

# DIVERSITY IN LAW SCHOOL FACULTY HIRING: WHY IT IS A MISTAKE TO MAKE IT ALL ABOUT RACE

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## I. INTRODUCTION

It is depressing to realize that we continue to live in a society where people are too often judged by the color of their skin rather than the content of their character.<sup>1</sup> Despite widespread acknowledgment by most citizens that race alone is not an appropriate basis on which to judge individuals,<sup>2</sup>

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<sup>1</sup> This sentiment was powerfully expressed on August 28, 1963 by Reverend Martin Luther King, Jr., as part of his hope that the civil rights movement would result in a “nation where [people] will not be judged by the color of their skin but by the content of their character.” A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217–19 (James M. Washington ed., 1986). This is not intended to suggest that racial identity and heritage are unimportant; rather it is a recognition of how our society ought to judge and treat individuals, which is with equal dignity and respect.

Doubtless, blacks, Hispanics, and members of other racial minorities are keenly aware of the failings of our current society. Whites, too, feel the unfairness. A deeply respected colleague and I had a long talk about an early draft of this article, and one of his (many) concerns was that blacks feel this pain far more than whites, and so should be in a better position to gauge whether any particular effort to address the problem is worth the cost of any resentment or backlash inspired by such effort. This was a thought-provoking notion, and as I considered the issue, I wondered why I felt so incredibly troubled by the anger that seems to be bubbling to the surface. See *infra* notes 7–8, 13–17 and accompanying text (describing the current levels of racial anger being openly expressed). I suppose that part of my answer is that I am the white mother of two black children (of mixed racial heritage, but who both self-identify as black, and who are readily labeled as black in this country), and that perspective influences me profoundly. More importantly, however, is the fact that I live here too. I not only raise my children in this country, I live here, work here, think here, teach here, interact with others here. This is *my* country, too, and it bothers me viscerally to have this level of overt racism. It is a personal harm, to me and to others of whatever race. It might be a different kind of harm than that experienced by the individual who is the recipient of angry taunts, or a thrown punch, a denied cab ride, a lost job, or yet another police stop, but that does not make it less real.

<sup>2</sup> Conventional sociological usage suggests that “race” refers to “a group that is socially defined but on the basis of physical criteria.” PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 9–10 (1967). This approach has clearly found its way into American jurisprudence. See, e.g., Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093(6) (2012) (explaining that “the term ‘racial group’ means a set of individuals whose identity as such is distinctive in terms of physical

progress in achieving a society where race, in and of itself, does not determine how individuals are treated, has been slow to come. Most

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characteristics or biological descent.") If this was accurate, separate races should be identifiable by discrete physical attributes that are possessed by one race and one race only. The problem is that there is no set of physical characteristics shared by and unique to members of any racial group. Genetic variation is generally more attributable to geographic separation than any clear division along "racial" lines. Interestingly, geneticists have pointed out that there is more genetic variation within the human population identified as "Black" than there is between populations identified as "Black" and "White." See John Tooby & Leda Cosmides, *On the Universality of Human Nature and the Uniqueness of the Individual: The Role of Genetics and Adaptation*, 58 J. PERSONALITY 17, 35 (1990); Masatoshi Nei & Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 38 (1982). Even the Supreme Court has recognized that "racial characteristics" have little significance. "The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

As used in this article, "race" reflects the general categories that are used and relied upon by most law schools, which includes the following groups of persons: Hispanics (which may be further divided), American Indians or Alaskan Natives, Asians, black or African American, Native Hawaiian or Pacific Islander, two or more races, or whites. As part of the regular reporting and accreditation process, law schools are required to use these categories to classify faculty members (based on how they self-report), pursuant to "guidance issued by the Department of Education and used by the Integrated Postsecondary Education Data System." *2016 ABA Annual Questionnaire Instructions, Part V: Profiles*, A.B.A. 1 (2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2016\\_aq\\_part5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_aq_part5.authcheckdam.pdf).

Similar categories are used in other ABA groups, such as its Council for Racial & Ethnic Diversity in the Educational Pipeline, a group of the ABA under its Office of Diversity & Inclusions. This group's stated mission is to "[a]ddress the lack of substantial ethnic/racial diversity in the legal profession by . . . identifying, developing, executing, and supporting initiatives . . . to increase diversity and inclusion in the educational pathway to the profession . . . ." *Council for Diversity and Inclusion in the Educational Pipeline*, A.B.A., [http://www.americanbar.org/groups/diversity/diversity\\_pipeline.html](http://www.americanbar.org/groups/diversity/diversity_pipeline.html) (last visited Mar. 17, 2018). The list of racial categories used by the ABA is similar. See *Achieving Diversity in the Legal Profession through the Educational Pipeline*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/diversity\\_pipeline/2014\\_rev\\_ach\\_div\\_slide\\_s\\_1\\_14\\_40\\_52\\_58.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/2014_rev_ach_div_slide_s_1_14_40_52_58.authcheckdam.pdf) (last visited Mar. 17, 2018).

The AALS uses and collects data on race and ethnicity of faculty members, using the similar groupings of human beings. For example, when submitting data for the AALS Directory of Law Teachers, faculty members are asked to self-identify their race or ethnicity as Asian, Black/African American, Mexican American, Native American or Alaskan Native, Other Hispanic American, Pacific Islander, Puerto Rican, White, or Other. *Directory of Law Teachers*, ASS'N OF AM. L. SCHOOLS, <https://dlt.aals.org/demographic> (last visited Aug. 18, 2016) (demographic information collected by the AALS is restricted but available online to faculty members.).

The concept of "race" continues to be discussed in all kinds of contexts in this country. One of the more interesting recent exchanges on the issue involved a consideration of the racial identity of Cory Booker, a well-known and widely admired U.S. Senator from New Jersey. See Stephen J. Dubner, *The United States of Cory Booker*, FREAKONOMICS (Mar. 3, 2016, 9:48 AM), <http://freakonomics.com/podcast/cory-booker/>. In the podcast, Senator Booker acknowledges that his racial heritage is "nearly as much European" as African, yet he identifies as black (and is identified that way) instead of being "mixed-race." *Id.* This paper does not contest that fact that race tends to be a matter of self-identification or outward appearance. Cf. Greg Botelho, *Ex-NAACP Leader Rachel Dolezal: 'I Identify as Black'*, CNN (June 17, 2015, 6:48 AM), <http://www.cnn.com/2015/06/16/us/washington-rachel-dolezal-naacp/> (discussing the woman who resigned as head of the Spokane NAACP chapter "over criticism that she's portrayed herself as black, even though she was born white").

regrettably, despite decades of slow and often incredibly painful progress in the civil rights arena, at this point in time, continued progress is hard to find.<sup>3</sup> As a society we seem to be increasingly fixated on race, as if that is an intrinsically determinative characteristic of one's viewpoint, experience, identity, and ability. Regrettably, this focus seems to have resulted in an angry and hostile pushback from a distressingly large and vocal segment of society.<sup>4</sup>

For any number of perfectly understandable historical reasons, we continue to be overwhelmingly preoccupied with race. We certainly spend a great deal of time collecting information about it. You fill out a census, and immediately there are questions about race. You take a standardized test for admission to a university, a professional or graduate school, or fill out an application for a government job, or apply for financial aid or for credit, or so many other things that they cannot possibly all be listed here, and you are asked (often right alongside or just after requests for your name and contact information) about your race.<sup>5</sup> Major corporations announce initiatives to

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<sup>3</sup> One of my colleagues commented, when reviewing a draft of this article, that most of the anger and unhappiness was from whites and that blacks are actually more optimistic than whites. There are certainly some studies and reports that appear to support this. In response to survey questions, poorer blacks in particular replied that they are happier and more optimistic than many other groups. A Gallup Healthways poll on satisfaction and optimism showed that "poor blacks score markedly higher than average." Carol Graham, *The Surprising Optimism of Black Americans*, BROOKINGS INST. (Sept. 25, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/09/25/the-surprising-optimism-of-black-americans/>; see also Rob Wile, *Despite Racism, Black People Are More Optimistic About the Future than Anyone Else*, SPLINTERNEWS (June 10, 2016, 9:33 AM), <https://splinternews.com/despite-racism-black-people-are-more-optimistic-about-1793857419>. On the other hand, there are plenty of angry black voices too. The 2015 Freddie Gray protests in Baltimore erupted in violence over a number of nights, even forcing one major league baseball game to be played in a stadium empty of fans. Jean Marbella, *The Day the Baltimore Riots Erupted: New details of Baltimore Riots After Freddie Gray's Death*, BALT. SUN (Oct. 23, 2015, 5:22 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-freddie-gray-april27-20151022-story.html>.

While not everyone may admit to being angry, there are certainly large numbers of individuals of various races who are quite angry, and they seem quite willing to show it.

<sup>4</sup> See *infra* notes 13–17 and accompanying text. The degree of anger actually appears to be increasing, with one study suggesting that, as of the start of 2016, half of all Americans were angrier than they had been a year ago, with white Americans being the angriest. *American Rage: The Esquire/NBC News Survey*, ESQUIRE (Jan. 3, 2016), <http://www.esquire.com/news-politics/a40693/american-rage-nbc-survey/>. This survey shows that a lot of white anger is based on "perceived disenfranchisement." *Id.* This study also confirms that when asked about outlook in the abstract, black Americans, despite reporting more actual financial difficulties, appear to be less angry and more optimistic about the state of the country and its future prospects. *Id.*

<sup>5</sup> My friend and colleague who disagrees with me about the thesis of this article has suggested that black people think about race all the time, and this is one of the few times that white folks do. I don't know if that is generally true or not. I know that it is not true for me. In addition to the thinking that went into this article, I have also previously written about race. See Carol R. Goforth, "What Is She?": *How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1 (1996) (representing the only article I have

address racial imbalances.<sup>6</sup> Universities establish units devoted to improving minority recruitment and retention.<sup>7</sup> The popular press covers racial issues incessantly.<sup>8</sup>

To the extent that our attention is continually directed to race, this fosters the attitude that race divides us; that race makes us different. It supports the

written for which I received what I would call academic “hate-mail”). I have two shelves in my law school office of books on race. And, not coincidentally, I am the mother (albeit by adoption) of two black children who are now adults, one who has just graduated from law school and one a practicing lawyer. I know I think about race a lot. I also know that my son tells me he rarely thinks about race, despite living in a predominantly white community, dating a white woman, and practicing law in a relatively conservative area where less than two percent of the population is black. See *Fayetteville-Springdale-Rogers Metropolitan Statistical Area*, ARK. COMPREHENSIVE ECON. DEV. STRATEGY, <http://www.arkansaseconomicregions.org/index.php/nwapdd-msa/fayetteville-springdale-rogers-ar-mo> (last visited Feb. 24, 2017) (reporting data from housing and survey estimates). I do not know how often most whites or blacks think about race; what I do know is that a preoccupation on race seems to me to be unhealthy. An awareness of the history and present realities is healthy, but it feels to me we have gone past that in purportedly attempting to promote “diversity.” One example of how the focus on race is perceived differently may be in the general reactions to the “Black Lives Matter” movement and the “All Lives Matter” response. Compare Daniel Victor, *Why ‘All Lives Matter’ Is Such a Perilous Phrase*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/us/all-lives-matter-black-lives-matter.html>, with Madison Gesiotto, *All Lives Matter*, WASH. TIMES (July 13, 2016), <https://www.washingtontimes.com/news/2016/jul/13/all-lives-matter/>. I am in both the “Black Lives Matter” and the “All Lives” camp. While black lives matter to me profoundly, so do the lives of others. These are not mutually exclusive positions. Equality and justice matter for all people, including the poor, women, religious minorities, members of the LGBT community and, in fact, everyone. Racial equality is important, but it is not the only thing that matters.

