/16/the-diversity-fraud> [<https://perma.cc/38N8-FXXT>].

15. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting).

16. Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* 103 (2013) [*hereinafter* Kennedy, *For Discrimination*].

Professor Kennedy is correct that the existing empirical literature on diversity in higher education is lacking. A major reason is the difficulty of measuring and evaluating performance in a manner that would shed light on the value of diversity in higher education. How can one measure the output of a university (or a law school)? Suppose a law school is able to attract a particularly diverse class for a given year. How would we be able to tell if the class's diversity improved the students' educational experience? Given that students are graded on a curve relative to each other, assessing whether having a more diverse class improves outcomes is not a straightforward task. Accordingly, the empirical evidence on the effects of diversity has remained lacking, and the debate has raged on.¹⁷

It is difficult to exaggerate the stakes of this debate. In January 2022, the Supreme Court agreed to hear lawsuits challenging the affirmative action admissions policies at Harvard University and the University of North Carolina.¹⁸ In Justice Sandra Day O'Connor's 2003 majority opinion in *Grutter v. Bollinger* upholding the University of Michigan Law School's affirmative action policy, she suggested that affirmative action would no longer be necessary in 2028.¹⁹ The Court now could very well be poised to eliminate the practice five years ahead of that schedule.²⁰ This dispute implicates private institutions as much as it does public ones: The Court held in *Bakke* that Title VI of the Civil Rights Act, which prohibits racial discrimination by any private institution that accepts federal funding, is coextensive with the Fourteenth Amendment's Equal Protection Clause.²¹ If diversity provides no benefits, then, under current doctrine, it cannot serve as a compelling governmental interest. If it cannot serve as a compelling governmental interest, then affirmative action programs throughout higher education rest on an infirm foundation and may soon fall.

This Article aims to offer empirical evidence of the effects of diversity in higher education. Indeed, we believe that the lawsuits against the

17. For a survey of the existing literature, see *infra* section I.C.

18. See Adam Liptak & Anemona Hartocollis, Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C., N.Y. Times (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> (on file with the *Columbia Law Review*).

19. 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). The Supreme Court in *Grutter* upheld the University of Michigan Law School's affirmative action policy because it was narrowly tailored to achieve Michigan's compelling interest in achieving a diverse class. See *id.* at 334. By contrast, in the companion case of *Gratz v. Bollinger*, the Court invalidated the University of Michigan's undergraduate admissions program because it reasoned that the program too closely resembled an impermissible quota. See 539 U.S. 244, 271–72 (2003).

20. See Liptak & Hartocollis, *supra* note 18.

21. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 352–53 (Brennan, J., concurring in part) ("Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's . . .").

Harvard Law Review and *New York University Law Review* offer an ideal setting in which to study the influence of diversity policies on group performance in higher education. The work of law review editors involves core higher-education functions: Students work together in a group to evaluate the merits of scholarly work, selecting a few articles to publish from thousands of submissions.²² The editors then edit the substance and style of those articles before publishing them.²³ The articles that student-run law reviews publish have the advantage of presenting a publicly observable outcome: article impact, as measured by citations.²⁴ And although diversity policies for selecting editors may only result in a few additional diverse law students selected as editors, research suggests that even minimal increases in diversity can radically change group decisionmaking.²⁵

We specifically investigate whether the citations to articles that a given law review publishes change after the adoption of a diversity policy for selecting editors.²⁶ To do so, we documented the adoption of diversity policies by the flagship law reviews for the top twenty law schools since 1960. We compiled a dataset of the citations to the nearly 13,000 articles published by leading law reviews during this period. In our preferred specification, we assess changes in the citations of articles published from the five years before a change in a journal's diversity policy relative to the five years afterward.²⁷ We find that law review membership diversity policies increase median article citations by roughly 25%. In addition to exploring the effect of diversity policies on median citations, we also explore the effect of diversity policies on mean citations. When doing so, our estimates are consistently positive, but they are largely not statistically significant at conventional levels.

22. See, e.g., Yale L.J., When to Submit Articles and Essays 2, https://www.yalelawjournal.org/files/WhenToSubmit_4xqshn68.pdf [<https://perma.cc/Y9U4-HBK6>] (last visited Sept. 28, 2021).

23. See Anne Enquist, Substantive Editing Versus Technical Editing: How Law Review Editors Do Their Job, 30 *Stetson L. Rev.* 451, 452 (2000).

24. See, e.g., Most Cited Journals and Journal Articles in HeinOnline—Updated!, HeinOnline Blog (May 4, 2009), <http://heinonline.blogspot.com/2009/04/most-cited-journals-and-journal.html> [<https://perma.cc/X2RL-Z84D>].

25. For other examples of increases in group diversity changing group behavior, see, e.g., Renée B. Adams & Daniel Ferreira, Women in the Boardroom and Their Impact on Governance and Performance, 94 *J. Fin. Econ.* 291, 293 (2009) (finding that “gender-diverse boards are tougher monitors”); Shamena Anwar, Patrick Bayer & Randi Hjalmarrsson, A Jury of Her Peers: The Impact of the First Female Jurors on Criminal Convictions, 129 *Econ. J.* 603, 607 (2019) [hereinafter Anwar et al., A Jury of Her Peers] (finding that “female representation on juries significantly increased conviction rates for sex offence cases”).

26. These policies have been referred to in numerous ways, including affirmative action policies, racial and gender preferences, and diversity policies. We use the term “affirmative action” in the title because we believe it is more widely understood, but we also use the term “diversity policies” throughout this Article in part because we believe it is less politically charged.

27. We performed a robustness check in which we used different windows of time and find consistent results. See *infra* Part III.

Notably, we find that this increase does not appear to be driven by a change in the share of articles a journal publishes on different subjects. One could imagine a diversity policy resulting in a journal publishing more articles on (for instance) constitutional law and fewer on tax law. Because citations systematically vary between subjects—for instance, constitutional law articles are cited more than tax law articles²⁸—the increase in citations to journals that adopted diversity policies could be driven by changes in the subjects of the articles being published. Nevertheless, we find no evidence that journals systematically changed the mix of subjects among the articles they accepted.

These findings have implications beyond the law review setting. If diverse groups of student editors perform better than nondiverse groups, it lends credibility to the idea that diverse student bodies, diverse student organizations, diverse faculties, diverse teams of attorneys, and diverse teams of employees generally could perform better than nondiverse teams. We thus view these results as placing empirical heft behind Justice Powell's much-derided rationale from *Bakke*. To the extent that the results are generalizable, courts should continue to view diversity as a compelling governmental interest when adjudicating affirmative action cases under the Equal Protection Clause or under Title VI.

Before continuing, it is important to acknowledge that citations are not a perfect measure of an article's impact, much less a perfect measure of its quality. In some instances, excellent work is no doubt lowly cited and execrable work is highly cited. Nevertheless, citations are a widely used measure of research impact across different disciplines²⁹ and a reasonable proxy for academic impact, as they indicate the extent to which an article

28. See Ian Ayres & Fredrick E. Vars, Determinants of Citations to Articles in Elite Law Reviews, 29 J. Legal Stud. 427, 431 (2000).

29. See, e.g., Dennis M. Gerrity & Richard B. McKenzie, The Ranking of Southern Economics Departments: New Criterion and Further Evidence, 45 S. Econ. J. 608, 611–13 (1978) (using citations to rank economics departments); Daniel S. Hamermesh, Citations in Economics: Measurement, Uses, and Impacts, 56 J. Econ. Literature 115, 125–42 (2018) (using citations to evaluate economics articles, subfields, journals, professors, and departments); John Mingers & Fang Xu, The Drivers of Citations in Management Science Journals, 205 Eur. J. Operational Rsch. 422, 422 (2010) (“Measuring the scientific impact of researchers’ work is a difficult but important issue Particular attention has been paid to the number of citations that a publication receives.”); Gregory Sisk, Valerie Aggerbeck, Nick Farris, Megan McNevin & Maria Pitner, Scholarly Impact of Law School Faculties in 2015: Updating the Leiter Score Ranking for the Top Third, 12 Univ. St. Thomas L.J. 100, 100 (2015) (“[T]he ‘Scholarly Impact Score’ for a law faculty is calculated from the mean and the median of total law journal citations over the past five years to the work of tenured members of that law faculty.”); Iman Tahamtan, Askar Safipour Afshar & Khadijeh Ahamdzadeh, Factors Affecting Number of Citations: A Comprehensive Review of the Literature, 107 Scientometrics 1195, 1196 (2016) (“When a particular paper is cited more frequently than others, it is usually concluded that it has a higher quality compared to other papers.” (citation omitted)). We further discuss the limitations and shortcomings of citations as a measure of output. See *infra* notes 200–202 and accompanying text.

has shaped the scholarly conversation.³⁰ In addition, citation counts are particularly pertinent because law review editors themselves consider how likely a piece may be cited when deciding whether to publish it.³¹ Thus, the measure used here is one that law review editors themselves prioritize. It is advantageous to assess the performance of law review boards according to a metric they value themselves. We also have it on good authority that citations are important to law professors, who endeavor to place their articles in publications with high visibility in order to maximize their citations.³²

This Article proceeds as follows. Part I sketches the legal history of the diversity rationale for affirmative action programs in the United States, which predates Justice Powell's opinion in *Bakke*. It then lays out the many criticisms of Powell's opinion that writers and thinkers across the political spectrum have lodged. In addition, Part I surveys the existing empirical literature on diversity. Part II describes the data collected for this study. Part III explains the research design used to assess the relationship between the adoption of diversity policies and article citations. Part IV presents the primary results, as well as a variety of checks on the robustness of those results. Part V connects the results to the broader debate over diversity and affirmative action. We argue that the law should provide even more space for institutions to pursue policies that will add to their diversity while simultaneously improving their work and results.

30. See, e.g., Gerrity & McKenzie, *supra* note 29, at 610 (“[T]he total number of citations a person or department has accumulated over a period of time is . . . a reasonably good proxy measure of the productivity of individual economists or departments.”); Mark J. McCabe & Christopher M. Snyder, Does Online Availability Increase Citations? Theory and Evidence From a Panel of Economics and Business Journals, 97 *Rev. Econ. & Stat.* 144, 144 (2015) (“Understanding the market for academic journals is important to scholars because it is the one market in which they function as both producers and consumers. Citations are the currency in this market . . .” (footnote omitted)).

31. See Jason P. Nance & Dylan J. Steinberg, The Law Review Article Selection Process: Results From a National Study, 71 *Alb. L. Rev.* 565, 585 (2008) (“Editors have an incentive to publish not the ‘best’ scholarship, but that which will be most widely read and cited.”).

32. See James Lindgren & Daniel Seltzer, The Most Prolific Law Professors and Faculties, 71 *Chi.-Kent L. Rev.* 781, 783 (1996) (noting before unveiling a list of the most cited law reviews that “many law professors will use the lists of law reviews to help them determine which law reviews to submit articles to”); Joe Palazzolo, The Most-Cited Law Review Articles of All Time, *Wall St. J.* (June 1, 2012), <https://www.wsj.com/articles/BL-LB-42728> (on file with the *Columbia Law Review*) (“The law professor equivalent of career hits is the ‘number of times cited’ in journals.”); Paul Caron, How to Juice Your Citations in the HeinOnline/U.S. News Rankings, *TaxProf Blog* (Mar. 29, 2021), https://taxprof.typepad.com/taxprof_blog/2021/03/how-to-juice-your-citations-in-the-heinonline-us-news-rankings.html [<https://perma.cc/P63S-N3D6>] (recommending that authors aim to publish in top journals in order to “juice” their citations). Unsurprisingly, this phenomenon is not confined to legal academia. See Tahamtan et al., *supra* note 29, at 1196 (“Researchers publish their findings so that they can attract the greatest attention and have the highest impact on the scientific community. They often try to publish their papers in high-impact journals to reach more readers and to become more frequently cited.” (citation omitted)).

I. THE LAW, THEORY, AND EMPIRICS OF THE DIVERSITY RATIONALE

A. *The Diversity Rationale in the Supreme Court*

For more than forty years, diversity has been at the heart of the Supreme Court's evaluation of affirmative action in the context of higher education. This Part sketches the development of that law across multiple decades and opinions. The goal is not to offer an exhaustive history of this topic, which is readily available elsewhere.³³ Instead, this Part's more modest aim is simply to establish the diversity rationale's origins and its centrality to the Supreme Court's affirmative action jurisprudence.

The Supreme Court elevated the diversity rationale beginning in the late 1970s, and diversity has exerted considerable influence on American law and American society more broadly ever since. As Professor Kennedy has argued with some force: "In the marketplace of political culture, few terms have amassed more influence as quickly as 'diversity.' Were it tradable as stock, its price would have soared over the past . . . decades."³⁴ To be sure, the diversity rationale has garnered many high-profile, vehement detractors among scholars, pundits, and jurists, as the following section explores in considerable depth. But it is more than likely that the Supreme Court's elevation of the diversity rationale has played no small role in motivating many universities, law schools, and even law reviews—not to mention private businesses—to enact their own policies promoting racial diversity.

Although the Supreme Court's involvement with affirmative action is often understood to have begun in 1978 with its decision in *Regents of the University of California v. Bakke*, the Court actually heard oral argument in an affirmative action case a few years earlier—*DeFunis v. Odegaard*.³⁵ It is important to recall that commonly overlooked case because it contains the origins of the Court's ultimate invocation of the diversity rationale.³⁶ In 1974, the Supreme Court entertained a challenge by Marco DeFunis, Jr.,

33. For two recent historical and analytical treatments of affirmative action, see generally Kennedy, *For Discrimination*, *supra* note 16; Urofsky, *supra* note 7. It is impossible to overstate the contributions of these two excellent volumes for both this Part and Part V. These Parts draw on their incisive analyses throughout.

34. Kennedy, *For Discrimination*, *supra* note 16, at 100.

35. 416 U.S. 312 (1974) (*per curiam*).

36. For the invaluable intellectual work that recovers this forgotten history, see David B. Oppenheimer, Archibald Cox and the Diversity Justification for Affirmative Action, 25 *Va. J. Soc. Pol'y & L.* 158, 162–64 (2018); Anthony S. Chen & Lisa M. Stulberg, *Before Bakke: The Hidden History of the Diversity Rationale*, *U. Chi. L. Rev. Online* (Oct. 30, 2020), <https://lawreviewblog.uchicago.edu/2020/10/30/aa-chen-stulberg/> [<https://perma.cc/BC8L-M9UF>].

to the University of Washington School of Law's affirmative action program.³⁷ The dispute attracted several amicus briefs,³⁸ including a notable one filed by Archibald Cox, a Harvard Law School professor who served as Solicitor General during the Kennedy Administration.³⁹ Cox defended race-conscious admissions policies in higher education by explaining in considerable detail Harvard College's diversity-based admissions program.⁴⁰

To formulate his brief, Cox worked closely with Harvard College's admissions office to demonstrate how its vision and implementation of diversity had changed over the years.⁴¹ While Harvard College had long pursued geographic diversity and diversity of intellectual and occupational ambitions in composing its entering classes,⁴² it had in recent years broadened its conception of diversity to include racial diversity.⁴³ As Cox vividly encapsulated the point, "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer . . ."⁴⁴ The Court ultimately dismissed *DeFunis* as moot, effectively making the case disappear.⁴⁵ But the diversity rationale would become ever more visible over time.

Four years later, when the Supreme Court agreed to resolve Allan Bakke's lawsuit against the U.C. Davis Medical School over its race-conscious admissions policy, the University of California retained Cox to defend the program.⁴⁶ Cox declined to mention Harvard College's admissions policy in the brief that he filed on California's behalf.⁴⁷ The Harvard admissions policy did, however, receive sustained attention in an amicus brief jointly filed in *Bakke* by Columbia, Harvard, Stanford, and the University of Pennsylvania.⁴⁸ That brief reproduced, almost verbatim,

37. *DeFunis*, 416 U.S. at 320–27 (Douglas, J., dissenting).

38. See, e.g., Brief of the Anti-Defamation League of B'nai B'rith Amicus Curiae, *DeFunis*, 416 U.S. 312 (No. 73-235).

39. Brief of the President and Fellows of Harvard College Amicus Curiae, *DeFunis*, 416 U.S. 312 (No. 73-235).

40. See Oppenheimer, *supra* note 36, at 165–68.

41. See *id.* at 174–89.

42. See *id.* at 166–67.

43. See *id.*; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978) (opinion of Powell, J.).

44. Oppenheimer, *supra* note 36, at 163.

45. While the University of Washington School of Law had initially rejected *DeFunis*, it provisionally admitted him after the lawsuit commenced. Had the Supreme Court issued a merits decision in the case, it would have done so very close to the time that *DeFunis* graduated. See *DeFunis v. Odegaard*, 416 U.S. 312, 314–17 (1974).

46. Oppenheimer, *supra* note 36, at 197.

47. See Supplemental Brief for Petitioner, *Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187977.

48. Brief of Columbia Univ., Harvard Univ., Stanford Univ. & the Univ. of Penn. as Amici Curiae app. at *1, *Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007.

Cox's explanation of the diversity-driven Harvard admissions policy from his *DeFunis* brief.⁴⁹ In *Bakke*, Justice Powell was so enamored of this diversity justification for affirmative action that his own opinion in the case quoted extensively from the amicus brief's description of the Harvard admissions policy, and he even included an appendix further excerpting that description.⁵⁰

Given the importance of this policy to Justice Powell's thinking and its continued relevance to the constitutionality of affirmative action today, it is worth examining an extended excerpt from the Harvard amicus brief:

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. . . . In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.⁵¹

Justice Powell's view is of great moment in *Bakke*, of course, because he cast the decisive vote to uphold the constitutionality of affirmative action in 1978. The Court in *Bakke* assessed the legality of U.C. Davis Medical

49. Oppenheimer, *supra* note 36, at 160–61, 164–65.

50. *Id.* at 161–62; see also *Bakke*, 438 U.S. at 321–24 (1978) (appendix to opinion of Powell, J.).

51. *Bakke*, 438 U.S. at 322–23 (appendix to opinion of Powell, J.). Justice Powell quoted an even longer excerpt from the amicus brief in his opinion; we have edited it here for length.

School's admissions policy, which set aside sixteen slots for racial minorities out of one hundred total places in the entering class.⁵² The dispute yielded a deeply divided Court. Four Justices voted to invalidate affirmative action programs, including U.C. Davis's program, under Title VI of the 1964 Civil Rights Act.⁵³ Four other Justices rejected this statutory challenge and further voted to uphold the constitutionality of affirmative action in virtually all cases, including U.C. Davis's.⁵⁴ Justice Powell's controlling vote split the difference between these two poles. Powell voted to invalidate U.C. Davis's program, as he concluded that the policy failed to pass constitutional muster because it reserved a set number of seats for racial minorities, which were insulated from competition with the larger applicant pool.⁵⁵ But Justice Powell also refused to declare that universities could never consider an applicant's race without violating the Fourteenth Amendment's Equal Protection Clause.⁵⁶

It was here that Justice Powell drew upon Harvard's admissions policy.⁵⁷ That policy was in no way a formal part of the *Bakke* lawsuit, but Powell reached out to identify Harvard's diversity-based admissions policy as the sort of program that could survive Title VI and the Equal Protection Clause.⁵⁸ While Powell expressly rejected the notion that remediation of racial harms could justify affirmative action,⁵⁹ he also noted that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."⁶⁰ Referencing ideas of academic freedom associated with the First Amendment, Powell declared: "The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."⁶¹ Powell further explained: "[T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores

52. *Id.* at 278–79. U.C. Davis's actual policy stated that the special admissions program applied to "economically and/or educationally disadvantaged backgrounds." *Id.* at 272 n.1. But the courts treated it as a policy for racial minorities. See *id.* at 319 (discussing the "Davis special admissions program [as] involv[ing] the use of an explicit racial classification").

53. *Id.* at 408–21 (Stevens, J., concurring in part and dissenting in part) (citing 42 U.S.C. § 2000d (1964)).

54. *Id.* at 324–79 (Brennan, J., concurring in part and dissenting in part).

55. *Id.* at 315–20 (opinion of Powell, J.).

56. *Id.* at 316–19.

57. *Id.*

58. *Id.* at 318 ("[Harvard's admissions] program treats each applicant as an individual in the admissions process. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."); see also *id.* at 287 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

59. *Id.* at 310 (declining to recognize "societal discrimination" as a permissible basis for affirmative action).

60. *Id.* at 311–12.

