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2020

## Rethinking the Writing Competition: Developing Diversity Policies on Law Journals After *FASORP I* and *II*

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### Recommended Citation

Paul Willison, *Rethinking the Writing Competition: Developing Diversity Policies on Law Journals After FASORP I and II*, 71 Case W. Rsrv. L. Rev. 351 (2020)

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— Comment —

RETHINKING THE WRITING  
COMPETITION: DEVELOPING  
DIVERSITY POLICIES ON LAW  
JOURNALS AFTER *FASORP I* AND *II*

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INTRODUCTION

I grew up in Uganda attending an international school where my graduating class of thirty-six students came from twenty different countries. My experience in middle school and high school was different

from most American schools, but I never thought twice about the broad array of differences between my classmates and I. Throughout middle school and high school we learned to appreciate each other's distinctions—often at school-sponsored events—and built bridges across cultural barriers inside and outside the classroom. It was unique. But I did not fully appreciate it until I returned to the United States for college, and now law school. Where diversity and inclusivity permeated the social fabric in Uganda, many doors in legal education remain closed to those who cannot assimilate to a certain culture.

Law journals represent one of the pinnacle achievements for law students. They help students obtain jobs, clerkships, and teaching positions. Law journals, however, have remained predominantly white and male throughout most of their existence. In the past two decades, law journals have turned to face their homogenous history, and some have developed policies to promote a diverse editorial staff. This prompted two recent lawsuits against New York University's and Harvard's law reviews for allegedly unconstitutionally considering applicants' race and gender in selecting members—arguably at the expense of white and male students. Although both complaints were dismissed for lack of standing, these lawsuits demand attention from all journals as they consider implementing their own diversity policies and reap the benefits that flow from a diverse editorial staff.

This Comment aims to provide color behind the conversation. Part I discusses diversity in law schools, barriers to achieving a diverse student body, and the relevant law for considering race and gender for applicants in institutions of higher education. Part II takes a closer look at law journals and discusses their history and modern purpose. Part III reviews the intersection of law journals and diversity and unpacks policies that have contributed to this homogenous membership. And finally, Part IV highlights key considerations for law journals that want to implement a new diversity policy in selecting new journal editors and considers a sample diversity policy that Case Western Reserve University law journals could implement.

#### PART I: DIVERSITY IN LEGAL EDUCATION AND PRACTICE— BENEFITS, BARRIERS, AND THE LAW

The legal profession has been, and continues to be, homogenous. Even “[c]ompared to other professions, the legal profession remains one of the least diverse of all professions in the US.”<sup>1</sup> It comes as no surprise

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1. INST. FOR INCLUSION IN THE LEGAL PRO., IILP REVIEW 2019–2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 15 (2020) (citation omitted) (“Aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs. In 2018, minority representation among lawyers was 16.5%, compared to 24.9% among financial managers, 29.6% among account–

then that law schools are similarly homogenous. For decades law schools have been predominantly white and male.<sup>2</sup> This flows partly from law schools' refusing to accept Black students into their halls until 1936 while also prohibiting women from entering the profession until women obtained the right to vote.<sup>3</sup> Nearly three decades later, in 1964, only 1.3% of law students were Black.<sup>4</sup> And, in 1978, minorities represented 9% of the national incoming JD class.<sup>5</sup> Some blame “the ‘systemic and institutional bigotry and prejudice’ that undergirded law school admissions well into the 1970s” for this homogeneity.<sup>6</sup> As of 2018, 31% of the entering JD class identified as racial minorities.<sup>7</sup> Forty years later, law schools have generally shifted towards pursuing diversity—even

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ants and auditors, 44.6% among software developers, 34.8% among physicians and surgeons, and 27.8% within the management and professional labor force as a whole.”).

2. AM. BAR ASS'N, ABA PROFILE OF THE PROFESSION 2019, at 27 (2019) (observing that “[f]or decades, most law school students were white and male”); *see also* Louis M. Rocconi, Aaron N. Taylor, Heather Haeger, John D. Zilvinskis & Chad R. Christensen, *Beyond the Numbers: An Examination of Diverse Interactions in Law School*, 12 J. OF DIVERSITY IN HIGHER EDUC. 27, 27 (2019) (“White men have tended to make up disproportionate numbers of students, faculty, and administrators.”).
3. *See, e.g.*, *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936) (requiring the University of Maryland to enroll a young Black man into the law school after he was denied admission for being Black); *see also* *Missouri. ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (ordering the University of Missouri—the only law school in the state—to admit a young Black man to the law school instead of sending him to an out-of-state law school for being Black); *Sweatt v. Painter*, 339 U.S. 629, 630 & n.1, 635–36 (1950) (unanimously requiring that the University of Texas admit a Black student to its whites-only law school instead of creating a separate law school for Black students); Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience about Law and Social Change?*, 61 ME. L. REV. 1, 3 (2009) (observing that all states admitted women to their bars by 1920 and outlining the timeline along which law schools began accepting women law students); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (upholding a state law excluding women from the state bar).
4. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 375 (2004).
5. AM. BAR ASS'N, *supra* note 2, at 27.
6. Rocconi et al., *supra* note 2, at 27 (quoting Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 78 (2015)).
7. AM. BAR ASS'N, *supra* note 2, at 27 (noting that although minority enrollment was only 31% in 2018, in 2019, “63% of law students are white, 13% Hispanic, 8% African-American, 6% Asian and 10% race unknown or other”).

going so far as providing “Diversity Index[es]” in the notable U.S. News and World Report Law School Rankings<sup>8</sup>—but remain primarily white.<sup>9</sup>

Outside law schools, a similar trend permeates the legal profession. This likely stems in part from exclusionary policies that precluded Black people from professional legal organizations into the twentieth century.<sup>10</sup> In the past decade, however, the number of lawyers who identify as racial or ethnic minorities grew slowly<sup>11</sup>—even though only 15% of all lawyers across the U.S. identified as a racial or ethnic minority in 2019 and “[n]early all minorities are underrepresented in the legal profession compared with their presence in the U.S. population.”<sup>12</sup> This is particularly noticeable among Black people who comprise 13.4% of the entire U.S. population but only 5% of lawyers nationally.<sup>13</sup> Racial and ethnic minorities are especially few and far between among law firm partners where only 9% of partners across the U.S. identify as racial or ethnic minorities.<sup>14</sup> Although the legal profession has progressed slowly throughout the years, “[r]acial minorities are seriously underrepresented . . . among the practicing bar.”<sup>15</sup>

The legal profession demonstrates a similar trend regarding the gender gap. In 1970, 91% of all law students identified as men.<sup>16</sup> Women

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8. *Law School Diversity Index*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (last visited Nov. 7, 2020) (ranking 188 law schools based on student body diversity).
  9. These trends regarding students who identify as racial and ethnic minorities are worse at Case Western Reserve University School of Law. As of 2019, 77% of incoming students identify as White, 4% as Hispanic, 6% as Black or African American, 5% as Asian, and 0% Unknown. See CASE W. RSRV. UNIV., 2019 STANDARD 509 INFORMATION REPORT 2 (2019).
  10. *ABA Timeline*, AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/timeline/](https://www.americanbar.org/about_the_aba/timeline/) [<https://perma.cc/Q7XD-LV3C>] (last visited Sept. 7, 2020) (noting that in 1912 the ABA excluded Black lawyers from its ranks); see also *History*, NAT’L BAR ASS’N, <https://www.nationalbar.org/NBA/History.aspx> [<https://perma.cc/VNV3-4LXW>] (last visited Sept. 7, 2020) (explaining that the National Bar Association—previously known as the “Negro Bar Association”—“was founded [in the 1920s] after some of the National Bar Association founders were denied membership in the American Bar Association”).
  11. AM. BAR ASS’N, *supra* note 2, at 8.
  12. *Id.*
  13. *Id.*
  14. *Id.* at 10 (highlighting also that only 3% of partners in Cleveland identify as a racial or ethnic minority).
  15. Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools”*, 7 AFR.-AM. L. & POL’Y REP. 1, 5 (2005).
  16. AM. BAR ASS’N, *supra* note 2, at 27.

gradually attended law schools in greater numbers and finally, “[i]n 2014, for the first time, there were more first-year female students than male students.”<sup>17</sup> As of 2018, 52.4% of all JD enrollees identified as women.<sup>18</sup> But, in 2019 only 36% of the total lawyers across the U.S. identified as women.<sup>19</sup> Thus, male lawyers still outnumber female lawyers nearly two to one and women can expect to leave an institution of relative equilibrium for a more male-centric occupation after graduation.<sup>20</sup>

It is difficult to know exactly how the legal profession has become more diverse because, unfortunately, data is scarce.<sup>21</sup> “Outside of law firms and Article III judgeships, the profession lacks even basic gender and racial/ethnic breakdowns . . . or more inclusive efforts covering sexual orientation and disability status.”<sup>22</sup> Law schools and the profession at large can, and should, do better. By collecting and consolidating more information, schools and legal organizations can better display how they are creating a more diverse and inclusive profession.

#### *A. Benefits of Diversity in Law Schools*

A full and growing body of research documents the benefits that flow from diversity generally.<sup>23</sup> As sociologists have argued, “each time an excluded group joins the larger legal discourse, society learns more about the ‘limits of [its] current way of seeing.’”<sup>24</sup> This research focuses

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17. *Id.*

18. *Id.*

19. *Id.* at 7.

20. These trends regarding students who identify as women are better at Case Western Reserve University School of Law. As of 2019, 61% of incoming students identify as women. *See* CASE W. RSRV. UNIV., *supra* note 9, at 2.

21. INST. FOR INCLUSION IN THE LEGAL PRO., *supra* note 1, at 17 (“Tracking the profession’s progress toward diversity and inclusion is made difficult by the continuing lack of data.”).

22. *Id.*

23. *See, e.g.*, Rocconi et al., *supra* note 2, at 27 (“A large body of research has demonstrated the positive effects of diversity in an educational setting . . . .”); *see also* Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity-Benefits Ideology Undermine Inclusion?*, 112 NW. U. L. REV. 1605, 1619 (2018) (“Social psychological research, along with research in other social sciences, catalogues a robust set of physiological, psychological, and interpersonal benefits derived from diversity.”).

24. Megan S. Knize, *The Pen Is Mightier: Rethinking the “Gladiator” Ethos of Student-Edited Law Reviews*, 44 McGeorge L. Rev. 309, 312 (2013) (alteration in original) (quoting Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, U. MIA. L. REV. 29, 52 (1987)). Indeed, the Supreme Court has recognized that a public law

primarily on racial and ethnic diversity and because a wealth of research highlights these benefits in an educational context,<sup>25</sup> many law firms have pursued diversity to similarly leverage the benefits associated with a diverse workforce.<sup>26</sup>

Diversity benefits student bodies in many ways. A diverse student body leads to “reductions in prejudice, appreciation of other’s perspectives, improved critical thinking, greater connection to the institution, improved self-confidence, greater civic engagement, and enhancement of leadership and professional skills.”<sup>27</sup> Diversity’s benefits also transcend education and psychology by physiologically reducing anxiety levels while also reducing prejudice among students.<sup>28</sup> Specific to racial diversity, “[g]reater intergroup contact increases cognitive abilities within racially diverse educational settings”<sup>29</sup> not only because of what racial minorities say, but also because of how minorities’ perspectives challenge stereotypes.<sup>30</sup>

Diversity also improves public perceptions of institutions of higher education. As Justice O’Connor stated in the preeminent affirmative action case, *Grutter v. Bollinger*, “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the

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school’s “student body diversity is a compelling state interest.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

25. See, e.g., Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* 126, 126–27 (Mitchell J. Chang, Daria Witt, James Jones & Kenji Hakuta eds., 2003) (noting the broad consensus of “the ways diversity expands and enriches the educational enterprise through the benefits it provides to individual students, to colleges and universities, and to our society and our world”).
26. See, e.g., Knize, *supra* note 24, at 312 (highlighting that “[t]here is little disagreement that the legal profession is well-served by embracing diverse perspectives”); see also *Diversity*, JONES DAY, <https://www.jonesday.com/en/firm/diversity?tab=thecommitment> [<https://perma.cc/44KX-7P9P>] (last visited Aug. 5, 2020) (explaining how “aggressively . . . hiring, retaining, and developing lawyers from historically underrepresented groups” allows the firm to “tap the unique strengths and experiences of very talented lawyers”).
27. Rocconi et al., *supra* note 2, at 27 (describing the benefits of diversity through a broad lens); see also Hurd & Plaut, *supra* note 23, at 1620 (footnotes omitted) (“[S]ocial science research demonstrates that interracial contact improves cognitive processing, critical thinking, and problem solving.”).
28. Hurd & Plaut, *supra* note 23, at 1619–20.
29. Rocconi et al., *supra* note 2, at 29.
30. Hurd & Plaut, *supra* note 23, at 1621 (“[I]nterracial contact . . . challenge[s] existing stereotypes . . . [and] requires deeper and more creative thinking than simply relying on preconceived stereotypes.”).

educational institutions that provide this training.”<sup>31</sup> Thus, in law schools, improving student body diversity validates that people across demographics can access legal training in law schools.<sup>32</sup> Law students share this sentiment, valuing diverse student bodies that expose them to new perspectives—an experience particularly relevant after law school.<sup>33</sup>

Finally, diversity impacts the legal profession—the sphere where law students eventually work. Recent studies show that diversity on the bench can affect case outcomes.<sup>34</sup> Managing Partners and General Counsel have also heralded multiple business justifications for diverse legal talent such as a broader base of experience, avoiding groupthink, and better representing the communities in which these organizations operated.<sup>35</sup> Thus, diversity’s benefits transcend educational settings and diverse student bodies provide a necessary training ground to engage with divergent perspectives before practicing law.

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31. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003); *see also* Knize, *supra* note 24, at 312 (quoting Carolyn B. Lamm, *Diversity and Justice: Promoting Full and Equal Participation in the Legal Profession*, 48 *JUDGES’ J.* 1, 1 (2009) (explaining that “homogeneity of lawyers and judges leads to cynicism and reduces confidence in the justice system” because “fairness and equal treatment are defining principles of the law, and lawyers have an obligation to eliminate discrimination and ensure that all people who aspire to become lawyers and judges have an equal opportunity to do so”). A lack of diversity in law schools could lead to a similar distrust in the criminal justice system. Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, PEW RSCH. CTR. (Aug. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-Blacks-view-the-criminal-justice-system-as-unfair/> [<https://perma.cc/S5MZ-5X9U>] (presenting research that shows how Black and Hispanic people believe their communities are “treated less fairly than whites”).
32. *See* Rocconi et al., *supra* note 2, at 28; *see also* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (stating that law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts”); *Grutter*, 539 U.S. at 332 (2003) (“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.”).
33. 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, 83 (2010).
34. *See, e.g.*, Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *YALE L.J.* 1759, 1787 (2005) (applying empirical research to demonstrate how judges’ gender on an appellate court affected Title VII sexual harassment and discrimination case outcomes).
35. Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 *FORDHAM L. REV.* 2483, 2487–88 (2015).