<sup>6</sup> For example, in 2014 alone the Walmart Foundation awarded \$1.75 million for diversity initiatives aimed at increasing opportunities for people of color. *Walmart Foundation Awards \$1.75 Million for Diversity Initiatives*, CORP. PHILANTHROPY REP. (Apr. 23, 2014), <http://www.corporatephilanthropyreport.com/Feature-Detail/walmart-foundation-awards-175-million-for-diversity-initiatives.aspx>. While major corporations also tend to be concerned with gender representation at the executive level in particular, there is a clear focus on race in these initiatives as well. Exxon, also one of the world’s largest corporations, includes data about the participation of women and minorities in management and engineering positions throughout the United States. See *Diversity and Inclusion*, EXXONMOBIL, <http://corporate.exxonmobil.com/en/company/careers/employment-policies/diversity> (last visited Feb. 24, 2017).

<sup>7</sup> A simple Google search of “Universities establishing diversity Units” turns up a list of such initiatives. On the first page of results from a search conducted September 13, 2016, the search results included (in order) the University of Dayton, Ohio State, Vanderbilt, University of North Carolina at Chapel Hill, University of California Riverside, Central Michigan University, University of Washington, University of Maryland, and Princeton University. Many pages of similar results followed. GOOGLE, [www.google.com](http://www.google.com) (search “Universities establishing diversity Units”).

<sup>8</sup> It is painfully easy to find articles about racially-motivated or inspired tension, violence, or anger. For example, on September 13, 2016, the day on which I wrote this footnote, I searched online for news about racial violence on the current date. The first post that was displayed was entitled *Racism News, Photos and Videos—ABC News*, which offered to let me “[b]rowse Racism latest news and updates, watch videos and more.” When clicked, the link took me to a page listing recent articles concerning racism. *Racism News*, ABC NEWS, <http://abcnews.go.com/topics/news/issues/racism.htm> (last visited Feb. 24, 2018) (other issues on ABC News include: “Anthem Protests,” “Black Lives Matter,” “Civil Rights,” “Confederate Monuments,” “Hate Crimes,” and “Vitriolic Political Rhetoric”).

suspicion of persons of color that all other individuals and institutions are still intentionally discriminating against them; it supports the belief of the whites that they are losing out because of preferences given to minorities. Given the backdrop of this constant focus on race, it is easy to see how, when someone suffers a slight or is disappointed when someone else receives something they believe should be theirs, it will be blamed on racial bias. If the disappointed individuals are black, all too often the sentiment seems to be that it is because the deck in this country has historically been so stacked against people who look like them, and people are still discriminating against them. If they are white, it is likely to be seen as being because they have been passed over in favor of members of some other race who have been unfairly favored through racial preferences. While these beliefs may be true in any given case, it is also possible that this is not what is going on, or at least not consciously.

For those who doubt the assertion that there is widespread resentment and anger focused on race, consider the shocking popularity of positions advocated by Donald Trump, the 45<sup>th</sup> President of the United States.<sup>9</sup> There is a lot written about the troubled history of President Donald Trump's position on race, which includes not only his statements during his Presidential campaign and Presidency, but also actions taken in the past decades of his business career.<sup>10</sup> This seems not to have deterred his supporters, nor resulted in enough pushback to make him moderate his views. On June 19th, 2016, in the aftermath of an absolutely horrific mass shooting in Orlando, Florida, Donald Trump advocated racial profiling as a preventive tactic.<sup>11</sup> His campaign relentlessly played on fears that race is being used to discriminate against whites; that this is a dark time for our country because

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<sup>9</sup> Former Secretary of State and Democratic Nominee for President Hillary Clinton famously opined in a poorly thought-out over-statement that one half of Donald Trump's supporters were "a basket of deplorables" because of their supposed racist, sexist, homophobic, xenophobic, and Islamophobic tendencies. Seema Mehta, *Transcript: Clinton's Full Remarks as She Called Half of Trump Supporters 'Deplorables'*, L.A. TIMES (Sept. 10, 2016, 4:14 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-transcript-clinton-s-full-remarks-as-1473549076-htmlstory.html>. While she quickly retreated from what she admitted was an inappropriate over-generalization, Clinton did not back down from her assertion that a significant number of his supporters have bought into Trump's "agenda of hate." See Donovan Slack, *Clinton: I Regret Saying 'Half' Trump Support From 'Basket of Deplorables'*, USA TODAY (Sept. 10, 2016, 10:22 AM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/09/10/clinton-trump-supporters-deplorable/90182922/>.

<sup>10</sup> See, e.g., Michael D'Antonio, *Is Donald Trump Racist? Here's What the Record Shows*, FORTUNE (June 7, 2016), <http://fortune.com/2016/06/07/donald-trump-racism-quotes/>.

<sup>11</sup> Emily Schultheis, *Donald Trump: U.S. Must 'Start Thinking About' Racial Profiling*, CBS NEWS (June 19, 2016, 10:14 AM), <http://www.cbsnews.com/news/donald-trump-after-orlando-racial-profiling-not-the-worst-thing-to-do/>.

of the influence of outsiders, those from other countries, those who do not look like “us.”<sup>12</sup>

The truth is that many of his supporters seem willing to buy into the notion that “other races” are to blame for their personal ills. Even a cursory search for comments from individuals identified as following or supporting Donald Trump turns up ordinary citizens blaming other races for their problems.<sup>13</sup> Demographic information of Trump voters confirms that his views are particularly attractive to whites “who are less-educated, and middle-aged or older—those who are anxious and angry because they are losing ground as the American economy changes.”<sup>14</sup> The modern reality is that there are a lot of unhappy, angry people in this country, way too many of whom have been encouraged to have racist leanings.<sup>15</sup> Perhaps part of the problem is that, at this point in our history as a nation, in our culture it is essentially impossible for adults to avoid being racist, at least in terms of whether people are inclined to make snap judgments and assumptions about others based on race.<sup>16</sup> We are, in fact, consistently trained to be obsessed

<sup>12</sup> For a thoughtful analysis of his July 21, 2016 acceptance speech at the Republican National Convention, which echoed these themes repeatedly, see Dara Lind, *Donald Trump's RNC Speech Turned His White Supporters' Fear into a Weapon*, VOX (July 22, 2016, 10:40 AM), <http://www.vox.com/2016/7/22/12254212/trump-rnc-speech-racist>. “Trump is telling his followers their racist gut instincts are right—and are the only thing that can save them.” *Id.*

<sup>13</sup> See, e.g., Arun Gupta, *The Working-Class Wounds Hidden Behind Trump Voters' Racism*, YES MAG. (June 30, 2016), <http://www.yesmagazine.org/people-power/the-working-class-wounds-hidden-behind-trump-voters-racism-20160630> (starting with a complaint from a white man about how Hispanics are stealing construction jobs from whites). Another report from June of 2016 begins with an anecdotal listing of racist incidents associated with Trump supporters (including “a young black student fearing for his life at his own school’s Trump rally in Georgia . . . [and] a Trump supporter sucker punching a black protester in North Carolina”) and then moves on to data from a Reuters/Ipsos poll showing that “Trump supporters were more likely than supporters of other candidates to view black people as ‘criminal,’ ‘unintelligent,’ ‘lazy’ and ‘violent’ with nearly 50% of Trump supporters saying black people were more violent than white people.” Rob Wile, *Trump Supporters Are More Likely to Be Racist, According to Incredibly Unnecessary Poll*, SPLINTER NEWS (June 28, 2016, 7:22 PM), <https://splinternews.com/trump-supporters-are-more-likely-to-be-racist-accordin-1793857893>. Paul Krugman, the Nobel-Prize winning economist proclaimed in August of 2016, that “the Republican nominee plays to racial tensions among white, low-income voters who blame immigrants and people of color for their financial hardship.” Alexander C. Kaufman, *Paul Krugman: Racism, Not Economic Anxiety, Drives Trump Voters*, HUFFINGTON POST (Aug. 16, 2016, 6:15 PM), [http://www.huffingtonpost.com/entry/paul-krugman-donald-trump-racism\\_us\\_57b376cbe4b04ff883991b51](http://www.huffingtonpost.com/entry/paul-krugman-donald-trump-racism_us_57b376cbe4b04ff883991b51).

<sup>14</sup> Dana Milbank, *Donald Trump Is a Bigot and a Racist*, WASH. POST (Dec. 1, 2015), [https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist/2015/12/01/a2a47b96-9872-11e5-8917-653b65c809eb\\_story.html](https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist/2015/12/01/a2a47b96-9872-11e5-8917-653b65c809eb_story.html) (citing a Washington Post-ABC News Poll by Scott Clement).

<sup>15</sup> See Gupta, *supra* note 17.