61. *Id.* at 312 (internal quotation marks omitted).

of students as diverse as this Nation of many peoples.”⁶² Powell extolled Harvard’s approach because it did not set aside a particular number of slots for racial minorities from the entire applicant pool.⁶³ Instead, Harvard used individualized consideration of the applicants with an eye toward creating a diverse entering class, racial and otherwise.⁶⁴ “The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive,” Powell explained.⁶⁵ “[A]n admissions program operated in this way 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”⁶⁶

Justice Powell’s veneration of the diversity rationale for upholding affirmative action in *Bakke* was, at the time, highly idiosyncratic.⁶⁷ He alone on the Court extolled Harvard’s policy, and he alone rejected hard quotas but embraced the softer goal of diversity.⁶⁸ Powell thus controlled the outcome, but not one of his colleagues followed his lead.⁶⁹ Yet that pattern did not hold. The Supreme Court has with some frequency revisited affirmative action in the years since it issued *Bakke*, and Powell’s once-unique vision has repeatedly been affirmed as the governing law of the land.⁷⁰ The Court’s subsequent affirmative action opinions may accentuate this color or dull that hue, but they are unmistakably working on the same diversity canvas created by Powell.

In 2003, twenty-five years after *Bakke*, the Supreme Court reconsidered affirmative action in higher education in two cases involving the University of Michigan. In *Gratz v. Bollinger*, the Supreme Court invalidated the University of Michigan’s undergraduate admissions program because it too closely resembled the quota approach that had been outlawed in *Bakke*.⁷¹ But in *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan Law School’s admissions program because it, in effect, had successfully replicated Harvard College’s policy, with its emphasis on individualized consideration of applicants and the goal of enrolling a racially diverse class.⁷²

The core of Justice O’Connor’s opinion for the Court in *Grutter* was a reaffirmation, and extension, of the diversity rationale pioneered by Justice Powell. Portions of O’Connor’s opinion linked racial diversity to

62. *Id.* at 313 (citations omitted) (internal quotation marks omitted).

63. *Id.* at 316.

64. *Id.* at 318.

65. *Id.* at 317.

66. *Id.*

67. See *supra* text accompanying notes 53–56.

68. See *supra* text accompanying notes 57–66.

69. See *supra* text accompanying notes 53–56.

70. See *infra* text accompanying notes 71–92.

71. 539 U.S. 244, 275–76 (2003).

72. 539 U.S. 306, 334–35 (2003).

geographic and other types of diversity. “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters,” O’Connor instructed.⁷³ “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.”⁷⁴

O’Connor further noted that the Court deferred to Michigan’s view that racial diversity formed a compelling governmental interest, as diversity “yield[s] educational benefits” that “are not theoretical but real.”⁷⁵ “[S]tudent body diversity promotes learning outcomes,” O’Connor contended, “and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”⁷⁶ Diversity, O’Connor stated, “promotes cross-racial understanding . . . [and] break[s] down racial stereotypes, [and] [t]hese benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”⁷⁷ Justice O’Connor noted that amicus briefs filed by several major corporations—including 3M and General Motors—and retired military leaders had emphasized diversity’s importance to fulfilling their basic missions.⁷⁸ Finally, Justice O’Connor extended Justice Powell’s logic by noting that racial diversity was particularly vital in law schools, which many of the nation’s future business and political leaders attend.⁷⁹ “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,” O’Connor observed. “All members of our heterogeneous society must have confidence in the openness . . . of the educational institutions that provide this training.”⁸⁰

73. *Id.* at 333.

74. *Id.*

75. *Id.* at 328, 330.

76. *Id.* at 330 (internal quotation marks omitted).

77. *Id.* (citations omitted) (internal quotation marks omitted).

78. *Id.* at 340; see also Consolidated Brief of Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 10–30, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554 (contending that the state has a compelling interest in diverse officer corps); Brief of Gen. Motors as Amicus Curiae in Support of Respondents at 5–18, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399096 (explaining that diversity in higher education is necessary to equip students with the skillsets that companies require); Brief of 65 Leading Am. Bus. as Amici Curiae in Support of Respondents at 3–10, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399056 (arguing that diversity in higher education is essential to prepare students to work in the modern, global economy).

79. *Grutter*, 539 U.S. at 332.

80. *Id.* For additional commentary suggesting that *Grutter*’s conception of diversity was more capacious than Powell’s opinion in *Bakke*, see Douglas Laycock, *The Broader Case for*

Most recently, the Supreme Court has entertained a pair of challenges to the race-sensitive admissions policy enacted by the University of Texas at Austin.⁸¹ Texas's flagship campus fills the majority of its entering class through its "Top Ten Percent" program, which guarantees a spot to any student in the state who graduates in the top decile of their public school's graduating class.⁸² Texas filled out the remainder of its class through its "holistic" review process, part of which involves considering the race of applicants.⁸³ In 2013, the Supreme Court in *Fisher v. University of Texas at Austin* (*Fisher I*) issued a narrow holding, finding that the U.S. Court of Appeals for the Fifth Circuit incorrectly deferred to Texas on the narrow tailoring prong of the strict scrutiny analysis, and the Court remanded the decision to the appellate court for further consideration.⁸⁴ Writing for the Court in *Fisher I*, Justice Anthony Kennedy acknowledged the continuing resonance of Justice Powell's opinion in *Bakke* extolling diversity. As Justice Kennedy conveyed this idea, "The attainment of a diverse student body . . . enhance[s] classroom dialogue and . . . lessen[s] . . . racial isolation and stereotypes."⁸⁵ But Justice Kennedy also sounded a note of caution: "Justice Powell's central point . . . was that this interest in securing diversity's benefits, although a permissible objective, is complex."⁸⁶

On remand from the Supreme Court, the Fifth Circuit again determined that Texas's admissions policy did not violate the Constitution.⁸⁷ The Supreme Court again granted certiorari and, with a 4–3 decision written by Justice Kennedy in 2016, agreed that the policy was constitutional in *Fisher v. University of Texas at Austin* (*Fisher II*).⁸⁸ The University of Texas, in its internal policies, had long justified its admissions program by invoking language and concepts from the Supreme Court's prior affirmative action decisions. Thus, Texas sought "an academic environment that offers a robust exchange of ideas" and also the "promot[ion] [of] cross-racial

Affirmative Action: Desegregation, Academic Excellence, and Future Leadership, 78 Tul. L. Rev. 1767, 1772–74 (2004).

81. *Fisher II*, 136 S. Ct. 2198 (2016); *Fisher I*, 570 U.S. 297 (2013).

82. *Fisher II*, 136 S. Ct. at 2205–06.

83. *Id.* at 2206–07.

84. 570 U.S. at 314–15.

85. *Id.* at 308.

86. *Id.*

87. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 659–60 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).

88. 136 S. Ct. at 2205–07. The unusually small number of Justices in *Fisher II* can readily be explained. Justice Elena Kagan recused herself from the case, presumably because she worked on the case during her time as Solicitor General. See Olivia Fitzpatrick, When Do Supreme Court Justices Recuse Themselves From Cases?, *Const. Daily* (May 21, 2016), <https://constitutioncenter.org/blog/when-do-supreme-court-justices-recuse-themselves-from-cases> [<https://perma.cc/C3BG-73YL>]. Justice Scalia died after oral argument but before the case had been decided. See Ross Ramsey, Julián Aguilar, Jordan Rudner, Matthew Watkins & Alexa Ura, Scalia's Death Impacts Texas Cases at U.S. Supreme Court, *Tex. Trib.* (Feb. 13, 2016), <https://www.texastribune.org/2016/02/13/texas-conservatives-lose-reliable-friend-high-cour> [<https://perma.cc/SE95-ZJRB>].

understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion] [of] a set of leaders with legitimacy in the eyes of the citizenry.”⁸⁹ Justice Kennedy’s opinion noted and did not dispute the diversity rationales previously articulated in *Bakke* and *Grutter*. At times, however, Kennedy also struck a tone that seemed less enamored of diversity than Justice O’Connor was in *Grutter*. “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission,” Kennedy wrote.⁹⁰ “But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”⁹¹ Kennedy closed his opinion for the Court by noting that it was incumbent upon universities to reevaluate continually whether their usage of racial classifications in admissions remained necessary.⁹²

Two interrelated aspects of this capsule history merit brief elaboration. First, it is striking how affirmative action has repeatedly been preserved by a highly improbable series of Republican-appointed, largely conservative Justices. *Bakke*, *Grutter*, and *Fisher II* were all decided by a single vote, and that controlling vote was cast by someone who would have reasonably been thought not to love affirmative action but to loathe it.⁹³ Before *Bakke*, Justice Powell led the Richmond School Board during the 1950s and 1960s in its efforts to resist *Brown v. Board of Education*.⁹⁴ The path from fighting desegregation in the Jim Crow South to promoting racial diversity in the nation’s universities has seldom been traveled, but Powell made that unlikely journey.⁹⁵ Before *Grutter*, Justice O’Connor had condemned efforts to promote racial inclusion in Congress as violating the Equal Protection Clause.⁹⁶ Nonetheless, ten years later, Justice O’Connor stirringly attested to the importance of having racially diverse law schools in order to have a racially diverse group of political leaders.⁹⁷ Before *Fisher II*, Justice Kennedy voted both to reject the affirmative action program contested in *Grutter* and even to invalidate democratically enacted efforts

89. *Fisher II*, 136 S. Ct. at 2211 (citations omitted) (internal quotation marks omitted).

90. *Id.* at 2214.

91. *Id.*

92. *Id.* at 2214–15.

93. See *infra* text accompanying notes 94–99.

94. 348 U.S. 886 (1954).

95. See John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 469–73 (1994); see also Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* 276 (2018) (“As chairman of the Richmond School Board when the Court issued *Brown*, Powell oversaw a system that for six full years after the decision saw not a single black student attend school with white students.”).

96. See *Shaw v. Reno*, 509 U.S. 630, 641–58 (1993); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218–37 (1995) (requiring strict scrutiny for all affirmative action programs, per an opinion by Justice O’Connor).

97. *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003).

to promote racially integrated elementary and secondary schools.⁹⁸ Yet, when presented with an opportunity to eliminate affirmative action less than a decade later, Justice Kennedy declined to do so.⁹⁹ This pattern may be tested again soon. Challenges to the Harvard¹⁰⁰ and University of North Carolina¹⁰¹ admissions programs have now made their way to the Supreme Court.¹⁰² In 2022, the Court will yet again contemplate the fate of affirmative action in America. And the Court's membership has only become more conservative since *Fisher II*, with Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg, Justice Brett Kavanaugh replacing Justice Anthony Kennedy, and Justice Neil Gorsuch assuming the seat that was empty in *Fisher II*.¹⁰³

Second, perhaps informed by these pivotal Justices' checkered histories on race, the major decisions in this area can all be viewed as validating affirmative action in a manner that is more half-hearted than full-throated. In 1978, *Bakke* invalidated the U.C. Davis program under review but upheld the prospect of affirmative action.¹⁰⁴ In 2003, the Court invalidated the Michigan undergraduate admissions plan in *Gratz* but upheld the Michigan Law School plan in *Grutter*—actions that Justice Scalia dubbed “today's *Grutter-Gratz* split double header.”¹⁰⁵ In 2016, *Fisher II* upheld Texas's admissions plan but did so in a somewhat grudging manner, emphasizing that states must continually check that they are not using race in admissions gratuitously.¹⁰⁶

These two dynamics may help to explain some of the vitriol that has been directed at the diversity rationale for affirmative action over the years. From the left, it might seem that a rationale capable of garnering the votes of Justices Powell, O'Connor, and Kennedy is insufficiently robust

98. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting). For an analysis of *Parents Involved*, including of Justice Kennedy's controlling opinion, see generally Driver, *supra* note 95, at 293–308.

99. For an illuminating article that may help to explain why Justice O'Connor and Justice Kennedy surprisingly voted to preserve affirmative action, see David A. Strauss, *Fisher v. University of Texas* and the Conservative Case for Affirmative Action, 2016 Sup. Ct. Rev. 1.

100. *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll.*, 980 F.3d 157, 182–204 (1st Cir. 2020) (holding that the Harvard admissions program does not violate Title VI).

101. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14CV954, 2019 WL 4773908, at *6–11 (M.D.N.C. Sept. 30, 2019) (denying parties' motions for summary judgment and setting the stage for trial).

102. See Liptak & Hartocollis, *supra* note 18.

103. See Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> [<https://perma.cc/83FC-MQL2>].

104. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–320 (1978) (opinion of Powell, J.).

105. *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part).

106. 136 S. Ct. 2198, 2214–15 (2016).

in its conceptualization of racial justice.¹⁰⁷ From the right, it might seem that the allegedly wishy-washy diversity rationale—barely esteemed even by its expositors—has failed to provide clear rules to universities about what is permissible.¹⁰⁸ The diversity rationale’s nebulous nature, critics from the right maintain, provides additional fodder for criticizing what they deem the deeply objectionable consideration of race.¹⁰⁹ The next section explores these criticisms in greater detail.

B. *Diversity’s Discontents*

Bakke has now existed as governing law for more than four decades. The decision’s durability has not, however, insulated it from criticism. To the contrary, *Bakke* in general and Justice Powell’s diversity rationale in particular have generated a firestorm of condemnation. In addition to its volume, perhaps the most notable aspect of this criticism is that it has emerged from across the ideological spectrum. From both the right and the left, from both opponents and proponents of affirmative action, Powell’s diversity rationale—and the Court’s subsequent iterations—have over the years encountered many foes and desperately few friends. Surveying this opposition to the diversity rationale—which has been voiced in newspapers, opinion journals, law reviews, and, of course, judicial opinions—is essential because this Article’s findings lend that much-beleaguered concept a meaningful measure of support.¹¹⁰

Upon *Bakke*’s release, the diversity rationale—and the compromise it engendered—enjoyed no honeymoon period but instead met immediate, vehement disapproval from some of the nation’s foremost legal scholars.¹¹¹ Then-Professor Robert Bork of Yale Law School set the early terms of debate in the *Wall Street Journal*. Writing less than a decade before he was nominated to the Supreme Court, Bork mocked Powell’s opinion as interpreting the Equal Protection Clause to “allow[] some, but not too much, reverse discrimination.”¹¹² “[T]he solution may seem statesmanlike,” Bork

107. See *infra* text accompanying notes 116–117.

108. See *infra* text accompanying notes 111–115.

109. Justice Scalia emphasized this point about the diversity rationale’s vagueness in *Grutter*. “Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear unconstitutional holding that racial preferences in state educational institutions are OK,” Justice Scalia maintained, “[the diversity standard] seems perversely designed to prolong the controversy and the litigation.” 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

110. Professor Kennedy offered a particularly crisp, lucid articulation of the diversity rationale’s critics from across the ideological spectrum. See Kennedy, *For Discrimination*, *supra* note 16, at 100–06. Our analysis here is deeply indebted to his categories and examples throughout.

111. Then-Professor J. Harvie Wilkinson III wrote, “Powell was . . . criticized by both sides for doing nothing more than chasing ‘reverse racism’ underground.” J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration: 1945–1978*, at 304 (1979) [hereinafter Wilkinson, *From Brown to Bakke*].

112. Robert H. Bork, *The Unpersuasive Bakke Decision*, *Wall St. J.*, July 21, 1978, at 8.

allowed, “but as constitutional argument, it leaves you hungry an hour later.”¹¹³ Antonin Scalia—who was then a professor at the University of Chicago Law School and would later ascend to the Supreme Court in 1986—derided the diversity rationale in similar terms. “Justice Powell’s opinion . . . strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal,” Scalia charged.¹¹⁴ “But it is thoroughly unconvincing as an honest, hardminded, reasoned analysis of an important provision of the Constitution.”¹¹⁵

Such conservative criticism may not be especially surprising. Yet left-leaning critics also quickly denounced Powell’s compromise in *Bakke*. Professor Ronald Dworkin, writing in the *New York Review of Books*, labeled Powell’s opinion “weak” and observed: “It does not supply a sound intellectual foundation for [Powell’s] compromise The compromise is appealing politically, but it does not follow that it reflects any important difference in principle”¹¹⁶ In a similar vein, Professor Guido Calabresi published a *New York Times* op-ed lamenting the “lost candor” and “subterfuge” enabled by Justice Powell’s “Solomonic vote” that embraced goals but eschewed quotas.¹¹⁷

Critics on both the left and the right have condemned the diversity rationale for inviting university administrators to obsess over racial appearances and to treat racial minorities as mere window dressing, whose presence benefits white students. Six years after *Bakke*, Professor Richard Delgado, an early proponent of Critical Race Theory, regretted how the diversity rationale “may well be perceived as treating the minority . . . as an ornament, a curiosity, one who brings an element of the piquant to the

113. *Id.*

114. Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race.”*, 1979 Wash. U. L.Q. 147, 148 (1979).

115. *Id.* Then-Professor Scalia further employed this sarcastic writing style to mock Powell’s emphasis on diversity:

[W]e will expose these impressionable youngsters to a great diversity of people. We want them to work and play with pianists, maybe flute players. We want people from the country, from the city. We want bespectacled chess champions and football players. And, oh yes, we may want some racial minorities, too.

Id. at 147–48; see also *id.* at 148 (“When it comes to choosing among these manifold diversities in God’s creation, will being a piano player, do you suppose, be regarded as more important than having yellow skin?”). Scalia later used this ridiculing style in numerous opinions as a Supreme Court Justice. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part) (“This is not, of course, an ‘educational benefit’ on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding).”).

116. Robert Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. Rev. of Books, Aug. 19, 1978, at 22.

117. Guido Calabresi, *Bakke: Lost Candor*, N.Y. Times, July 6, 1978, at A19 (critiquing the diversity rationale); see also Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 Cath. U. L. Rev. 427, 431–32 (1979) (same).

lives of white professors and students.”¹¹⁸ Professor Nancy Leong recently voiced a similar critique in the *Harvard Law Review*: “[O]ur legal and social emphasis on diversity . . . has . . . in many cases contributed to a state of affairs that degrades nonwhiteness by commodifying it and . . . relegates nonwhite individuals to the status of ‘trophy’ or ‘passive emblems.’”¹¹⁹ These warnings have been echoed by conservatives as well. As *Fisher I* made its way to the Supreme Court, columnist George Will inveighed against the harms of racial artifice. “[D]iversity bureaucracies on campuses will continue to use minority students as mere means to other people’s ends,” Will asserted, “injuring minorities by treating them as ingredients that supposedly enrich the academic experience of others.”¹²⁰ Relatedly, Shelby Steele, a fellow at the Hoover Institution, has criticized the diversity rationale as “an unexamined kitsch that whites (especially administrators and executives) use to dignify their use of racial preferences as they . . . engineer . . . a look of racial parity.”¹²¹

Many scholars, on both the left and the right, have amplified Professor Calabresi’s fears concerning lost candor. They have criticized the diversity rationale’s effort to distinguish goals from quotas because they believe that the distinction requires decisionmakers to dissemble—or perhaps even to outright lie. Professor Sanford Levinson, a supporter of affirmative action, lambasted Powell’s opinion for creating “the disingenuous reliance on the language of ‘diversity.’”¹²² Professor John McWhorter, in an article titled *The Campus Diversity Fraud* published by the conservative Manhattan Institute, contended that the diversity rationale “has been, from the start, an argument shot through with duplicity and bad faith,” and called it “a craven, disingenuous, and destructive canard.”¹²³ Professor Lino Graglia, an ardent opponent of affirmative action, has also deemed the diversity rationale simply a “fraud.”¹²⁴ In

118. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 570 n.46 (1984).

119. Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151, 2156 (2013); see also *id.* at 2155 (“This superficial view of diversity consequently leads white individuals and predominantly white institutions to treat nonwhiteness as a prized commodity rather than as a cherished and personal manifestation of identity.”). For a related argument, see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. Rev. 425, 450–53 (2014), which overviews critiques that the ultimate beneficiaries of diversity initiatives are white institutions, not minority students.

120. George F. Will, *Opinion, The Unintended Consequences of Racial Preferences*, Wash. Post (Nov. 30, 2011), https://www.washingtonpost.com/opinions/the-unintended-consequences-of-racial-preferences/2011/11/29/gIQAbuoPEO_story.html (on file with the *Columbia Law Review*).

121. Kennedy, *For Discrimination*, *supra* note 16, at 101 (quoting an email from Shelby Steele).

122. Sanford Levinson, *Wrestling With Diversity* 55–56 (2003).

123. John H. McWhorter, *The Campus Diversity Fraud*, City J. (2002), <https://www.city-journal.org/html/campus-diversity-fraud-12218.html> [<https://perma.cc/V2HL-86RR>].