Greater diversity among a law school's student body improves students' experiences and public perception of law schools before practice. As Justice Ruth Bader Ginsburg commented as she joined the bench in 1993, "[a] system of justice will be the richer for diversity of background and experience . . . [and] poorer, in terms of appreciating what is at stake and the impact of its judgments, if all of its members are cast from the same mold."<sup>36</sup> Thus, especially at law schools, a diverse student body confers valuable benefits to the students, the institution, and the public.

*B. Barriers to Diversity in Law Schools*

Despite diversity's well-known benefits, many barriers still prevent law schools from attaining a diverse student body. Although some schools have developed affirmative action policies,<sup>37</sup> more is needed.<sup>38</sup> Instead of simply admitting a handful of minority students, a school must admit a "critical mass" of underrepresented students to obtain the educational benefits that a diverse student body brings. Schools must admit enough historically underrepresented students to ensure they actively participate without feeling isolated.<sup>39</sup>

A student's identity as an historically underrepresented minority changes their law school experience.<sup>40</sup> "Many indicators suggest that the experience of racial minorities, once they are admitted to law school, is shaped by continued patterns of social and professional exclusion and academic underperformance."<sup>41</sup> Moreover, these students are more likely to leave law school for financial reasons.<sup>42</sup> Law students of color

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36. Brenna Williams, *#TBT: Ruth Bader Ginsburg Becomes a Supreme Court Justice*, CNN POL.: THE POINT WITH CHRIS CILLIZZA (Aug. 21, 2018, 9:26 AM), <https://www.cnn.com/2018/08/09/politics/ruth-bader-ginsburg-swear-in-tbt/index.html> [<https://perma.cc/BGC3-Y5WS>].

37. Sander, *supra* note 4, at 411 ("[T]he evidence within the law school world shows conclusively that a very large majority of American law schools . . . engage in affirmative action.").

38. See Bhabha, *supra* note 6, at 83.

39. Rocconi et al., *supra* note 2, at 28; see also *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

40. See, e.g., Johnson & Onwuachi-Willig, *supra* note 15, at 16 (footnote omitted) ("The impact of environment on students of color in law school, particularly the effects of unconscious racism on minority students' feelings of belonging and their actual performance, is well documented.").

41. Bhabha, *supra* note 6, at 84.

42. *Id.*; see also AM. BAR ASS'N, *supra* note 2, at 35 (showing that in 2016 the "Average Cumulative Debt" for White law students was \$100,510, the debt for Hispanic law students was \$149,573, and for Black students was \$198,760, while there was not enough data for Asian students).

and female law students, therefore, face a more difficult endeavor when they study law than their straight, white, or male peers.<sup>43</sup>

Perhaps the real problem, then, is that law schools still do not understand how to effectively support minority students. “Among elite American law schools, minorities are most often concentrated in the bottom half of their classes.”<sup>44</sup> This suggests (1) minority students are dumber than white students—a controversial argument that has received widespread attention and criticism<sup>45</sup>—or (2) law school is easier to navigate as a straight, white man.

The foundational teaching method deployed in law schools advantages white or male students at the expense of minority students. The case method of legal instruction leads to imbalances in the classroom by expressing the law in abstraction—marginalizing lived experiences with the law that primarily come from members of disadvantaged groups.<sup>46</sup> Compounding the problem, “evaluation methods” tend to preference analytical reasoning at the expense of subjective, lived experiences, “arbitrarily magnify[ing] perspectives of privileged law students while minimizing those of minority students.”<sup>47</sup> The most common form of legal education therefore disadvantages minority students.

Further, interactions between historically underrepresented minority law students and the law school community can marginalize minority students from the typical, easier law school experience. Law students of color and female law students “endure daily ‘micro-

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43. Deo et al., *supra* note 33, at 73.

44. Bhabha, *supra* note 6, at 84.

45. See, e.g., Sander, *supra* note 4, at 427–29 (finding that Black students’ “poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools’ use of heavy racial preferences”). *But see* Johnson & Onwuachi-Willig, *supra* note 15, at 2 (criticizing Professor Sander’s article for “neglect[ing] to account for the well-documented hostile environment faced by African-American, and other minority, students in law school” and “fail[ing] to take into consideration the time many African-American students spend on activities related to racial climate . . . thereby reducing the time that they are able to commit to academic study”).

46. Bhabha, *supra* note 6, at 88 (“Unengaged and outmoded methods of instruction, such as the case method and Socratic dialogue, heighten existing power imbalances in the classroom, reward entitlement, and make outsiders feel even more alien.”); see also Virginia Taborn, Comment, *Law and the Black Experience*, 11 NAT’L BLACK L.J. 267, 269–71 (1989) (describing a Black student’s experience in law school whereby “weighing of interests according to a reasonable man’s standard, easily interpreted by Black students as a reasonable White man’s standard”).

47. Bhabha, *supra* note 6, at 88.

aggressions' in the form of subtle racist and sexist insults."<sup>48</sup> This hostile environment adversely affects minority law students' academic performance.<sup>49</sup> For example, one study at the University of Florida Levin College of Law found that "although only 28% of white students agreed that discussions in class made them feel uncomfortable, almost 43% of African-American students agreed with this statement."<sup>50</sup> The same study also found that "African-American students also reported that they were more likely to speak in a class taught by a same-race professor and that they ordinarily were more comfortable with the teaching approach of a same-race professor."<sup>51</sup> Minority students exclusively endure this parallel law school experience that is fraught with barriers that straight, white, and male law students need not consider.

Additionally, even if law schools maintained perfectly balanced and diverse incoming classes, excessive competition among students negates positive benefits from a diverse student body. Competition discourages interactions between students from different backgrounds unless four key ingredients are present—"equal group status, shared goals, cooperation, and support from authority."<sup>52</sup> Without these four ingredients, the diverse student body would experience "hostile and guarded interactions as well as increased racial tension and conflict."<sup>53</sup> This is particularly salient in law school where students are typically graded on a curve. Under this grading system, one student's success necessarily comes at the expense of another's—heightening competition and dampening the benefits expected to flow from a diverse student body. Thus, "student body diversity only creates the opportunity for diverse interactions" but certain environmental factors must also be present to ensure those diverse interactions take place.<sup>54</sup> While admissions offices provide the potential for diverse interactions, faculty and administrators must ensure that these interactions actually take place. Law school faculty and administrators must, therefore, pursue policies that ensure that students benefit from studying alongside diverse classmates.

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48. Deo et al., *supra* note 33, at 74.

49. Johnson & Onwuachi-Willig, *supra* note 15, at 15 ("[A] wide range of factors work to undermine the academic performance of African-American students in law schools, including feelings of alienation and isolation, the amount of study time that African-American law students lose as a result of the hostile environment, and simply recovering from feeling devalued and attacked both inside and outside of the classroom.").

50. *Id.* at 16.

51. *Id.*

52. Rocconi et al., *supra* note 2, at 29.

53. *Id.* at 28–29.

54. *Id.* at 29.

Students who identify as minorities often experience law school differently than their predominantly straight, white, or male colleagues—facing additional barriers that do not befall their peers. Law school is already difficult. And even when a law school attains a diverse student body, faculty and administrators must be cognizant of the different law school experiences that these students face and promote a collaborative environment.

*C. Law Surrounding Diversity Policies for School Admissions*

Although diversity has been widely regarded as improving educational outcomes, the law has not always allowed consideration of demographic factors, particularly race, in admitting students. The three preeminent cases *Bakke*, *Grutter*, and *Fisher II*, however, provide guidance for institutions of higher education to consider race—all premised on the benefits that flow from a diverse student body.

In *Regents of University of California v. Bakke*,<sup>55</sup> Justice Powell wrote the judgment of the Court and considered four purposes advanced by the University of California Davis Medical School to support considering race in its admissions process: (1) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,” (2) “countering the effects of societal discrimination,” (3) “increasing the number of physicians who will practice in communities currently underserved,” and (4) “obtaining the educational benefits that flow from an ethnically diverse student body.”<sup>56</sup> Powell rejected all rationales except the fourth—finding that attaining a diverse student body was essential to a high quality education.<sup>57</sup> Justice Powell also adopted a broad conception of diversity and noted that, “[a] farm boy from Idaho can bring something . . . that a Bostonian cannot offer [and] . . . a black student can usually bring something that a white person cannot offer.”<sup>58</sup> The Court, therefore, allowed the state university medical school to employ an “admissions program involving the competitive consideration of race and ethnic origin.”<sup>59</sup>

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55. 438 U.S. 265 (1978).

56. *Id.* at 306.

57. *Id.* at 312 (“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.”); *see also* Hurd & Plaut, *supra* note 23, at 1610 (discussing Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (recognizing the benefits of diversity)). This aligns with the tomes of scholarly research chronicling the values from a diverse student body. *See infra* note 66.

58. *Bakke*, 438 U.S. at 316.

59. *Id.* at 320.

*Bakke* also extended equal protection jurisprudence regarding “race, color, and national origin” to private universities that receive federal financial aid through Title VI.<sup>60</sup> Although Title VI only outlaws discrimination based on race, color, or national origin in “any program or activity receiving Federal financial assistance,” Justice Powell read Title VI to overlap directly with equal protection clause jurisprudence when he noted that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”<sup>61</sup> Private schools that accept federal funding, therefore, became subject to the same scrutiny applied to public schools.

Later, in *Grutter v. Bollinger*,<sup>62</sup> the Supreme Court again considered the use of race in an admissions program, this time at the University of Michigan Law School.<sup>63</sup> The Court applied strict scrutiny and reverted to the justification from *Bakke* by holding that the law school could consider race in its admissions process to pursue the compelling “educational benefits that flow from a diverse student body.”<sup>64</sup> Notably, the Court deferred to the law school’s educational judgement in pursuing its educational mission through diversity<sup>65</sup> and relied heavily on social science research documenting the many benefits of a diverse student body.<sup>66</sup> Also, the Court allowed the law school to admit a “critical mass” of minority law students to ensure that they felt “encourage[d] . . . to participate in the classroom and not feel isolated.”<sup>67</sup>

The Court, however, provided two caveats. First, to be narrowly tailored, the admissions policy could not rely on quotas.<sup>68</sup> The law school could not hold a specific number or percentage of seats open for students from a specific racial background.<sup>69</sup> Rather, “race [must] be used in a flexible, nonmechanical way . . . [that does not] insulate applicants who belong to certain racial or ethnic groups from the competition for admission.”<sup>70</sup> Second, to ensure the preferential policy was “employed no more broadly than the interest demands,” the “race-

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60. *Id.* at 284 (quoting 42 U.S.C. § 2000d (1972)).

61. *Id.* at 284, 287.

62. 539 U.S. 306 (2003).

63. *Id.* at 311.

64. *Id.* at 343.

65. *Id.* at 328.

66. *Id.* at 330.

67. *Id.* at 318, 340.

68. *Id.* at 334.

69. *Id.* at 335.

70. *Id.* at 334.

conscious admissions policies must be limited in time.”<sup>71</sup> The Supreme Court highlighted that schools could meet this requirement with “sunset provisions” and “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>72</sup> Thus, although the Supreme Court held that admissions policies that account for race can be constitutional, the Court also limited these policies to ensure that they were narrowly tailored to reap the benefits that flowed from a diverse student body.<sup>73</sup>

Finally, in *Fisher v. University of Texas (Fisher II)*,<sup>74</sup> the Supreme Court again considered whether a public university could pursue a race-conscious admissions policy.<sup>75</sup> The Court affirmed the earlier *Fisher I* opinion that allowed the University of Texas to consider race in its admissions policies to seek “the educational benefits that flow from student body diversity.”<sup>76</sup> Also, again, the Court affirmed that deference to the school’s expertise in pursuing a race-conscious admissions program was proper.<sup>77</sup> And, in reaching this conclusion, Justice Kennedy beckoned back to Justice Powell’s broad conception of diversity whereby “diversity takes many forms.”<sup>78</sup> But, in *Fisher II*, the Court also introduced a new requirement for universities by requiring them to continuously scrutinize affirmative action policies to evaluate if such policies outlived their purpose.<sup>79</sup>

More than 1,300 social scientists contributed to briefs in *Fisher II* detailing the benefits that flowed from a diverse student body.<sup>80</sup> But

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71. *Id.* at 342.

72. *Id.*

73. *Id.* at 343. (citation omitted) (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

74. 136 S. Ct. 2198 (2016).

75. *Id.* at 2205; *see also* *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 314 (2013) (holding the University of Texas could consider race in its admission policy if it is “tailored to obtain the educational benefits of diversity”).

76. *Fisher II*, 136 S. Ct. at 2215 (quoting *Fisher I*, 570 U.S. at 310).

77. *Id.* at 2208, 2214.

78. *Id.* at 2210.

79. *Id.*

80. Hurd & Plaut, *supra* note 23, at 1617 (quoting Liliana M. Garces, *The Legal Context and Social Science Evidence in Fisher v. University of Texas, in AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE FISHER CASE TO FORGE THE PATH AHEAD* 3, 11 (Uma M. Jayakumar, Liliana M. Garces & Frank Fernandez eds., 2015)) (highlighting how the briefs in *Fisher I* and *Fisher II* “argu[ed] that diversity brings ‘increased cross-racial interaction

the briefs in *Fisher II* differed from the social science research in *Grutter* and *Bakke* because they “highlighted a wider range of benefits, including the mitigating effects of diversity on racial isolation, stereotype threat, social identity threat, and feelings of tokenism, as well as the ameliorating effects on social belonging.”<sup>81</sup> This was a departure from *Bakke*, where research focused primarily on “the value that students of certain backgrounds would bring to the education of the rest of the student body.”<sup>82</sup> However, it highlights the backbone behind affirmative action precedent—benefits to all students in a diverse student body.

It is worth noting that although the Equal Protection Clause only protects against discrimination in public universities,<sup>83</sup> private universities are still prohibited from discriminating based on race and sex under Title VI<sup>84</sup> and Title IX,<sup>85</sup> respectively. These statutes apply to private universities that receive “Federal financial assistance”<sup>86</sup> and prohibit them from “discriminating against students and applicants in a manner that would violate the Equal Protection Clause.”<sup>87</sup> Thus, the analysis under the equal protection clause mirrors the analysis under Titles VI and IX.<sup>88</sup>

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among students, reduced prejudice, improved cognitive abilities, critical thinking skills and self-confidence, greater civic engagement, and improved leadership and workplace skills”).

81. *Id.*

82. *Id.* at 1611.