<sup>16</sup> For a contrary viewpoint, see Jenn M. Jackson, *Racism Doesn't Work Both Ways and Neither Does Cultural Appropriation*, WATERCOOLERCONVOS (Aug. 13, 2014), <http://watercoolerconvos.com/2014/08/13/racism-doesnt-work-both-ways-and-neither-does-cultural->

with race, which is in line with our innate predisposition to act that way.<sup>17</sup> This is true for blacks as well as whites; our experiences tend to reinforce our genetic predisposition to favor people who share our own personal racial characteristics.<sup>18</sup> And, of course, as long as we act as if it matters, and fail to

appropriation/ (claiming that blacks cannot be racist and reverse racism does not exist because black people lack privilege compounded over generations to wield against whites).

<sup>17</sup> Scientific data has long confirmed that there is also an underlying genetic basis for our focus on race and racial characteristics. This starts with research demonstrating “that human beings have a natural proclivity to make distinctions between ‘us’ and ‘them.’” Peter Jaret, *Are We Born Racist*, BERKELEY WELLNESS (June 25, 2015), <http://www.berkeleywellness.com/article/are-we-born-racist> (discussing an interview with Dr. Rodolfo Mendoza-Denton, one of the contributing authors and editors of *ARE WE BORN RACIST: NEW INSIGHTS FROM NEUROSCIENCE AND POSITIVE PSYCHOLOGY* (Jason Marsh, Rodolfo Mendoza-Denton & Jeremy Adam Smith eds., 2010)).

While it is clear that some individuals are overtly and intentionally racist in outlook (often referred to as explicit racism), many others are prone to making judgments based on race at a subconscious level (implicit racism). In fact, recent research about the psychology and science of prejudice suggests that for most of us, some degree of racial prejudice operates at an unconscious and virtually automatic level. Susan T. Fiske, *Look Twice*, GREATER GOOD MAG. (June 1, 2008), [http://greatergood.berkeley.edu/article/item/look\\_twice/](http://greatergood.berkeley.edu/article/item/look_twice/).

Despite this, it is also clear that widespread attitudes are, in many respects, contagious. In other words, we absorb the biases that are widespread in our society. Robert Mitchel, *Yale Professor Examines Unconscious Biases by Whites*, HARV. GAZETTE (Dec. 7, 2015), <http://news.harvard.edu/gazette/story/2015/12/yale-professor-examines-unconscious-biases-by-whites/> (discussing opinions offered by Dr. John Dovidio, a Yale professor). In its simplest form, this idea can be expressed as follows: “If you grow up in an environment where people think white people are superior to people of color, you begin to believe in it.” Carolyn Gregoire, *A Psychologist’s Explanation of Why Racism Persists in America*, HUFFINGTON POST (July 14, 2015, 8:31 AM), [http://www.huffingtonpost.com/2015/07/10/social-psychology-racism\\_n\\_7688910.html](http://www.huffingtonpost.com/2015/07/10/social-psychology-racism_n_7688910.html) (quoting Dr. Pricilla Dass-Brailsford, a psychologist at Georgetown University and the Chicago School of Professional Psychology). That is why it is so critical that people do not allow leaders to suggest that they should buy into the notion that anything they do not like should be blamed on blacks, Hispanics, or others who do not look like whites.

<sup>18</sup> See Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NAT. NEUROSCIENCE 940, 945–48 (2012) (demonstrating how neuroscience can track implicit and unconscious bias in decision-making ranging from investment practices, hiring processes, and legal outcomes). People respond differently when they see members of their race than when they see members of a different race. See Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs. Ingroup Face Stimuli*, 11 NEUROREPORT 2351, 2351 (2000); see also Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 430–31 (arguing that ingroup affinity and outgroup prejudice are independent and separable phenomena).

It is apparently true that white and black Americans experience different levels of subconscious racism. “[F]or white Americans, even when weak or no race preference is apparent on explicit, self-report measures, substantial levels of preference for positive stereotypes of white rather than black are observed... For black Americans, the pattern is more complex, with 40% of black Americans showing a pro-white preference . . . , 40% showing pro-black attitudes and 20% neutral with regard to race.” Kubota et al., *supra*, at 942–43. It has been hypothesized that variation in racial attitudes across and within racial groups reflects cultural and social learning. See Amy J. C. Cuddy et al., *Stereotype Content Model Across Cultures: Towards Universal Similarities and Some Differences*, 48 BRIT. J. SOC. PSYCHOL. 1, 1–4 (2009) (presenting a model to predict stereotypes and prejudice across cultures based on survival need to identify people and hierarchy of distribution of resources); Susan T. Fiske et al., *Images of Black Americans: Then,*

address our predisposition to believe that it does, race will continue to matter considerably more than it should.

But none of this means that diversity initiatives in the context of hiring law school faculty should be focused exclusively on race.

Legal academia, whether in an effort to address past discrimination, to promote equality and justice, or in a genuine attempt to achieve diversity, has itself adopted a set of assumptions based on race. We presume that the color of someone's skin tells us whether they will add diversity to our communities. This belief may be disguised behind statements that tout broad-based inclusiveness, but, in too many cases, law schools have been either making the assumption that race is the single most important factor when seeking to achieve meaningful diversity or attempting to disguise their real desire to achieve racial equity with an ostensible search for diversity in general.<sup>19</sup> One commentator has complained that the "seeming neutrality of diversity is often illusory because the last thing that many who favor diversity in law school faculties want is a strong effort to make faculty viewpoints more closely resemble the distribution of political and social opinion in the country."<sup>20</sup> Remarks attributed to Professor Randall Kennedy suggest that at one time he believed that "[n]o one really believes in diversity."<sup>21</sup> The thesis behind this assertion was apparently that diversity became the buzzword that replaced affirmative action only because that was required by the Supreme Court's opinion in *Bakke*.<sup>22</sup>

There are costs to using "diversity" as code for special efforts to achieve representation from individuals of specified races. One such cost may well be a deepening anger and resentment now being openly expressed by

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"Them," and Now, "Obama!"; 6 DU BOIS REV. 83, 84 (2009) (arguing that stereotypes of groups by warmth and competence explain affinity, prejudice, and the "Obama phenomena"); Peter A. Caprariello et al., *Social Structure Shapes Cultural Stereotypes and Emotions: A Causal Test of the Stereotype Content Model*, 12 GROUP PROCESSES INTERGROUP REL. 147, 147-48 (2009) (positing a causal relationship between social structural relationships and stereotypes and emotional prejudices).

<sup>19</sup> It has been observed before that "virtually everyone" assumes that "diversity" is a proxy for race, and that we are so used to thinking about diversity in this way that we have an almost "instinctual" understanding that "diversity of a given group is one assessed solely on the basis of its racial and/or ethnic composition." See Ann M. Killenbeck, *It's All About Education: Implementation Issues in the Wake of Grutter, Gratz, and Fisher*, in 2 CONTROVERSIES IN AFFIRMATIVE ACTION 113, 115 (James A. Beckman ed., 2014).

<sup>20</sup> James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5, 6 (2005) [hereinafter Lindgren, *Conceptualizing Diversity*].

<sup>21</sup> Professor Lindgren reports that Professor Randall Kennedy was the commentator for one of his talks on measuring diversity in the fall of 1996. See *Id.* Lindgren explained that he "originally recorded the quoted statement in notes," and acknowledged back in 2005 that the view "may or may not have represented Kennedy's current thinking." *Id.* at 5 n.1.

<sup>22</sup> *Id.* at 5 (referencing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).



relatively large segments of society,<sup>23</sup> despite noticeable past strides in seeking equality of opportunities for members of all races.<sup>24</sup> Another cost is

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<sup>23</sup> Current levels of apparently racially-directed anger and resentment are described *supra* notes 7–8, 13–17 and accompanying text. Another possibility is that these views have always been held, and they are only now coming to the forefront. Even though this is likely to be true for some overtly racist individuals, there is a cost to having them expressed widely and openly, especially when they appear to be endorsed or even initiated by national figures. For most of us, regardless of race, racism should neither be embraced nor a point of pride; it is part of a legacy from a deeply troubling history that we want to move past. Racism is ingrained within us, a prejudice we need to acknowledge and work to overcome. The harms stemming from this kind of overt racism and disdain for diversity are more difficult to document. Not only are the victims of overt racism harmed through the loss of opportunity and fair treatment, but a growing body of evidence from neuroscientists and psychologists shows that prejudice and racism are actively harmful to more than just the targets. Those who are overtly or strongly racist and those who experience the stress of witnessing it also suffer measurable harm in the form of increased stress reactions. Elizabeth Page-Gould, *Warning: Racism is Bad for Your Health*, GREATER GOOD MAG. (Aug. 3, 2010), [http://greatergood.berkeley.edu/article/item/why\\_racism\\_is\\_bad\\_for\\_your\\_health](http://greatergood.berkeley.edu/article/item/why_racism_is_bad_for_your_health) (concluding that those who harbor and witness prejudice suffer significantly increased stress that could contribute to a number of chronic health issues). Others are careful to explicitly note that the harms are “much more severe for the targets of discrimination than for the agents of discrimination.” Jaret, *supra* note 21 (quoting Dr. Mendoza-Denton).

<sup>24</sup> It is beyond question that this nation has made great strides since the days when slavery was legal. For one poignant reminder of how far we have come, consider the remarks of Michelle Obama at the 2016 Democratic National Convention in which she movingly described watching her two children play on the White House lawn, a house that slaves built. *Transcript: Read Michelle Obama's Full Speech from the 2016 DNC*, WASH. POST (July 26, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/26/transcript-read-michelle-obamas-full-speech-from-the-2016-dnc/>. In 1954 the U.S. Supreme Court declared that racial segregation was unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Congress passed a sweeping civil rights reform legislation in the early 1960s, enacting the most widely used antidiscrimination legislation in 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). It is unthinkable, today, that members of a racial minority would be excluded from any public school on the grounds of their race, or that they would be forced to use different public facilities. We would not turn a blind eye to blacks being lynched by whites. In fact, despite a history where some of such behavior was ignored, in the past several decades, these atrocities have been prosecuted. *See United States v. Pospisil*, 186 F.3d 1023, 1027 (8th Cir. 1999) (taking legal action against defendants who burned a cross in the victims' yard, slashed the victims' tires, and fired shots into the air); *United States v. Stewart*, 65 F.3d 918, 918–23 (11th Cir. 1995) (prosecuting defendants for burning a cross in victim's yard, provoking an exchange of gunfire); *Cox v. State*, 585 So. 2d 182, 184–85 (Ala. Crim. App. 1991) (prosecuting a white man for lynching a black man whose trial for killing a white police officer had ended in a mistrial); *United States v. McDermott*, 29 F.3d 404, 405 (8th Cir. 1994) (prosecuting defendants for burning a large cross in the park, as well as “waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park”). This does not mean, of course, that the progress has been swift, easy, or complete, or even that we continue to make strides in achieving equality for all today.