124. Lino A. Graglia, *The “Affirmative Action” Fraud*, 54 Wash. U. J. Urb. & Contemp. L. 31, 31–34 (1998) [*hereinafter* Graglia, *The “Affirmative Action” Fraud*].

Grutter's wake, Professor Brian Fitzpatrick went further, contending that the University of Michigan Law School "lied to the Supreme Court when it claimed it [uses affirmative action] to obtain the educational benefits of diversity, and well near every other elite university lies when they say the same thing."¹²⁵ In 2016, Thomas Sowell condemned the "slippery" concept of diversity and blamed Justice Powell's opinion for telling leaders of higher education "in effect that they can have racial quotas, but they just can't call them racial quotas."¹²⁶

Several prominent scholars have extended this disingenuousness critique by observing that higher education typically employs an anemic conception of diversity compared to the one Justice Powell defended in *Bakke*. Professor Jed Rubenfeld, writing in the *Yale Law Journal*, pressed this point memorably in 1997, one year after the Fifth Circuit struck down the University of Texas's affirmative action plan in *Hopwood v. Texas*.¹²⁷ "Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued," Rubenfeld wrote.¹²⁸ "(Why no preferences for fundamentalist Christians or for neo-Nazis?)"¹²⁹ Six years later, Professor Samuel Issacharoff advanced an almost identical claim while the Court considered *Grutter* and *Gratz*. "The commitment to diversity is not real," Issacharoff informed the *Wall Street Journal*.¹³⁰ "None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint. How many schools reach out for neo-Nazis?"¹³¹ Although Rubenfeld and Issacharoff support affirmative action, opponents have also suggested that higher education is not actually interested in diverse viewpoints. Professor Graglia has stated: "If diversity of views or experience were the objective, one would expect to see a preference for foreign students or members of minority religions, which is not the case."¹³² In 2002, Professor McWhorter endorsed this same critique. "Mormons, paraplegics, people from Alaska, lesbians, Ayn Randians, and poor whites exert

125. Brian T. Fitzpatrick, *The Diversity Lie*, 27 *Harv. J.L. & Pub. Pol'y* 385, 386 (2003); see also Lino A. Graglia, *Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on "Diversity" Grounds*, 36 *Loy. U. Chi. L.J.* 57, 65–68 (2004) (referring to the Harvard College admissions policy that Powell extolled as a model in *Bakke* as "a compendium of lies and hypocrisies" and referring to "[t]he fundamental and overarching falsehood of *Grutter*").

126. Sowell, *supra* note 14.

127. 78 F.3d 932, 962 (5th Cir. 1996), abrogated by *Grutter v. Bollinger*, 539 U.S. 306 (2003).

128. Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 471 (1997).

129. *Id.*

130. Daniel Golden, *Some Backers of Racial Preference Take Diversity Rationale Further*, *Wall St. J.* (June 13, 2003), <https://www.wsj.com/articles/SB105545471212086900> (on file with the *Columbia Law Review*).

131. *Id.* Professor Kennedy also linked the diversity critiques lodged by Professors Rubenfeld and Issacharoff. See Kennedy, *For Discrimination*, *supra* note 16, at 103.

132. Graglia, *The "Affirmative Action" Fraud*, *supra* note 124, at 34.

little pull on the heartstrings of admissions committees so committed to making campuses ‘look like America,’” McWhorter noted.¹³³ “The diversity that counts is brown-skinned minorities, especially African Americans.”¹³⁴

Supporters of affirmative action have repeatedly expressed concern that diversity is a weaker justification for racial policies of inclusion than remediation for America’s racist past and present would be. After *Grutter*, Professor Orlando Patterson asserted that “[u]sing diversity as a rationale for affirmative action . . . distorts [its] aims” and noted that the diversity rationale was weaker compared to “[t]he original, morally incontestable goal of . . . the integration of African-Americans into all important areas . . . from which they had been historically excluded.”¹³⁵ Colin Diver—then-President of Reed College and a former law school professor—espoused this same reasoning: “We would be better off by giving up the diversity rationalization and forthrightly adopting a suitably constrained remedial justification.”¹³⁶ In 2013, on *Grutter*’s tenth anniversary, Professor Kennedy similarly contended, “[T]he obligation to right past wrongs, the imperative to facilitate integration and the duty to counter ongoing but hard-to-detect biases are better reasons for race-conscious affirmative action than the educational hunch of ‘diversity’”¹³⁷ In 2019, Professor Melissa Murray published a *New York Times* op-ed hailing a lower court decision that upheld the legitimacy of affirmative action in Harvard College’s admissions program, but she bemoaned the central place the accompanying opinion afforded to the diversity rationale. “The decision—and the [diversity] logic on which it depends—is far removed from the remedial rationales that first animated affirmative action policies,” Murray lamented.¹³⁸

133. McWhorter, *supra* note 123.

134. *Id.*

135. Orlando Patterson, Opinion, Affirmative Action: The Sequel, *N.Y. Times* (June 22, 2003), <https://www.nytimes.com/2003/06/22/opinion/affirmative-action-the-sequel.html> (on file with the *Columbia Law Review*).

136. Colin S. Diver, From Equality to Diversity: The Detour From *Brown* to *Grutter*, 2004 U. Ill. L. Rev. 691, 694. Diver suggests that a careful reading of *Grutter* reveals that the opinion can be understood to promote remedial goals. See *id.* at 721–22.

137. Randall Kennedy, Viewpoint: The Goal of Affirmative Action Should Not Be ‘Diversity’ but Righting Wrongs, *Time* (June 25, 2013), <https://ideas.time.com/2013/06/25/viewpoint-the-goal-of-affirmative-action-should-not-be-diversity-but-righting-wrongs> [<https://perma.cc/S7VD-E7WD>] [hereinafter Kennedy, Goal of Affirmative Action]. To be clear, Kennedy believes that diversity should also be an acceptable justification for affirmative action. But he contends that it should not be the sole acceptable justification, and that it is comparatively weaker. See *id.* (“[T]he court has abjured justifications for affirmative action that are as compelling, if not more persuasive than the diversity rationale that is now all too dominant as a basis for positive discrimination on behalf of marginalized racial minorities.”).

138. Melissa Murray, Opinion, That Affirmative Action Ruling Was Good. Its Rationale, Terrible., *N.Y. Times* (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/opinion/harvard-affirmative-action.html> (on file with the *Columbia Law Review*). For related criticisms, see

Tellingly, even proponents of the diversity rationale have often suggested that its value lies primarily in its statesmanlike effort to defang a contentious national issue, rather than from any actual underlying value that stems from increased racial diversity. For example, Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit commended Justice Powell for his “moderation and statesmanship” in *Bakke*, which was a “great service [to] the nation,” because the case held “the potential for being another *Dred Scott*.”¹³⁹ Then-Professor J. Harvie Wilkinson III—who clerked for Justice Powell and would go on to become an esteemed federal judge¹⁴⁰—similarly suggested: “Invocation of diversity was Powell’s masterstroke. It was also his healing gesture. Diversity was the most acceptable public rationale for affirmative action”¹⁴¹ Writing five years after *Bakke*, Professor Paul J. Mishkin, who had helped defend U.C. Davis Medical School, also glimpsed diplomatic wisdom in Powell’s approach. “The Court took what was one of the most heated and polarized issues in the nation,” Mishkin noted, “and by its handling defused much of the heat.”¹⁴²

Since *Grutter*, conservative opponents of affirmative action on the Supreme Court have often drawn from these stock arguments to attack the diversity rationale’s legitimacy. Justice Clarence Thomas contended that the University of Michigan’s policies were driven by its obsession with “racial aesthetics” and “classroom aesthetics.”¹⁴³ Diversity, Thomas charged,

Derrick Bell, *Diversity’s Distractions*, 103 *Colum. L. Rev.* 1622, 1625 (2003) (noting that diversity, rather than “the need to address past and continuing racial barriers,” animated *Grutter*); Dahlia Lithwick, *The Legal Fiction of “Diversity”*: Good Intentions and the Unraveling of Affirmative Action, *Slate* (May 16, 2002), <https://slate.com/news-and-politics/2002/05/the-legal-fiction-of-diversity.html> [<https://perma.cc/U42T-ACST>] (“We don’t even get to talk about correcting for past racial imbalances or promoting minority advancement as reasons to favor affirmative action. Those ideas are off the table.”); Kimberly Reyes, *Affirmative Action Shouldn’t Be About Diversity*, *Atlantic* (Dec. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/affirmative-action-about-reparations-not-diversity/578005/> [<https://perma.cc/LF9D-8MYU>].

139. Jeffries, *supra* note 95, at 498 (internal quotation marks omitted).

140. See Judge J. Harvie Wilkinson III, U.S. Court Appeals for the Fourth Circuit, <https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-j-harvie-wilkinson-iii> [<https://perma.cc/FF3C-5WJZ>].

141. Wilkinson, *From Brown to Bakke*, *supra* note 111, at 303. Writing in *Bakke*’s immediate aftermath, Wilkinson offered a relatively nuanced assessment of the decision. He was in no way, however, an ardent defender of affirmative action. Over time, Wilkinson became a committed opponent of race consciousness in education. See J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 *Harv. L. Rev.* 158, 169–82 (2007).

142. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 *U. Pa. L. Rev.* 907, 929 (1983).

143. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part).

is merely “a fashionable catchphrase” and “a faddish slogan of the cognoscenti.”¹⁴⁴ Justice Scalia suggested that the University’s stated desire to achieve a “critical mass” would fool only the “gullible,” as it was, in fact, “a sham to cover a scheme of racially proportionate admissions.”¹⁴⁵ Mocking the notion that any tangible benefit would flow from increased racial diversity, Scalia further argued: “[Michigan Law School’s diversity rationale] is not . . . an ‘educational benefit’ on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding).”¹⁴⁶ Justice Kennedy, prior to his about-face in *Fisher II*,¹⁴⁷ also noted that many defenders of affirmative action preferred the remediation rationale over the diversity rationale, and he claimed: “[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”¹⁴⁸ Predictably, conservative Justices similarly heaped ridicule on the diversity rationale in both *Fisher I* and *Fisher II*.¹⁴⁹

It is extremely difficult to think of a contentious legal question on which legal thinkers as varied as Guido Calabresi, Richard Delgado, Lino Graglia, Sanford Levinson, Melissa Murray, Antonin Scalia, and Clarence Thomas would locate common ground. Yet all those legal minds agree that the diversity rationale’s justification for affirmative action suffers from profound flaws. On the legitimacy of the diversity rationale, then, it would seem that there is precious little diversity of thought.

144. *Id.* at 350, 354 n.3. Writing three years before Justice Thomas, Professor Levinson similarly argued: “[B]ecause of Justice Powell’s emphasis on the almost unique legitimacy of ‘diversity’ as a constitutional value, it has become the favorite catchword—indeed, it would not be an exaggeration to say ‘mantra’—of those defending the use of racial or ethnic preferences.” Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577 (2000).

145. *Grutter*, 539 U.S. at 346–47 (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted). Chief Justice William Rehnquist’s dissent in *Grutter* voiced similar themes. See *id.* at 383 (Rehnquist, C.J., dissenting) (“[T]he Law School’s disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of ‘critical mass’ is simply a sham.”); *id.* at 379 (“Stripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”); see also Kennedy, *For Discrimination*, *supra* note 16, at 102–03 (observing invocations of the “sham” language by Justice Scalia and Chief Justice Rehnquist).

146. *Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part and dissenting in part).

147. 136 S. Ct. 2198, 2214–15 (2016) (upholding the University of Texas’s use of a race-conscious admissions policy to increase the diversity of its student body).

148. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

149. See, e.g., *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting) (contending that the University of Texas’s defense of its affirmative action program was “less than candid”); *Fisher I*, 570 U.S. 297, 320 (2013) (Thomas, J., concurring) (casting doubt on “the educational benefits flowing from student body diversity”); *id.* at 326 (“There is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertion that segregation yielded those same benefits.”).

Notably, many of the attacks on diversity from both the left and the right have emphasized the lack of empirical support for diversity's benefits. Professor Kennedy, a supporter of affirmative action, has referred to the diversity rationale as an "educational hunch."¹⁵⁰ Justice Alito, dissenting in *Fisher II*, argued that the University of Texas had "merely invoke[ed] 'the educational benefits of diversity'" and had failed to "identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests."¹⁵¹ Professor Schuck has explained the importance of this empirical question in stark terms, writing that "the premises underlying the diversity rationale for race-based affirmative action are empirically tenuous and theoretically implausible. Policies justified under that rationale thus could not survive if the 'strict scrutiny' standard were seriously applied."¹⁵²

Professor Schuck accurately assesses the stakes of the debate: If the benefits of diversity are proven to be illusory, it is difficult to imagine diversity remaining a compelling governmental interest for purposes of the Equal Protection Clause, at least as interpreted by the modern Supreme Court. Thus, if the diversity rationale falls, affirmative action in higher education may soon cease to be legal.

C. *The Existing Empirical Evidence on Diversity*

This Article is not the first empirical study of the effects of diversity, and in this section we survey the literature on this subject. At the outset, however, it is worth noting that there are three reasons why most existing studies are not directly relevant to the constitutional questions at issue in *Bakke* and its progeny. First, many of the most prominent academic studies of affirmative action concern the effects of affirmative action on the *individuals* who are provided new opportunities by affirmative action policies, rather than on the academic environment as a whole.¹⁵³ Second, many contexts lack objective measures that would permit a court or policymaker to determine whether the diversity program is actually attaining its goals¹⁵⁴—a workable "metric," in Justice Alito's words.¹⁵⁵ Third, many of the studies involve contexts other than students' experiences in higher education, where conditions may be very different.¹⁵⁶

Within the legal academy and beyond, the most famous study of the effects of affirmative action involves Professor Richard Sander's "mismatch

150. Kennedy, Goal of Affirmative Action, *supra* note 137.

151. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).

152. Schuck, *supra* note 12, at 76.

153. See *infra* text accompanying notes 157–163.

154. See *infra* text accompanying notes 164–165, 169.

155. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).

156. See *infra* text accompanying notes 174–180.

theory.”¹⁵⁷ Using data on bar passage rates and employment outcomes, Professor Sander argued that affirmative action actually *harmed* Black law students by causing them to enroll at schools where they could not succeed academically.¹⁵⁸ Sander’s work spawned a series of rebuttals,¹⁵⁹ followed by a substantial literature on the mismatch hypothesis,¹⁶⁰ which taken together suggests that Sander’s theory is at best unsubstantiated. Much of the research cited in briefs to the Supreme Court in *Grutter* and *Fisher* sim-

157. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stan. L. Rev.* 367, 449–54 (2004) [hereinafter Sander, *Systemic Analysis*] (attempting to substantiate the “mismatch theory”). For the popularization of this idea, see generally Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It* (2012).

158. See Sander, *Systemic Analysis*, *supra* note 157, at 472–73 (suggesting that “racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system”).

159. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L. Rev.* 1807, 1809 (2005) (“While the mismatch hypothesis is plausible, this response refutes the claim that affirmative action has reduced the number of black lawyers.”); Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 *Yale L.J.* 2011, 2011–12 (2005) (arguing, contrary to Sander, that there is “no evidence that affirmative action reduces the bar performance of the students it is designed to help”); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *Yale L.J.* 1997, 1997 (2005) (arguing that Sander’s study “misapplies basic principles of causal inference” and thus draws “internally inconsistent and invalid conclusions about the effects of affirmative action”); see also Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 *Yale L.J.* 2005, 2005 (2005) (responding to the criticism).

160. See, e.g., Gregory Camilli, Darrell D. Jackson, Chia-Yi Chiu & Ann Gallagher, *The Mismatch Hypothesis in Law School Admissions*, 2 *Widener J.L. Econ. & Race* 165, 165–66, 166 n.3, 203–04 (2011) (defining and testing the mismatch hypothesis and finding that “the bar passage rates difference seems very modest relative to the substantial social networking advantages of attending elite law schools”); David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 *Stan. L. Rev.* 1855, 1857 (2005) (arguing that Sander’s work “rest[s] on a series of statistical errors, oversights, and implausible assumptions”); André Douglas Pond Cummings, “Open Water”: *Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 *Brandeis L.J.* 795, 802–05 (2006) (rejecting Sander’s framing of racial issues and his scapegoating of affirmative action policies); Harry G. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos Review Essay: Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It*, 66 *S.C. L. Rev.* 119, 124–25 (2014) (insisting that we must move beyond the empirical battle over the mismatch theory and address the deeper philosophical issues underlying the debate over race relations); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander Is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 *Conn. Pub. Int. L.J.* 41, 42–43 (2005) (pointing out the methodological flaws and logical leaps that undergird Sander’s work); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 *Stan. L. Rev.* 1915, 1919 (2005) (arguing that Sander’s empirical evidence “does not come anywhere close to proving that most black lawyers would be better off” without affirmative action).

ilarly focused on the educational outcomes of individual students who benefited from affirmative action.¹⁶¹ This is undoubtedly an important subject of research in its own right,¹⁶² and it would gain constitutional importance if the Court came to view the remediation of past or ongoing discrimination as a compelling governmental interest. But the diversity rationale is not based primarily on claims that individuals benefit. Rather, it rests on the idea that diversity is beneficial for academic institutions as a whole—that the learning undertaken and the academic work produced at those institutions will be stronger if the institutions are diverse. Accordingly, this *individual*-based literature does not speak directly to that *institutionally* based question as the Supreme Court has consistently framed it.¹⁶³

Several qualitative studies analyze the effects of diversity in the classroom.¹⁶⁴ These studies, based on surveys of and conversations with students, find that students perceive that greater diversity improves their educational experience.¹⁶⁵ Some evidence suggests that greater racial di-

161. See, e.g., William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 219 (rev. ed. 2018) (discussing survey data that examines the benefits of diversity); Patricia Gurin, *Expert Report of Patricia Gurin*, 5 Mich. J. Race & L. 363, 422 (1999) (summarizing data that “strongly support the theory [underlying affirmative action] by showing that students, indeed, acquire a very broad range of skills, motivations, values, and cognitive capacities from diverse peers when provided with the appropriate opportunities to do so”); Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 495 (2000) (reporting that a Michigan Law School survey found that former students believed diversity “contribut[ed] considerably to their classroom experience”).

162. See, e.g., Christopher S. Cotton, Brent R. Hickman & Joseph P. Price, *Affirmative Action and Human Capital Investment: Evidence From a Randomized Field Experiment*, 40 J. Lab. Econ. 157, 159–60 (2022) (studying the impact of affirmative action policies on student effort).

163. There is at least some research that has examined the impact of team diversity on performance in academic settings. See, e.g., Sophie Calder-Wang, Paul A. Gompers & Kevin Huang, *Diversity and Performance in Entrepreneurial Teams 5* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28684, 2021), https://www.nber.org/system/files/working_papers/w28684/w28684.pdf [<https://perma.cc/F8KW-QUZS>] (finding that exogenously imposed diversity decreased the performance of teams of MBA students participating in a required course to propose microbusinesses, while endogenously formed diversity eliminated this negative performance effect).

164. Professor Meera Deo is perhaps the leading contemporary legal scholar in this area. See generally Meera E. Deo, *Unequal Profession: Race and Gender in Legal Academia* (2019) (critiquing and empirically examining inequalities in legal academia).

165. See Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 143, 154–69 (Gary Orfield & Michal Kurlaender eds., 2001) (discussing the results of a student survey with questions on racial diversity’s impact on their educational experience); Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 Berkeley La Raza L.J. 237, 238 (2001) (examining the experience of students of color in

versity is correlated with increased discussions of racial issues in the classroom¹⁶⁶ and cross-racial interpersonal relationships.¹⁶⁷ Greater diversity is also associated with greater participation of minority students in classrooms.¹⁶⁸ Nonetheless, this literature seems unlikely to satisfy Supreme Court Justices searching for evidence of diversity's impact on actual learning outcomes. As one social scientist explains:

Determining the extent to which diversity among students affects the learning process in a classroom is inherently a very difficult task. Simply measuring learning outcomes is a challenge; quantitative indicators such as grades and standardised tests have well-known weaknesses as measures of what, or how well, a student has learned. It is even more challenging to isolate in a systematic way the impact of any one factor—such as racial/ethnic diversity—on the learning process.¹⁶⁹

In addition to research on the impact of diversity on learning in educational settings, there is also research on the impact of diversity on the production of academic scholarship. Over time, a growing share of academic scholarship has been conducted by collaborative teams as opposed to scientists and scholars working alone.¹⁷⁰ Researchers studying this move toward team production have found evidence that collaborative teams are more likely than solo authors to produce innovative scientific articles and

their campus environments and discussing student comments on perceived benefits of diversity on campus); Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, 23 Nat'l Black L.J. 71, 77 (2010) (discussing results of a survey examining law student support for diversity, demonstrating both white and minority students feel that diversity enhances their learning environment).

166. Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *Diversity Challenged*, supra note 165, at 175, 181 (finding a correlation between racial diversity and (1) cross-racial socializing and (2) discussion of racial issues); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 Fordham L. Rev. 3115, 3138 (2015) (“Three interrelated themes emerge: (1) educational diversity allows for a richer range of perspectives to be included in the classroom, (2) with personal context helping to illuminate black letter law, and (3) providing benefits that will reach into future legal practice.”).

167. See Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. Fla. J.L. & Pub. Pol'y 11, 25 (2003) (discussing survey results showing that most students agreed that diversity on campus improved their educational experience and interpersonal relationships with students of other races).

168. See Carole J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity"—Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. Rev. 877, 883–93 (2004) (synthesizing empirical research and summarizing studies on the experience of minority students in law school, including participation in class).

169. Thomas E. Weisskopf, *Consequences of Affirmative Action in US Higher Education: A Review of Recent Empirical Studies*, 36 Econ. & Pol. Weekly 4719, 4724 (2001).

170. See Stefan Wuchty, Benjamin F. Jones & Brian Uzzi, *The Increasing Dominance of Teams in Production of Knowledge*, 316 Science 1036, 1036 (2007) (noting an increase in working in teams throughout many different areas of scholarship).

patents.¹⁷¹ As an important corollary, other researchers have found that collaborative teams with ethnically homogenous members are more likely to publish their scholarship in lower-impact journals, and teams with ethnically diverse members are more likely to publish their scholarship in higher-impact journals and receive more citations.¹⁷² Similarly, other research has also found that greater gender diversity on teams improves outcomes.¹⁷³

Finally, several papers study the influence of diversity on the outcomes of groups or teams outside of the academic context. For instance, researchers have explored the impact of corporate board diversity on firm performance,¹⁷⁴ jury diversity on conviction rates and sentencing,¹⁷⁵ team diversity on efficiently completing tasks,¹⁷⁶ and police departments adopting affirmative action policies on police responsiveness to Black victimization.¹⁷⁷ Although the evidence on the effect of diversity on group

171. See *id.* at 1037 (finding that teams dominate the top of the citation distribution in the examined domains).

172. See Richard B. Freeman & Wei Huang, *Collaborating With People Like Me: Ethnic Co-Authorship Within the United States*, 33 *J. Lab. Econ.* S289, S313 (2015) (“A reasonable interpretation of the pattern for homophily, addresses, and references is that greater diversity and breadth of knowledge of a research team contributes to the quality of the scientific papers that the team produces.”).

173. See Julia B. Bear & Anita Williams Woolley, *The Role of Gender in Team Collaboration and Performance*, 36 *Interdisc. Sci. Rev.* 146, 151 (2011) (“[G]ender diversity can also enhance group processes, which are increasingly important as collaboration becomes a centerpiece in the production of science.”).

174. See, e.g., Adams & Ferreira, *supra* note 25, at 291 (showing that female directors have a significant impact on board inputs and firm outcomes); Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 *Q.J. Econ.* 137, 188 (2012) (“[I]mposing a severe constraint on the choice of directors leads to economically large declines in value.”); Daehyun Kim & Laura T. Starks, *Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?*, 106 *Am. Econ. Rev. Papers & Proc.* 267, 270 (2016) (finding that gender diversity in the board improves firm value); David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence From Quotas*, 5 *Am. Econ. J.: Applied Econ.* 136, 165 (2013) (discussing how gender quotas can affect corporate strategy).

175. See, e.g., Anwar et al., *A Jury of Her Peers*, *supra* note 25, at 603; Shamena Anwar, Patrick Bayer & Randi Hjalmarrsson, *The Impact of Jury Race in Criminal Trials*, 127 *Q.J. Econ.* 1017, 1017–22 (2012) [hereinafter Anwar et al., *Jury Race in Criminal Trials*]; Shamena Anwar, Patrick Bayer & Randi Hjalmarrsson, *The Role of Age in Jury Selection and Trial Outcomes*, 57 *J.L. & Econ.* 1001, 1001–05 (2014); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. Pers. & Soc. Psychol.* 597, 597–98, 608–10 (2006); Mark Hoekstra & Brittany Street, *The Effect of Own-Gender Juries on Conviction Rates 1–3*, 14–16 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25013, 2018), https://www.nber.org/system/files/working_papers/w25013/w25013.pdf [https://perma.cc/KM93-XGL3].

176. See, e.g., Benjamin Marx, Vincent Pons & Tavneet Suri, *Diversity and Team Performance in a Kenyan Organization*, 197 *J. Pub. Econ.* 1, 1–3, 9–17 (2021).

177. See, e.g., Anna Harvey & Taylor Mattia, *Reducing Racial Disparities in Crime Victimization: Evidence From Employment Discrimination Litigation 2–4*, 21–23 (Apr. 1, 2021) (on file with the *Columbia Law Review*) (unpublished manuscript). Studying the effects

performance is mixed, some research has found that even a modest increase in diversity can have profound effects on group performance. For instance, a study of felony trials in Florida from 2000 to 2010 found that all-white jury pools convicted Black defendants 81% of the time and white defendants 66% of the time but that juries with at least one Black potential juror convicted Black defendants 71% of the time and white defendants 73% of the time.¹⁷⁸ Another study, which an amicus brief in *Fisher I* cited,¹⁷⁹ found that diverse groups outperformed nondiverse groups at identifying hypothetical murder suspects from clues.¹⁸⁰ But, of course, this line of research addresses situations far afield from higher education.

We thus believe that student-run law reviews, in which student editors work as a team to select and edit articles, offer an advantageous context for studying the influence of diversity policies on group performance. Law reviews generate a publicly observable and quantifiable outcome: article impact, as measured by citations.¹⁸¹ Even if adopting a diversity policy only slightly increases the diversity of a law review, results such as the jury study described above suggest that it is possible for even minimal increases in diversity to meaningfully change group decisionmaking.¹⁸² The next Part describes the data and empirical methods that we employ to estimate the effects of diversity on the performance of student-run law reviews.

II. DATA

To study the effect of law review diversity policies on citations to law review articles, we built a dataset that includes information on citations to 12,889 articles that were published by leading law reviews between 1960 and 2018. In this Part, we describe the construction of that dataset.

of group diversity on performance is related to a large literature on peer effects. For a discussion, see generally, e.g., Zeynep Hansen, Hideo Owan & Jie Pan, *The Impact of Group Diversity on Class Performance: Evidence From College Classrooms*, 23 *Educ. Econ.* 238 (2015).

178. See Anwar et al., *Jury Race in Criminal Trials*, *supra* note 175, at 1019.

179. Brief of Dean Robert Post and Dean Martha Minow as Amici Curiae in Support of Respondents at 18, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345), 2012 WL 3418596 [hereinafter *Post & Minow Amicus Brief*].

180. Katherine W. Phillips, Gregory B. Northcraft & Margaret A. Neale, *Surface-Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help?*, 9 *Grp. Processes & Intergroup Rels.* 467, 477 (2006).

181. Again, there are important limitations to the use of citations as a measure of the work being done by law review boards. We discuss these limitations at length. See *infra* section II.C. Nonetheless, citations offer an important, reliable, and widely adopted means of judging the performance of law review boards over time.

182. For other examples of increases in group diversity changing group behavior, see Adams & Ferreira, *supra* note 25, at 293 (finding that “gender-diverse [corporate] boards are tougher monitors”); Anwar et al., *A Jury of Her Peers*, *supra* note 25, at 5 (finding that “female representation on juries significantly increased conviction rates for sex offence cases”).

A. *Law Reviews in Our Study*

Our research focuses on the flagship law reviews of the top twenty law schools, as determined by the law school rankings published by *U.S. News & World Report*.¹⁸³ These law reviews are: *California Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Georgetown Law Journal*, *Harvard Law Review*, *Michigan Law Review*, *Minnesota Law Review*, *New York University Law Review*, *Northwestern University Law Review*, *Southern California Law Review*, *Stanford Law Review*, *Texas Law Review*, *UCLA Law Review*, *University of Chicago Law Review*, *University of Pennsylvania Law Review*, *Vanderbilt Law Review*, *Virginia Law Review*, *Washington University Law Review*, and *Yale Law Journal*.¹⁸⁴

Admittedly, in selecting the law reviews to study, any cutoff is arbitrary. We use the law reviews at the top twenty law schools for a number of reasons, including that the top ranked law schools have been relatively stable over time; that a *New York Times* article in 1995 reports on diversity policies of the top twenty law schools;¹⁸⁵ that the top law schools and law reviews have high profiles; and that articles in the top law reviews are widely cited.¹⁸⁶ For these and other reasons, there has been more coverage of their policies, and so it is easier to collect information about their diversity policies.

B. *Changes in Diversity Policies*

For these twenty flagship law reviews, we set out to identify every instance where they adopted or repealed a diversity policy between 1960 and 2018. We define a diversity policy as a policy under which a law journal takes into consideration the race or ethnicity of applicants when selecting new editors for membership at the end of their first year of law school. Accordingly, we do not treat additional outreach, by itself, as the creation of a diversity policy.¹⁸⁷ Similarly, a policy that only concerns gender, like the *Harvard Law Review's* 2013 policy change, is not considered a diversity

183. We specifically used the 2019 *U.S. News & World Report* law school rankings to identify these flagship law reviews. We use the 2019 rankings, which were released in March 2018, because they were the most current version available when we began this project in 2018. See Staci Zaretsky, Behold, The Full 2019 U.S. News Law School Rankings Leak (1-144), *Above the Law* (Mar. 14, 2018), <https://abovethelaw.com/2018/03/behold-the-full-2019-u-s-news-law-school-rankings-leak-1-144-rnp/> [<https://perma.cc/3FJU-T3K2>].

184. *Id.*

185. See Lisa Anderson, Law Review Masks Diversity in a New Admission System, *N.Y. Times* (July 7, 1995), <https://www.nytimes.com/1995/07/07/us/law-review-masks-diversity-in-a-new-admission-system.html> [<https://perma.cc/ZP2B-7N4A>].

186. See Fred R. Shapiro, The Most-Cited Law Reviews, 29 *J. Legal Stud.* 389, 392 (2000).

187. For an example of such a program that involved additional outreach but not consideration of diversity at the selection stage, see About the *Stanford Law Review*, *Stan. L. Rev.* (Dec. 2, 2011), <https://web.archive.org/web/20111202175044/https://www.stanfordlawreview.org/about/> [<https://perma.cc/9AFX-VBD6>] (last visited Jan. 22, 2022).

policy for purposes of our study.¹⁸⁸ We adopt this definition because it largely matches the issues presented in *Bakke*, *Grutter*, and *Fisher II*.

To identify these policies, we first conducted extensive searches for news reports, academic articles, and other information on the topic. We then surveyed current and former editors of the law reviews about changes to diversity policies during their tenures as editors.¹⁸⁹ Through this process, we identified twenty-two extensive margin changes to diversity policies made by sixteen law reviews.¹⁹⁰ Table 1 provides a list of these changes. The Appendix lists the sources for these policies.

188. See Carl Straumsheim, Tackling Gender Disparity, *Inside Higher Ed.* (Feb. 27, 2013), <https://www.insidehighered.com/news/2013/02/27/harvard-law-review-consider-gender-editor-selection-process> [<https://perma.cc/77PQ-DFDW>].

189. In addition to the use of typical sources such as law firm websites and LinkedIn, our search for former editors involved other, more obscure methods. In one case, we left a phone message at the hospital where a former editor—who received a J.D. and M.D. but never practiced law—is now working as a physician. In another, we sent a physical letter through the U.S. mail to a former editor who had no listed email address or phone number. In these cases and others, we are very grateful to the editors who responded to our inquiries.

190. By *extensive margin changes*, we mean a change where a diversity policy is adopted or rescinded. This is in contrast to *intensive margin changes*, which mean a change in the number of diverse editors that a diversity policy helped become members of the law review.

TABLE 1. EXTENSIVE MARGIN CHANGES IN LAW REVIEW DIVERSITY POLICIES

Journal	Year	Journal	Year
Berkeley	1969	Georgetown	1991
Berkeley	1996+	Georgetown	1994
		Georgetown	2007
Harvard	1982		
		UCLA	2007
Michigan	1983		
		Yale	2012
NYU	1983		
		Northwestern	2016
Penn	1985		
Penn	1989+*	Chicago	2017
Penn	1994		
		Duke	2017
Minnesota	1987*		
		Stanford	2017
Virginia	1987		
		WashU	2020
Columbia	1989		
		Texas	Never
Cornell	1989		
		USC	Never
		Vanderbilt	Never

+ indicates the journal abolished an existing diversity policy

* indicates our best guess based on incomplete or conflicting evidence

There are three caveats about the diversity policies worth noting. First, although we communicated extensively with the former editors and supervising faculty members of these law reviews, their memories are not perfect, and some changes to diversity policies may have been forgotten over time. In particular, there are two policy changes whose dates we are unable

to identify with high confidence. The editors of the *Minnesota Law Review* and faculty at the University of Minnesota Law School are not certain whether a diversity policy was adopted in 1983 or in 1987.¹⁹¹ The *University of Pennsylvania Law Review* eliminated its 1984 diversity policy at some point between 1989 and 1992, but we cannot determine the precise date.¹⁹² It is thus possible that there are changes to diversity policies that we do not perfectly capture.

Second, the forms that the diversity policies take are not identical. For example, some of the policies likely involved the consideration of demographic factors directly, whereas others involved placing weight on personal statements that could include information relevant to diversity. In addition, the diversity policies applied to different numbers of available positions on the law review. At some journals, for instance, only a small number of new editors were chosen in part based upon their personal statements; at other journals, personal statements were relevant to the selection of a majority of the editors.¹⁹³ Moreover, even journals with similar diversity policies may have selected different numbers of editors pursuant to those policies, particularly given that many of the policies treat the personal statement as just one factor of many. Without being party to a law journal's confidential decisionmaking, it is impossible to know how many

191. We had extensive email correspondence with individuals who ran the *Minnesota Law Review* from 1979 to 1989. More specifically, we emailed every Editor-in-Chief from the relevant periods for whom we could find contact info, as well as the faculty advisors for those periods. Here is what the Editors-in-Chief and managing editors said: 1982–1983: no policy; 1983–1984: no policy; 1984–1985: the Editor-in-Chief thinks that there was a policy (in that the law review used a personal statement as part of the criteria for selecting members) and thinks there was a policy the previous year, while managing editors from those years cannot recall; 1985–1986: nobody we were able to contact can recall; 1986–1987: no policy; 1987–1988: a policy existed, according to the next year's Editor-in-Chief, but we got no response from the Editor-in-Chief from 1987–1988; 1988–1989: policy existed. Our best guess is that the diversity policy began in the 1987–1988 year, meaning that it applied to the members chosen in Summer 1987, and the articles that the law review published starting in Fall 1987. But it is possible that it actually began earlier, back in Summer 1983 or Summer 1984. As a result, for our primary analysis, we exclude the *Minnesota Law Review* from our sample. As a robustness check, however, we reran the specifications including Minnesota in the sample, separately coding Minnesota's policy starting in 1983 and 1987. The results change little in an economic sense and do not differ in a statistical sense. The estimates are slightly more negative in some specifications, including the panel regression using mean citations, and are slightly more positive in our preferred specifications, including the stacked event study using mean and median citations.

192. We corresponded extensively with the student editors who ran the *University of Pennsylvania Law Review* during the relevant time period. Leading student editors confirmed to us that a diversity policy existed in 1988, but they disagreed as to whether a policy existed in 1989 and 1990 or whether it had been repealed. By 1992, there appeared to be no doubt that a policy no longer existed.

193. Our information regarding these details is highly incomplete. Many newspaper stories do not report details regarding the scope of diversity policies, and we promised former law review editors that we would not ask them to reveal these details as a condition of their correspondence with us. The information that we have regarding the scope of diversity policies is reported in the Appendix.

editors were selected as a result of a given policy change. Accordingly, even though these different policies likely had different effects on the share of diverse editors selected relative to the total membership of the journals, we treat the adoption or elimination of diversity policies uniformly.¹⁹⁴ As a result, we estimate the effect of a law review adopting a diversity policy, rather than the effect of the change in composition of the members that are on the law review.¹⁹⁵ Or, put another way, we study changes to the extensive margin of diversity policies (whether there is a diversity policy or not) and not changes to the intensive margin of diversity policies (the extent to which a diversity policy leads to the selection of diverse editors).

Third, law reviews that do not formally adopt diversity policies may still use a variety of strategies to increase the diversity of their membership. For instance, journals may decide not to factor in diversity when reviewing applicants but still decide to host information sessions designed to encourage diverse students to participate in the writing competitions and provide mentoring to those students in advance of the competition.

Importantly, these three limitations—that is, forgotten changes to diversity policies, dissimilarities between policies, and potential informal efforts to promote diversity—likely bias our estimates toward finding no effect. This is because these limitations create measurement error in our key independent variable—the existence of a diversity policy. Measurement error in the independent variable creates attenuation bias, which drives regression coefficients toward zero.¹⁹⁶ In other words, to the extent

194. Ideally, we could parametrize the size of the expected treatment by using a continuous variable that accounted for the magnitude of the policy changes. But, because the policy changes take different forms, we are unable to do so. We cannot observe how the diversity of law review membership actually changed in light of these policies or even if it changed at all. It is possible that the diversity policies did not make the law reviews more diverse, and our results are driven by the publicity surrounding the diversity policies or some other coincidental effect.

However, this strikes us as highly unlikely. One reason is that many of the diversity policies were never publicized. Another reason is that diversity policies in other contexts have typically led to increased diversity, even though the effects are sometimes modest. See, e.g., Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 *J. Pol'y Analysis & Mgmt.* 463, 471, 475 (2006) (finding a modest impact in the contexts of employment and higher education); Jeremy Ashkenas, Haeyoun Park & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, *N.Y. Times* (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> (on file with the *Columbia Law Review*) (“The number of Hispanic and black freshmen on the University of California campuses declined immediately after California’s affirmative action ban took effect, especially at the most sought-after campuses . . .”).

195. For a further discussion of this issue, see *infra* section III.B.

196. For a discussion of this issue, see generally Adam Bonica, Adam Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, *Legal Rasputins? Law Clerk Influence on Voting at the U.S. Supreme Court*, 35 *J.L. Econ. & Org.* 1 (2019) (noting challenges in assessing whether law clerks influence judicial decisionmaking).

that attenuation bias is present, it would lead our estimates to understate the true magnitude of the effects.

C. Citations and Subjects of Law Review Articles

For these twenty flagship law reviews, we built a dataset containing the information on all full-length research articles they published from 1960 to 2018. It is important to note that there are several types of publications in law reviews beyond just full-length research articles. We focus on full-length research articles because these are the pieces that law reviews exercise the greatest discretion in selecting for publication.¹⁹⁷ In addition, the claims in the lawsuits filed against the *Harvard Law Review* and *New York University Law Review* alleged specifically that these are the articles for which quality suffers as a result of diversity policies.¹⁹⁸ This means that our sample excludes several types of publications. First, we exclude publications by student editors, known as student comments or notes. Second, we exclude book reviews. Third, we exclude shorter publications, known as essays.¹⁹⁹ Fourth, because articles that are published as part of a symposium typically do not go through the same selection process, we exclude them as well.

As a measure of article impact, we identified the citations to each article. Citation counts are hardly the sole way of assessing legal scholarship's impact.²⁰⁰ And there are surely superb articles (and superb scholars) that receive few citations, just as there are deficient articles and scholars that are highly cited. Nonetheless, citation counts are a widely used measure of impact.²⁰¹ In addition, law review editors themselves aim to publish influential scholarship, with influence being measured (by the editors) in considerable part through citation counts.²⁰² Accordingly, we evaluate whether

197. Such discretion arises as a result of the high volume of full-length research articles submitted. See, e.g., When to Submit Articles and Essays, *supra* note 22, at 1–2 (detailing the *Yale Law Journal's* receipt of at least 1,700 pieces per cycle over the period of three publication cycles, from which only sixteen to twenty pieces were selected per cycle for publication). Legal academia also prioritizes full-length research articles when evaluating professors. See, e.g., Steven W. Bender, The Value of Online Law Review Supplements for Junior and Senior Faculty, 33 *Touro L. Rev.* 387, 393 (2017) (“Clearly, full-length law review articles are the quintessential scholarly work for tenure-track law faculty.”).