83. CHRISTINE J. BACK & JD S. HSIN, CONG. RSCH. SERV., R45481, “AFFIRMATIVE ACTION” AND EQUAL PROTECTION IN HIGHER EDUCATION, at Summary (2019).

84. 42 U.S.C. § 2000d (2018).

85. 20 U.S.C. § 1681 (2018).

86. 42 U.S.C. § 2000d (2018); *see also* 20 U.S.C. § 1681(a).

87. BACK & HSIN, *supra* note 83, at summary; *see, e.g.*, *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002) (citations omitted) (“[I]ntentional discrimination proscribed by Title VI is discrimination that violates the Equal Protection Clause of the Fourteenth Amendment. Similarly, intentional discrimination proscribed by Title IX is discrimination that violates the Equal Protection Clause.”); *see also* Vikram David Amar & Jason Mazzone, *How do Grutter and Fisher Bear on the Question Whether Law Reviews Can Take Race and Gender into Account in Selecting Members (and Also Articles)? Part Two in a Series*, JUSTIA (Feb. 22, 2019), <https://verdict.justia.com/2019/02/22/how-do-grutter-and-fisher-bear-on-the-question-whether-law-reviews-can-take-race-and-gender-into-account-in-selecting-members-and-also-articles> [<https://perma.cc/5V79-59NV>] (noting that Harvard receives federal funding so the authors presume Harvard Law Review is subject to the Equal Protection Clause).

88. *See, e.g.*, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 23 (1st Cir. 2005) (noting that “resolution of the constitutional equal protection challenge

The Supreme Court initially intimated this reading of Title VI in *Bakke*<sup>89</sup> and courts have since maintained this view on several occasions.<sup>90</sup> Also, courts adhere to *stare decisis* most in matters of statutory interpretation.<sup>91</sup> Therefore, Justice Powell's interpretation of Title VI in *Bakke*—an interpretation that courts have reaffirmed throughout the past forty years<sup>92</sup>—remains of prime importance.<sup>93</sup> Thus, the constitutional parameters that guide equal protection analysis for public schools likewise apply to private universities through Title VI and Title IX.

*Bakke*, *Grutter*, and *Fisher* provide valuable guidance for incorporating applicants' demographics into admissions processes. Although *Grutter* remains the only precedent of these three cases to control a five-justice majority, *Bakke* and *Fisher* help clarify the legal contours surrounding affirmative action. *Bakke* established a foundation on which courts built affirmative action jurisprudence—approving of diversity to reap educational benefits and overlap with Title VI and Title IX. *Fisher* then reinforced *Bakke* and *Grutter* in many respects while adding a new, although not binding, requirement to the mix—requiring administrators to continuously review affirmative action policies. Thus, these cases provide ample affirmative action jurisprudence for law journals to consider as they pursue a diverse editorial staff.<sup>94</sup>

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controls [Title VI claims]" because "Title VI 'proscribes only those racial classifications that would violate the Equal Protection Clause'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001)).

89. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).
90. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87 (alterations in original) (quoting *Bakke*, 438 U.S. at 287) (noting that in *Bakke* the Court found that "Title VI [which prohibits race discrimination in educational institutions receiving federal funding] must be held to proscribe only those racial classifications that would violate the [Fourteenth Amendment's] Equal Protection Clause"); *see also id.* (highlighting that the Court "on several occasions has reaffirmed this statutory interpretation of Title VI").
91. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . .").
92. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citing Justice Powell's analysis that views Title VI as only proscribing "those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment" (quoting *Bakke*, 438 U.S. at 287)).
93. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87.
94. *Id.*



## PART II: STUDENT-RUN LAW JOURNALS

Law journals have become a defining characteristic of law schools<sup>95</sup> and affect lawyers in virtually all areas of society by “nurturing jurisprudential thought and sculpting America’s ever-changing legal climate.”<sup>96</sup> From their educational value to the prestigious résumé line they present to employers, editorial positions on law journals are coveted. But these positions did not always exist, nor was prestige an initial purpose behind these peculiar legal publications. Through history, however, law journals morphed to take the student-run, prestigious position that we acknowledge today.

### *A. A Brief History of American, Student-Run Law Journals*

In the early 1800’s, news was primarily circulated in newspapers—publications that frequently mischaracterized the law or were incomplete.<sup>97</sup> Lawyers, therefore, “demanded a medium of their own” to combat this problem.<sup>98</sup> So, in 1808, Philadelphia lawyers created the first law journal titled the *American Law Journal and Miscellaneous Repertory*.<sup>99</sup> Other law journals followed.<sup>100</sup> Although many journals initially fizzled and were eventually discontinued,<sup>101</sup> two law journals remained steadfast, the *American Law Review* and the *American Law Register*—the latter of which gained prominence from its scholarly emphasis.<sup>102</sup>

In 1875, Albany Law School became the first law school to publish a student-run law journal.<sup>103</sup> Harvard Law School followed suit soon

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95. Michael L. Clozen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 15 (1996) (highlighting how “[a]lmost immediately upon their establishment, the student-edited law reviews became a significant and lasting feature of legal education in the United States”).
  96. Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America’s Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 59–60 (1995) (describing how law reviews affect litigators, legislators, and judges).
  97. Michael L. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 750 (1985).
  98. *Id.* (quoting *American Law Periodicals*, 2 ALB. L.J. 445, 445 (1870)).
  99. *Id.* at 751.
  100. *Id.* at 752.
  101. *Id.* at 754.
  102. *Id.* at 755.
  103. Clozen & Dzielak, *supra* note 95, at 33–34 (highlighting that the “first American law periodical to be published by students instead of practitioners was the *Albany Law School Journal* in 1875”); *see also* Swygert & Bruce,

afterwards by creating the “Langdell Society ‘for the serious discussion of legal topics and for other serious work on law,’” and Columbia Law School founding the *Columbia Jurist*.<sup>104</sup> Although Harvard Law Review’s members invited faculty involvement, none participated.<sup>105</sup>

In 1887, the *Harvard Law Review* published its first issue.<sup>106</sup> The editors wanted the *Harvard Law Review* “to furnish news about the school to alumni, . . . to spread the word of the new method of instruction introduced at Harvard,” and to “convey to the professional world the message and the scholarship of the Law School’s faculty.”<sup>107</sup> Soon enough, “Yale (1891), Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern (1906) . . . modeled legal periodicals after the Harvard prototype.”<sup>108</sup> Although law reviews were not identical,<sup>109</sup> they soon became valuable centerpieces in American legal education.

These law reviews began to influence the law along three axes: judicially, legislatively, and professionally.<sup>110</sup> Judicially, Justice Benjamin Cardozo, for example, found the new publications particularly useful and noted that “courts are turning more and more to the great scholars of the law schools to canalize the stream and redeem the inundated field.”<sup>111</sup> Indeed, it was not long before the Supreme Court

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*supra* note 97, at 764; James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1263 (1998) (stating that the first student-run law journal was the Albany Law School Journal in 1875).

104. Swygert & Bruce, *supra* note 97, at 766, 770.

105. *Id.* at 771.

106. *Id.* at 773 (describing the first issue as including “two lead articles, notes about happenings at the school, reports of moot court arguments, summaries of class lectures, case digests and comments, book reviews, and a list of books received”).

107. *Id.* at 774, 778.

108. *Id.* at 779.

109. *Id.* at 781, 783 (explaining how Pennsylvania’s law review arose from “Pennsylvania law students assum[ing] the editorial chores for the already thriving *American Law Register* in 1896” and that “the journals at Michigan and Northwestern were initially operated by the faculty”).

110. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* 5 (Robert C. Clark et al. eds., 5th ed. 2016) (noting that an “article may influence judges, lawyers, and legislators”).

111. Swygert & Bruce, *supra* note 97, at 789 (quoting Benjamin N. Cardozo, *Introduction* to *SELECTED READINGS ON THE LAW OF CONTRACTS*, at vii, ix (Ass’n of Am. Law Sch. ed., 1931)). *But see* Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), [https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?\\_r=0](https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0) [<https://perma.cc/64PW-JAYK>] (quoting federal appeals court Judge

cited a law review in an opinion—Justice White’s 1897 dissenting opinion in *United States v. Trans-Missouri Freight Ass’n*.<sup>112</sup> Two years later, Justice Fuller cited the first law review article in a majority opinion in *Chicago, Milwaukee & St. Paul Railway Co. v. Clark*.<sup>113</sup> Thus, from their inception, law journals played an important role influencing judicial thought.

Legislatively, “law reviews served ‘as a mine for legislative drafting bureaus;’ numerous statutes resulted from the suggestions of authors of law review articles” and “[o]ne authority has even suggested that the National Conference of Commissioners on Uniform State Laws was created in response to law review criticism of existing law.”<sup>114</sup> Law journals, therefore, substantially influence the legislature.

And finally, “[p]ractitioners who subscribed to these periodicals became more aware of current legal thinking and recent developments in other jurisdictions than those who did not.”<sup>115</sup> Given authors’ reputations and the substantial effort behind each article, it is not surprising that the legal profession takes these articles seriously.<sup>116</sup>

Law journals established themselves as central facets of American legal education. The legal profession has adopted their work in a variety of arenas, leading to widespread acceptance and influence. But, despite these origins, law journals’ purpose and functions have gradually shifted.

#### *B. Purposes and Functions of Law Journals*

As highlighted earlier, law reviews were initially created to serve as a “vehicle for the ‘faculty’s scholarship, . . . not so much as an organ for [the students].”<sup>117</sup> Since then, however, law reviews have shifted their focus. Now, law journals serve two primary purposes: “(1) to act

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Dennis G. Jacobs, who said in 2007 “I haven’t opened up a law review in years . . . . No one speaks of them. No one relies on them.”).

112. 166 U.S. 290, 350 n.1 (1897) (White, J., dissenting) (citing Amasa M. Eaton, *On Contracts in Restraint of Trade*, 4 HARV. L. REV. 128 (1890)); see also Closen & Dzielak, *supra* note 95, at 26 (discussing the significance of the first citation to a law review by a Supreme Court Justice).

113. 178 U.S. 353, 365 (1900) (citing James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 521 (1899)); see also Closen & Dzielak, *supra* note 95, at 26 (discussing the significance of the first citation to a law review in a Supreme Court majority opinion).

114. Swygert & Bruce, *supra* note 97, at 789 (footnotes omitted).

115. *Id.*

116. VOLOKH, *supra* note 110, at 5.

117. Swygert & Bruce, *supra* note 97, at 772–73, 778 (“One of the principal purposes for establishing the *Harvard Law Review* was to convey to the professional world the message and the scholarship of the Law School’s faculty.”).

as an intense research and writing course for students, and (2) to provide the legal community with a vehicle for scholarly and political expression that is capable of transmitting many different views and perspectives.<sup>118</sup> Law journals therefore occupy a liminal space between an academic extracurricular activity and a professional organization.

First, law journals train student editors through the research and editing process.<sup>119</sup> Law journals offer students “a unique, challenging experience in research, writing, editing, critical thinking, and even just working together on a project that carries professional expectations.”<sup>120</sup> Some even consider this work “the most effective training presently offered in American law schools.”<sup>121</sup> On a law journal, students source authors’ diverse array of citations, ensure the sources support the author’s assertion, and then ensure that the author’s citations conform with minutiae codified in the Bluebook.<sup>122</sup> Thus, participating on a law journal teaches its editors valuable legal skills such as legal writing, editing, citing, and legal analysis.<sup>123</sup> This work runs parallel to the standard law school course load and many law journal editors receive academic credit for their work on the journal—further highlighting the journals’ teaching function.<sup>124</sup> Law journals “supplement[] the [law school] curriculum by giving valuable training in writing, in research technique, in policy considerations, and in a strong understanding of

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118. Godsey, *supra* note 96, at 62; *see also* Harper, *supra* note 103, at 1272–73 (highlighting the primary purposes for student-edited law journals such as “teaching students”).
119. Harper, *supra* note 103, at 1273 (“Consistent with the notion that students learn from law review, many schools now give academic credit for law review participation.”).
120. *Id.* at 1272; *see also* VOLOKH, *supra* note 110, at 322 (discussing the “[e]diting, proofreading, and source-checking training” that students get from working on law journals).
121. Godsey, *supra* note 96, at 67 (quoting JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 185 (1978)).
122. *See, e.g.*, Guidance for Student Eds., Case W. Rsrv. L. Rev. Handbook 2020–2021, at 6 (2020) (on file with author).
123. Adriane Kayoko Peralta, *The Underrepresentation of Women of Color in Law Review Leadership Positions*, 25 BERKELEY LA RAZA L.J. 69, 73 (2015); *see also* VOLOKH, *supra* note 110, at 322.
124. Harper, *supra* note 103, at 1273; *see, e.g.*, U. Minn. L. Sch. Pol’y & Procs. Regarding Acad. Credit for J. Serv., University of Minnesota L. Sch. 1 (2015), [https://www.law.umn.edu/sites/law.umn.edu/files/journalcreditspolicy\\_0.pdf](https://www.law.umn.edu/sites/law.umn.edu/files/journalcreditspolicy_0.pdf) [<https://perma.cc/QW7Z-ZCNH>]; *2019–20 General Bulletin Laws (LAWS)*, CASE W. RSRV. UNIV. SCH. LAW, <https://bulletin.case.edu/course-descriptions/laws/> [<https://perma.cc/GH46-8PN4>] (last visited Aug. 31, 2020) (describing how Case Western Reserve’s various journals provide editors two semester credit hours).

how the American legal system operates.”<sup>125</sup> In this way, law journals help train “future lawyers, judges, and law professors.”<sup>126</sup>

Second, in addition to teaching students, law journals educate the legal profession.<sup>127</sup> Law reviews provide a venue for students, professors, politicians and practitioners to discuss and debate legal issues.<sup>128</sup> While other professions publish noteworthy research in peer-edited journals, student-run law journals are the primary vessel to furnish cutting-edge legal scholarship.<sup>129</sup> Law journals are the legal profession’s “primary ‘marketplace of ideas.’”<sup>130</sup> As students and authors expose problems and suggest solutions in different practice areas, they develop and reform the law—exerting influence on the American legal system.<sup>131</sup> In this way a “major purpose of law reviews is their influence and impact on the development of the law” since “law reviews play an unparalleled role in nurturing jurisprudential thought and sculpting America’s ever-changing legal climate.”<sup>132</sup> Law journals’ unique prestige, therefore, distinguishes the publications from other professions and highlights the unique opportunity for students to directly influence the legal profession.

Both of these purposes support law journals’ added function as a critical résumé builder. Placement on a journal is an accomplishment that signals elite legal thinking to lawyers everywhere.<sup>133</sup> This is why many urge law students to join a law journal—from professors<sup>134</sup> to

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125. Godsey, *supra* note 96, at 64–65 (quoting Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1100 (1986)).

126. Closen & Dzielak, *supra* note 95, at 24.

127. *Id.* at 22.