The most visible difference from modern America and the days of overt, institutional racism appears to be in the realm of explicit racism. For nearly a century, researchers have been studying and evaluating “the feelings and beliefs that white Americans have about black Americans, and the data demonstrate a consistent and marked drop in negative attitudes and stereotypes.” Kubota et al., *supra* note 22, at 940 (citing John B. McConahay et al., *Has Racism Declined in America? It Depends on Who Is Asking and What Is Asked*, 25 J. CONFLICT RESOL. 563 (1981); J. F. Dovidio & S. L. Gaertner, *Aversive Racism*, in 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY I (Mark P. Zanna ed., 2004).

that academic institutions lose credibility and respect when they are seen as hiding behind the concept of diversity as a way to manipulate the constitutional limits that restrict racial preferences unless they are given in the context of a wider program to achieve the benefits of diversity.<sup>25</sup> But the cost that this article focuses on is actually the loss of real diversity on law school faculties. In other words, this article presumes that there is merit in diversity, at least with regard to views and perspectives. If this is true, then the real question is how best to achieve the benefits that having such a diverse community can offer.

This article looks at law school faculty hiring as the context for considering one narrow example of how considerations of race have overshadowed a broader discussion of what kinds of diversity should matter and why they matter in academic communities. The focus in this paper is not on the constitutional limits of what is permissible, but on practical considerations of what is best for our law schools and broader society assuming we choose to abide by the current constitutional limits within which we are supposed to operate. This paper is less concerned with pushing the boundaries of what law schools are allowed to do or arguing about what they should be allowed to do, and instead focuses on what law schools should be doing within the current legal framework. To that end, this paper suggests that the goal of diversity in law school faculty hiring can indeed be a valuable and meaningful one, but it would be better served if law faculties were not so focused on race. Only in tangential ways are the issues of racial equality and justice discussed, although there is the possibility that an honest look at diversity might provide the impetus for developing more honest and more effective (and constitutional) ways to address the problems of racial bias which continue to plague our country.

There are several reasons why this paper concludes that the primary focus of diversity initiatives in faculty hiring should look at ideological and

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There are, of course, many other kinds of unfairness over which to be annoyed in the academic context. One of these is the widespread practice of “legacy” or “influential” admissions. It is widely acknowledged that legacy preferences and special admissions of individuals related to “rich, influential or famous people whom the school intends to cultivate as major donors,” result in the admission of “less qualified” students. Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1, 31–34 (2014). In fact, “affirmative action students” outperform legacy applicants. *Id.* at 33. But there is no suspect classification here to support litigation, resulting in substantially less attention being paid to this than to race. It is therefore race, which is highly visible, pervasive, and closely scrutinized in the courts when used in decision-making, that garners the bulk of attention and becomes a focus for anger and backlash. On the other hand, for a recent scathing indictment of legacy admissions, see Daniel Golden, *The Story Behind Jared Kushner’s Curious Acceptance into Harvard*, BUS. INSIDER (Nov. 19, 2016), <http://www.businessinsider.com/the-story-behind-jared-kushners-curious-acceptance-into-harvard-2016-11> (reporting how President Trump’s son-in-law was accepted into Harvard).

<sup>25</sup> See *infra* notes 82, 89, 147 and accompanying text for a further discussion of this concern.

viewpoint diversity, with a focus on adding conservative voices to the academy instead of race. First, there is a shocking lack of ideological diversity in American law schools, at least outside of a limited number of conservative bastions that we could all probably identify in our own minds. Recent hiring efforts certainly do not seem to be geared at addressing this apparent imbalance, despite the fact that there are far more people of color at most law schools than there are conservatives.<sup>26</sup> Second, we all tend to prefer people who we see as being “like” us, a psychological phenomenon that produces implicit bias, but this is not limited to race; this kind of bias extends to preferring people who “think” like us in addition to those who look like us.<sup>27</sup> Third, given the paucity of law faculty positions, the most significant gains in achieving meaningful diversity are likely to arise if we focus our efforts on the kinds of diversity that are most lacking. In addition, although it is not a major theme of this article, consideration should be given to the potentially negative impact of having law schools and universities focus on race alone as if it is the most or even only intrinsically meaningful classification justifying preferential treatment in hiring decisions.<sup>28</sup> Finally, to the extent that there really is a consensus and informed belief that additional efforts must be made to achieve racial equality and fairness, then attention should be focused directly on that problem and finding a way for academic institutions to help achieve those societal objectives in a constitutional manner.

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<sup>26</sup> See *infra* notes 58–62, 65, 67 and accompanying text.

<sup>27</sup> See *supra* note 22 and accompanying text; see also Angela J. Bahns et al., *Similarity in Relationships as Niche Construction: Choice, Stability, and Influence Within Dyads in a Free Choice Environment*, 112 J. PERSONALITY SOC. PSYCOL. 329, 329 (2017) (presenting research showing values and similarities between people are important factors in forming relationships between people).

<sup>28</sup> Although it is generally outside the scope of this article, the question of whether racial preferences are actually harmful to the very persons they seek to benefit has been hotly debated. For example, Professor Richard Sander has argued that racial preferences in admission policies at elite law schools actually harm blacks in the long-run. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371–72 (2004). “The programs set blacks up for failure in school, aggravate attrition rates, turn the bar exam into a major hurdle, disadvantage most blacks in the job market, and depress the overall production of black lawyers.” *Id.* at 481. For a detailed critique of Sander’s article, see Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander is Right: A Response to A Systematic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005).

## II. DIVERSITY MATTERS, BUT NOT JUST BECAUSE THE SUPREME COURT SAYS LAW SCHOOLS CAN USE IT.

### A. *Why Diversity Matters*

It has been said that “[t]here is nothing duller than a classroom of people whose backgrounds are identical.”<sup>29</sup> This is true not because differing backgrounds matter in and of themselves, but because different backgrounds are likely to produce different opinions and viewpoints.<sup>30</sup> The only way those different viewpoints can be fully expressed and understood is if thoughtful people, who hold them, articulate them and advocate for them. Different viewpoints deserve to be acknowledged, expressed, and defended, especially at institutions of higher learning.<sup>31</sup>

[D]iverse views are the backbone of universities, for they stimulate new ideas and creations . . . The belief that knowledge or understanding flourishes best in a climate of vigorous debate dates back to the Socratic tradition . . . For hundreds of years, colleges and universities have operated on the premise that knowledge is best organized within disciplinary communities of experts and that these communities are enriched by debating alternative ideas while engaged in skepticism, scrutiny, and constructive criticism.<sup>32</sup>

Justice Sandra Day O’Connor, writing for the majority in *Grutter v. Bollinger*,<sup>33</sup> explained the role of viewpoint diversity as follows: “The skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and

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<sup>29</sup> Greg Winter, *University of Michigan Alters Admission Use of Race*, N.Y. TIMES, Aug. 29, 2003, at A12 (attributing the statement to Paul N. Courant, Provost of the University of Michigan).

<sup>30</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 321 (2003).

<sup>31</sup> Interestingly, Justices on the Supreme Court have also expressed concern about a lack of diversity, although it is not ideological diversity that concerns them. Rather, as Justice Sotomayor recently noted about the sitting Justices, “We’re not as diverse as some would like in many important characteristics — educational institutions, religion, places where we come from.” Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court*, N.Y. TIMES (Sept. 5, 2016), <http://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html>. Justice Kagan agreed that a more diverse bench could produce different outcomes, because “people bring their backgrounds and experiences to the job in some sense.” *Id.* In this arena, it is more public confidence that is at risk if the Supreme Court is composed solely of Ivy League graduates who come from coastal areas. According to Justice Kagan, “[p]eople look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that’s a sort of natural thing and they feel more comfortable if that occurs.” *Id.*

<sup>32</sup> Geoffrey Maruyama & Jose F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, in DOES DIVERSITY MAKE A DIFFERENCE?: THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 9, 10 (2000), [https://www.aaup.org/NR/rdonlyres/F1A2B22A-EAE2-4D31-9F68-6F235129917E/0/2000\\_diversity\\_report.pdf](https://www.aaup.org/NR/rdonlyres/F1A2B22A-EAE2-4D31-9F68-6F235129917E/0/2000_diversity_report.pdf).

<sup>33</sup> 539 U.S. 306 (2003).

viewpoints.”<sup>34</sup> The rationale behind that reasoning had been articulated by the district court, which noted that the result of having different views expressed is that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting . . . .”<sup>35</sup>

Problems with a singular viewpoint are easy to predict. One obvious concern is that teaching and the classroom experiences could be skewed, even if faculty members acknowledge their personal bias and attempt to appear neutral on controversial issues.<sup>36</sup> This could also mean that opposing viewpoints from students might be quashed, or that students feel unable to express their personal views.<sup>37</sup> Another such issue “is a certain lack of rigor. To be blunt, a kind of intellectual laziness can set in when everyone agrees. Faculty workshops fail to challenge basic premises. Scholarship becomes unreflective and imprecise.”<sup>38</sup> Another problem can be “group polarization,” which occurs when “like-minded people, engaged in discussion with one another, tend to go to extremes.”<sup>39</sup> The result of this can be seen when law faculties become unable to relate to “the actual practice of American law” because they approach the issues from so far to the left.<sup>40</sup>

<sup>34</sup> *Id.* at 330.

<sup>35</sup> *Id.* Obviously, the context of these comments was on students rather than faculty, but given the prominence of the faculty members’ roles in classroom discussion, this analysis should apply at least as much to any consideration of the range of views possessed by faculty.