198. *Fac., Alumni & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev.*, No. 18 Civ. 9184 (ER), 2020 WL 1529311, at *2 (S.D.N.Y. Mar. 31, 2020); *Fac., Alumni & Students Opposed to Racial Preferences v. Harvard L. Rev.*, No. 18-12105-LTS, 2019 WL 3754023, at *2 (D. Mass. Aug. 8, 2019).

199. This choice may be overinclusive because many journals use the same process to select essays as they do to select articles, and they are often cited and treated the same way. Nonetheless, we adopt it out of an abundance of caution in order to avoid biasing our data against journals that publish essays.

200. We prefer the term “article impact” or “article influence” rather than “article quality” because quality is in the eye of the beholder, but impact can be reasonably measured. However, we use the two terms interchangeably throughout this Article.

201. See *supra* notes 29–30 and accompanying text.

202. See *supra* note 31 and accompanying text.

law reviews are succeeding at the goal that they are themselves pursuing. Citation counts are thus a reasonable way of assessing how diversity policies affect law reviews' efforts to achieve their own stated objectives.

We collected data on each article's citations from HeinOnline. HeinOnline is a searchable internet database containing information on law review publications.²⁰³ HeinOnline has a unique URL for every law review article, which lists every citation it has received. It is worth noting that, like all citation databases, HeinOnline may not perfectly capture the citations to every article. This is because HeinOnline focuses on counting citations to law review publications from other law review publications. It thus does not include full information on citations to law review articles from many non-law journals or academic books. Despite this limitation, HeinOnline is still considered the most comprehensive database of legal research and is a standard database for measuring citations within the legal academy.²⁰⁴ Moreover, HeinOnline citations may soon be used as part of the *U.S. News & World Report* rankings of law schools, which reflects their status as the standard way to measure citations to legal research.²⁰⁵

In addition to collecting article citations from HeinOnline, we also scraped available information on the article subjects. HeinOnline lists subjects for most articles, and articles can have multiple subjects. In total, HeinOnline includes information on roughly 1,500 subjects. However, for our empirical analysis, we focus on the top fifty most common subjects. To illustrate, Figure 1 reports the average mean citations for articles of each of these subjects after controlling for journal and year.²⁰⁶

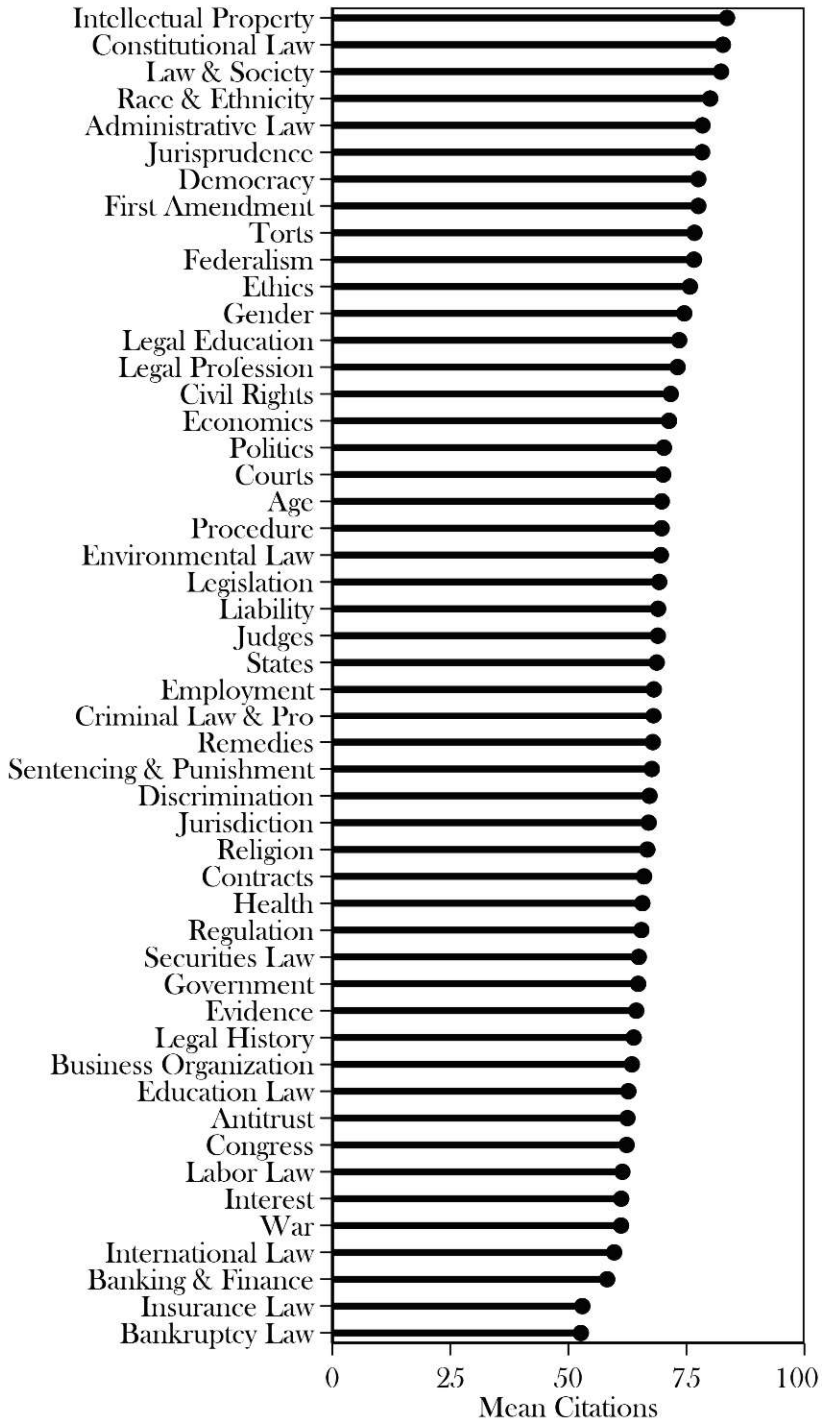
203. Journals and Periodicals, HeinOnline, <https://home.heinonline.org/content/journals-and-periodicals/> [<https://perma.cc/9UT2-6A69>] (last visited Sept. 28, 2021).

204. There is a substantial body of research in peer-reviewed law and economics journals that utilizes citations from HeinOnline. See, e.g., Adam Chilton, Jonathan S. Masur & Kyle Rozema, Political Ideology and the Law Review Selection Process, 22 *Am. L. & Econ. Rev.* 211, 220 (2020); Adam Chilton, Jonathan S. Masur & Kyle Rozema, Rethinking Law School Tenure Standards, 50 *J. Legal Stud.* 1, 6 (2021); Paul J. Heald & Ted Sichelman, Ranking the Academic Impact of 100 American Law Schools, 60 *Jurimetrics* 4–39 (2019).

205. For a discussion of this development, see Ted Sichelman, A Defense and Explanation of the U.S. News 'Citation' Ranking, *TaxProf Blog* (Mar. 20, 2019), https://taxprof.typepad.com/taxprof_blog/2019/03/sichelman-a-defense-and-explanation-of-the-us-news-citation-ranking.html [<https://perma.cc/TQU4-5CDB>].

206. To generate the results for Figure 1, using our sample of articles, we regressed citations on year and journal fixed effects. We then recovered the residuals from these regressions and added back the overall average citations to the residuals. We then calculated the averages by subject.

FIGURE 1. CITATIONS BY ARTICLE SUBJECT



III. RESEARCH DESIGN

We preregistered the research design that we use for this study before we had the complete dataset. This Part first explains the rationale of that precommitment. We then describe the two approaches that we use to estimate the effects of diversity policies on citations: (1) two-way fixed effects regressions, and (2) a stacked event study.

A. *Pre-Registration*

When conducting empirical research, scholars have substantial discretion regarding how to resolve a wide range of issues. As just one example, for any given study, there are many potential control variables that could be included in a regression. The set of justifiable choices that researchers could plausibly make while still being consistent with best practices are sometimes called “researcher degrees of freedom.”²⁰⁷ Unfortunately, however, even if researchers are trying to be unbiased, there is reason to believe they may—perhaps even unconsciously—make choices in ways that increase the likelihood that they would produce a preferred result.²⁰⁸ In these situations, one way to ensure the credibility of reported results is to preregister a research design prior to conducting the empirical analysis.

On December 3, 2018, we posted our research design to precommit ourselves to the approaches and specifications we use in this Article.²⁰⁹ We posted this after we had initial results but before we had the final dataset on all the instances that a law review adopted, amended, or repealed a diversity policy. After additional efforts to document diversity policies, we reran the specifications to which we precommitted initially. We have added robustness checks to this draft, but the main approaches and specifications are the same with one exception: the regressions where we control for article subjects. We added these specifications to our initial approach because HeinOnline first began reporting article subjects after we initially scraped the website. Once HeinOnline reported article subjects, we re-scraped the website to obtain information on article subjects, which we

207. See Joseph P. Simmons, Leif D. Nelson & Uri Simonsohn, False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant, 22 *Psych. Sci.* 1359, 1359–62 (2011) (describing “researcher degrees of freedom” as a construct to understand the range of decisions a researcher can make in the course of collecting and analyzing data).

208. See Andrew Gelman & Eric Loken, The Garden of Forking Paths: Why Multiple Comparisons Can Be a Problem, Even When There Is No ‘Fishing Expedition’ or ‘P-Hacking’ and the Research Hypothesis Was Posited Ahead of Time 4–10 (Nov. 14, 2013) (on file with the *Columbia Law Review*) (unpublished manuscript) (discussing prominent research papers in which results were statistically significant because researchers could choose among variable interactions, exclude data, and isolate individual studies).

209. Adam Chilton, Jonathan S. Masur & Kyle Rozema, Affirmative Action in Law Reviews (Dec. 2, 2018), <https://ssrn.com/abstract=3295334> [<https://perma.cc/EJ9G-EJB8>] [hereinafter Chilton et al., Preregistered Study] (unpublished manuscript).

then added as controls in additional specifications (specifically, we added Panel B of Tables 3 and 4).

B. *Two-Way Fixed Effects Regressions*

Using the panel data, we begin the analysis with a standard difference-in-differences (DiD) approach by estimating the two-way fixed effects specification in Equation 1²¹⁰

$$y_{ijt} = \alpha + \beta \text{Policy}_{jt} + \psi_t + \eta_j + \delta_{jt} + \varepsilon_{ijt} \quad (1)$$

for article i in law review j and year t . The dependent variable y_{ijt} is article citations. The specification includes year fixed effects ψ_t , law review fixed effects η_j , and law review linear time trends δ_{jt} . Policy_{jt} is an indicator variable for whether law review j has a diversity policy in place in year t . This analysis therefore assumes all policies have the same effect on article impact and only uses extensive margin changes of a diversity policy in a journal as variation to estimate β (including any adoption or removal of a diversity policy). The coefficient of interest is β , which indicates the average change in citations attributable to diversity policies. Standard errors are clustered by journal.

Equation 1 is estimated on the panel data using articles since 1960.²¹¹ We follow a standard practice in the literature and focus on articles that have had time to be cited.²¹² In particular, we allow articles to be cited for at least five years, so we exclude articles published after 2013.²¹³

One important additional aspect of our research design is that we account for the staggered way that a diversity policy takes effect. In particular, there are two different pathways by which a diversity policy could change the articles published, and these pathways inform how we should code a policy as taking effect. First, in the immediate aftermath of a policy being adopted, we anticipate that the second-year student members of the law review will be more diverse. These second-year students can influence ar-

210. A DiD estimation involves looking at the change in the difference between two quantities over time. So, for instance, articles published in the *Harvard Law Review* and *Stanford Law Review* were likely cited different numbers of times before either journal implemented a diversity policy. A DiD estimation compares the difference between the two law reviews before the *Harvard Law Review* implements a diversity policy with the difference between the two law reviews after the *Harvard Law Review* implements a diversity policy. The idea is that any sort of secular trend—for instance, law reviews being cited more in general—will affect both journals, so the change in the difference can more plausibly be attributed to the *Harvard Law Review's* implementation of a diversity policy.

211. The results are similar if we restrict our panel to starting in later years when the policies we study in our stacked event study specifications go into effect.

212. See, e.g., James J. Heckman & Sidharth Moktan, *Publishing and Promotion in Economics: The Tyranny of the Top Five*, 58 J. Econ. Literature 419, 445 (2020) (limiting analysis to articles published after 2010).

213. The results are very similar if we cut the sample a few years earlier or later.

title selection and impact in the year after the policy was adopted by reviewing and editing articles over the course of that year.²¹⁴ Second, starting the second year after a diversity policy is adopted, the more diverse editors may ascend to positions on the law review board. The board members can further influence article selection and quality because they vote on which articles to accept and have control over the journal more generally.²¹⁵

To account for both possible pathways, we first report results where we define an event as starting in the first year after a policy was enacted and then report results of a distributed lag model, in which we also include the policy lagged by one year (Policy_{jt+1}). A distributed lag model is a regression specification that allows the effect of a given variable to take place in different time periods and then aggregates those effects together to estimate the joint effect. Given the two pathways, this approach may be preferred. In the distributed lag model, we estimate the two-year incremental changes in citations and report the cumulative effect (the sum of the coefficients).²¹⁶

C. *Stacked Event Study*

Although the two-way fixed effects approach is a commonly used research design,²¹⁷ a growing econometric literature has shown that it has

214. Consider, for instance, a diversity policy adopted during the 2020–2021 academic year. That policy would affect the new law review members chosen in Summer 2021 and, thus, the articles they edit from Summer 2021 through February 2022. Those articles will generally be published during the 2021–2022 academic year, the year after the policy is enacted. The new law review members (from the Class of 2023) will then assume board positions in February 2022. At that point, the diversity policy will have a further effect on the articles selected. These articles will generally be published during the 2022–2023 academic year, two years after the policy was implemented.

215. This is true at all journals in our sample but Harvard and NYU, at which the entire law review membership votes on article selection.

216. If an effect of an intervention is expected to emerge gradually after it takes effect, using a distributed lag model is a standard approach in the social science literature. See, e.g., Olivier Deschênes & Enrico Moretti, *Extreme Weather Events, Mortality, and Migration*, 91 *Rev. Econ. & Stat.* 659, 667 (2009) (using a distributed lag structure to study the effects of extreme weather on life expectancy); Myungho Paik, Bernard Black & David A. Hyman, *Damage Caps and Defensive Medicine, Revisited*, 51 *J. Health Econ.* 84, 92 (2017) (using a distributed lag model to study whether tort reform reduces defensive medicine and healthcare spending); Kyle Rozema, *Tax Incidence in a Vertical Supply Chain: Evidence From Cigarette Wholesale Prices*, 71 *Nat'l Tax J.* 427, 428–29 (2018) (using a distributed lag model to study how the “burden of consumption taxes not borne by consumers is shared between upstream firms . . . and downstream firms”).

217. See, e.g., Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence From Florida*, 38 *J.L. Econ. & Org.* 1, 5 (2020) (using a fixed effects approach to study the effect of law enforcement bargaining rights on misconduct incidents); Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence From Secure Communities*, 57 *J.L. & Econ.* 937, 958–66 (2014) (using a fixed effects approach to examine the impact of a federal program on immigrant crime rates).

limitations,²¹⁸ especially in settings where there is staggered rollout in treatment timing.²¹⁹ Because the treatments in our research setting are staggered (that is, law reviews adopted diversity policies in different years), we thus also follow current best practices and use a stacked event study research design. In particular, we assess changes in citations in the five years before and after the adoption of each diversity policy.

Event studies are a widely used method in the empirical social sciences.²²⁰ An event study is an empirical method that assesses the effect of a given intervention by establishing a control group that is likely to have developed similarly over time to the treatment group that received the intervention and then measures changes in the outcome of interest for the treatment group relative to the control group from before and after the intervention.²²¹ A stacked event study is where there are multiple treatment events (e.g., different law reviews adopting diversity policies at different times) that can be “stacked” on top of each other and analyzed as part of a single event study framework.²²²

218. See, e.g., Andrew Goodman-Bacon, Difference-in-Differences With Variation in Treatment Timing, 225 *J. Econometrics* 254, 255 (2021) (noting some limitations of the two-way fixed effects approach, such as knowing “relatively little about . . . [the model] when treatment timing varies”).

219. See, e.g., Susan Athey & Guido W. Imbens, Design-Based Analysis in Difference-in-Differences Settings With Staggered Adoption, 226 *J. Econometrics* 62, 62 (2022) (using a staggered design approach when estimating the average treatment effect in a setting with panel data); Brantly Callaway & Pedro H.C. Sant’Anna, Difference-in-Differences With Multiple Time Periods, 225 *J. Econometrics* 200, 201 (2021) (noting the issues of interpreting the results for two-way fixed effects regressions); Kosuke Imai & In Song Kim, On the Use of Two-Way Fixed Effects Regression Models for Causal Inference With Panel Data, 29 *Pol. Analysis* 405, 413 (2021) (“We show that contrary to the common belief, the standard two-way fixed effects regression estimator does not represent a design-based, nonparametric causal estimator. It is impossible to simultaneously adjust for unobserved unit-specific and time-specific confounders.”); Anton Strezhnev, Semiparametric Weighting Estimators for Multi-Period Difference-in-Differences Designs 2 (2018) (on file with the *Columbia Law Review*) (unpublished working paper) (noting that the “two-way fixed effects estimator itself does not correspond to any valid matching estimator and can often impute improper counterfactuals for treated units”).

220. See Athey & Imbens, *supra* note 219, at 62–63; see also A. Craig MacKinlay, Event Studies in Economics and Finance, 35 *J. Econ. Literature* 13, 13 (1997) (explaining that event studies are widely used in accounting, finance, and economics research, among other fields).

221. For an explanation of the developments regarding event study methodology, see generally Simon Freyaldenhoven, Christian Hansen & Jesse M. Shapiro, Pre-Event Trends in the Panel Event-Study Design, 109 *Am. Econ. Rev.* 3307 (2019). For the history of event study designs, see generally John J. Binder, The Event Study Methodology Since 1969, 11 *Rev. Quantitative Fin. & Acct.* 111 (1998).

222. See, e.g., Liyang Sun & Sarah Abraham, Estimating Dynamic Treatment Effects in Event Studies With Heterogeneous Treatment Effects, 225 *J. Econometrics* 175, 175–77 (2021). For recent examples of stacked event studies being used in the law and economics literature, see Adam Chilton & Mila Versteeg, How Constitutional Rights Matter 106–10, 143, 187–89, 279–82 (2020); Kyle Rozema & Max Schanzenbach, Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct, 11 *Am. Econ. J.* 225, 244 (2019) (using

Employing this method, we define an event as the adoption of a diversity policy for the selection of editors. Event time is defined as the year relative to the year that the diversity policy was adopted. For each event, we match “treated” law reviews that had a change in a diversity policy that we observe for ten years (five before and five after the change in policy) with a set of “control” law reviews that we observe for the same ten years (five before and five after the change in policy of the treated journal).

For a given event, the control group consists of all journals in our sample that did not change their diversity policies over the same time period. This means that there can be a different number of control law reviews for each event. For example, consider *Virginia Law Review*'s first policy, which was adopted in 1987. This event consists of ten years of articles for Virginia (the treatment journal) from 1982 to 1991. This event uses any journal that did not change its policy from 1982 to 1991 as a control group. Based on the information in Table 1, the control group in this example therefore includes the law reviews at the University of Chicago, the University of Michigan, Northwestern University, Stanford University, the University of Texas at Austin, UCLA, USC, Vanderbilt University, Washington University in St. Louis, and Yale University. However, because the law reviews at University of California, Berkeley, Columbia University, Cornell University, Georgetown University, Harvard University, and the University of Pennsylvania changed their policies between 1982 and 1991, the control group in this example does not include these journals. For each of the control journals for an event, there are ten years of articles. The *California Law Review* has altered its diversity policy repeatedly in the years since 1969, so we never use it as part of the control group in our event studies.²²³ There are nineteen journals in our sample due to the fact that we always exclude Minnesota on account of uncertainty regarding when its one diversity policy change was made.²²⁴ This means that there are up to 190 journal-years for each event (ten for the treatment journal and 180 for the control journals).

We make two important sample restrictions. First, to allow articles time to be cited, we exclude events where the articles in the last year of the event window have not been published for at least five years. This means that we exclude events occurring after 2008. Second, in attempts to isolate

the stacked event study to examine police misconduct); Michael D. Frakes & Melissa F. Wasserman, Investing in Ex Ante Regulation: Evidence From Pharmaceutical Patent Examination 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27579, 2020), https://www.nber.org/system/files/working_papers/w27579/w27579.pdf [<https://perma.cc/3G33-7H93>] (using a stacked event study for patent examination investigations).