128. Godsey, *supra* note 96, at 60.

129. VOLOKH, *supra* note 110, at 321.

130. Godsey, *supra* note 96, at 60.

131. Closen & Dzielak, *supra* note 95, at 22.

132. *Id.*; Godsey, *supra* note 96, at 59 (footnote omitted); *see also* VOLOKH, *supra* note 110, at 322 (discussing the value of law review as a “credential” that is “especially valuable if you want to get a judicial clerkship or a teaching job”).

133. *See, e.g.*, Harper, *supra* note 103, at 1274 (“Another purpose of student-run law reviews, complimentary [sic] and subsidiary to the teaching function, is distinguishing among students for legal employers.”); *see also* *Joining the Law Review*, CHAMBERS ASSOC., <https://www.chambers-associate.com/where-to-start/joining-the-law-review> [<https://perma.cc/D4U8-7X9Z>] (last visited Apr. 15, 2020) (discussing how legal employers perceive law review experience).

134. *See, e.g.*, VOLOKH, *supra* note 110, at 322.

bloggers<sup>135</sup> to books<sup>136</sup> to the American Bar Association.<sup>137</sup> After all, law journals “place [their] members on a fast track to the most lucrative and powerful careers.”<sup>138</sup> Many also highlight the ways that a well-written piece of legal scholarship can help the author obtain “jobs, clerkships, and . . . teaching positions.”<sup>139</sup> Thus, law journals also serve as a sieve for employers that helps them “distinguish[] among students.”<sup>140</sup>

But the legal profession should refrain from letting a secondary *function* or *benefit* of editing for a law journal usurp the law journal’s fundamental *purposes*—to educate students and transmit a diverse array of legal ideas.<sup>141</sup> As Chief Justice Earl Warren argued, “perhaps most important, the review affords invaluable training to the students.”<sup>142</sup> Legal professionals should recognize, therefore, that the prestige associated with students on law journals only comes from the “skills and work ethic” imparted by working on a law journal.<sup>143</sup> The former Dean of Northwestern University Law School characterized law reviews similarly:

Law reviews are unique among publications in that they do not exist because of any large demand on the part of the reading

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135. See, e.g., Emily Mermell, *Law School Lingo: What is Law Review?*, BARBRI: L. PREVIEW (Jan. 7, 2020), <https://lawpreview.barbri.com/what-is-law-review/> [<https://perma.cc/9MHM-ZE9G>] (describing the various reasons to join a law journal, such as “[a]ppealing to [s]elective [l]egal [e]mployers”).

136. See, e.g., ANDREW J. MCCLURG, 1L OF A RIDE 414–15 (2013) (describing joining a flagship journal as “the holy grail of law school success”).

137. See Legally Blonde & Broke, *The Right Way to Write on to the Law Journal*, ABA FOR L. STUDENTS: BEFORE THE BAR (Aug. 16, 2018), <https://abaforlawstudents.com/2018/08/16/the-right-way-to-write-on-to-the-law-journal/> [<https://perma.cc/GBU6-WLKB>] (asserting that one of the most attractive activities to prospective employers is a law journal).

138. Godsey, *supra* note 96, at 61.

139. VOLOKH, *supra* note 110, at 5.

140. Harper, *supra* note 103, at 1274.

141. See *supra* text accompanying notes 117–1132. Class rank, grades, and even “order of the coif” membership could just as easily serve as the elite marker that distinguishes law students from peers. These markers are also identifiable for employers on students’ transcripts or résumés. It is easy to appreciate this argument considering law reviews’ selection methods. See generally Godsey, *supra* note 96 (discussing the arbitrariness of the traditional selection methods, as well as the cultural and racial biases built into them).

142. Earl Warren, *Messages of Greeting to the U.C.L.A. Law Review*, 1 UCLA L. REV. 1, 1 (1953).

143. Peralta, *supra* note 123, at 73 (footnote omitted) (“Membership signals to future employers a certain set of skills and work ethic.”).

public. Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order *that they may be written*.<sup>144</sup>

Thus, while law journals help employers assess applicants' research and writing skills, this is only possible "because [applicants] come certified as having had, and been capable of using, the best education that the school has thus far offered."<sup>145</sup> Any prestige from participating on a law journal, therefore, is secondary to the core purposes highlighted earlier. Law journals train student editors and contribute valuable legal scholarship to the legal academy.<sup>146</sup>

### PART III: DIVERSITY AND LAW JOURNALS

Law schools have historically lacked diversity.<sup>147</sup> It should come as no surprise then that the journals at these schools are also quite homogenous.<sup>148</sup> A little over thirty years ago, for example, 76% of law journals lacked a single Black student, 69% lacked a Hispanic student, 97% lacked a Native American student, and 85% percent lacked an Asian student.<sup>149</sup> Given law journals' historic homogeneity, this section will unpack the current data indexing diversity on America's law journals and discuss policies that shaped this homogeneity.

#### *A. Current Journal Demographics*

Historically, law journals lacked diversity.<sup>150</sup> In recognition of this homogeneity, New York Law School partnered with Ms. JD from 2010–

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144. Godsey, *supra* note 96, at 64 (emphasis added) (quoting Martin, *supra* note 125, at 1099).

145. *Id.* at 64 (quoting KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 134–35 (1951)).

146. *See supra* text accompanying notes 117–1132.

147. *See supra* Part I.A; *see also* Frederick Ramos, *Affirmative Action on Law Reviews: An Empirical Study of Its Status and Effect*, 22 U. MICH. J.L. REFORM 179, 179, 198 (1988) ("In its first seventy-three years of existence, the Virginia Law Review never had a black member.").

148. *See, e.g., Many of the Nation's Most Prestigious Law Reviews Have Lily-White Editorial Boards*, 19 J. BLACKS HIGHER ED. 55, 56–57 (1998) (describing how law journals at the top law schools in the country have "lily-white" editorial boards as evidenced by the lack of people of color).

149. Ramos, *supra* note 147, at 198.

150. *See, e.g., Many of the Nation's Most Prestigious Law Reviews Have Lily-White Editorial Boards*, *supra* note 148, at 55 (highlighting how during the Jim Crow era very few African Americans made law review while facing constant hostility from faculty and classmates).

2012 to compile information on law journal demographics.<sup>151</sup> Although these findings highlight many racial and gender disparities across journals, they lack granular demographic information about journals' editorial staff.<sup>152</sup> Instead these reports "primarily focus[] on gender diversity of law review membership and leadership, and inquiry about levels of minority student participation has been limited to asking whether the EIC identifies as a person of color."<sup>153</sup> This research study, therefore, highlights the dearth of recent and specific data about law journal editorial staff composition.

The study made three primary findings: (1) historically under-represented minority law journal members disproportionately do not obtain the editor-in-chief (EIC) position, (2) a diverse law school faculty correlates with a diverse law journal editorial staff, and (3) the lack of female law students in the EIC position could foreshadow a lack of female lawyers in leadership positions across the legal profession.<sup>154</sup> This dataset, while helpful, only skims the surface. The broader picture of modern law review membership demographics has yet to be filled in.

Despite the lack of data, however, scholars have compiled research about diverse editors' experiences on law journals.<sup>155</sup> For example, in 1926, when Sadie Tanner Mossell Alexander became a contributing editor for the University of Pennsylvania's Law Review, the law school

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151. *See generally* DANA BRODSKY, MARIA CHEUNG, KELLY GARNER & JAMIE SINCLAIR, THE N.Y. L. SCH. L. REV., 2010–2011 LAW REVIEW DIVERSITY REPORT (2011) (documenting minority law review membership among the top 50 law schools' flagship journals in the 2010–11 academic year); STEPHANIE CHICHETTI, EMILY J. FREEBORN & LILIA VOLYNKOVA, THE N.Y. L. SCH. L. REV., 2011–2012 LAW REVIEW DIVERSITY REPORT (2012) (documenting minority law review membership among the top 50 law schools' flagship journals in the 2011–12 academic year).

152. CHICHETTI ET AL., *supra* note 151, at 8 ("To date, the Ms. JD and NYLS studies have primarily focused on gender diversity of law review membership and leadership, and inquiry about levels of minority student participation has been limited to asking whether the EIC identifies as a person of color . . ."). *See generally* BRODSKY ET AL., *supra* note 151 (documenting minority law review membership among the top 50 law schools' flagship journals in the 2010–2011 academic year).

153. CHICHETTI ET AL., *supra* note 151, at 8–9 ("Law review editors exploring issues of diversity within their organizations will need reliable data about their student members and leaders. But the data shows that few law reviews actually collect information about their students.").

154. Paul Caron, *2011-2012 Law Review Diversity Report*, TAXPROF BLOG (Oct. 20, 2012), [https://taxprof.typepad.com/taxprof\\_blog/2012/10/2011-2012.html](https://taxprof.typepad.com/taxprof_blog/2012/10/2011-2012.html) [<https://perma.cc/888B-YUV7>].

155. *See, e.g.*, Peralta, *supra* note 123, at 71 (researching the lack of diversity in law review leadership).



dean challenged her election and her peer editors threatened to resign.<sup>156</sup> Similarly, when weighing two, different-race editor-in-chief candidates, one scholar highlighted “coded” language that promoted a white candidate over the minority controversial candidate.<sup>157</sup>

Also, participating on a law journal negatively affects the likelihood that a student will engage in interactions with law school constituents substantially different from themselves.<sup>158</sup> A recent study measured the regularity of “diverse interactions” depending on different law students’ group affiliations.<sup>159</sup> Notably, the study found that participating on a law journal correlated with fewer “diverse interactions.”<sup>160</sup> This research can be viewed in two ways: (1) demonstrating homogeneity on law journals, or (2) highlighting the negative effects of competition on diverse interactions in an organization where competition is fierce for “coveted internships or law journal positions.”<sup>161</sup> If the former, law journals need to reevaluate their editor selection processes. If the latter, however, “[l]aw journal membership provides an example of how competition may depress the benefits of diversity.”<sup>162</sup>

Additionally, once an underrepresented minority joins a law journal, they still might not feel included. After all, Black and white law students perceive discrimination differently.<sup>163</sup> “While many whites

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156. *The First Black President of the Harvard Law Review*, 30 J. BLACKS HIGHER EDUC. 22, 22 (2000). In 1926, Sadie Tanner Mossell Alexander became a contributing editor for *University of Pennsylvania Law Review*. Law school dean Edward Mikell challenged her election because she was a woman and was Black. Additionally, “[o]ther Penn law review members threatened to resign in protest.” *Id.*

157. Peralta, *supra* note 123, at 70, 77 (“Perhaps the problem was not the candidate, but rather the expectations that women of color should conform to white male norms and that they are behaving inappropriately if they strongly support a policy whose value is not obvious to white men.”).

158. Rocconi et al., *supra* note 2, at 35.

159. *Id.* at 30. The study defines “diverse interactions” as instances when “the following interactions occur[ed]: (a) serious conversations with students of a different race or ethnicity than your own; (b) serious conversations with students who are very different from you in terms of their religious beliefs, political opinions, or personal values; (c) the inclusion of diverse perspectives (different races, religions, sexual orientations, genders, political beliefs, etc.) in class discussions or writing assignments.” *Id.*

160. *Id.* at 29, 34–35 (outlining one of the study’s primary goals as understanding how the “campus environment [affects] student interactions with peers of different backgrounds”).

161. *Id.* at 35 (also stating that “[t]he insulated nature of journal membership and work may be a contributing factor as well”).

162. *Id.*

163. Peralta, *supra* note 123, at 76 (quoting Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1093 (2008)) (“Studies show that

expect evidence of discrimination to be explicit, and assume that people are colorblind when such evidence is lacking, many blacks perceive bias to be prevalent and primarily implicit.”<sup>164</sup> This is problematic because “[i]f white law review members tend to only recognize explicit discrimination, then implicit discrimination may go unchecked.”<sup>165</sup> These subtle exclusionary practices are not limited only to social contexts but also occur in editor selection,<sup>166</sup> executive board selection,<sup>167</sup> and article selection.<sup>168</sup> Thus, editors from diverse backgrounds might distance themselves from their journal because of discrimination that runs amok with most white or male editors blind to its existence.

Law journals have been, and continue to be, homogenous institutions. Although the school aims to attract a diverse student body from which all students can learn from a wide variety of perspectives,<sup>169</sup>

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blacks and whites are likely to differ substantially in how they conceive of and define discrimination.”).

164. *Id.* at 76 (quoting Robinson, *supra* note 163, at 1093). This is consistent with transparency theory whereby “whites [tend] not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.” Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).
165. Peralta, *supra* note 123, at 76. This author noticed similar attitudes when I first discussed potential racial disparities between the Case Western Reserve University School of Law community and the *Case Western Reserve Law Review*. Although law review members did not believe they had ever witnessed discrimination, they acknowledged that the journal did not have a single Black editor in the class of 2019, 2020, or 2021.
166. Godsey, *supra* note 96, at 80 (“Minority students are the objects of both overt and unintentional discrimination in the highly subjective law review selection processes.”).
167. Peralta, *supra* note 123, at 70 (describing a personal experience witnessing a better qualified Black woman Editor-in-Chief candidate being passed over by an entirely white, male executive board for being too “biased, opinionated, and assertive” when she promoted a policy to foster greater diversity on the *UCLA Law Review*).
168. Godsey, *supra* note 96, at 70–71; *see also* Cynthia Grant Bowman, Dorothy Roberts & Leonard S. Rubowitz, *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 28–33 (2006) (describing widespread silence in publishing legal analyses in the *Northwestern University Law Review* addressing prominent civil rights landmarks such as *Plessy v. Ferguson*, *Dred Scott*, *Korematsu*, executive-branch initiatives to ban racial discrimination by federal defense contractors, and NAACP congressional lobbying for anti-lynching legislation).
169. *See, e.g.*, *JD Admissions*, CASE W. RSRV. UNIV. SCH. L., <https://case.edu/law/admissions/jd-admissions> [<https://perma.cc/8WJX-NDVQ>] (last visited Sept. 9, 2020) (marketing that the law school “insist[s] upon diversity in our student body because we believe that the entire law school community benefits from difference”); *see also* Grutter v. Bollinger, 539 U.S. 306, 323–

the crowning achievement of most law students' education remains elusive to minority students. Law journals should therefore confront the manner whereby they select editorial staff to consider how these methods may have affected editorial demographics.

*B. Current Law Journal Editor-Selection Processes*

Any proposal for reform should necessarily start with understanding how journals have traditionally selected a new class of editors. Generally, law journal membership has been based on grades which historically cut along racial lines.<sup>170</sup> In fact, the “[a]bsence of an affirmative action program effectively excludes minorities from membership on a large number of law reviews.”<sup>171</sup> This is unfortunate because, as highlighted above in Part II, law journals play a critical role teaching students a broad set of valuable skills that often lead to enhanced employment opportunities.<sup>172</sup> This aligns with studies highlighting that “general[ly] . . . the places where diversity inadequacies remain virtually unchanged are in the highest levels of influence and authority.”<sup>173</sup> Therefore, the question becomes, “why?” To answer this question, this section explores how law journals have historically selected their editors.