<sup>36</sup> While personal experience suggests that not all faculty members even attempt to present issues from a politically or economically objective or neutral perspective, it is very difficult to know what actually happens in most classrooms. It is certainly true that even the most left-leaning faculty could attempt to present issues without allowing their personal opinions to permeate the discussion, but there is at least some anecdotal evidence that this is not always the case, or always successful. Consider the complaints of conservative students at Harvard, who certainly seem aware of the liberal bias. *See infra* notes 58–62 and accompanying text. One commentator has gone so far as to suggest that “the liberal version of the conservative argument is generally a caricature of the *actual* conservative argument.” Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL’Y 137, 143 (2014).

<sup>37</sup> *See infra* notes 58–62 and accompanying text.

<sup>38</sup> Rosenkranz, *supra* note 40, at 138. Professor John O. McGinnis, who has studied the ideological leanings of law faculties in some detail, also agrees that “liberal ideas might well be strengthened and made more effective if liberals had to run a more conservative gantlet among their own colleagues when developing them.” Adam Liptak, *If the Law Is an Ass, the Law Professor Is a Donkey*, N.Y. TIMES (Aug. 28, 2005), <http://www.nytimes.com/2005/08/28/weekinreview/if-the-law-is-an-ass-the-law-professor-is-a-donkey.html>.

<sup>39</sup> *Politically Correct*, U. CHI. L. SCH. FAC. BLOG (Oct. 11, 2005), [http://uchicagolaw.typepad.com/faculty/2005/10/politically\\_cor.html](http://uchicagolaw.typepad.com/faculty/2005/10/politically_cor.html).

<sup>40</sup> *See* Rosenkranz, *supra* note 40, at 138–41 (offering three specific examples of scholarship where the bias of homogeneity adversely affected public debate). For a more recent critique of how law professors fail to understand the realities of modern society, see Stephen B. Presser, *Commentary: What American Law Professors Forgot and What Trump Knew*, CHI. TRIB. (Nov. 17, 2016), <http://www.chicagotribune.com/news/opinion/commentary/ct-law-professors-trump-scalia-supreme-court-conservative-perspec-1118-md-20161117-story.html> (discussing how the author was one of only a

Unfortunately, when it comes to really achieving the richness that “diversity” promises, law schools fall far short of the goal.<sup>41</sup> Go to any law school’s website, and you are likely to find something that talks about diversity,<sup>42</sup> but if you look into the information, chances are that the report will focus on how well the school is doing with racial or ethnic diversity. The effort, attention, time, expense, and publicity surrounding diversity initiatives is focused primarily on race or ethnicity.<sup>43</sup>

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handful of law professors nationwide who believed that Trump would be a better president than Hillary Clinton).

<sup>41</sup> One commentator has cynically suggested that is not at all surprising, given that “diversity” is really just code for wanting to achieve a greater representation of certain historically underrepresented races. Lindgren, *Conceptualizing Diversity*, *supra* note 26, at 6 (“This seeming neutrality of diversity is often illusory because the last thing that many who favor diversity in law school faculties want is a strong effort to make faculty viewpoints more closely resemble the distribution of political and social opinion in the country.”). Another commentator characterizes the lack of viewpoint diversity as a “dirty little (not-so) secret” based on the fact that law school faculties “care much more about diversifying their skin colors, genders, and surnames than about diversifying the points of view . . . .” Rick Garnet, *Schuck on Intellectual Diversity in Law Schools*, PRAWFSBLAWG (Dec. 2, 2005), [http://prawfsblawg.blogs.com/prawfsblawg/2005/12/schuck\\_on\\_intel.html](http://prawfsblawg.blogs.com/prawfsblawg/2005/12/schuck_on_intel.html) (quoting Peter H. Schuck, *Leftward Leaning*, AM. LAW., Dec. 2005, at 77).

<sup>42</sup> This focus starts early. Consider the post on diversity from the LSAC (the Law School Admissions Council). Their statement on Diversity in Law School starts by claiming that they “use” the term diversity broadly to include all aspects of human differences, including but not limited to socioeconomic status, race, ethnicity, language, nationality, gender, gender identity, sexual orientation, religion, geography, disability, and age.” *Diversity in Law School*, LSAC, <http://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants> (last visited Mar. 16, 2018). The next paragraph, however, focuses solely on race and ethnicity as the important characteristics, stating that “[r]acial and ethnic diversity is essential to the study of law, and greatly benefits the law class, the law school, and the legal profession.” *Id.* Similarly, the focus on these characteristics is highlighted in the next paragraph, when the statement notes that in order “[t]o promote diversity, law schools actively seek qualified African American, Latino, Asian, and Native American students, as well as other students of color.” *Id.*

News items recently posted by law schools bolster the claim that law schools mean racial inclusion when they claim to have excellent diversity programs. See Koran Addo, *SLU Law School Promotes Increased Law School Diversity*, ST. LOUIS POST-DISPATCH (June 17, 2016) [http://www.stltoday.com/news/local/education/slu-law-school-promotes-increased-law-school-diversity/article\\_82df2083-047d-5823-8617-2b54ed3de0a2.html](http://www.stltoday.com/news/local/education/slu-law-school-promotes-increased-law-school-diversity/article_82df2083-047d-5823-8617-2b54ed3de0a2.html) (speaking about St. Louis University School of Law’s efforts to improve racial diversity).

Similarly, publications that focus on law school “diversity” tend to report information only on minority representation. Consider, for example, the U.S. News and World Report ranking of the “Most Diverse Law Schools.” Their “diversity index” looks only at racial and ethnic participation in law schools. See *Law School Diversity Index*, US NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings> (last visited Mar. 16 2018).

Of course, others have commented on the narrow focus of the concept of diversity in law schools. See, e.g., J.T. Manhire, *Beyond the U.S. News Index: A Better Measure of Law School Diversity*, 101 IOWA L. REV. ONLINE 1, 4–7 (2015), <https://ilr.law.uiowa.edu/assets/Uploads/101-Online-Manhire.pdf> (suggesting that differences of identity, experience, and training should also be recognized as critical components of diversity that should be measured and considered when selecting a student body).

<sup>43</sup> Consider this assessment of the popularity of diversity as an appropriate goal of universities: “We

This is not surprising. Law school accrediting agencies, both the ABA<sup>44</sup> and AALS,<sup>45</sup> have racial diversity as a hallmark of their efforts at improving legal education and the legal profession. This reinforces the notion that race is significant independent of anything else, as if it is only skin color that continues to matter most in the diversity context.<sup>46</sup>

This is a tragedy, because diversity of viewpoints does matter.<sup>47</sup> While the focus of this article is not on the constitutionality of preferences of any

have diversity initiatives, statements, requirements, training and courses—even diversity officers. Opposing diversity is like announcing membership in the Ku Klux Klan. You might as well climb on a desk and yell, ‘I am a racist and a bigot.’” Jacoby, *supra* note 1. “The predominant construction of ‘diversity’ in higher education focuses on race or, specifically, on ‘underrepresented minorities.’” Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967, 968 (2014) (citing RICHARD KAHLENBERG, *THE REMEDY* 16–42 (1996) (detailing the rise of the diversity narrative in affirmative action)). These statements perfectly capture the reality that “diversity” is generally seen as being synonymous with “racial diversity.”

<sup>44</sup> It has been noted many times that the ABA has a long standing commitment “to a policy of racial and ethnic diversity and to a goal of promoting the full and equal participation of minorities and women in the profession . . . .” John E. Higgins, *Grutter and Gratz Decisions Underscore Pro-Diversity Trends in Schools and Businesses*, 76 N.Y. ST. B.J. 32, 32 (2004) (citing the Brief for the A.B.A. as Amicus Curiae in Support of Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (describing the ABA’s mission statement and goal to diversify the legal profession).

<sup>45</sup> Bylaws of the AALS require both diversity of viewpoint and “a diverse faculty . . . hired, promoted, and retained . . . in accordance with principles of nondiscrimination.” *Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership*, § 6-1, AALS, <https://www.aals.org/about/handbook/membership-requirements/> (last visited Mar. 16, 2018). In Bylaw 6-3, entitled *Diversity: Nondiscrimination and Affirmative Action*, the AALS mandates that “[a] member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure . . . without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation.” *Id.* § 6-3. While the AALS includes in its statement on membership and core values respect for “[d]iversity of viewpoints,” and a “diverse faculty,” *Membership*, AALS, <http://www.aals.org/about/membership-core-values/> (last visited Mar. 18, 2016) (items #3 and 7, respectively, in the list), the only relevant standing committee that appears to focus on any kind of diversity is one clearly focused on race: the section on Minority Groups; see *Committees and Sections*, AALS, <http://www.aals.org/about/committees-sections/> (last visited Mar. 16, 2018). In addition, when submitting information for the AALS Directory of Law Teachers, as a faculty member I was asked to provide information on my race/ethnicity, but not anything about my ideological positions.

<sup>46</sup> Note that I say “continues to matter.” There certainly was a time when racial diversity needed to be addressed in law school faculties. At one time, almost all law students were taught by white men. People of color and women were left out of the mix. But that is not the world in which we live today. See *infra* note 60–62, 64–65, 68, and Part III for a contemporary analysis of the composition of typical law faculties.

<sup>47</sup> Illustrating this point, Professors Maruyama and Moreno note:

[D]iverse views are the backbone of universities, for they stimulate new ideas and creations... The belief that knowledge or understanding flourishes best in a climate of vigorous debate dates back to the Socratic tradition... For hundreds of years, colleges and universities have operated on the premise that knowledge is best organized within disciplinary communities of experts and that these communities are enriched by debating alternative ideas while engaged in skepticism, scrutiny, and constructive criticism.

sort, it is certainly worth considering the words of Justice Powell, written in the context of his landmark opinion in *Bakke*. He wrote: “The quality of the educational experiences of all . . . depends in part on the differences in the background and outlook . . .”<sup>48</sup> Although this was expressed in the context of student admissions at Harvard, the same rationale should apply even more substantially to the value of a diverse faculty. Faculty members have a disproportionate impact on the shaping of academic discourse. In the classroom, they decide on topics and generally set the tone of classroom discussions, controlling the discourse in a way that no student can.<sup>49</sup> Faculty

Maruyama & Moreno, *supra* note 36.