223. See Amy DeVaudreuil, Silence at the *California Law Review*, 91 Calif. L. Rev. 1183, 1191–201 (2003) (reviewing Andrea Guerrero, Silence at Boalt Hall: The Dismantling of Affirmative Action (2002)). We excluded Berkeley from our initial pre-analysis plan because of the changing diversity policies and precommitted to this approach. Chilton et al., Preregistered Study, *supra* note 209, at 8–9. However, when we include Berkeley as part of the control group in our event study analysis, our results are unaffected.

224. See *supra* note 191.

only changes attributable to a single change in policy, we restrict to events where there are no other changes in the law review's diversity policies within the event window. Our final sample includes eight events (Harvard 1982, Michigan 1983, NYU 1983, Virginia 1987, Columbia 1989, Cornell 1989, Georgetown 2007, UCLA 2007).

We then stack all events around event time and compare the treated law reviews with the change in a diversity policy to the control law reviews experiencing no changes in diversity policies in the event window. With the stacked event study dataset, we estimate the change in citations following the DiD approach in Equation 2

$$y_{ijet} = \alpha + \beta \text{Treated}_{jet} \times \text{Post}_{et} + \gamma \text{Treated}_{jet} + \zeta \text{Post}_{jet} + \psi_t + \eta_j + \varphi_e + \delta_{je} + \varepsilon_{ijet} \quad (2)$$

for article i , law review j , event e , and year t . Treated_{jet} is an indicator variable for the treatment law review in the event. Post_{et} is an indicator variable for the years after event time 0. The specification includes year fixed effects ψ_t , law review fixed effects η_j , and event fixed effects φ_e (which apply to both the treatment and control journals in the event). In the preferred specification, we include event-journal fixed effects δ_{je} , absorbing both the event fixed effects and the journal fixed effects. This implies that we draw on variation within a given journal-event. The coefficient of interest β is on the interaction between Treated_{jet} and Post_{et} . It indicates the average change in citations after the adoption of a diversity policy.

In this stacked event study framework, statistical inference requires proper clustering of standard errors to account for several dimensions of correlation in the error terms. First, the stacked nature of the data means that a given journal-year can be present multiple times in the data. For example, the *University of Chicago Law Review* in 1985 serves as a control observation for Harvard's 1982 change, Michigan's 1983 change, NYU's 1983 change, Penn's 1984 change, Virginia's 1987 change, Columbia's 1989 change, and Cornell's 1989 change. The fact that a single journal-year observation shows up multiple times as a control group for different events introduces correlation between the error terms for the repeated control observations in the data. This can be accommodated by clustering standard errors by journal. By clustering by journal, our approach additionally accounts for residual within-journal variation that occurs across events and across time. Second, the journals in any given year can experience a shock common to all the journals, caused by, for instance, many important Supreme Court cases that give rise to articles or the changing composition of authors or articles written. To address this, we additionally

cluster standard errors by year. Finally, there can be correlation within a given event, in part because we select control journals at the event level.²²⁵

To interpret the estimates, it is worth emphasizing two points. First, the same number of minority students might be selected to join law reviews irrespective of the law review's diversity policy. Without information on whether each member was selected because of the diversity policy, there is no way to estimate the effect of diversity itself. Because we estimate the effect of the changes in policies and not the resulting change in the percent of the members that are on the law review, our estimates should be interpreted as intent-to-treat estimates.

Second, there are many mechanisms that could cause the adoption of law review diversity policies to be associated with changes in citations of the articles they publish, but we cannot distinguish between them. For instance, it could be the case that diverse groups of editors deliberate in a way that makes it more likely that they compromise and select already prominent articles, which may lead to higher citations. Alternatively, the adoption of diversity policies could improve the quality of the editors on the law review without directly changing the way the editors deliberated. Additionally, having a diverse group of editors could lead to an improved deliberative process that resulted in better articles being selected. But even if the adoption of diversity policies does improve the deliberation process, this could be due to several specific mechanisms. Notably, the theoretical literature on the value of diversity has suggested several distinct mechanisms that could all lead to better decisionmaking when groups are more diverse. For instance, diverse groups may be better at problem solving, prediction, classification, verifying the truth of claims, or idea generations.²²⁶ Or another possibility is that the adoption of diversity policy leads to changes in author behavior where authors of higher quality articles are more likely to choose to publish with a given law review because of the diversity policy it has in place. We are unable to delineate between which of these, or many other, potential mechanisms may lead to a law review with a diversity policy in place selecting articles that may be more or less likely to be cited.

D. *Descriptive Statistics and Parallel Trends*

Table 2 reports descriptive statistics of the panel dataset and the stacked event study dataset at the article level. Column 1 reports descriptive statistics of the panel dataset. Columns 2–4 report descriptive statistics

225. To perform the multi-way clustering, we employ the approach described in Sergio Correia, *A Feasible Estimator for Linear Models With Multi-Way Fixed Effects 1–2* (2016), <http://scoreia.com/research/hdfe.pdf> [<https://perma.cc/PG9V-XRJ7>] (working paper).

226. See generally Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007) (discussing how diversity leads to improved group decisions and predictions); see also Scott E. Page, *The Diversity Bonus: How Great Teams Pay Off in the Knowledge Economy 68–132* (2017) (analyzing the contribution of diversity on various cognitive tasks).

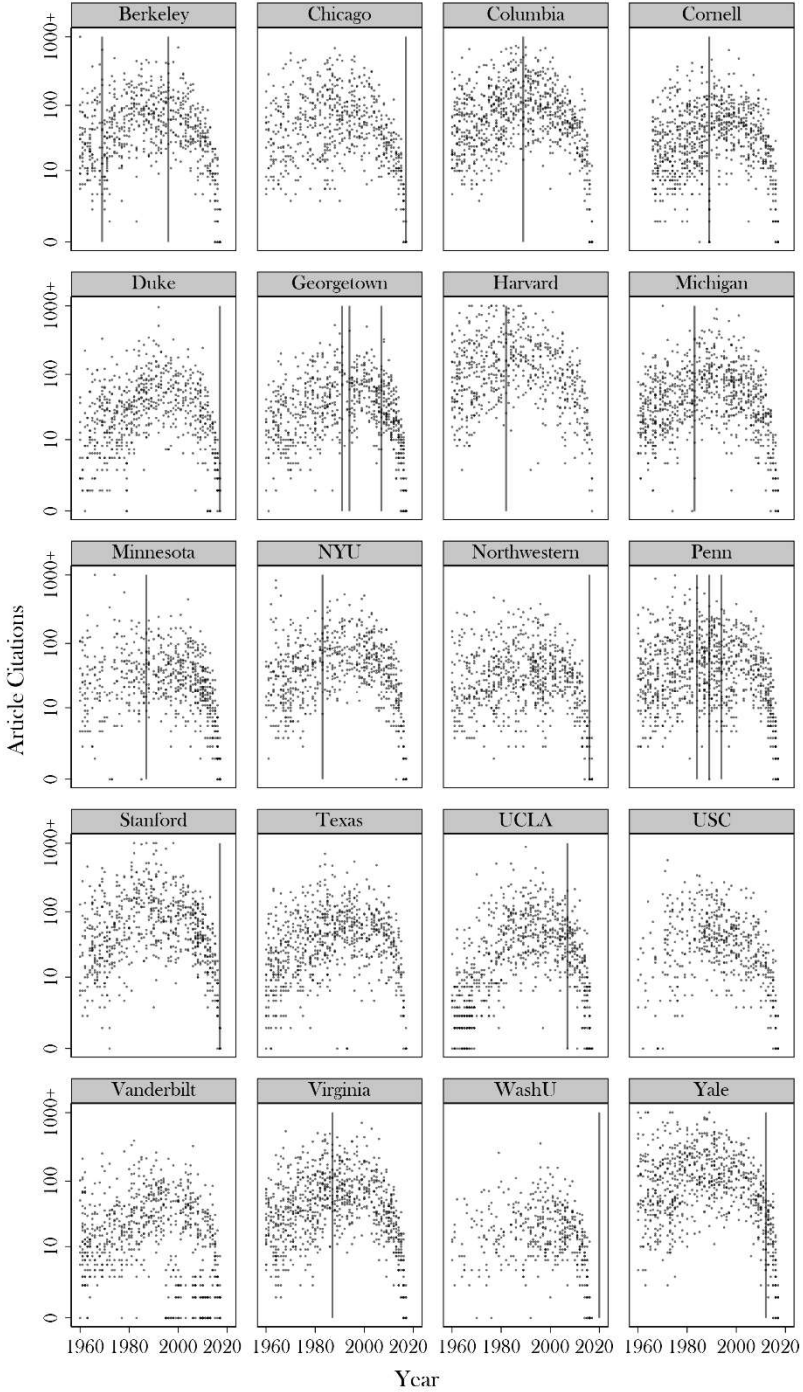
of the stacked event study dataset. The mean and median citations in the stacked event study dataset are comparable but higher than in the panel dataset.

TABLE 2. DESCRIPTIVE STATISTICS

Citations	Panel (1)	Stacked Events		
		All (2)	Control (3)	Treatment (4)
Mean	74	84	82	102
Median	41	46	45	60
Standard Deviation	112	120	119	130
Observations				
Articles	13468	13067	11938	11129
Journal-Year	1080	1050	970	80

Figure 2 reports a scatterplot of article-level citations separately by journal, where the vertical line indicates an extensive margin change in diversity policy from Table 1. Importantly, Figure 2 reveals that there is a decline in the number of citations that articles published in later years have received. This is because recent articles have had less time to receive citations, which suggests that raw data of citations alone will be insufficient to reveal whether diversity policies have been associated with increases in citations.

FIGURE 2. CITATIONS OF ARTICLES BY JOURNAL

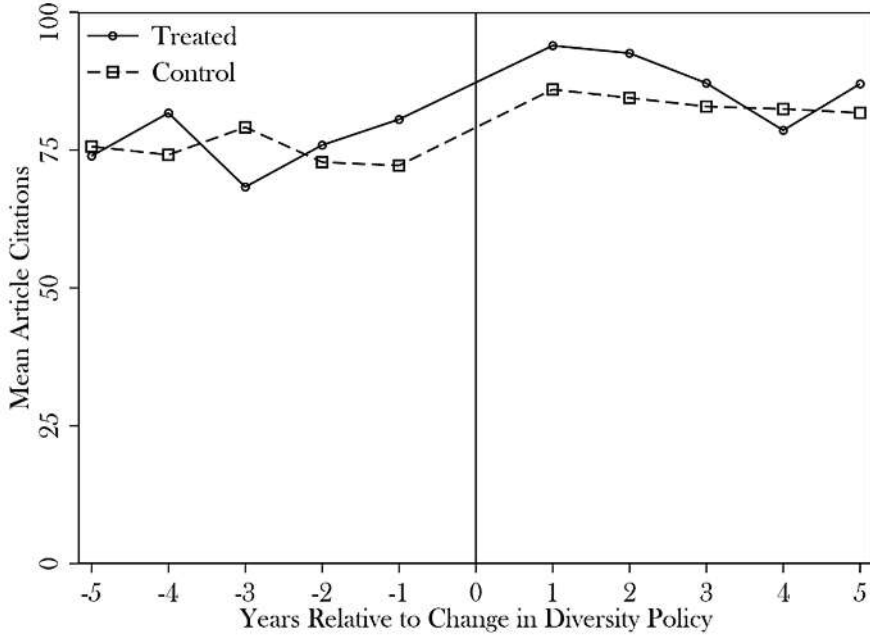


The key identifying assumption in our approach is that article citations would develop similarly over time in the treated and control law reviews. This “parallel-trends assumption” is the standard assumption for DiD research designs. We assess this parallel-trends assumption in Figure 3. The figure reports event studies of mean citations (Panel A) and median citations (Panel B) in the treatment and control law reviews for each of the five years before and after a change in a diversity policy. We average citations for treatment and control series across all events for each event time. The panels provide visual evidence for the parallel-time trends assumption for mean citations and median citations.

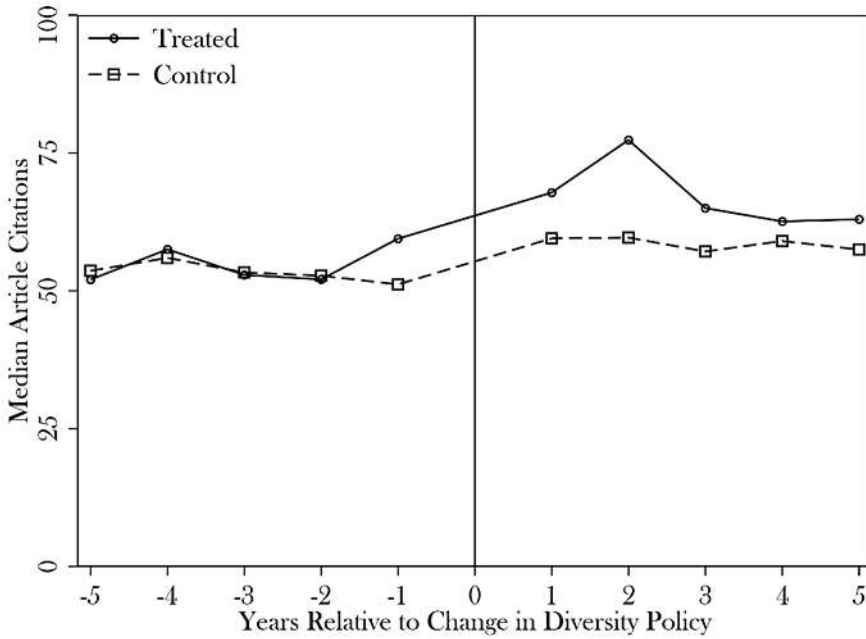
However, although this visual evidence is consistent with the assumption that article citations would develop similarly over time in the treated and control law reviews, it is still possible that article citations would have diverged even if the diversity policies were not adopted when they were. This could be true if, for instance, the diversity policies were adopted at the same time that other policy changes were made at the treated law reviews or the law schools that publish them that would have produced the same results. The estimates should therefore be interpreted as the combined effect of the diversity policy and any other unobserved policy changes.

FIGURE 3. CITATIONS AROUND CHANGES IN DIVERSITY POLICIES

1. Mean Citations



2. Median Citations



IV. RESULTS

We now turn to estimating the relationship between law reviews' adoption of diversity policies and the impact of the articles those journals publish. We begin by presenting our primary results using the two research designs described in Part III. We then present several additional analyses we performed to assess the robustness of our results.

A. *Primary Results*

Table 3 reports the results of the two-way fixed effects specifications from Equation 1. Columns 1 and 2 report the estimates where the policy takes effect in the year after it was enacted. Columns 3 and 4 report the cumulative estimates of the distributed lag model. Columns 1 and 3 include year and journal fixed effects. Columns 2 and 4 add journal-specific linear time trends.

We begin in Panel A by estimating Equation 1 at the article level.²²⁷ Because article citations are skewed to the right, we use the natural log of article citations as the outcome.²²⁸ This roughly allows for an interpretation of the estimates in percent terms (e.g., a coefficient of 0.06 would suggest that citations are 6% higher in years where a law review has a diversity policy).²²⁹ Panel B of Table 3 also estimates Equation 1 at the article level, but it adds fixed effects for the top fifty most popular article subjects on HeinOnline.²³⁰ Panels C and D of Table 3 report the results where the observation is at the journal-year level. Panel C reports the results where the outcome is the mean citation in a journal-year. Panel D reports the results where the outcome is the median citation in a journal-year.

227. Differences in the number of articles published from year-to-year and journal-to-journal means that we give journals and years with more articles published more weight for the article level regressions. We nonetheless report the article level regressions as a different cut at the data and for transparency.

228. To account for articles with zero citations, we add one before taking the log.

229. The coefficient is interpreted in log points but can be converted into a percent interpretation.

230. These subjects were shown in Figure 1.

TABLE 3. PANEL REGRESSIONS—ESTIMATES OF DIVERSITY POLICIES ON CITATIONS

	Distributed Lag			
	No (1)	No (2)	Yes (3)	Yes (4)
A. Article Level: ln(Citations)				
Diversity Policy	0.04 (0.10)	0.04 (0.10)	0.04 (0.10)	0.05 (0.10)
N	13468	13468	13468	13468
B. Article Level With Subject Fixed Effects: ln(Citations)				
Diversity Policy	0.03 (0.10)	0.04 (0.10)	0.03 (0.11)	0.05 (0.10)
N	13468	13468	13468	13468
C. Journal-Year Level: Mean Citations				
Diversity Policy	1.6 (6.0)	3.2 (6.7)	1.0 (6.9)	1.9 (6.8)
N	1080	1080	1080	1080
Dep Var Mean	75.0	75.0	75.0	75.0
D. Journal-Year Level: Median Citations				
Diversity Policy	6.3* (3.6)	10.7* (4.7)	6.4 (3.9)	11.3* (6.2)
N	1080	1080	1080	1080
Dep Var Mean	53.0	53.0	53.0	53.0
Covariates				
Year Fixed Effects	Yes	Yes	Yes	Yes
Journal Fixed Effects	Yes	Yes	Yes	Yes
Journal Time Trends	No	Yes	No	Yes

Standard errors are in parentheses and corrected using multi-dimensional clustering that allows for correlation within event, within law review, and within year. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table 4 reports the results of the stacked event study. Columns 1 and 2 have the treatment apply in the year after the vote, and Columns 3 and 4 have the treatment apply two years after the vote. Columns 1 and 3 include year, journal, event time, and event fixed effects. Columns 2 and 4 add journal-event fixed effects. The four panels in Table 4 follow the same structure as the panels in Table 3. Because we include journal-event fixed effects in the event study, we draw on variation within a given journal-event. In the stacked event study dataset at the journal-event-year level, the overall standard deviation of mean citations is 65, the between journal-event standard deviation of mean citations is 55, and the within journal-event standard deviation of mean citations is 34; the overall standard deviation of median citations is 46, the between journal-event standard deviation of median citations is 39, and the within journal-event standard deviation of median citations is 25.²³¹

231. Given that the event window is shifted one year later when the treatment is defined as taking effect in the two years after a policy was adopted, these numbers will differ slightly in this data construction.

TABLE 4. STACKED EVENT STUDY—ESTIMATES OF DIVERSITY POLICIES ON CITATIONS

	Treatment at t+1		Treatment at t+2	
	(1)	(2)	(3)	(4)
A. Article Level: ln(Citations)				
Post × Treated	0.19 (0.20)	0.17 (0.22)	0.15 (0.14)	0.14 (0.13)
N	13067	13067	13267	13267
B. Article Level With Subject Fixed Effects: ln(Citations)				
Post × Treated	0.18 (0.23)	0.17 (0.19)	0.15 (0.14)	0.14 (0.14)
N	13067	13067	13267	13267
C. Journal-Year Level: Mean Citations				
Post × Treated	11.8 (9.0)	11.8 (8.9)	6.7 (5.3)	6.7 (7.0)
N	1050	1050	1050	1050
Dep Var Mean	84.4	84.4	83.8	83.8
D. Journal-Year Level: Median Citations				
Post × Treated	15.1 (8.9)	15.1 (8.9)	17.2* (8.3)	17.2* (8.2)
N	1050	1050	1050	1050
Dep Var Mean	60.7	60.7	60.1	60.1
Covariates				
Year FE	Yes	Yes	Yes	Yes
Journal FE	Yes	Yes	Yes	Yes
Event Time FE	Yes	Yes	Yes	Yes
Event FE	Yes	Yes	Yes	Yes
Journal × Event FE	No	Yes	No	Yes
Standard errors are in parentheses and corrected using multi-dimensional clustering that allows for correlation within event, within law review, and within year. * p<0.1, ** p<0.05, *** p<0.01.				