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25 (2003) (“We endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

170. *Many of the Nation’s Most Prestigious Law Reviews Have Lily-White Editorial Boards*, *supra* note 148, at 57 (“In the past, academic merit, in theory, played a major role in the selection to law review but, in practice, favoritism and discrimination precluded blacks from membership.”); *see also* Godsey, *supra* note 96, at 67 (describing how law review’s function as a tested and verified education tool is “unpalatable and indefensible when it cuts along racial lines”).

171. Ramos, *supra* note 147, at 198.

172. *See* Knize, *supra* note 24, at 310–11 (highlighting that “[g]iven the value of this experience, it is unfortunate that law review membership does not always reflect the diversity of law-school populations”); Godsey, *supra* note 96, at 66 (citing Max Stier, Kelly M. Klaus, Dan L. Bagatell & Jeffrey J. Rachlinski, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1492 (1992)) (noting that the “wide range of educational benefits perceived to flow from law journal participation has been empirically confirmed by a study performed by several students at Stanford Law School”).

173. Bhabha, *supra* note 6, at 91.

1. First-Year Grades

Many law schools use first-year exam grades to select their new editors.<sup>174</sup> Some law journals will automatically offer Law Review positions to students “near the top of [their] class, for instance in the top 10%.”<sup>175</sup> But grades are not necessarily the only criteria used to select new law journal editors.<sup>176</sup> As of 2012, “88% of law reviews reported using grades or class rank as factors in selecting students for law review membership.”<sup>177</sup> However, despite the tradition and prevalence, law school grades are an inadequate singular basis to select law review editors because the skills necessary to succeed in law school exams—such as memorization, writing quickly, organizing outlines, issue-spotting, and psychoanalyzing professors—are inconsistent with the skills necessary to perform well on law review.<sup>178</sup>

For example, law school exams are time-bound.<sup>179</sup> They synthetically create a pressured environment by demanding extensive legal analysis in a tight time frame. Law journal editors, however, write their Notes or Comments over the course of several months.<sup>180</sup> The time pressure that characterizes exams therefore disappears and, instead, long-term, strategic time management takes over. Thus, content of writing and the ability to speedily write one’s legal conclusions does not directly relate to law journal success.

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174. VOLOKH, *supra* note 110, at 324–25 (describing the various methods typically employed by law journals to select their editors including the “[g]rade-on” method).

175. *Id.*; accord 6.1 *Journals*, UNIV. CHI. L. SCH., <https://www.law.uchicago.edu/students/handbook/academicmatters/journals> [https://perma.cc/N4QW-CDRS] (last visited Sept. 1, 2020) (noting that “[a]pproximately 10% of the first-year class is selected for *The Law Review* on the basis of grades”).

176. See, e.g., Alex Bou-Rhodes, *I Went Undercover on Law Review: Here’s What I Found*, BC LAW: IMPACT (Jan. 28, 2019), <https://bclawimpact.org/2019/01/28/i-went-undercover-on-law-review-heres-what-i-found/> [https://perma.cc/C22Q-9T6A] (“For most students, the grades of [their memorandum of law, Bluebook exercise, and personal statement] are combined with the final factor, [their] first-year law school grades, to create an overall score. Those who score the highest are invited onto law review.”).

177. CHICHETTI ET AL., *supra* note 151, at 9.

178. Godsey, *supra* note 96, at 76–79.

179. See, e.g., Joshua Craven, *What are Law School Exams Like?*, LAWSCHOOLI (June 14, 2013), <https://lawschooli.com/what-are-law-school-exams-like/> [https://perma.cc/5TNE-DQ62] (observing that law school exams are timed and place students under “terrific time pressure” that, without word limits, converts some exams into what “are often referred to as typing contests”).

180. Godsey, *supra* note 96, at 76.

Similarly, wordier law school exam answers tend to receive higher grades.<sup>181</sup> Thus, “those who can put their ideas on paper in the least amount of time have a clear advantage, regardless of the amount of knowledge that they possess.”<sup>182</sup> But a fast typist does not a good editor make. Where law school exams place a premium on *writing* words on paper quickly, law journals editors must *edit* intricate footnotes with precision. The ability to speedily analyze intricate legal hypotheticals does not ground a successful law review editorial staff. Rather, characteristics such as legal research, technical editing, leadership, maturity, dependability, originality, and teamwork can all grease the gears in a law journal’s editorial process.<sup>183</sup>

Also, beyond writing a Note or Comment, law journal editors spend copious hours editing the minutiae of legal scholarship—footnotes.<sup>184</sup> Law journal editors must have a keen understanding of Bluebook citation rules paired with a searching eye to spot missed italicization, small caps, introductory signals, and more.<sup>185</sup> This is an entirely different set of skills to writing an insightful analysis of a nuanced legal issue. A law school exam typically does not assess these technical editing skills and some professors do not even account for grammar or punctuation during exam review *at all*.<sup>186</sup> Thus, another core set of skills necessary to succeed as a law journal editor are not captured by law school exams—highlighting yet another shortcoming of the traditional selection method.

Generally, grades and an extracurricular activity require fundamentally different motivations. Although law journals are much more than an extracurricular activity in many respects, students recog-

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181. Karen Sloan, *On Law School Exam Answers, the Longer the Better*, LAW.COM (Sept. 27, 2016), <https://www.law.com/sites/almstaff/2016/09/27/on-law-school-exam-answers-the-longer-the-better/> [<https://perma.cc/FK9A-HBET>].

182. Godsey, *supra* note 96, at 77.

183. *Id.* at 76–77 (identifying the key skills necessary for law school exams—such as memorization, writing quickly, organizing outlines, issue-spotting, and psychoanalyzing professors—as different from the critical attributes for law review).

184. Allyson Evans, *Should I Join a Law Journal*, MAGOOSH (Mar. 28, 2019), <https://magoosh.com/lsat/2019/should-i-join-a-law-journal/#pros> [<https://perma.cc/MY4X-FWQF>].

185. VOLOKH, *supra* note 110, at 322; *see also* Ariel Salzer, *What You Need to Know About Getting Onto Law Review*, L. SCH. TOOLBOX (May 19, 2015), <https://lawschooltoolbox.com/what-you-need-to-know-about-getting-onto-law-review/> [<https://perma.cc/9ZWE-WB9T>] (“You are being hand-picked based, in part, on how well you can edit minutiae.”).

186. *Law School Exam Writing Guide*, QUIMBEE, <https://www.quimbee.com/resources/law-school-exam-writing-guide> [<https://perma.cc/8WQZ-GFDN>] (last visited Sep. 25, 2020).

nize tension between commitments for law classes and law journals. Grades are mandatory. Editing for a law journal is voluntary. And law journal activities demand a substantial chunk of time, with “[m]ost journals requir[ing] at least 15 or 20 hours of work . . . each week.”<sup>187</sup> This time weighs heavily atop the already-demanding workload from classes.<sup>188</sup> Thus, success on law reviews is a function of “genuine interest in scholarly publishing, a desire to create a helpful and insightful periodical for the benefit of the legal community, or a desire to influence the law through a creative Note or Comment.”<sup>189</sup> But journal responsibilities can easily be couched as secondary and completed sloppily when the journal’s duties interfere with editors’ GPAs. Just as some students might skip a sports practice to study for an exam, so can a law journal’s importance dissipate when competing with one’s peers for a mandatory marker of academic success.

Finally, law school instruction and evaluation methods appeal to majority students’ conceptions of the law. The case method of legal education is the dominant mode of teaching in law schools.<sup>190</sup> This method “mutes or excludes factors that are arguably relevant in any given case . . . [which] can have an objectifying impact on members of minority groups who identify with the ‘other’ side of a rule in the face of a dominant frame that treats rules as inherently objective, legitimate, and fair.”<sup>191</sup> This ordering of lawyering skills that places “abstract analytical reasoning at the top and experienced subjective realities at the bottom—again arbitrarily magnif[ies] perspectives of privileged law students while minimizing those of minority students.”<sup>192</sup> Thus, although the case method remains popular, its “attachment to assumptions that only make sense when presented in the abstract can create actual alienation for students who have experienced or witnessed the law in ways that challenge these underlying assumptions.”<sup>193</sup> These barriers to law school success are heightened when the school lacks diverse faculty to foster engagement among underrepresented minority students.<sup>194</sup>

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187. Evans, *supra* note 184.

188. VOLOKH, *supra* note 110, at 322 (stating that “law review takes a lot of effort, often many hours a week that you’d rather spend studying for other classes or having fun”).

189. Godsey, *supra* note 96, at 78.

190. Bhabha, *supra* note 6, at 97.

191. *Id.* at 98.

192. *Id.* at 88.

193. *Id.* at 97–99.

194. Elizabeth Mertz, Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 3 (1998) (noting in some scenarios that “students of color participated

It is important to note that many schools assess students' legal writing in at least one first-year legal writing course. This might urge many to discount arguments that grades cannot predict new law journal editors' contributions. But law journal student work differs from these legal writing courses because, where motions and memoranda apply the law to fictional fact patterns, legal scholarship dives deeper into unexplored legal nuances to prescribe a novel solution.<sup>195</sup> Thus, first-year legal writing classes, while valuable for practical legal training, similarly do not capture all the skills necessary for intense legal scholarship and technical editing.

Also, while many students write an intense legal research paper during their law school career, these typically occur in a student's second or third year.<sup>196</sup> But most law journals select new editors after the first year of law school. Thus, while these intense legal research and writing seminars are the most similar to working on a law journal Note or Comment, they are too late to affect law journal editor selection.

First-year grades are ill equipped to measure an editor's potential success on a law journal. First-year grades do not measure traits that translate to working on a law journal and, therefore, law journals should depart from considering grades as the primary factor behind offers to new members. This metric demands even further criticism knowing that law journals historically excluded minority students. But rethinking how law journals consider grades cannot be the end of the conversation. Another traditional metric for selecting new law journal editors has led to homogenous editorial staff—writing competitions.

## 2. “Canned” Writing Competitions

“Canned” writing competitions permeate many law review selection processes.<sup>197</sup> Typically, a writing competition has two parts, (1) a

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more in the classrooms with teachers of color and in several of the classes in which there was a larger percentage or cohort of minority students”).

195. VOLOKH, *supra* note 110, at 12, 273 (suggesting the many ways to transform a practical piece of work that focuses primarily on “utility” and is “generally shorter and shallower than a good law review article” into a law review article).

196. See, e.g., *Writing Requirement*, UNIV. OKLA. COLL. LAW, <https://www.law.ou.edu/academics/programs/jd-program/writing-requirement> [https://perma.cc/JCB3-8XWK] (last visited Sept. 9, 2020) (detailing an advanced piece of written scholarship required for graduation); *Advanced Writing Requirement*, SETON HALL L. SCH., <https://law.shu.edu/students/academics/advanced-writing-requirement.cfm> [https://perma.cc/QDL3-J7TP] (last visited Sept. 9, 2020) (describing an advanced writing requirement that typically results in a “sophisticated analysis of a current legal question”).

197. *About*, HARV. L. REV., <https://harvardlawreview.org/about/> [https://perma.cc/F2ZJ-PU8U] (last visited Sept. 1 2020); *Law Journals*, CASE W. RSRV. UNIV. SCH. LAW, <https://case.edu/law/campus-life/law-journals> [https://perma.cc/LSX4-SCMU] (last visited Aug. 24, 2020) (indicating the use of the

technical editing component, and (2) a legal writing component.<sup>198</sup> Students are required to familiarize themselves with the Bluebook to “cite check” citations and then use the materials provided to write a short piece of academic legal literature.<sup>199</sup> These “canned” writing competitions, however, do not measure a skill critical to effective law journal membership—legal research skills.<sup>200</sup> Students write a piece of academic legal research but avoid sifting through the tomes of legal knowledge surrounding the subject to find the relevant law and policy considerations that could undergird an author’s proposed solution. The “closed universe” limits their sources.<sup>201</sup> Additionally, when law journals demand that students remove any potentially personally identifying information from their submissions, law journals prevent candidates from applying their personal perspectives—a valuable source of analysis that pits abstractions against realities.<sup>202</sup>

Additionally, law journal *students* manage the law journal writing competitions to select their new editors, not trained administrators or faculty well-versed in assessing academic legal writing.<sup>203</sup> Most law

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write-on competition for first-year editors). Case Western Reserve’s write-on competition chooses the topic that candidates must discuss, gives candidates a closed universe of twenty sources, and limits candidates’ submission length. Memorandum from Case W. Rsrv. Univ. Sch. Law, L.J. Write-On Competition: What Is It? 2 (unpublished letter, on file with the author).

198. Shelley Awe, *Tips for Nailing the Law Review Writing Competition*, VAULT (May 7, 2020), <https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/tips-for-nailing-the-law-review-write-on-competition> [<https://perma.cc/5YJ3-8KFE>].

199. See, e.g., B.C. L. SCH., 2017 WRITING COMPETITION MATERIALS 4–5 (2017), <https://www.bc.edu/content/dam/bc1/schools/law/top-bar/current-students/get-involved/law-reviews/competition2017/Omni-problem-2017.pdf> [<https://perma.cc/U3BB-5YDH>]; Awe, *supra* note 198; *An Insider’s Guide to Journal Write-On Competition*, LEARNLEOBLOG, <http://blog.learnleo.com/in-siders-guide-to-journal-write-on-competition/> [<https://perma.cc/8HBW-BUN8>] (lasted visited Sept. 25, 2020) (highlighting that “[t]he typical write-on competition provides students with a ‘closed write-on packet,’ which includes all the factual and legal information that you’ll need to complete the competition”). Case Western Reserve’s write-on competition similarly provides students with a closed universe of sources for competitors to use to draft their work. L.J. Write-On Competition: What Is It?, *supra* note 197, at 1–2.

200. Godsey, *supra* note 96, at 79.

201. VOLOKH, *supra* note 110, at 325 (observing that while write-on competitions vary from school to school, students typically receive “a prepared set of research materials” and “are generally not allowed to cite any authority that is not part of those materials”).

202. Godsey, *supra* note 96, at 79.

203. Vikram David Amar & Jason Mazzone, *How Much Deference Will Be Given to Affirmative Action Plans Fashioned by Students, and to Affirmative Action Plans More Generally? Part Three in a Series on the Challenge to Harvard*



review editors evaluating writing submissions have only completed their own Note less than a year prior. Also, these evaluators might not ensure that at least one student reads through all the writing submissions—leading to inconsistent grading between submissions. Students are naturally more inclined to assess familiar writing styles and samples more favorably—intentionally or not—and might not be as attuned to their own prejudices as law school faculty would be.<sup>204</sup> Thus, the criteria that student editors use to assess prospective editors' work may vary substantially from one reviewer to another.