The first empirical study I located about the lack of diversity on American law faculties dates back to 1980, and it focused on the fact that nearly a third of all law faculty members received their J.D. degrees from one of five schools (Harvard, Yale, Columbia, Michigan, and Chicago). Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 5 AM. B. FOUND. RES. J. 501, 507 (1980). A study by Borthwick and Schau slightly more than a decade later appeared to confirm that graduates of the same five law schools were the most heavily represented on law faculties. Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 596–97 n.8 (2003) (citing Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J.L. REFORM 191, 226, 237 (1991)). These patterns of hiring continue to predominate legal academia. See, e.g., Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 78 (2011); Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 38 (2014); accord Jeffrey M. Lipshaw, *Memo to Lawyers: How Not to “Retire and Teach”*, 30 N.C. CENT. L. REV. 151, 164 (2008) (noting that newly hired tenure-track law professors tend to be “almost uniformly, among the elite law schools’ elite former students”).

Newer studies tend to focus on the lack of racial and sometimes gender diversity on law school faculties. See, e.g., Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 961 (2015) (finding that only 37% of law professors are women and 15% are people of color). When women and persons of color are present, they are often found in lower-paying positions lacking the same security of position traditional tenure-track faculty enjoy. See Jan Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 541 (1995). Supporters of racial diversity have argued that the evidence suggests additional efforts must be made:

A truly dynamic law school would try not to replicate its own faculty, but to diversify it in order to improve its standards. Certainly, a faculty rich in experience is one that is rich in ideas. Different experiences and a diversity of ideas should lead to a better law school: better teaching, better scholarship, and better service.

Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1039 (1997).

This should mean that the focus should be on ideological diversity, because, ideally “[a] law-school faculty should include people with divergent views on politics, economics, social policy, constitutional construction, states’ rights, etc.” Elyce H. Zenoff & Jerome A. Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 498 (1983).

<sup>48</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (quoting from the Harvard Admissions Program statement).

<sup>49</sup> Naturally, this has been noted before. “[P]rofessors even more than students set the intellectual



members produce the bulk of academic scholarship and have a large role in setting up colloquia and symposia. A lack of faculty support for particular student organizations and perspectives can increase students' beliefs that their views are neither respected nor appreciated.<sup>50</sup>

Perhaps the most visible and vocal critics of the prevalence of liberal viewpoints on law school faculties comes from students and former students at Harvard Law School. Consider the following reports, written about Harvard Law in 2003:

Rarely will a student hear a professor praise the decision of Supreme Court Justices . . . Rehnquist, or even O'Connor; right-leaning law and economics scholars like the 7<sup>th</sup> Circuit's Richard Posner . . . are routinely criticized. It is not unusual in some classes to hear a left-wing student's comments applauded, a conservative's booed.<sup>51</sup>

Student respondents to a 2002 fall survey on academic diversity at Harvard Law revealed a significant concern about the liberal focus of the school: "Harvard is horribly liberal, and the orthodoxy is enforced with a vengeance," one anonymous respondent wrote. Another opined, "The greatest problem with diversity at HLS is a lack of ideological diversity."<sup>52</sup> According to such students, this creates an environment where conservative students are reluctant to speak up,<sup>53</sup> certainly not something one would wish to encourage in an environment where the free exchange of ideas is supposedly the ultimate objective. More recent stories from Harvard suggest that not much has changed in the past decade.<sup>54</sup> It has been reported as recently as 2015 that "[m]any conservative students at Harvard feel overwhelmed by the large number of liberals on campus, and as a result censor their own speech."<sup>55</sup>

tone in university life. Generating ideas is their job." John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL ST. J., <http://www.wsj.com/articles/SB104916382927878800> (last updated Apr. 1, 2003, 12:01 AM).

<sup>50</sup> See *infra* notes 58–62 and accompanying text.

<sup>51</sup> Jonas Blank, *All the Right's Moves*, HARV. L. TODAY (Apr. 24, 2003), <http://today.law.harvard.edu/feature/rights-moves/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Luca F. Schroeder, *The Elephant in the Room: Conservatives at Harvard*, HARV. CRIMSON (Oct. 1, 2015), <http://www.thecrimson.com/article/2015/10/1/conservatives-scrutiny-oct-2015/>.

<sup>55</sup> *Id.* It isn't only self-censorship that can be an issue. A number of universities have created safe zones and trigger warning policies that virtually mandate censorship of some ideas or concepts. For a listing of some of the most outrageous examples of these policies, see Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation That Hates Speech*, NEWSWEEK (May 26, 2016, 6:08 AM), <http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html>. Other universities have responded differently. The University of Chicago has a policy

Other elite institutions suffer the same imbalance. In 2014, Professor Rosenkranz reported that, to his knowledge, at his alma matter, Georgetown, of the 120 faculty members:

[T]he number of professors who are openly conservative, or libertarian, or Republican or, in any sense, to the right of the American center, is three—three out of 120. There are more conservatives on the nine-member United States Supreme Court than there are on this 120-member faculty.<sup>56</sup>

Yale is also reported as having a faculty that leans far to the left.<sup>57</sup> Some of the most often cited studies on the lack of intellectual diversity in law schools concentrate on the most elite institutions, presumably as a way of managing study size.<sup>58</sup> They all support the belief that most of these institutions have law faculties that are overwhelmingly liberal.

It would be comforting to think of this as a problem limited to the most elite schools,<sup>59</sup> and certainly the available evidence suggests that most top law schools have more than a fair share of liberals.<sup>60</sup> Unfortunately for those

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that is designed to encourage students to “speak, write, listen, challenge and learn without fear of censorship.” David Schaper, *University of Chicago Tells Freshman It Does Not Support ‘Trigger Warnings,’* NPR (Aug. 26, 2016, 4:29 PM), <http://www.npr.org/2016/08/26/491531869/university-of-chicago-tells-freshmen-it-does-not-support-trigger-warnings> (quoting the 2016 welcome letter from the school’s Dean of Students, John Ellison). The purpose behind the warning was to advise students that the University “won’t cancel controversial speakers, and it ‘does not condone the creation of intellectual “safe spaces” where individuals can retreat from ideas and perspectives at odds with their own.’” *Id.*

<sup>56</sup> Rosenkranz, *supra* note 40, at 137.

<sup>57</sup> Professor Rosenkranz cites a Yale Daily News blog from 2008 that suggested “the number of Yale professors who gave money to the John McCain campaign was five. That is, five from the entire university—all of Yale. From Yale Law School, it was one (and that person no longer teaches at Yale Law School).” Rosenkranz, *supra* note 40, at 138 n.4 (citing Margy Slattery, *Eli Profs Show Obama Support in Dollars*, YALE DAILY NEWS (Nov. 4, 2008), <https://yaledailynews.com/blog/2008/11/04/eli-profs-show-obama-support-in-dollars/>).

<sup>58</sup> For example, McGinnis and Schwartz studied the top 22 law schools from 1994 to 2000, and concluded that there was “evidence of the ideological imbalance at elite law schools,” of which they had “heard no plans to rectify.” McGinnis & Schwartz, *supra* note 53. This study found the imbalance to be particularly stark in subject areas like constitutional law and international law “the subjects that set the agenda for debate on the hot-button issues of our time.” *Id.*

<sup>59</sup> After all, Harvard was once famously called the “Kremlin on the Charles,” by President Richard Nixon, “playfully refers to itself as the ‘People’s Republic of Cambridge,’” and is located in a very liberal leaning state. Schroeder, *supra* note 58.

<sup>60</sup> As mentioned above, Professor John McGinnis reported in 2006 the results of a study showing that “among politically active professors at top law schools, some 80% contributed mostly to Democrats,” and he updated this in 2013 saying “the situation hasn’t improved much.” Richard Wolf, *Harvard asks: Are Law School Faculties Too Liberal?*, USA TODAY (Apr. 4, 2013, 6:38 PM), <http://www.usatoday.com/story/news/nation/2013/04/04/supreme-court-law-school-harvard-federalist-society-faculty/2054423/>. The study involved 22 “elite” law schools, and was originally summarized by John McGinnis and Matthew Schwartz. McGinnis & Schwartz, *supra* note 53.

eager to see a free flow and exchange of ideas, and vigorous debate of positions on issues including the appropriate role of government in regulation of businesses, there is an apparent dearth of conservative voices on most law school faculties. Issues that could benefit from adequate representation on both sides include such matters as appropriate tax policy, employee and employer rights and responsibilities, the constitutional rights of corporations, the extent to which government should provide safety nets in various areas for citizens, the optimal approach to immigration issues and reform, the costs and benefits of various regulations, and the like.

One empirical assessment from the mid-1990s provides evidence that the imbalance in ideological viewpoint persists at least through the top 100 law schools.<sup>61</sup> The author of the paper reporting that study asked, “Which groups would provide most viewpoint diversity if added to the typical law faculty? On most law faculties, the groups that would provide the most viewpoint diversity would be Republicans, conservatives, and evangelical or fundamentalist Christians.”<sup>62</sup>

### *B. Is It Possible to Achieve Both Racial and Viewpoint Diversity Simultaneously?*

One obvious response to the primary thesis of this article is to say that of course viewpoint diversity is important, but so is racial diversity. Unfortunately, if “diversity” is really just a subterfuge for trying to achieve what is seen as a proper racial and ethnic representation, saying that we are seeking both simply does not work. We have achieved remarkable gains in racial and gender representation in the past few decades,<sup>63</sup> we have certainly not become any less one-sided on the ideological spectrum, at least outside of the limited number of overwhelmingly conservative schools.<sup>64</sup>

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<sup>61</sup> See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 109 tbl.2 (2016) [hereinafter Lindgren, *Measuring Diversity*] (presenting survey data of law professors at top 100 law schools showing the underrepresentation of Republicans, representing 41% of the population in 1994, but only 13.2% of law professors).

<sup>62</sup> Lindgren, *Conceptualizing Diversity*, *supra* note 24, at 8.

<sup>63</sup> Compare Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988) (presenting survey data that law school faculties were somewhat more integrated in terms of race and gender from 1980–81 to 1986–87, increasing black representation from 2.8% to 3.7%, and female representation from 13.7% to 20%), with Lindgren, *Measuring Diversity*, *supra* note 65, at 109 tbl.2, 143 tbl.12 (presenting survey data that law school faculties became more integrated in terms of race and gender from 1996–97 to 2013, increasing black representation from 6.4% to 9.7%, and female representation from 25.9% to 35.9%). From Lindgren’s survey data in 2013, black law faculty are underrepresented by 1.7%, and female law faculty are underrepresented by 9.2% as a percentage of the working population. *Id.* at 143 tbl.12.