The results in Tables 3 and 4 are broadly consistent. The coefficients are positive for all specifications reported in Tables 3 and 4. The specifications using mean citations—reported in Panels A, B, and C—as the dependent variable, however, are imprecisely estimated. It is important to note that citations are right skewed, which results in measures of mean citations being largely influenced by outliers.²³² That is, although it is impossible to have fewer than zero citations, a handful of articles can have a great deal more citations than other articles. As a result, measures of mean citations have higher variance than measures of median citations.²³³

For median article citations as the dependent variable, the results are positive and statistically significant at the 10% level in five of eight specifications, and the specifications that are not statistically significant at the 10% level narrowly miss being significant. To put the size of the effects in context, the estimates from Column 4 in Panel D of Table 3 suggest that the median citations increased by 21% after the adoption of a diversity policy (more specifically, the estimated increase is 11.3 compared to an average of 53.0 citations), and the estimates from Column 4 in Panel D of Table 4 suggest that the median citations increased by roughly 29% (more specifically, the estimated increase is 17.2 compared to an average of 60.1 citations).²³⁴

232. See, e.g., María Victoria Anauati, Sebastian Galiani & Ramiro H. Galvez, *Difference in Citation Patterns Across Journal Tiers: The Case of Economics*, 58 *Econ. Inquiry* 1217, 1221 (2020) (“Differences between mean and median values show that skewness in the distribution of total citation at the article level is noteworthy.”); Hamermesh, *supra* note 29, at 125 (“A central fact runs through all these comparisons: the distributions of citation measures are highly right-skewed. For that reason, throughout this section I present data describing the shapes of the distributions of citations, not merely measures of central tendency, particularly means”); Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 *J. Legal Analysis* 309, 319 (2013) (“The difference between mean and median is reflected by the high standard deviation . . . , skewed in part by outlier articles with unusually high citations”).

233. For further exploration of this issue, see *infra* section IV.B.5.

234. Given the claims made in current lawsuits that increased diversity may actually lead to worse performance, it is also worth considering whether our results leave open the possibility that the effect may be negative. To assess this claim, we can examine whether the 90% confidence interval would include any negative effects that could be still considered substantively meaningful. This approach has been most commonly used in political science. See, e.g., Carlisle Rainey, *Arguing for a Negligible Effect*, 58 *Am. J. Pol. Sci.* 1083, 1090 (2014). But it is also used in peer-reviewed law and economics journals. See, e.g., Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 *J.L. & Econ.* 713, 734 (2017). To do so, we focus on the lower bound of the 90% confidence interval in Column 4 of each panel of both Table 3 and Table 4. Panel A of Tables 3 and 4 rule out negative effects of diversity policies on citations at the article level larger than 11.5% and 7.5%, respectively. Panel B of Tables 3 and 4 rule out negative effects of diversity policies on mean article citations larger than 11.5% and 9%, respectively. Panel C of Tables 3 and 4 rule out negative effects of diversity policies on mean article citations larger than 9.5% and 5%, respectively. Panel D of Tables 3 and 4 rule out any negative effects of diversity policies on median article citations.

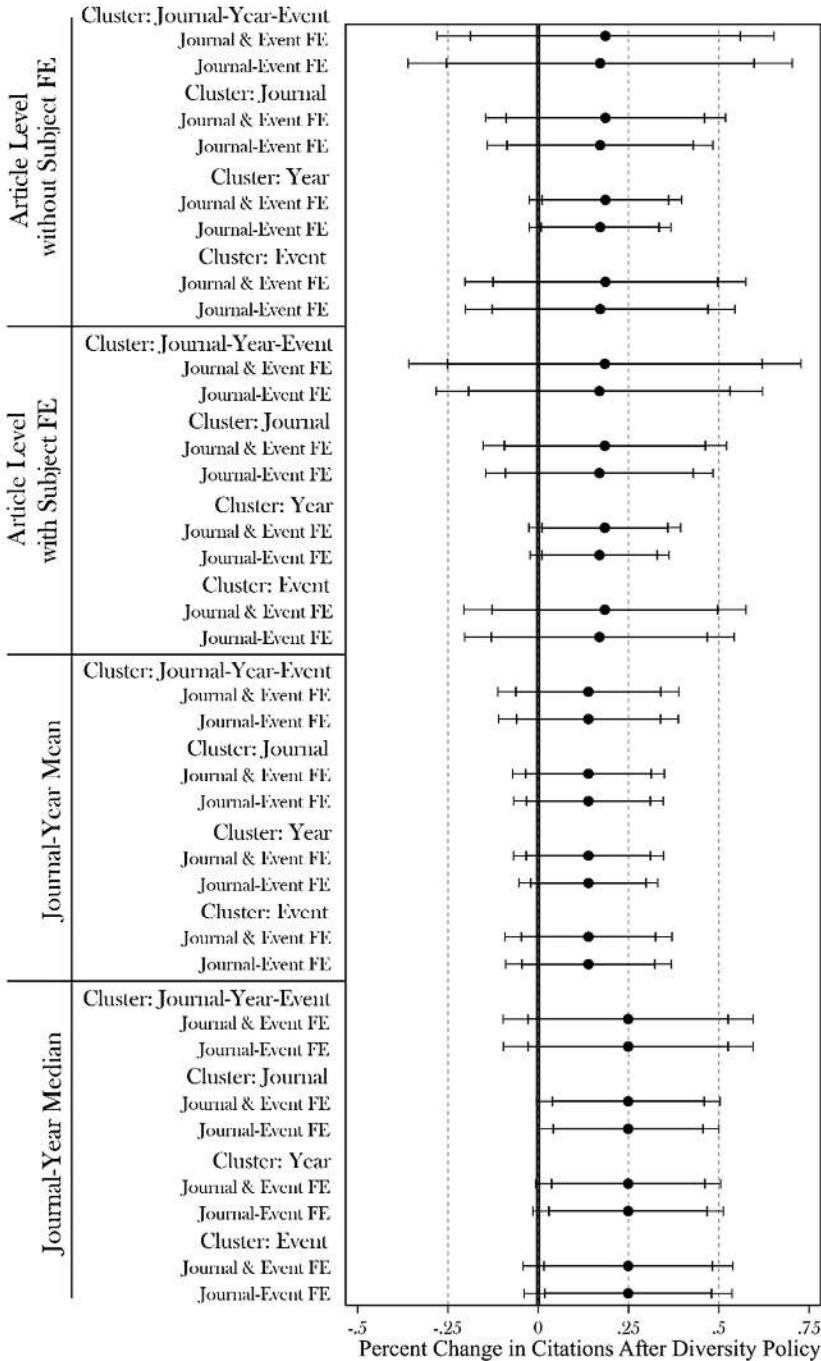
It is worth emphasizing that a few of these specifications narrowly miss being significant at a 10% level. This is in part due to the approach we take to clustering standard errors. Our primary results use three-way clustering at the journal, year, and event level.²³⁵ This is a conservative approach to clustering standard errors that significantly reduces statistical power, which in turn makes it less likely that we would find statistically significant results. Importantly, other recent studies that have used DiD research methods while analyzing treatments with staggered timing have clustered their standard errors at a single level.²³⁶ We thus explore the sensitivity of the stacked event study estimates to alternative ways of clustering standard errors. Figure 4 reports all of the main results in the stacked event study design described above with different units of clustering (in particular, separately by journal, year, and event). Figure 4 specifically plots the point estimates and 90% and 95% confidence intervals using the specifications reported in Table 4. Across the panels and specifications, the results are consistent with the results reported in the main analysis, but the standard errors are usually larger when using multi-way clustering.

235. See *supra* text accompanying note 225.

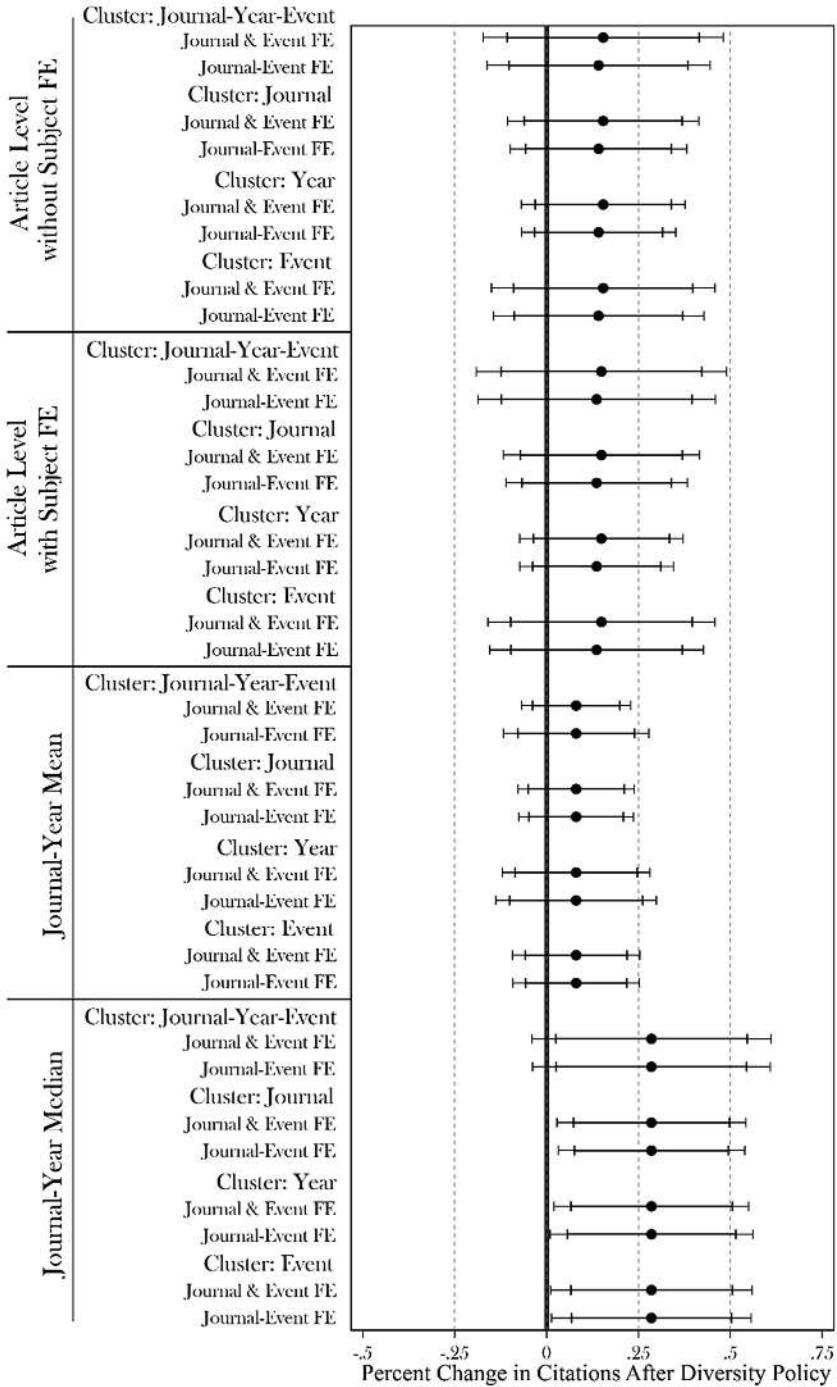
236. See, e.g., Andrew Goodman-Bacon, *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes*, 111 *Am. Econ. Rev.* 2550, 2559–60 (2021); see also Frakes & Wasserman, *supra* note 222, at 16–20.

FIGURE 4. SENSITIVITY TO ALTERNATIVE CLUSTERING AND CONTROLS

1. *Treatment at t+1*



2. Treatment at t+2



B. *Robustness Checks*

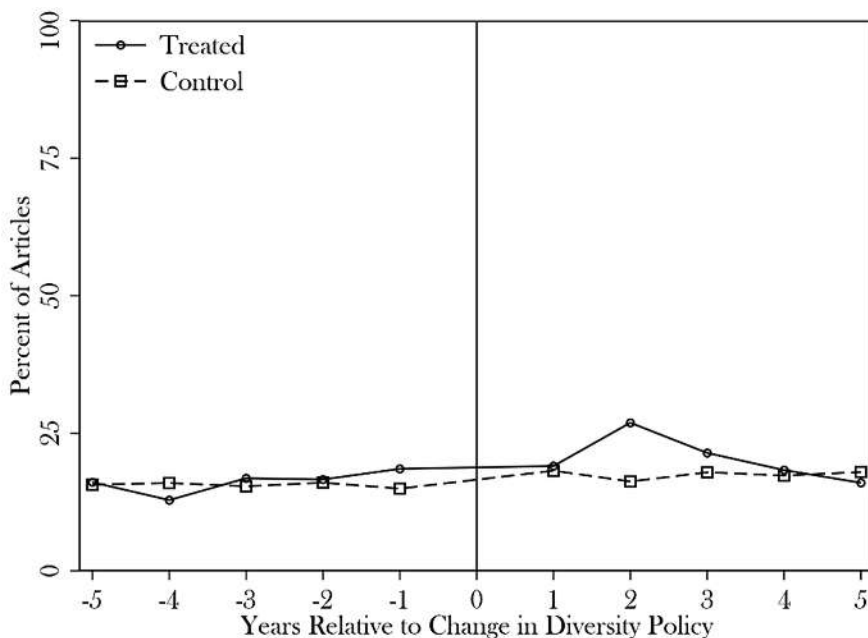
We next report five ways in which we explore the robustness of our results: (1) assessing changes to article subjects, (2) accounting for home-school authors, (3) changing the event window, (4) dropping individual events, and (5) exploring changes in the publication of highly cited articles.

1. *Assessing Changes to Article Subjects.* — A change in diversity policy might lead to a change in the distribution of the subjects of the articles the journal publishes. For example, a journal that implements a diversity policy might simultaneously begin publishing more articles about race and gender, either due to a shift in journal priorities or because of the new editors' preferences. This increased focus on race and gender might mean that the journal publishes more articles about constitutional law and fewer on tax law, for example. But because articles on different subjects have different citations patterns, one concern is that changes in quality could be masked by an accompanying change in the distribution of article subjects. For example, the true quality of articles could have decreased, but the journal might now be publishing more articles in subjects that are highly cited.

We investigate this concern by assessing whether law reviews published a higher share of articles related to diversity after the adoption of diversity policies. To do so, we identify five of the fifty most common subjects from HeinOnline that we believe are most directly related to diversity. Those five subjects are: age, civil rights, discrimination, gender, and race and ethnicity. Figure 5 reports the share of articles related to diversity that were published by the law reviews in our stacked event study framework. The results suggest there may be a modest increase in the share of articles that were published related to diversity in the years after diversity policies are adopted. The differences are small and not statistically significant, but the data in Figure 5 leaves open the possibility that there is some change in the subjects of articles published after diversity policies are adopted.

To more formally account for this possibility, Panel B of Tables 3 and 4 include subject fixed effects, which should control for changes in the subjects of articles. The results when including these fixed effects are similar to the other results in Tables 3 and 4. These results suggest that even if diversity policies do lead to some change in the distribution of the subjects of the articles the journal publishes, these changes in subjects are not driving the primary results.

FIGURE 5. PUBLICATION OF ARTICLES WITH SUBJECTS RELATED TO DIVERSITY



2. *Accounting for Home-School Authors.* — Another concern is that law reviews' tendency to publish articles written by scholars that teach at their law school may bias our results. Notably, there is evidence that the articles that law reviews publish that are written by the schools' own faculty are cited less than articles that law reviews publish by outside faculty.²³⁷ If law reviews publish home-school faculty for purposes other than choosing the best articles, then including articles by home-school faculty in the sample will affect the estimates. Moreover, if law reviews are more or less likely to accept articles written by home-school faculty after implementing a diversity policy, then including articles by home-school faculty can bias the results. For instance, if a more diverse group of editors has greater difficulty reaching consensus on which articles to select for publication, the editors may be more likely to default to selecting articles written by professors that teach at their institution.

To assess these concerns, we remove home-school faculty from our sample and re-estimate our primary specifications. To do so, we match authors in our sample to the AALS directory. We code articles with multiple authors as being written by a home-school author if any of the professors are from the home law school. Table 5 reports the results of the stack event study analysis after excluding home-school faculty. The results provide no

237. See Yoon, *supra* note 232, at 310. Professors Ian Ayres and Fredrick Vars found similar evidence. See Ayres & Vars, *supra* note 28, at 440.

evidence that including articles written by home-school faculty meaningfully influences the results.

TABLE 5. STACKED EVENT STUDY—ESTIMATES OF DIVERSITY POLICIES ON CITATIONS—AFTER EXCLUDING HOME-SCHOOL AUTHORS

	Treatment at t+1		Treatment at t+2	
	(1)	(2)	(3)	(4)
A. Article Level: ln(Citations)				
Post × Treated	0.20 (0.21)	0.18 (0.22)	0.16 (0.17)	0.15 (0.15)
N	11603	11603	11894	11894
B. Article Level With Subject Fixed Effects: ln(Citations)				
Post × Treated	0.20 (0.23)	0.18 (0.24)	0.15 (0.17)	0.14 (0.16)
N	11603	11603	11894	11894
C. Journal-Year Level: Mean Citations				
Post × Treated	7.5 (8.8)	7.5 (8.7)	5.4 (6.9)	5.4 (10.3)
N	1050	1050	1050	1050
Dep Var Mean	82.4	82.4	81.4	81.4
D. Journal-Year Level: Median Citations				
Post × Treated	19.0 (10.4)	19.0* (9.2)	20.1* (9.8)	20.1** (7.8)
N	1050	1050	1050	1050
Dep Var Mean	59.0	59.0	58.3	58.3
Covariates				
Year FE	Yes	Yes	Yes	Yes
Journal FE	Yes	Yes	Yes	Yes
Event Time FE	Yes	Yes	Yes	Yes
Event FE	Yes	Yes	Yes	Yes
Journal × Event FE	No	Yes	No	Yes

Standard errors are in parentheses and corrected using multi-dimensional clustering that allows for correlation within event, within law review, and within year. * p<0.1, ** p<0.05, *** p<0.01.

3. *Changing the Event Window.* — We next investigate the extent that the results are sensitive to our decision to examine a five-year window around changes in diversity policies. To assess this possibility, we vary the event window before and after changes in diversity policies from three to seven years. Table 6 reports the results of these regressions using the specifications reported in Table 4 in Columns 2 and 4 of Panels C and D. As the results in Table 6 show, although the point estimates and standard errors differ between the event windows, the differences are not substantively meaningful.

TABLE 6. STACKED EVENT STUDY—ESTIMATES OF DIVERSITY POLICIES ON CITATIONS—USING ALTERNATIVE EVENT WINDOWS

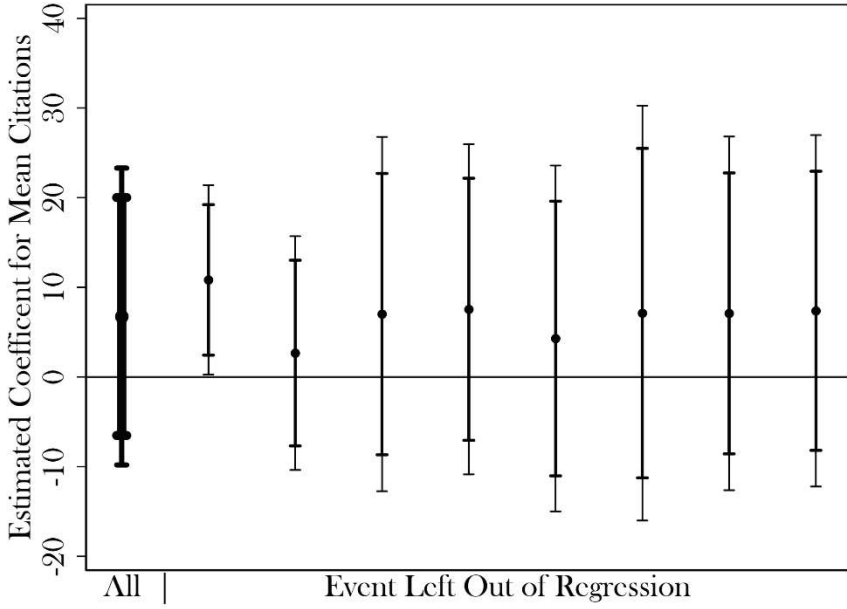
	Event Window				
	3 years	4 years	5 years	6 years	7 years
A. Mean Citations (Table 4, Column 2)					
Post × Treated	23.4 (12.5)	11.5 (10.5)	11.8 (8.9)	15.3 (8.7)	10.2 (10.0)
Dep Var Mean	86.9	85.1	84.8	84.1	83.3
B. Mean Citations (Table 4, Column 4)					
Post × Treated	-3.1 (12.0)	4.6 (7.1)	6.7 (7.0)	7.2 (8.5)	11.9 (9.1)
Dep Var Mean	84.6	85.3	83.8	82.7	82.2
C. Median Citations (Table 4, Column 2)					
Post × Treated	21.9* (11.4)	16.7* (8.4)	15.1 (8.9)	17.0* (7.8)	16.1 (10.9)
Dep Var Mean	61.7	61.1	60.7	60.8	59.9
D. Median Citations (Table 4, Column 4)					
Post × Treated	12.6 (9.9)	15.0 (8.8)	17.2* (8.2)	16.3 (12.8)	18.6* (9.8)
Dep Var Mean	60.7	60.5	60.1	59.1	59.1
N	630	840	1050	1260	1470
Standard errors are in parentheses and corrected using multi-dimensional clustering that allows for correlation within event, within law review, and within year. * p<0.1, ** p<0.05, *** p<0.01.					