In these ways, “canned” writing competitions—like “grade-on” policies—are imperfect assessments of the skills critical to a high-functioning law journal. They do not measure a student's legal research skills, originality that could stem from a student's identity, or soft factors that develop a cohesive editorial team. Students' legal research filters are crucial to writing timely and insightful Notes within a deadline—one of the core components of law journal membership.<sup>205</sup> But “canned” writing competitions spoon-feed sources to students. Students are also asked to draft novel research in the form of a Note or Comment but scrubbing personally identifying information from submissions depresses originality. These “canned” writing competitions, therefore, paint a limited picture of all that prospective editors can offer law journals.

Blind grading and writing competition selection methods wrongly assume that all candidates start the race for law review membership from the same starting line and face the same obstacles along the way.<sup>206</sup> Ample research highlights how traditional law school teaching appeals

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Law Review's *Diversity Program*, JUSTIA (Mar. 8, 2019), <https://verdict.justia.com/2019/03/08/how-much-deference-will-be-given-to-affirmative-action-plans-fashioned-by-students-and-to-affirmative-action-plans-more-generally> [<https://perma.cc/6GHQ-KEZ3>] (noting that law journal editors “are not (typically) educational professionals[,] . . . have probably not previously been involved in designing and implementing admissions (or other) programs in educational or quasi-educational settings . . . [and] are picking their peers—other students with whom they will work in the coming academic year—or selecting the authors with whom they themselves will interact”).

204. Godsey, *supra* note 96, at 80 (“[M]inority students face discrimination in the subjectivity of the selection processes . . .”). Although these forms of discrimination are almost certainly “unintentional, it still results in negative outcomes” for law journals. Peralta, *supra* note 123, at 76.
205. VOLOKH, *supra* note 110, at 322 (describing how “[m]any journals require you to write a student Note”).
206. *See generally*, Malcolm Gladwell, *Carlos Doesn't Remember*, REVISIONIST HISTORY, <http://revisionisthistory.com/episodes/04-carlos-doesnt-remember> [<https://perma.cc/D7BU-DQXS>] (last visited Oct. 3, 2020); *see also* Godsey, *supra* note 96, at 80 (“[M]inority students . . . have faced educational barriers, stemming from past discrimination against their minority group, which impede their ability to perform at a competitive level.”).

primarily to white men and these traditional law journal selection methods exacerbate this reality.<sup>207</sup>

*C. Current Attempts to Incorporate Diversity into the  
Law Review Editor Selection Process*

“There is little disagreement that the legal profession is well-served by embracing diverse perspectives.”<sup>208</sup> To this end many law journals have recognized the need for increased diversity on their law journals and developed policies to promote a diverse editorial staff.<sup>209</sup> This was not always the case. The earliest that any diversity policy arose was in 1969 at the University of California, Berkeley.<sup>210</sup> Then, starting in 1982, Harvard, University of Michigan, New York University (NYU), University of Virginia, University of Minnesota, Columbia, Cornell, Penn, Georgetown, UCLA, Yale, Northwestern, University of Chicago,

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207. See, e.g., 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 26, 34 (2003) (finding that white males showed the greatest level of comfort with and acceptance of law school, perceiving it to be more fair and neutral than did other students and concluding that “race, ethnicity, and gender all significantly affect students’ experiences of legal education [at the University of Florida], and that diversity of faculty and students enhances the educational experience”); Bhabha, *supra* note 6, at 88 (“Unengaged and outmoded methods of instruction, such as the case method and Socratic dialogue, heighten existing power imbalances in the classroom, reward entitlement, and make outsiders feel even more alien.”).

208. Knize, *supra* note 24, at 312.

209. See, e.g., Adam Chilton, Jonathan Masur & Kyle Rozema, Affirmative Action in Law Reviews 29 (Nov. 27, 2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3295334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295334); see also Vikram Amar, *First Monday Musings By Dean Vik Amar: Reflections on the Lawsuit Against Harvard Law Review*, ABOVE THE LAW (Mar. 4, 2019, 3:42 PM), <https://abovethelaw.com/2019/03/first-monday-musings-by-dean-vik-amar-reflections-on-the-lawsuit-against-harvard-law-review/> [<https://perma.cc/A8PE-V2NV>] (“Some law reviews now also take account of race, gender, and other demographic factors in order to increase the diversity of the journal’s membership.”). *But see*, *St. John’s Law Review*, ST. JOHN’S L. REV. <https://www.stjohns.edu/law/academics/journals-co-curricular-programs/st-johns-law-review> [<https://perma.cc/5DFL-NXS6>] (last visited Oct. 3, 2020) (stating that law review membership is “based on a combination of cumulative grade point average and successful completion of the St. John’s annual writing competition, conducted in the spring of the 1L year”). Additionally, Case Western Reserve University School of Law does not account for diverse backgrounds of law journal applicants in the editor selection process. Rather, the school selects most law review members based on first-year grades and then selects a much smaller number of law students based on a law journal writing competition score. Further, upon discussing diversity on Case Western Reserve Law Review with the journal’s faculty advisor, he indicated that he could count on his hands the number of law journal editors who identified as Black.

210. See, e.g., Chilton et al., *supra* note 209, at 29.

Duke, and Stanford followed suit.<sup>211</sup> The University of Texas, University of Southern California, Vanderbilt, and Washington University in St. Louis never adopted a diversity policy.<sup>212</sup>

These diversity policies are typically characterized by a holistic assessment of prospective editors' potential contributions to the law review—that is, they account for all available factors voluntarily submitted by the candidate including race, gender, personal statement, grades, writing competition score, and résumé.<sup>213</sup> For example, Harvard Law Review's editor selection process is as follows:<sup>214</sup>

<i>Criteria</i>	<i>Number of Editors Selected</i>
<i>Writing Competition Score</i>	20
<i>50/50 Writing Competition Score and Grades; 1 Editor from Each Section</i>	7
<i>50/50 Writing Competition Score and Grades; No Regard for Class Section</i>	3
<i>Holistic but Anonymous Review of All Available Information</i>	18
<i>Total</i>	<b>48</b>

These policies do not on their face preference a racial or gender identity above others. Rather, the policies seek to uncover “important information about an individual’s qualifications and abilities to contribute to the journal” by “striking a balance among [writing competition entries, grades, and personal statements].”<sup>215</sup> A candidate’s race or

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211. *See, e.g., id.* (documenting when, if at all, the law reviews at the top twenty law schools in the United States incorporated diversity policies in their law review editor selection processes).

212. *See, e.g., id.*

213. *See, e.g., Membership Selection*, N.Y.U. L. REV. <https://www.nyulawreview.org/about/membership-selection/>, [<https://perma.cc/R4SK-UWTA>] (last visited Oct. 3, 2020) (describing the various factors that contribute to selecting new law review editors including “writing competition entries, grades, and personal statements”—the last of which is read “in light of various factors, including (but not limited to) race, ethnicity, gender identity, sexual orientation, disability, age, first generation graduate student status, national origin, religion, socio-economic background, ideological viewpoint, and academic interests”).

214. *About*, *supra* note 197.

215. *Membership Selection*, *supra* note 213.

gender, therefore, factors into a thorough, holistic assessment that considers the ways that a candidate's background, experience, and skills could contribute to the overall journal.

*D. Challenges to Diversity Policies for Selecting Law Review Editors*

Recently, these law journals' diversity policies have been challenged at both Harvard and NYU.<sup>216</sup> The non-profit group named "Faculty, Alumni, and Students Opposed to Racial Preferences" (FASORP) sued, alleging that these journals' policies that account for race and gender "violate[] the clear and unequivocal language of Title VI and Title IX" and use an illegal quota system for selecting editors based on race or gender.<sup>217</sup> In FASORP's eyes, "while *Grutter* permits law schools to pursue diversity in assembling their entering classes, federal law prohibits *journals within law schools* from taking account of race or gender in assembling their entering classes of journal members."<sup>218</sup> To FASORP, these policies cause law review alumni to "suffer . . . diminish[ed] prestige," regardless of race and gender.<sup>219</sup> The law review's female and minority alumni are further harmed, so FASORP's argument goes, by allegedly being viewed with suspicion since they cannot prove that they earned their law review credential through academic merit and not diversity "set-asides."<sup>220</sup> Finally, FASORP alleges that law students are denied an equal opportunity to compete for law review membership.<sup>221</sup> These policies, they argue, amount to a "fixed,

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216. Complaint at 1, *Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review*, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018); *see also* Complaint at 1, *Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review*, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018).

217. Complaint at 1, *Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review*, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018); *see also*, Complaint at 1, 3, *Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review*, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018) ("To enable it to fill this 'diversity' quota, the NYU Law Review instructs all applicants to submit a 'personal statement' of no more than 500 words.").

218. Vikram David Amar & Jason Mazzone, *Can Law Reviews Take Race and Gender into Account in Selecting Members (and Also Articles)? Part One in a Series*, JUSTIA (Feb. 8, 2019), <https://verdict.justia.com/2019/02/08/can-law-reviews-take-race-and-gender-into-account-in-selecting-members-and-also-articles#:~:text=A%20new%20lawsuit%20against%20Harvard,or%20gender%20in%20assembling%20their> [https://perma.cc/U2U6-NDX8].

219. Complaint at 6, *Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review*, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018).

220. *Id.* at 7.

221. *Id.*

numerical set-aside of 18 slots reserved for ‘diversity candidates’—in other words, a *de facto*, unlawful quota.<sup>222</sup>

Both the Southern District of New York and District of Massachusetts—the courts in which FASORP filed suit—dismissed the lawsuits for lack of standing.<sup>223</sup> FASORP’s complaints did not identify any member by name that was injured by Harvard’s or NYU’s flagship law journals’ respective policies—no current law review member, alumna, or faculty.<sup>224</sup> The same holds for FASORP’s representation of students seeking membership in the future.<sup>225</sup> The complaints failed to identify “at least one member who would satisfy the constitutional prerequisites for standing.”<sup>226</sup> These new challenges, therefore, have yet

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222. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87.

223. Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev. Ass’n., No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at \*28 (D. Mass. Aug. 8, 2019); Faculty, Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev., No. 18-cv-09184-ER, 2019 U.S. Dist. LEXIS 56187, at \*13–14 (S.D.N.Y. Mar. 31, 2020); *see also* Juliet E. Isselbacher, *Lawsuit Alleging Harvard Law Review Discriminates in Member Selection Process Dismissed*, HARV. CRIMSON (Aug. 11, 2019), <https://www.thecrimson.com/article/2019/8/11/fasorp-suit-dismissed/> [<https://perma.cc/WK9S-FRJ5>]; Braden Campbell, *NYU Beats Anti-Affirmative Action Group’s Race Bias Suit*, LAW360 (Mar. 31, 2020), <https://www.law360.com/articles/1258943/nyu-beats-anti-affirmativeaction-group-s-race-bias-suit> [<https://perma.cc/HS6K-4ZD2>].

224. Complaint at 5–8, Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018); *see also* Complaint at 5–7, Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018); Amar & Mazzone, *Can Law Reviews Take Race and Gender into Account*, *supra* note 218 (“It is striking that the most obvious plaintiff for challenging HLR’s membership practices is nowhere to be found: the student who has already sought to join HLR but who alleges the application was denied under the admissions process that makes use of race and gender.”).

225. Complaint at 7–8, Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018); *see also*, Complaint at 7, Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018).

226. Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev. Ass’n., No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at \*17 (D. Mass. Aug. 8, 2019); *see also* Faculty, Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev., No. 18-cv-09184-ER, 2019 U.S. Dist. LEXIS 56187, at \*14 (S.D.N.Y. Mar. 31, 2020) (holding that failure to “identify one injured member with specific allegations . . . alone requires dismissal on the basis that FASORP inadequately pleads associational standing” and further positing that “FASORP’s allegations also fall short of pleading either a concrete and particularized injury, or a real and immediate threat of repetition of that injury”).

to be argued on the merits. The threshold issue of standing has impeded substantive challenges and will likely continue to impede legal challenges to law journals' diversity policies in the future until FASORP or another plaintiff can name a specific member who suffered an actual or imminent injury at the hands of the law journal.

But, even if plaintiffs sufficiently named a member in each group of plaintiffs—a faculty member, an alumna, and a student—the court indicated in dicta that FASORP still would not meet the threshold to confer Article III standing.<sup>227</sup> Law journals should therefore feel secure in their diversity policies by the cursory dicta criticizing the deficiencies in FASORP's lawsuits because it signals the difficulty that plaintiffs face in suing a law journal for a newly enacted diversity policy.

In its suit against the Harvard Law Review, specifically, FASORP still did not allege sufficient facts “showing the sort of ‘concrete and particularized,’ ‘actual or imminent,’ and redressable ‘injuries in fact’ necessary to confer Article III standing.”<sup>228</sup> And then, later, the Southern District of New York found that, even after dismissal on the issue of standing against Harvard Law Review, FASORP *still* did not allege sufficient information to confer Article III standing *for the same reasons as before*.<sup>229</sup> Thus, with two bites at the apple, FASORP could not plead sufficiently to even reach the merits of their case. This should encourage law reviews across the United States, therefore, to enact similar diversity policies because of the demonstrated difficulty in alleging sufficient facts to survive preliminary motions to dismiss for lack of standing.

Once a plaintiff pleads sufficient facts to confer Article III standing, he could urge courts to strike down law journals' diversity policies because *Grutter* and *Fisher* only apply to institutions of higher education, not organizations within those institutions. First, a plaintiff could argue that a law journal's diverse editor membership is not a “compelling interest” worthy of protection.<sup>230</sup> But, as highlighted in *Grutter*, diversity is only valuable inasmuch as it helps “obtain[] the educational benefits that flow from a diverse student body.”<sup>231</sup> This

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227. Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard L. Rev. Ass'n, No. 18-12105-LTS, 2019 U.S. Dist. LEXIS 133181, at \*20 (D. Mass. Aug. 8, 2019).

228. *Id.*

229. Faculty, Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev., No. 18-cv-09184-ER, 2019 U.S. Dist. LEXIS 56187, at \*14 (S.D.N.Y. Mar. 31, 2020) (“FASORP's allegations also fall short of pleading either a concrete and particularized injury, or a real and immediate threat of repetition of that injury.”).

230. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87.

231. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

rationale transfers directly to law journals.<sup>232</sup> Many law schools consider law journals as a “seminar” and offer credit to students that participate on that journal.<sup>233</sup> This directly contradicts an argument that journals are too different from law school classes to represent a “compelling interest.”<sup>234</sup> Also, in *Grutter*, Justice O’Connor expressly justified Michigan Law School’s “compelling interest in securing the educational benefits of a diverse student body” by understanding that law schools “represent the training ground for a large number of the Nation’s leaders.”<sup>235</sup> Law journals similarly represent institutions that create future leaders—particularly within the legal community.<sup>236</sup> Courts would therefore likely find that law journals maintain a justified “compelling interest” in diversifying their editorial staff.<sup>237</sup>

Plaintiffs could also challenge that law journals are institutions to which courts should not defer on questions of educational policy. In *Grutter*, the Court noted that deference to the University of Michigan Law school was proper because it involved “educational judgments in an area that lies primarily within the expertise of the university.”<sup>238</sup> Here, however, students, not trained educational practitioners, manage law journals.<sup>239</sup> Law students are typically not trained in higher education administration and they only pick new editors once as third-year journal editors.<sup>240</sup> The policies that they create, therefore, would

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232. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87 (“But if the classroom seminar is the paradigm setting in which the value of diversity can be most easily appreciated, then it is not hard to see why HLR policymakers might believe diversity is arguably a compelling interest among its membership too.”).

233. *2019–20 General Bulletin Laws (LAWS)*, *supra* note 124.

234. If courts upheld a plaintiff’s argument of this character, the plaintiff might then feel empowered to compel course-by-course scrutiny to determine which courses lead to benefits from diversity and which courses would not—an ugly can of worms to determine the exact areas in which a state maintains an actual compelling interest in diversity.

235. *Grutter*, 539 U.S. at 332–33.

236. *See supra* Part II.B (discussing one of the purposes and functions of law journals as valuable résumé builders).

237. Amar & Mazzone, *Whether Law Reviews Can Take Race and Gender into Account*, *supra* note 87.

238. *Grutter*, 539 U.S. at 328.

239. VOLOKH, *supra* note 110, at 321 (2003) (noting the various ways that law students contribute to law journal publications).

240. Amar & Mazzone, *How Much Deference Will Be Given to Affirmative Action Plans*, *supra* note 203.

likely not receive deference from the court if these policies were established exclusively by law journal student editors.<sup>241</sup>

Many have also challenged law journals' diversity policies in the court of public opinion—claiming that diversity policies undermine the quality of law reviews' publications.<sup>242</sup> Three professors from the University of Chicago recently researched this issue “using citations as a measure of article impact and studying changes in diversity policies at the flagship law reviews of the top 20 law schools.”<sup>243</sup> From this sample, however, they found “no evidence that diversity policies for editor selection meaningfully decrease the impact of published articles.”<sup>244</sup> Rather, they found “at least some evidence that diversity policies may actually increase the impact of published articles.”<sup>245</sup> Although these professors focused only on the law reviews at the top twenty law schools in the United States,<sup>246</sup> their findings at least address—and rebut with respect to the top twenty law schools' law reviews—public criticism that had followed these diversity policies since their inception.<sup>247</sup>

Law journals' diversity policies have received scrutiny both from the courts and the courts of public opinion. However, no party has yet brought an articulable claim specifying how law journals' diversity policies injure anyone. This should herald a new opportunity for law journals without diversity policies to finally adopt such policies, diversify their editorial staff, and reap the benefits that flow from diversity.

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241. *Id.* (since law review students select their peers for law review “[a] court might therefore reason that the deference given in *Grutter* and *Fisher* should not extend to HLR’s assertion that diversity is a compelling interest, thereby requiring HLR to prove the claim—as well as prove that the particular process for selecting members and authors is narrowly tailored”).

242. *See, e.g.*, Kathryn Rubino, *Does Diversity Hurt the Quality of Law Reviews?*, ABOVE THE LAW (Feb. 8, 2019), <https://abovethelaw.com/2019/02/does-diversity-hurt-the-quality-of-law-reviews/> [<https://perma.cc/9RR6-MWJA>].

243. Chilton et al., *supra* note 209, at Abstract.

244. *Id.*

245. *Id.*

246. *Id.* at 4.

247. *Id.* at 22 (“[T]he Harvard Law Review, with its epicycles of affirmative action, is on the way to becoming a laughing stock.”) (quoting RICHARD A. POSNER, *OVERCOMING LAW* 77 (1995)).



PART IV: A WAY FORWARD—RE-EVALUATING  
LAW REVIEW DIVERSITY POLICIES

Diversity has become a core goal for many institutions across the legal profession as lawyers recognize the benefits that flow from a diverse profession.<sup>248</sup> Scholars now recognize that the benefits from “diverse student membership on law reviews . . . cannot be overstated.”<sup>249</sup> This led some law journals to develop diversity policies that were recently challenged and dismissed in court for lack of standing. But the question remains, what should law journals consider as they develop diversity policies to obtain the benefits that would flow from a diverse editorial staff?

*A. Core Considerations for Law Journals Formulating Diversity Policies*

1. Alterations to Existing Editor-Selection Policies

As a threshold matter, law journals must recognize the limited value from “grade-on” and “canned” writing competition models. Although these methods are arguably meritocratic, they have historically cut along racial and gender lines—possibly demonstrating how “[w]hites who preferred group-based hierarchy used colorblindness to defend the status quo.”<sup>250</sup>

Therefore, first, law journals should rethink the breadth of factors to assess in writing competitions. As indicated earlier, the writing competition offers only a limited window into law journal editorship. This method does not adequately account for candidate’s legal research skills and only accidentally, if at all, accounts for a candidate’s demographics or experience.<sup>251</sup> Law journals should therefore alter the writing competition to allow students to (1) incorporate demographic information into their editor-selection processes as part of a holistic review process, and (2) include sources outside of the closed universe writing competition problem.

By incorporating demographics and experience into the law journal editor selection process law journals can better understand the unique perspective that each student will bring to the publication. This perspective manifests itself in social interactions, topic selection, and journal-specific policy creation. Therefore, law journals are able to diversify their editorial staff to ensure that they consider the widest possible variety of perspectives that can still publish exceptional legal scholarship annually.

Law journals should also aim to incorporate legal research into the writing competition by allowing students to find sources from outside

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248. Knize, *supra* note 24, at 312.

249. *Id.* at 313.

250. Hurd & Plaut, *supra* note 23, at 1625.

251. *Supra* notes 197–207 and accompanying text.

the “closed universe” problem—if not doing away with the closed universe entirely. This will allow law journal editors to understand candidates’ legal research skills and legal judgment in synthesizing swathes of information and including only the most relevant, timely, or otherwise valuable sources to include in their submission.

Law journal editors will naturally want to limit the extent to which students can add new sources for practical reasons. For example, some students might be in closer proximity to a law library—thereby gaining greater access to legal scholarship. Other students might have limited internet availability. Further, writing competition submission reviewers likely do not want to spend the extra time tracking down multitudes of new sources to double-check content and Bluebooking. Therefore, law journals could tailor the extent to which students use outside legal research based on their own institution-specific needs.

As an example, a new writing competition policy might “cap” students’ outside sources to a maximum of ten outside sources per student while requiring students to Bluebook each additional source and provide a PDF copy of the relevant portions of the source in their writing competition packet. This policy mimics sourcing authors’ footnotes for law journal articles and therefore provides insight into how students will manage their first year of editing on that law journal. These limitations also ensure that students only include the most relevant sources for their submission while also providing enough leeway for students to apply a new lens to the writing competition topic.

Law journal editors would not be overly burdened by the new sources because the candidate would include the relevant portions of the source for the reviewer’s consideration. Also, candidates competing in the writing competition could each receive information about generating PDFs, scanning documents using smartphones, and submitting PDFs of sources with their submission. A revised writing competition policy can, therefore, assess candidates’ legal research skills while ensuring that their editors can practically grade submissions in a timely manner.

Specific solutions that incorporate legal research into the writing competition will likely vary between law journals or between law schools. However, the underlying policy behind assessing legal research lies in the yet-untested ability of students to sift through legal scholarship and draw-out relevant content to formulate coherent, persuasive, and likely prescriptive solutions to novel legal issues.<sup>252</sup> Law

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252. Some may argue that these skills are tested in legal writing classes. However, these classes place a premium on case law and reciting what the law is, as opposed to challenging laws or promoting new, policy-based solutions which are at the heart of law journal publications. *See Guide to Writing a Note or Comment Based on Summer, Clinical, or RA Work*, YALE L.J., [https://www.yalelawjournal.org/files/GuidetoWritingaNnoteorCommentBasedonSummerClinicalorRAWork\\_e855wwei.pdf](https://www.yalelawjournal.org/files/GuidetoWritingaNnoteorCommentBasedonSummerClinicalorRAWork_e855wwei.pdf) [<https://perma.cc/ZXD6-G>]

journals should therefore adjust current writing competition policies to incorporate legal research, demographics, and experience as an indicator of journal readiness.

## 2. Legal Considerations to Guide Law Journals' Diversity Policies

Affirmative action cases from *Bakke* through *Fisher II* can help law journals lawfully incorporate “diversity policies.”

First, law journals should pursue diversity policies in order to obtain the benefits that would flow from a diverse editorial staff. This would align with the only justification for accounting for race in admissions policies affirmed by Justice Powell in *Bakke*<sup>253</sup>—the same justification the Supreme Court reaffirmed in *Grutter*<sup>254</sup> and *Fisher II*.<sup>255</sup>

Second, law journals should avoid any semblance of a “quota” system.<sup>256</sup> FASORP alleged that the spots reserved on both Harvard’s and NYU’s law reviews for “holistic” review amounted to a quota.<sup>257</sup> However, the diversity policies at both Harvard and NYU do not amount to quotas because they consider race or sex “only as a ‘plus’ in a particular applicant’s file,” consistent with *Grutter* and *Bakke*.<sup>258</sup> As Justice Powell put it:

The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications,

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ZND] (last visited Oct. 4, 2020) (“While all of the authors we spoke with found it extremely helpful to have generated a memo, paper, or litigation document on their topic, none simply turned that work product wholesale into their Note or Comment submission.”).

253. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

254. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

255. *Fisher II*, 136 S. Ct. 2198, 2214–15 (2016).

256. *Grutter*, 539 U.S. at 334.

257. Complaint at 3, Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018) (“After these 30 students are selected on the basis of merit, the remaining 18 students are selected ‘through a holistic but anonymous review that takes into account all available information.’”); *see also* Complaint at 3, Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018) (describing the methods NYU Law Review’s followed “[t]o enable it to fill this ‘diversity’ quota”).

258. *Grutter*, 539 U.S. at 334; *see also Bakke*, 438 U.S. at 317.

which may have included similar nonobjective factors, did not outweigh those of the other applicant.<sup>259</sup>

Law reviews that adopt a wide, holistic review process in which race is one factor, therefore, do not partake in a quota because they consider all available information in which race or gender is only one factor.<sup>260</sup>

This “holistic review” policy aligns with Justice Powell’s broad conception of diversity outlined in *Bakke*. There, Justice Powell highlighted that schools should review students for “qualities more likely to promote beneficial educational pluralism.”<sup>261</sup> This, however, was not limited to race and ethnicity but ran the gamut of leadership, personal talents, work experience, maturity, history of overcoming disadvantages, and “other qualifications deemed important.”<sup>262</sup> Thus, law journals that employ a “holistic review” of multiple factors important to the diversity of its editors can (1) avoid any semblance of a quota, and (2) embrace a broad conception of diversity that will include a broader variety of students.

Third, law journals should include a critical mass of diverse students to ensure that their unique experiences are heard and welcomed. A critical mass is necessary because the benefits from a diverse editor membership cannot be realized without a critical mass of editors who feel empowered to share their perspectives.<sup>263</sup> This critical mass ensures students “do not feel isolated or like spokespersons for their race.”<sup>264</sup>

But law journals should avoid a fixed number of students of a particular race, ethnicity, gender, or other demographic that would create a critical mass *per se* because this could transform the law journal’s policy into a quota.<sup>265</sup> Therefore, law journals can avoid liability under *Grutter* by pursuing diversity policies that are imprecise as to the exact number or percentage of candidates selected through using a particular demographic factor.<sup>266</sup> In *Grutter*, although Justice

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259. *Bakke*, 438 U.S. at 318.

260. *Id.*

261. *Id.* at 317.

262. *Id.*

263. Rocconi et al., *supra* note 2 at 27; *Grutter*, 539 U.S. at 318.

264. *Grutter*, 539 U.S. at 319.

265. *Id.* at 336 (highlighting how “‘some attention to numbers,’ without more, does not transform a flexible admissions system into a rigid quota”).

266. Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54, 67–68. (2017) (highlighting that “as both Justice Powell’s rule in *Bakke* and Justice Kennedy’s opinion in *Fisher* suggest, the Court accepts a relationship between

Kennedy and Justice Rehnquist challenged the law school's critical mass policy as a quota, Justice O'Connor noted that the law school adequately maintained a balanced review process.<sup>267</sup> Thus, law journals should cleave to vague policies that ensure a critical mass of students from diverse backgrounds to avoid liability and fully realize the benefits that flow from a diverse editorial staff.

Fourth, law journals should consult with law school administrators to (1) develop sunset provisions governing how long the diversity policy will last, and (2) maintain regularly scheduled reviews of law journals' staff diversity. These sunset provisions and periodic reviews of law journals' membership demographics will ensure that law journals' diversity policies do not outlive their purpose—continuing to exist despite “achiev[ing]” law journal editorial diversity.<sup>268</sup>

This also allows journals to abide by the guidance established in *Grutter* and *Fisher II* which extended judicial deference to law school administrators' “experience and expertise,” to pursue diversity as an educational objective.<sup>269</sup> Unlike law school administrators, however, law students are not experts in higher education administration and evaluate applications for membership only once as third-year journal editors.<sup>270</sup> The policies that they create, therefore, would not likely receive substantial, if any, deference.<sup>271</sup>

Consulting with law school administrators, however, would endow law journals' diversity policies with expertise. Law journals could talk with law school administrators at arms-length and then adopt policies independently from the law school. This would allow law journals to use administrators' expertise, promote diversity on their journal, and maintain independence from the law school. This would maintain a shield against Title VI and Title IX claims while pursuing judicial deference under *Grutter* and *Fisher II*.<sup>272</sup> It is in law journals' best interests, therefore, to consult with law school administrators as they develop their diversity policies.

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numbers and achieving the educational benefits of diversity, so long as that relationship remains implicit and imprecise”).

267. *Grutter*, 539 U.S. at 336 (stating that consulting daily composition reports denoting the incoming class's racial, ethnic, and gender composition while continuing to afford each applicant the same attention regardless of what these daily reports indicated did not constitute a quota).

268. *Id.* at 342.

269. *Id.* at 328; *Fisher II*, 136 S. Ct. 2198, 2208 (2016).

270. Amar & Mazzone, *How Much Deference Will Be Given to Affirmative Action Plans*, *supra* note 203.

271. *Id.*

272. *Grutter*, 539 U.S. at 328; *Fisher II*, 136 S. Ct. at 2208.