<sup>64</sup> Lindgren, *Measuring Diversity*, *supra* note 65, at 145 tbl.13, 147 n.126 (presenting data in 2013

This failure to look for conservative perspectives might be offset if we were achieving a mix of ideological viewpoints when we seek to hire persons of color, but this does not actually seem to be the case either. While it is indisputably true that the experience of a black person will be different from that of a white person, the same can be said of any two individuals. Everyone's experience is distinct. That does not necessarily translate into different perspectives for individuals on many of the major issues that shape today's legal landscape. It translates to a different perspective along a single dimension, a dimension that is not unimportant, but it is certainly not the only important issue facing our country.

Those who have most studied the issue of diversity have noted that if we look only at individuals, everyone is likely to be part of some over-represented and some underrepresented group.<sup>65</sup> The problem is that when overall patterns of faculties are examined, the most underrepresented categories of persons on law faculties are not racial; they are ideological.<sup>66</sup> A continuing focus on race during the academic hiring process, even if it is couched in terms of an effort to obtain "all kinds" of diversity, is not likely to address this lack.<sup>67</sup>

A second alternative that might achieve both racial and ideological variety would be for hiring efforts to target both racial and ideological diversity when considering new faculty candidates. One problem with this approach is that there are not enough new positions on law faculties to make this feasible. The truth is that in the current economic climate, the number of new faculty positions has been sharply curtailed. Because of this, if law schools are focused on racial diversity this necessarily means that they will

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estimating the percentage of Republican faculty to be between 11% and 15.6%).

<sup>65</sup> As one commentator explained, "law professors [are] all members of both under-represented and over-represented groups in some nontrivial way." Lindgren, *Conceptualizing Diversity*, *supra* note 24, at 10. Lindgren noted that as an atheist and white male teaching in the mid-1990's, he was over-represented, but under-represented based on his age. *Id.* A similarly mature hypothetical "African American Democratic female" would have been substantially over-represented by age and political affiliation, but under-represented by gender and race. *Id.* His ultimate conclusion was that political diversity was the dimension that counted most to ensure representation of differing viewpoints, with this pattern holding "not only for a range of political issues, but also for a range of legal issues as well (e.g., abortion rights, gun control, pornography prohibition)." *Id.* When Professor Lindgren updated his research, he found that three groups continued to be the most under-represented among racial, gender, religious, and ideological groups in law teaching: Republicans (both male and female), Protestants, and Catholics. Lindgren, *Measuring Diversity*, *supra* note 65, at 93.

<sup>66</sup> Lindgren, *Measuring Diversity*, *supra* note 65, at 93.

<sup>67</sup> Some commentators argue race is an "inescapably imprecise" proxy for ideological diversity. Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 649 (2006) ("There is wide disagreement about how well racial diversity serves as a proxy for viewpoint diversity.").

not be able to focus on ideological diversity to the same extent. New faculty lines are in too short a supply. To support this assertion, consider information on new hiring data gather by Professor Sarah Lawsky in her blog.<sup>68</sup> There were 158 new hires of faculty on the tenure track in 2006, and 167 in 2009, while the number of new faculty hires in 2015 dropped to 70, and those 70 new hires reflected hiring at only 52 schools in 2015, rather than 99 schools as recently as 2011.<sup>69</sup> While it is not clear that this data is comparable, because it is not limited to tenure-track positions, the 2002–03 directory of law professors listed 488 new faculty positions, not including new assistant or associate deans.<sup>70</sup> This severe downward trend in hiring tracks the continuing decline in applications to and enrollment of students at law schools across the nation over the past several years.<sup>71</sup>

In 1994, federal law ended mandatory retirement at age 70 for university professors.<sup>72</sup> This has resulted in an aging community of law professors, with the need to hire new and younger academics being deferred for more and more years. One study suggested that the average age for all tenured professors (not just those in law schools) was approaching 55 and edging ever higher, with the number of professors over 65 doubling between 2000 and 2011.<sup>73</sup> This operates to depress the number of new faculty positions further, as older faculty simply stay on to teach.

Moreover, one recent assessment suggests that to reach parity with the general population, the average law faculty of 42 members would have to hire only two new African-American faculty members. Yet to reach parity

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<sup>68</sup> See Sarah Lawsky, *Spring Self-Reported Entry Level Hiring Report 2015*, PRAWFSBLAWG (May 19, 2015, 9:00 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/05/spring-self-reported-entry-level-hiring-report-2015.html>.

<sup>69</sup> *Id.*

<sup>70</sup> This represents a sizeable decline in the number of new hires from 10 years ago. Richard A. White, *AALS Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 2002–03*, ASS'N OF AM. L. SCH. 7 (2002–2003), <https://web.archive.org/web/20051220104940/http://www.aals.org/statistics/2002-03/2002-03statistics.pdf>.

<sup>71</sup> See generally Elie Mystal, *Welcome to the Suck, Law Profs*, ABOVE L. (May 21, 2015), <http://abovethelaw.com/2015/05/welcome-to-the-suck-law-profs/>.

<sup>72</sup> The Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012) (prohibiting the compulsory retirement of tenured faculty after 1993).

<sup>73</sup> Paul Caron, *The Forever Professors: Academics Who Don't Retire Are Greedy, Selfish, and Bad for Students*, TAXPROF BLOG (Nov. 18, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/11/the-forever-professors.html](http://taxprof.typepad.com/taxprof_blog/2014/11/the-forever-professors.html) (citing a Fidelity Investments study which indicates that 75% of professors between the ages of 47 and 67 plan to delay retirement past 65 or never retire at all). As Caron noted, “[o]ld professors who refuse to retire hobble an institution’s ability to control its academic priorities.” *Id.* This concern clearly applies to any efforts at achieving diversity, whether racial, ideological, or by some other indicia.

with the general population, every law faculty would have to hire 146 Christians tomorrow (bringing the average faculty size to 188 members).<sup>74</sup>

Realistically, that is not going to happen, and if new hires continue to include a focus on racial diversity, the likelihood that improvement will be seen in terms of ideological diversity becomes vanishingly small.

On top of that issue, there is the lingering suspicion that racial diversity is easier to demonstrate than ideological diversity, and that law schools (and academia in general) have really used the labels of “diversity and inclusion” to mean race and ethnicity alone.<sup>75</sup> It is easier to put a picture of a person of color on a law school’s website and tout success in achieving diversity than to show a meaningful effort at achieving an ideological, diverse community even if the latter would have a more profound impact on the mix of ideas and perspectives.

### III. THE PROBLEM WITH USING “DIVERSITY” TO ACHIEVE FAIR RACIAL REPRESENTATION

One logical question that might be raised in response to the preceding discussion is whether this really means we need to stop offering racial preferences in the name of diversity. While some commentators view efforts focusing on racial diversity as a “modest mechanism,” designed “as much to further the self-interest of the white majority as to aid the designated beneficiaries,”<sup>76</sup> others have suggested that preferences for members of designated racial groups is “a source of both economic injury and profound personal resentment to members of the excluded . . . groups . . . .”<sup>77</sup> Great strides have been made in the civil rights movement in the last hundred years, but we continue to focus on race in some very unhealthy ways. In the past, racially-based preferences certainly helped us progress, but it is not clear that they are doing so now. In addition, in the academic arena, they have been deemed unconstitutional unless they are part of a larger academic mission and need.<sup>78</sup>

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<sup>74</sup> Lindgren, *Measuring Diversity*, *supra* note 65, at 92–93.

<sup>75</sup> See *supra* notes 48–52 and accompanying text.

<sup>76</sup> Derrick A. Bell Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 17 (1979).

<sup>77</sup> Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action,”* 67 CAL. L. REV. 171, 177 (1979).

<sup>78</sup> The most recent Supreme Court case on this issue, *Fisher v. University of Texas at Austin (Fisher II)* reaffirmed that “[a] university cannot impose a fixed quota . . . . Once, however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” 136 S. Ct. 2198, 2208 (2016) (internal citations and marks omitted).

In 1990, Shelby Steele, a Senior Fellow at Stanford University's Hoover Institution, wrote in his provocative book on race relations that he believed "the civil rights movement in its early and middle years offered the best way out of America's racial impasse: in this society, race must be not a source of advantage or disadvantage for anyone."<sup>79</sup> He was particularly impassioned about this belief because he was concerned about the "hidden investment in victimization and poverty" that would come about if blacks were faced with the possibility that "conditions have worsened for most [blacks] . . . as racism had receded."<sup>80</sup> In his words, blacks could be tempted to "hold race up to shield us from what we do not want to see in ourselves."<sup>81</sup>

Chief Justice John G. Roberts Jr. offered a direct recommendation about how to address the problem of racism: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>82</sup> Obviously, pretending that we are all color blind will not make us so; but a set of policy guidelines obliquely framed in terms of "diversity" certainly does a disservice to the ideal of a race-neutral society if it is both seen and used as an excuse to bring race into decisions on such things as law faculty hiring without admitting that is what we are doing.

The position taken in this article is somewhat different from either the view that we should start pretending that race no longer matters or that we should continue to use diversity as a means of responding to the toxic residue of decades of entrenched racism. The U.S. Supreme Court has said that race may be considered when making decisions about who to invite into academic communities, but only in sharply curtailed circumstances. In 2003, in *Grutter v. Bollinger*,<sup>83</sup> the Supreme Court found in the context of student admissions that diversity in higher education could be sufficiently compelling to justify race-conscious policies under certain circumstances.<sup>84</sup> A decade later, the Court held in *Fisher* that "universities may not use racial preferences until they have convincingly proven that 'race-neutral' alternatives cannot produce a level of student diversity consistent with the university's educational mission."<sup>85</sup> At the current time, this still leaves room for race-

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<sup>79</sup> SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 17 (1991). At the time he wrote this book in 1990, Steele was a professor at San Jose State University, and he later became the Robert J. and Marion E. Oster Senior Fellow at Stanford. *Shelby Steele*, HOOVER INST., <https://www.hoover.org/profiles/shelby-steele> (last visited Mar. 16, 2018). This book won the National Book Critics Circle Award in the general nonfiction category. *Id.*

<sup>80</sup> STEELE, *supra* note 83, at 15.

<sup>81</sup> *Id.* at 24.