4. *Dropping Individual Events.* — Another concern with our results is that they could be driven by abnormally large changes in article citations associated with a single event. This concern is particularly relevant in our setting because our stacked event study analysis leverages just eight diversity policies as treatment events. To assess this possibility, we conducted a robustness check where we dropped individual events one at a time from our sample and re-ran our primary specifications.²³⁸ Figure 6 reports the results. Panel A reports the results of mean citations from estimating the specification in Column 4, Panel C of Table 4. Panel B reports the results of median citations from estimating the specification in Column 4, Panel D of Table 4. In both panels, the left-hand estimate shown in bold reports the coefficient and confidence interval for our initial results that do not leave out any events. The other estimates then show the coefficient of interest and confidence interval when leaving out one event at a time. In Panel A, we find some evidence that one of the events is increasing the noise of our estimates. In Panel B, we find no evidence that a single event is driving the results.

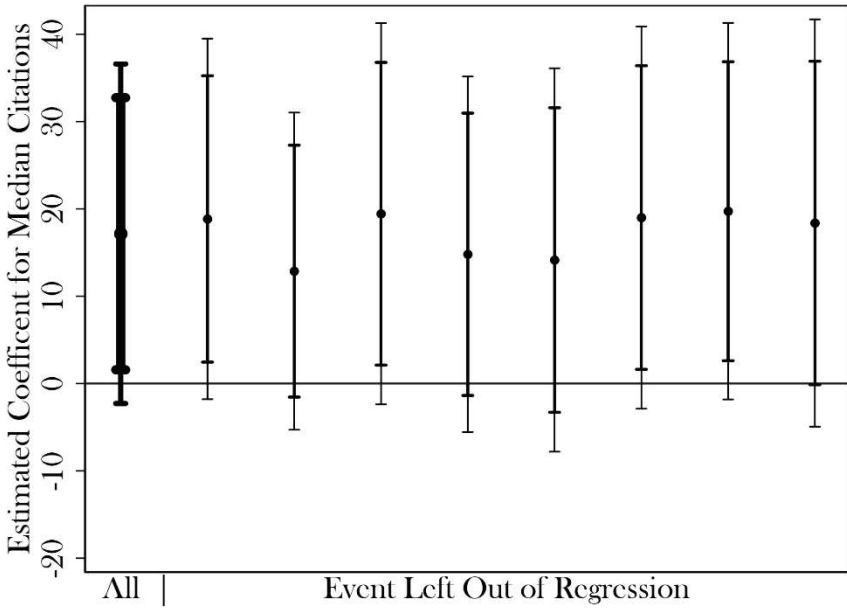
238. For an example of the use of this robustness check in a DiD framework, see Michael Frakes, *The Impact of Medical Liability Standards on Regional Variations in Physician Behavior: Evidence From the Adoption of National-Standard Rules*, 103 *Am. Econ. Rev.* 257 app. C (2013).

FIGURE 6. ESTIMATES LEAVING ONE EVENT OUT

a. Mean Citations



b. Median Citations



5. *Exploring Changes in the Publication of Highly Cited Articles.* — In our primary results, when assessing the effect of diversity policies on mean citations, the point estimates in Tables 3 and 4 were consistently positive but not statistically significant. In contrast, when assessing the effect of diversity policies on median citations, the point estimates were consistently positive and either statistically significant at the 10% level or close to conventional levels of statistical significance.

This raises the question of how a law review that adopts a diversity policy could improve the median citations of the articles they publish without at the same time increasing the mean citations of the articles they publish. There are at least two possible explanations for this pattern. The first explanation is that the selection of high-impact articles may be somewhat random. Since mean citations can be skewed by a handful of papers getting a large number of citations, any arbitrariness in the publication of a highly cited paper would introduce noise in mean citations.

The second explanation is that law reviews that adopt diversity policies may be less likely to select high-impact articles for publication. This could be the case, for instance, if diverse boards are more risk averse in their article selection. To assess this possibility, we test whether the changes in mean results are driven by law reviews with diversity policies in place rejecting high-impact articles, alternatively defined as articles at least in the 90th, 95th, or 99th percentile of citations in a given year. We then re-estimated the specifications from Panels A and B of Tables 3 and 4 while using these three definitions of high-impact articles as the dependent variable. When doing so, we find no evidence that law reviews with diversity policies are less likely to publish high-impact articles than law reviews without diversity policies in place. This result provides some evidence that the noisiness in mean estimates may be driven by outliers when a law review by chance publishes an article that becomes extremely highly cited.

V. THE CONSTITUTIONAL RAMIFICATIONS

We found evidence that diversity policies of law reviews increase the median impact of the articles those law reviews select. With respect to mean citations, the point estimates are consistently positive, but do not reach statistical significance at conventional levels. Given that one of law reviews' principal objectives is to publish impactful scholarship, we take this as evidence that diverse law review boards outperform nondiverse boards. In this Part, we discuss the possible ramifications of this study for larger questions of diversity in higher education. Although student-run law journals are a particularized context, the work done by student editors is similar to the academic work that takes place in many other settings, both inside and outside the classroom, in which diversity is relevant or contested. We thus believe that our findings hold implications for larger debates on affirmative action.

First, the article selection process is undertaken by a group of students working and discussing as a team. It thus mirrors, in many ways, the sorts of discussions that students might have in the normal course of academic life: discussions within the classroom on academic topics, group projects of all types, and even discussions about academic or other issues of importance that take place outside of the classroom. Diversity in higher education has focused on promoting better conversations and collaboration among students both inside and outside of the classroom. The law review selection and editing process exemplifies the types of collective work at which diverse groups are thought to excel.²³⁹

Our study thus implicates the core rationales the Supreme Court has relied upon in upholding affirmative action. As Justice Powell wrote in *Bakke*, “The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”²⁴⁰ In *Grutter*, Justice O’Connor noted that “student body diversity promotes learning outcomes,” and “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”²⁴¹ Most recently, Justice Kennedy concluded in *Fisher I* that “the attainment of a diverse student body . . . enhance[s] classroom dialogue.”²⁴² Our results lend support to Justice O’Connor’s and Justice Kennedy’s predictions about the potential gains from promoting diversity.

Second, the law review selection process involves reasoning, deliberation, and analysis similar to that which characterizes higher education more generally. Imagine, for instance, a group of law review editors discussing whether to accept for publication an article that examines “stop-and-frisk” policies and criminal procedure. The students will likely debate whether the argument is sound on its own terms, whether it adequately addresses potential counterarguments, and whether it offers novel ideas. Our study suggests that the law review editors may be more effective at answering those questions if the group is diverse. For instance, it could be the case that different members of the group are able to contribute different viewpoints to the collective process. In this example, Black and Latinx students might be able to supply perspectives or information on “stop-and-frisk” policies that differ from those of their white peers. But the point is more general and cuts across a wide range of legal subjects. These are precisely the sorts of discussions that students might have in the context of a

239. See Post & Minow Amicus Brief, *supra* note 179, at 17 (“In our educational judgment, law students who pursue careers both within and outside the legal profession will inevitably interact with increasingly diverse clients, managers, and colleagues In our view, diversity is associated with better educational outcomes.”).

240. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (internal quotation marks omitted).

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

242. *Fisher I*, 570 U.S. 297, 308 (2013).

class on criminal procedure or in the hallways following the class. Of course, the issue of whether an article makes a novel contribution is not one that will normally appear in class. But the analytic process of assessing the relationship between ideas and weighing the importance of one argument against another is a quintessential academic exercise, one which should be familiar to any law student who has been asked to distinguish cases or trace a line of precedent.

These points drawn from the law school context extend to many spheres in higher education. The classroom work of undergraduates studying history, political science, literature, or economics, and the conversations students enrolled in those courses have in their dorm lounges late into the night, bear a strong resemblance to the conversations of law students in class or law review editors debating which article to select. Indeed, as much as law professors talk about “learning to think like a lawyer,” the modes of argument and analysis that operate in law recur in a wide swath of academic disciplines.

We thus believe that our study is relevant to many of the criticisms leveled against the diversity rationale, which section I.B details. In the context of student editors accepting law review articles, our results provide evidence that diversity can provide meaningful benefits for institutions of higher education, benefits that are tied directly to the academic mission. And contra Justice Alito, we have proposed one “metric that would allow a court to determine” whether the diversity rationale is serving its desired purpose.²⁴³ At the same time, our research does not speak to other critiques of the diversity rationale. For instance, Professor Stephen Carter has noted that the diversity rationale could encourage Black students to embrace a sort of racialized party line, “to articulate the presumed views of other people who are black—in effect, to think and act and speak in a particular way, the *black* way—and [it may suggest] that there is something peculiar about black people who insist on doing anything else.”²⁴⁴ Professor Delgado’s trenchant criticism that the diversity rationale could render minority students “as an ornament, a curiosity” for the white majority makes a similar point.²⁴⁵

These are serious concerns, ones that our study cannot address. At the same time, they are not the concerns that animate the Supreme Court’s affirmative action jurisprudence. As we have explained, the relevant question for purposes of the Equal Protection Clause (and Title VI) is whether diversity does in fact provide meaningful benefits to institutions of higher education that would justify its status as a compelling governmental interest.²⁴⁶ Our study addresses that issue directly. The criticisms

243. *Fisher II*, 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting).

244. Stephen L. Carter, *Reflections of an Affirmative Action Baby* 31 (1991).

245. Delgado, *supra* note 118, at 570 n.46. For an argument contending that the diversity rationale also adversely affects white students, see generally James, *supra* note 119.

246. See *supra* Part I.

raised by Professors Carter and Delgado, by contrast, are more relevant to the wisdom of pursuing diversity than to the legality of doing so. Educational leaders would do well to heed their words of caution in designing and implementing diversity initiatives. But those types of design questions will be irrelevant if the Supreme Court declares affirmative action unlawful. If diversity is to remain an option, assessing its legal foundation thus remains critical.

Other critics of diversity initiatives have charged that diversity is irrelevant to significant segments of higher education. This criticism is well-encapsulated by Chief Justice John Roberts's question during oral argument in *Fisher II*: "[W]hat unique perspective does a minority student bring to a physics class? . . . I'm just wondering what the benefits of diversity are in that situation?"²⁴⁷ Chief Justice Roberts's critique has some force—it may well be that the benefits of diversity we have analyzed are of diminished relevance in a physics class as compared to a criminal procedure class.²⁴⁸ But our study is indicative of a consideration that Chief Justice Roberts overlooked. Physics majors participate in academic life in more ways than merely attending physics classes.²⁴⁹ They work for the student newspaper, they take classes outside of their major, and, of course, they socialize with other students and have wide-ranging conversations covering matters great and small. In the law school context, the student interested in corporate income tax (perhaps the law school version of physics) might join the law review and find herself analyzing the merits of an article on the Equal Protection Clause or the Clean Air Act's intersection with theories of environmental justice. Students—as Walt Whitman would note—"[are] large, [they] contain multitudes."²⁵⁰

Finally, we do not contend that diversity is the *only* rationale that might lead one to support affirmative action. Nor do we contend that diversity is necessarily the strongest rationale for affirmative action, as the remediation-style argument might well possess greater power. Nothing in our study should be read to cast doubt on the idea that affirmative action is justified as a means of remedying past and present racial bias. But that is not to say that our study is irrelevant to the debate among supporters of affirmative action. Our study reveals that measurable benefits can flow from racial diversity in academic settings.

247. Transcript of Oral Argument at 55, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 8482483.

248. There are potentially other benefits to diversity, such as the signaling effect of seeing that all academic disciplines are open to all students regardless of race or other characteristics. But the Supreme Court has not acknowledged or relied upon those benefits in upholding affirmative action. See, e.g., *Fisher II*, 136 S. Ct. at 2210 (noting certain benefits of diverse classrooms, but not the signaling effect).

249. Or, at least, most of them do. The one of us who was a physics major can testify to having done things other than study physics on a regular basis.

250. Walt Whitman, Song of Myself, in *Leaves of Grass* (1855).

CONCLUSION

A decade after Barack Obama's presidency of the *Harvard Law Review* concluded, he reflected on the importance of having racial minorities serve on law reviews:

I think that minority participation in law reviews is critical for three reasons. First, in a profession such as law that is obsessed with rankings and hierarchies, participation in a law review provides minority students the additional edge that they may need for clerkships, positions in the top law firms, and career advancement. Second, law reviews shape the conversation about those legal issues that matter most in our society, and it is imperative that minority voices participate in that conversation. Finally, law reviews provide the intensive writing, research, and organizational experience that will serve any student in becoming a quality lawyer.²⁵¹

Obama's assessment is characteristically thoughtful and thorough. But he might have also added a fourth reason that racial diversity on law reviews is worthwhile: Diverse law reviews do better work.

This Article empirically evaluates how the adoption of policies aimed at increasing the diversity of law review editors influenced the impact of articles published. To do so, we collected data on when the flagship law reviews of the top twenty law schools adopted or changed diversity policies and on citations to all articles published in those journals between 1960 and 2018. Using a stacked event study research design, we find evidence that law reviews that adopted diversity policies saw an increase in the median citations of the articles they publish of roughly 25%. Assessing mean citations, the point estimates are consistently positive, though only a few specifications are statistically significant at conventional levels.

Our results thus speak to a long-standing constitutional debate over the diversity rationale for affirmative action. Ever since Justice Powell adopted diversity as the sole permissible justification for affirmative action in *Bakke*,²⁵² and through the Supreme Court's reaffirmations of that rationale in *Grutter* and *Fisher*,²⁵³ critics from both the right and left have savaged the diversity rationale as unsupported and unsound. Indeed, the critics of diversity—Guido Calabresi, Richard Delgado, Lino Graglia, Sanford Levinson, Melissa Murray, Antonin Scalia, and Clarence Thomas, among many others—themselves form an impressively diverse group.²⁵⁴ The criticism of diversity has even been visited directly upon student-

251. JBHE, First Black President, *supra* note 6, at 25.

252. See *supra* text accompanying notes 47–66.

253. See *supra* text accompanying notes 71–92.

254. See *supra* section I.B.

edited law reviews. Richard Posner has been characteristically blunt, contending that “[t]he *Harvard Law Review*, with its epicycles of affirmative action, is on the way to becoming a laughing stock.”²⁵⁵

Such attitudes culminated in lawsuits against the *Harvard Law Review* and *New York University Law Review*.²⁵⁶ And litigation challenging diversity programs more generally, including against Harvard University and the University of North Carolina, is now before the Supreme Court.²⁵⁷ In *Grutter*, Justice O’Connor suggested that in 2028 affirmative action would no longer be needed.²⁵⁸ The Court will soon confront anew the question of whether diversity is a compelling governmental interest, with the legality of affirmative action in higher education hanging in the balance.

When the Court faces this question, will it be swayed by the antipathy that has been heaped upon the diversity rationale? Will it content itself with mere unsubstantiated assertions? Or will it look to empirical evidence? We have found evidence that policies designed to increase the diversity of groups in an academic setting can lead to an improvement in group performance. If the Supreme Court does indeed consider renouncing the diversity rationale—thereby forcing universities, law schools, and even student-run law reviews to forego the benefits of diversity—it would do well to contemplate the evidence of this Article.

255. Richard A. Posner, *Overcoming Law* 77 (1995).

256. *Fac., Alumni & Students Opposed to Racial Preferences v. Harvard L. Rev.*, No. 18-cv-12105 (D. Mass. Oct. 8, 2018); *Fac., Alumni & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev.*, No. 18-cv-9184 (S.D.N.Y. Oct. 8, 2018).

257. See Liptak & Hartocollis, *supra* note 18.

258. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

APPENDIX

TABLE 7. SOURCES OF INFORMATION FOR DIVERSITY PLANS

Diversity Plan	Source and Details (if available)
Berkeley 1969 & 1996	Amy Devaudreuil, Silence at the <i>California Law Review</i> , 91 Calif. L. Rev. 1183 (2003).
Harvard 1982	<p>Paras D. Bhayani, Law Review Debates Affirmative Action Policy, Harv. Crimson (June 5, 2006), https://www.thecrimson.com/article/2006/6/5/law-review-debates-affirmative-action-policy/ [https://perma.cc/D7K9-8DG6].</p> <p>Eighteen of the forty-eight spots on the <i>Harvard Law Review</i> involved, as part of the selection process, a personal statement that could include information relevant to diversity.</p>
Michigan 1983	<p>Ted Lee, Staff Overhauls Review Selection, Res Gestae (Feb. 16, 1983), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1422&context=res_gestae [https://perma.cc/79KJ-ADMF].</p>
NYU 1983	<p>Email and telephone correspondence with Editors-in-Chief from 1982–1989.</p> <p>Twelve of the fifty available spots on the <i>NYU Law Review</i> involved, as part of the selection process, a personal statement that could include information relevant to diversity.</p>
Penn 1985 & 1989	Townsend Davis, Letter to the Editor, <i>Columbia Law Review</i> Broadens Its Outlook, N.Y. Times, May 4, 1989, at A34; email and phone correspondence with editors from 1982–2003.
Penn 1994	Lisa Anderson, Law Review Masks Diversity in a New Admission System, N.Y. Times, July 7, 1995, at A17; email correspondence with Editors-in-Chief and Executive Editors from 1982–2003.
Minnesota 1987	Email correspondence with Editors-in-Chief from 1979–1989 and relevant faculty advisors.

Virginia 1987	<p>William Raspberry, Opinion, Affirmative Action That Hurts Blacks, Wash. Post (Feb. 23, 1987), https://www.washingtonpost.com/archive/opinions/1987/02/23/affirmative-action-that-hurts-blacks/c933a68f-a9f7-4df8-b7e4-a97dcffaa214/ (on file with the <i>Columbia Law Review</i>).</p> <p>Ten of the sixty available spots on the <i>Virginia Law Review</i> involved, as part of the selection process, a personal statement that could include information relevant to diversity.</p>
Columbia 1989	<p>Stephen Labaton, Law Review at Columbia in a Dispute on Bias Plan, N.Y. Times, May 3, 1989, at B1.</p> <p>Thirty of the forty-five available spots on the <i>Columbia Law Review</i> involved, as part of the selection process, a personal statement that could include information relevant to diversity.</p>
Cornell 1989	<p>Cornell Law Review By-Laws, Cornell Univ. (June 5, 2008), https://web.archive.org/web/20080605052004/http://www.lawschool.cornell.edu/research/cornell-law-review/bylaws.cfm (on file with the <i>Columbia Law Review</i>).</p>
Georgetown 1991	<p>Marshall Ingwerson, In Pursuit of Racial Diversity, Christian Sci. Monitor (May 8, 1991) https://www.csmonitor.com/1991/0508/08081.html (on file with the <i>Columbia Law Review</i>).</p>
Georgetown 1994	<p>Email correspondence with editors of the <i>Georgetown Law Journal</i> from 1993–2005.</p>
Georgetown 2007	<p>Email correspondence with faculty and administrators at Georgetown.</p>
UCLA 2007	<p>Law Review and Diversity, Who Owns the Fox? (Mar. 14, 2008), http://uclaw.blogspot.com/2008/03/law-review-and-diversity.html [https://perma.cc/G32A-YPGP].</p>
Yale 2012	<p>Email correspondence with the Editor-in-Chief from 2011–2012.</p>

Northwestern 2016	Email correspondence with editors. Ninety percent of the available spots on the <i>Northwestern Law Review</i> involved, as part of the selection process, a personal statement that could include information relevant to diversity.
Chicago 2017	Elie Mystal & Joe Patrice, <i>Campus Strife Over Law Review Diversity</i> , Above L. (May 22, 2014), https://abovethelaw.com/2014/05/campus-strife-over-law-review-diversity/ [https://perma.cc/K335-J6LP]; personal knowledge of authors.
Duke 2017	Email correspondence with the faculty advisor to the <i>Duke Law Journal</i> .
Stanford 2017	Email correspondence with the President of the <i>Stanford Law Review</i> from 2018–2019.
WashU 2020	Personal knowledge of authors.
Texas (Never)	Email correspondence with Editors-in-Chief.
USC (Never)	Email correspondence with Editors-in-Chief.
Vanderbilt (Never)	Email correspondence with Editors-in-Chief.

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