Also, beyond working to develop diverse law journal editorial staff, incorporating demographic information into writing competitions allows law journals to track their editorial staff demographics moving forward. As highlighted earlier, law journals have historically done a poor job recording their editors' demographics.<sup>273</sup> By tracking this information, law journals can simultaneously fill the gap in data regarding law journal editor demographics and review their demographic makeup to ensure their diversity policies do not outlive their purpose.<sup>274</sup>

*B. Sample Diversity Policy for Case Western Reserve University  
School of Law Journals*

Case Western Reserve University School of Law has five law journals: the Case Western Reserve Law Review; Health Matrix; the Journal of International Law; the Journal of Law, Technology, & the Internet; and the Canada-US Law Journal.<sup>275</sup> Like most schools, Case Western Reserve typically selects law journal editors through a combination of grades (exclusively for the law review) and a “canned,” closed-universe writing competition for first-year law students that takes place every Summer after finals.<sup>276</sup> Presently, the only journals that consider factors in addition to writing competition scores and grades are JOLTI and the Canada-US Law Journal which both interview prospective editors before offering positions.<sup>277</sup>

Case Western Reserve's law journals could expand their editor selection methods to a holistic process that encompasses more than just grades and writing competition scores. Prospective editors could submit

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273. *See supra* Part III.A (highlighting the lack of data on law journal membership demographics); CHICHETTI ET AL., *supra* note 151 at 2–3; *see also* E-mail from Paul Willison, Exec. Notes & Comments Ed., Case W. Rsrv. L. Rev., to Jessie Hill, Assoc. Dean Fac. Rsch., Case W. Rsrv. Univ. Sch. of L., and Avidan Cover, Assoc. Dean of Acad. Affs., Case W. Rsrv. Univ. Sch. Law, about (1) trying to obtain data on law journal editors' demographics at Case Western Reserve University School of Law and (2) setting up a conversation with Professor Entin where he highlighted that the law review at Case has historically been quite homogenous (on file with author).

274. *Grutter*, 539 U.S. at 342–43.

275. *Law Journals*, CASE W. RSRV. UNIV.: SCH. OF L., <https://case.edu/law/campus-life/law-journals> [<https://perma.cc/L5LU-QN7J>] (last visted Oct. 12, 2020).

276. E-mail from Avidan Cover, Assoc. Dean of Acad. Affs., to the Case W. Rsrv. Sch. of L. Class of 2022, (May 9, 2020) (on file with author).

277. Memorandum from Paul Willison, Bethany Gump-Jones, Emily Hoffman & Calvin Freas, Exec. Eds., Law Journal Write-On Competition: What is It? 4 (2020) (on file with author) (indicating in a color-coded table the metrics that each Case Western Reserve law journal uses to select new editors).

personal statements with a word-limit,<sup>278</sup> anonymous demographic information, and standardized and anonymized résumés to highlight different life experiences and allow editors to view their candidacy with greater depth. Personal statements allow students to think critically about their worldview and how it applies to legal scholarship. Anonymous demographic information allows law review editors to consider the ways that applicants lived experiences would differ from the more common white and male law journal editors' experiences. And anonymized résumés can account for students' unique professional experiences, leadership roles, community involvement, and academic training. Law journal editors could collect this information through the same portal the law school currently uses for the annual writing competition. Also, this portal would allow law journals to compile demographic information anonymously every year to inform sunset provisions and annual reviews contemplated in *Grutter*.<sup>279</sup> Current journal editors could then review candidate's skillsets with an eye beyond the technical editing skills, writing skills, and grades that typically ground journal offers—a holistic process akin to “giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>280</sup>

This system would allow law journal editors to account for a “broad range of qualities and experiences that may be considered valuable contributions to student body diversity.”<sup>281</sup> This review would focus on the ways that a candidate's application shows “promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic.”<sup>282</sup> All candidates would have the opportunity to demonstrate their unique contributions and law journal editors could then consider demographic identifiers as a “plus” in candidates' applications consistent with the Harvard plan referenced in

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278. *See About, supra* note 197. The Harvard Law Review describes its membership selection as a “holistic but anonymous review that takes into account all available information” including “racial or ethnic identity, disability status, gender identity, sexual orientation, and socioeconomic status . . . . Applicants also have the option of submitting an expository statement of no more than 150 words that identifies and describes aspects of their background not fully captured by the categories provided on the form.” *Id.*

279. *Grutter*, 539 U.S. at 342.

280. *Id.* at 337.

281. *Id.* at 338.

282. *Id.* (offering examples such as “unusual intellectual achievement, employment experience, nonacademic performance, or personal background”).

*Bakke*<sup>283</sup> and supported in *Grutter*.<sup>284</sup> This policy, therefore, would adhere to the reasoning that supported affirmative action in *Grutter* and would allow law journal editors to consider a broad array of factors that would contribute to a diverse editorial staff.

Once this system is established, journals who choose not to holistically select *all* their editors could determine, at their discretion, how many spots they would fill through this holistic review process. The law review, for example, could preserve half of each year's editor positions for "grade-ons" and then commit the other half to candidates from the holistic review process—similar to how many law journals preserve some spots for holistic review and others for various combinations of grades and writing competition scores.<sup>285</sup> Some journals might choose to consider all applications holistically to extend offers.<sup>286</sup> Law journals could, therefore, account for factors that previously would have gone unmarked and "enroll[] a 'critical mass' of [underrepresented] minority students . . . to 'ensure their ability to make unique contributions'" to the law journal.<sup>287</sup>

Editors-in-chief at all of Case Western Reserve's law journals could then consult with law school administrators each year to discuss editor membership demographics. This would fulfill the required regular reviews mandated in *Fisher II* while accounting for law school administrators' expertise in considering demographic factors for diversity policies.<sup>288</sup> These meetings would allow editors-in-chief to discuss any changes to the number of spots reserved for the holistic

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283. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 321–23 (1978) (appending a description of the policy that Harvard used to consider diverse backgrounds in its admissions decisions).

284. *Grutter*, 539 U.S. at 338 (finding that "like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

285. *See generally About*, *supra* note 197 (describing the holistic selection process for Harvard Law Review); *Membership Selection*, *supra* note 213 (describing the various factors that contribute to selecting new law review editors).

286. *See, e.g., Membership*, WASHINGTON L. REV., <https://www.law.uw.edu/wlr/about/membership> [<https://perma.cc/W7SZ-SLWF>] (last visited Oct. 12, 2020); *Prospective Members*, NW. U. L. REV., <https://northwesternlawreview.org/about/prospective-members/> [<https://perma.cc/HWS9-5DXD>] (last visited Oct. 12, 2020); *Membership Selection*, COLUM. L. REV., <https://columbia.lawreview.org/membership/> [<https://perma.cc/8XV2-AYHK>] (last visited Oct. 12, 2020).

287. *Grutter*, 539 U.S. at 316 (considering diverse applicants' contributions to the law school).

288. *See supra* text accompanying notes 69–76 (discussing how the Supreme Court upheld the University of Texas's race-conscious admissions program in *Fisher II*).



review process as well as examine whether journals still need their diversity policies.

Law journals can account for race and gender in new diversity policies and stay within constitutional bounds outlined in *Bakke*, *Grutter*, and *Fisher*. These cases provide ample guidance to ensure that law journals pursue a diverse editorial staff with narrowly tailored policies that incorporate annual reviews and leverage higher education administrators' expertise. This will ensure that law journals become more accessible to law students, regardless of their demographics, and further enhance law journals' performance by attaining the benefits that would flow from a diverse editorial staff.

*C. Potential Pitfalls of Diversity Policies on Law Journals*

Although this sample policy strikes at the same benefits and legal concerns highlighted earlier,<sup>289</sup> it is still susceptible to disadvantages and pushback. Law journal diversity policies would likely stir dissent among law students who would claim that these new policies discriminate against white or male students.<sup>290</sup> These arguments would likely be without merit so long as the journals enacted policies consistent with the guidance above.<sup>291</sup> However, regardless of the legality, diversity policies could draw scrutiny from alumni or prospective students who feel devalued by the new practice. Law school administrators and law journal editors will therefore likely face a challenging task managing stakeholders' expectations as they enact the new policy.

Additionally, it is worth remembering that both of FASORP's complaints against Harvard Law Review and NYU Law Review were dismissed for lack of standing.<sup>292</sup> If a plaintiff sues a law journal with standing, the court could potentially find law journals' diversity policies unlawful under either prong of the strict scrutiny standard—disregarding any claims that diversity on law journals are a “compelling state interest” or, upon discovery, rejecting claims that the policies were narrowly tailored.<sup>293</sup> While the recent *FASORP* cases should offer law journals security in their diversity policies, courts have yet to hear arguments on the merits.

Practical issues also arise from opening a writing competition from a closed universe. How will law journals ensure that all competitors

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289. *See supra* Part II.

290. *See generally* Complaint, Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review, No. 1:18-cv-12105 (D. Mass. Oct. 6, 2018); Complaint, Faculty, Alumni, & Students Opposed to Racial Preferences v. NYU Law Review, No. 1:18-cv-9184 (S.D.N.Y. Oct. 7, 2018).

291. *See supra* Part IV.A.

292. Isselbacher, *supra* note 223; Campbell, *supra* note 223.

293. BACK & HSIN, *supra* note 83, at 25.

compete on an even playing field? How can law journal editors consistently assess writing competition packets if all the subjects vary from student to student? And, even if the writing competition topic is established but the research is open-ended, what will ensure that students with greater means or access to legal research resources do not monopolize the top scores? These are all valid concerns. But law journals should feel empowered to adequately tailor their writing competition to fit the needs and policies that they strive to uphold.<sup>294</sup> The exact specifications are for each law journal to decide.

Some might argue that diversity policies appeal to another form of white-centric education by exploiting minorities for the benefits that they confer upon predominantly white law journal editorial staff.<sup>295</sup> Under this view, diversity policies create tension by recognizing the history of homogeneity while fixing that problem through a doctrine that, again, privileges the majority group with the benefits that flow from incorporating historically underrepresented students.<sup>296</sup> But law journals can combat this form of “diversity entitlement” with multiculturalism messaging and group culture that values each individual’s strengths without “pigeonholing—placing people into limited socially conscribed roles where they are valued mostly for their social identity.”<sup>297</sup> Law journals should therefore be sensitive in how they market their diversity policies and should commit to messaging that focuses on the strength from each editors’ experiences—not the boxes that they might tick.

Some may argue that accounting for diversity in the law journal editor-selection process could perpetuate homogeneity by incorporating greater subjectivity. Law journal editors may naturally evaluate candidates similar to themselves favorably, thereby preserving homogeneity instead of diminishing it. These arguments, however, lack merit because law journals have already employed similar policies that have successfully combatted historically homogenous law journals.<sup>298</sup> Therefore, although diversity policies may lead to greater subjectivity

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294. One solution, for example, might limit additional writing competition sources to only those found online.

295. See e.g., Hurd & Plaut, *supra* note 23, at 1608 (documenting how *Bakke*, *Grutter*, and *Fisher* established a diversity doctrine that privileged white, majority students despite claiming to help minority students).

296. *Id.* at 1618.

297. *Id.* at 1625.

298. See, e.g., Claire E. Parker, *Law Review Inducts Most Diverse Class of Editors in History*, HARV. CRIMSON (Sept. 6, 2016), <https://www.thecrimson.com/article/2016/9/6/law-review-inducts-most-diverse-class/> [<https://perma.cc/MXA8-76QE>] (“For the first time in the publication’s nearly 130-year history, the Harvard Law Review inducted a group of editors this year whose demographics reflect those of their wider Law School class—including the highest-ever percentages of women and students of color.”).

in the editor-selection process, diversity policies remain viable solutions to diversify law journals' editorial staff.

Lastly, this entire solution assumes that the only viable solution to diversifying editorial staff is to explicitly consider race and gender in law journals' editor selection processes. Another solution might, however, be to provide academic support for historically underrepresented law students before law journal writing competitions. Law journals could then maintain blind editor selection processes. Under this solution the lack of diversity on law journals is a symptom of a greater problem—ineffective academic support for minority law students. But this solution still does not solve shortcomings that have plagued current race- and gender-neutral editor selection processes. Law journals would still need to pioneer a method to account for substantive legal research and granting competitors freedom to incorporate their background into their writing competition submissions. Additionally, this solution promotes academic assimilation to methods that have historically discriminated against historically underrepresented law students. Like transparency theory, it sets a standard developed when law schools were primarily white men and then requires that diverse students perform according to those criteria.<sup>299</sup> Therefore, unless law schools wish to change the methods of teaching the law—such as incorporating “diversity pedagogy”<sup>300</sup>—then academic support structures still inadequately focus on traditional methods of legal instruction that primarily serve white interests.

Additionally, these diversity policies combat a possibly more sinister ideology stemming from remaining “color-blind”—that being justifications for inequality.<sup>301</sup> “Whites who preferred group-based hierarchy used colorblindness to defend the status quo.”<sup>302</sup> Law journals should, therefore, continue to pursue diversity policies while promoting a multiculturalist culture among editors that recognizes and values difference—leading to “leadership self-perceptions and goals among minorities.”<sup>303</sup>

## CONCLUSION

Law journals ascended to the pinnacle of legal scholarship and student training but have remained homogenous throughout most of

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299. Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 331–32 (2015).

300. Bhabha, note 38, at 93.

301. Hurd & Plaut, *supra* note 23, at 1624; Flagg, *supra* note 164, at 957 (describing how white decisionmakers who disavow white supremacy sometimes still impose white norms on Black individuals consistent with “transparency theory”—thereby requiring assimilation to white norms).

302. Hurd & Plaut, *supra* note 23, at 1625.

303. *Id.*

their existence. Some law journals pioneered diversity policies to combat this history of exclusion which has sparked lawsuits against both the NYU and Harvard law reviews. But these law journals' diversity policies show no signs of leaving. The recent lawsuits against NYU's and Harvard's law reviews demonstrate that it is difficult to plead sufficient facts to have standing to sue these institutions for discrimination. And Supreme Court jurisprudence weighs in favor of affirming these diversity policies that seek to leverage the benefits that would flow from a diverse editorial staff.

Law journals, therefore, are at a crossroads. Diversity had proven to enhance educational experiences and increase trust in institutions of higher education. Also, as law journals command one of the most prestigious functions in legal education, diversifying law journal editorial staff stands to increase diversity in the upper echelon of the legal profession. It is for law journals to choose, however, whether the proven benefits—social, professional, and educational—merit instituting new diversity policies to select more diverse law journal editors, or adhering to the same metrics that historically led to “lily-white” law journal editorial staff.<sup>304</sup>

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304. *Many of the Nation's Most Prestigious Law Reviews Have Lily-White Editorial Boards*, *supra* at note 148, at 57.

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