<sup>82</sup> *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>83</sup> 539 U.S. 306 (2003).

<sup>84</sup> *Id.* at 328–33.

<sup>85</sup> Sander & Danielson, *supra* note 47, at 967 (citing *Fisher I*, 570 U.S. 297, 312 (2013)). The Court

conscious decisions, but only in furtherance of a legitimate university mission requiring diversity, and only as a last resort.<sup>86</sup> In order to be legitimate, *Grutter* seems to require that there must be “beneficial educational outcomes” of efforts to achieve “diversity.”<sup>87</sup>

Given that this is the current state of the law, it seems self-evident that there has to be a preference for achieving diversity that does not focus on race alone. Especially in the context of faculty hiring, where existing faculties are less diverse along ideological lines than they are along racial divides, it is hard to make the case that law schools have been using diversity in a constitutional manner. In other words, if other forms of important diversity are demonstrably more lacking than racial diversity, efforts to address those deficiencies should come first. This raises the question of whether the evidence supports this article’s contention that ideological diversity is even more lacking on law faculties than racial diversity, and that it is a bigger issue from an outcomes perspective. It also demands that we consider carefully what we are trying to achieve when we do look at race in our hiring decisions. When we make a decision such as whom to hire as a new colleague are we trying to address profound racial inequalities that exist in our country, are we trying to achieve the most meaningfully diverse faculty, or are we trying to overcome implicit bias that might keep us from finding the “best” candidate? This article is obviously suggesting that the first objective is currently prevalent and objectionable, but it also supports the conclusion that the next two ideals are meaningful and should be pursued.

#### IV. THE NEED FOR VIEWPOINT DIVERSITY; WHERE ARE THE CONSERVATIVE VOICES?

The preceding sections of this article have attempted to make the case that achieving diversity can be a valuable objective for law schools, especially in the context of faculty hiring, and have examined some of the problems with treating this objective as a justification for looking exclusively or primarily at racial diversity. This section will consider whether ideological diversity is a worthier objective, and whether there truly is a lack of

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in *Fisher I* stated “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race.” *Id.*

<sup>86</sup> In addition, proponents of affirmative action have expressed concern over the possibility that the Supreme Court has been looking for a way to end all race-conscious admissions policies. See Ann Mallatt Killenbeck, *Ferguson, Fisher, and the Future: Diversity and Inclusion as a Remedy for Implicit Racial Bias*, 42 J.C. & U. L. 59, 61 (2016).

<sup>87</sup> *Id.* at 62.



conservative voices in the legal academy. Aside from personal impressions, what data is there to support the contention that law school faculties are lacking in persons who espouse conservative positions? There is a surprising amount of information that supports this proposition.<sup>88</sup> Some of the data is anecdotal, some is empirical based on political party and religious affiliation, and some is based on an assessment of scholarly output.

Some of the available empirical work on ideological diversity on law school faculties is discussed earlier in this article.<sup>89</sup> Obviously, the data is subject to a variety of criticisms, including concerns about whether the results are skewed because of the focus on elite and higher-ranked schools, because contributions to political parties may not reflect true ideology, or because the information is self-reported and only self-selected individuals responded.<sup>90</sup> On the other hand, it is certainly worth noting that no reported survey from any group of public law schools suggests that law faculties are more conservative than either the general population or lawyers as a whole.<sup>91</sup>

Looking at the available data, which are the most under-represented groups on law faculties? According to James Lindgren's data, in the mid-1990s "[t]he most under-represented large racial, gender, political, or religious groups [were] Republicans and Hispanics, whose shares of law faculties in the mid-1990s were less than a third of their shares in the full-time working population."<sup>92</sup> Karl Zinsmeister reviewed the political affiliation at twenty-one top universities, and reported in 2002 that he had "found very small (usually single-digit) proportions of faculty members

<sup>88</sup> See *supra* notes 62, 64–65, 68 and accompanying text.

<sup>89</sup> See *supra* notes 62, 64–65, 68 and accompanying text. In fact, the data is so consistent that some scholars simply start from the proposition that the imbalance in ideologies is a given. "There are very few conservative or libertarian law professors. They are the snail darter or great horned owl of the legal academy." James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL'Y 153, 153–54 (2016). Such commentators do note that there are pockets of conservatism. *Id.* at 154 (noting that the numbers of conservative law faculty members, "while low, are stable, due in part to outliers like George Mason or Pepperdine where they are a majority of the faculty")

<sup>90</sup> See Phillips, *supra* note 93, at 180–81.

<sup>91</sup> *Id.*; Lindgren, *Measuring Diversity*, *supra* note 65, 109 tbl.2, 145 tbl.13, 147 n.126; John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1186–89 tbl.7 (2005); Deborah J. Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998).

<sup>92</sup> Lindgren, *Conceptualizing Diversity*, *supra* note 24, at 9 (citing James Lindgren, *Measuring Diversity* (Nov. 7, 2001) (unpublished manuscript)). In Lindgren's subsequently published work with the same title, data that he collected for 1996–97 demonstrated that Hispanic and Republican professors were represented as a percentage of the working population at ratios of 31% and 32% respectively. Lindgren, *Measuring Diversity*, *supra* note 65, at 110 tbl.3. When he further broke down these groups, he found that white female Republicans were almost nonexistent in law teaching, making up only about 0.3% of law professors compared to about 13.5% of the full-time working population. *Id.* at 111 tbl.4.

affiliated with political parties of the Right.”<sup>93</sup> His study prompted the Wall Street Journal to run a piece opining that “[e]ven the press corps aren’t this uniformly liberal.”<sup>94</sup>

Professor John O. McGinnis has been vocal in criticizing the lack of ideological diversity on law faculties. In 2003, he and a law student at Columbia wrote a piece in the Wall Street Journal noting that “law schools almost uniformly lack a ‘critical mass’ of conservatives to offer an alternative to the reigning liberal orthodoxy.”<sup>95</sup> Professor McGinnis and Matthew Schwartz conducted a study of twenty-two elite law schools, reviewing all federal campaign contributions over \$200 by professors from those schools from 1994 to 2000.<sup>96</sup> As they report, “[d]uring that time, close to a quarter of these law professors contributed to campaigns—a proportion far greater than the average citizen . . . . America splits evenly between the GOP and Democrats, but 74% of the professors contribute primarily to Democrats. Only 16% do so to Republicans.”<sup>97</sup> In addition, the study noted that the overall percentages understate the imbalance:

Republican-contributing law professors are very disproportionately concentrated at two schools—the University of Virginia and Northwestern. In contrast, many other elite schools have few or no politically active Republicans. At Yale, where almost 50% of the faculty donate, almost 95% give predominantly to Democrats. At Michigan itself, the ratio is eight to one.<sup>98</sup>

The amounts donated also appear to be “instructive,” with the two authors noting that “in the last six years Georgetown law professors have donated approximately \$180,000 to the Democratic Party, \$2,000 to the GOP and \$1,500 to the Green Party.”<sup>99</sup>

Nor are such empirical studies on political affiliation the only evidence of how far to the left law faculties tend to lean. Consider scholarship produced by current law faculty. There is some empirical data on this issue,

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<sup>93</sup> Jon Sanders, *Court’s Squishy Language Should Allow Conservatives to Join the Campus Debate*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (July 14, 2003), <http://www.popecenter.org/2003/07/courts-squishy-language-should-allow-conservatives-to-join-the-campus-debate/> (citing Karl Zinsmeither, *The Shame of America’s One-Party Campuses*, AM. ENTERPRISE, Sept. 2002, at 18, 18).

<sup>94</sup> *One Faculty Indivisible*, WALL ST. J. (Aug. 30, 2002), <http://www.wsj.com/articles/SB1030667904874606195> (“That this lack of faculty diversity eludes university administrators is especially interesting given the totality of their efforts to reorder all other aspects of campus life based on that principle.”).

<sup>95</sup> McGinnis & Schwartz, *supra* note 53.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

as well. One study reports that “at a statistically significant level, law professors at elite law schools who make donations to Democratic political candidates write liberal scholarship and law professors who make donations to Republican political candidates write conservative scholarship.”<sup>100</sup> It is, therefore, no surprise that there appears to be substantially less conservative scholarship than that which takes a liberal bent.<sup>101</sup>

To provide one small illustration of the disparity between the prevalence of “liberal” and “conservative” voices in legal scholarship, consider academic legal articles on one of the hot topics in current society: same-sex marriage.<sup>102</sup> While public sentiment now favors allowing same-sex marriage by a relatively slim margin, legal scholarship has long been overwhelmingly associated with the “liberal,” pro-same-sex rights position.<sup>103</sup> It is, in fact,

<sup>100</sup> Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277, 277 (2015).

<sup>101</sup> This should not be taken as an indication that conservative faculty are any less productive than their liberal counterparts. In fact, the data suggests that the opposite is true. In 2016, James Phillips reported data indicating that “[c]onservatives/libertarians [on law faculties] have significantly higher mean annual citation rates for every post-tenure cohort compared to the pre-tenure cohort . . . . Thus, citation rates among scholars of varying experience do not provide a rationale for not hiring conservatives and libertarians.” Phillips, *supra* note 93, at 201. His conclusion was that, at least at the top sixteen law schools, these conservative and libertarian professors were both “more productive and more relevant [in terms of being cited]” and that “[w]hile there could be other explanations for conservatives and libertarians being cited more than their peers, when viewed in combination with the number of articles published per year (which was controlled for in the citation analysis), as well as the qualification gap, a discrimination-bias explanation makes more sense.” *Id.* at 201–02. Phillips also cited data from Stewart and Tolley that indicated more conservative schools had no demonstrably different rates of scholarly production. *Id.* at 161 (citing Monte N. Stewart & H. Dennis Tolley, *Investigating Possible Bias: The American Legal Academy’s View of Religiously Affiliated Law Schools*, 54 J. LEGAL EDUC. 136, 137 (2004)).

<sup>102</sup> Prohibitions against same-sex marriage are now unconstitutional. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

<sup>103</sup> Even a cursory search of legal literature on the subject turns up a plethora of publications favoring same-sex marriage, despite the fact that this is an admittedly contentious issue outside of legal academia. See Matthew E. Feinberg, *And the Ban Plays on . . . for Now: Why Courts Must Consider Religion in Marriage Equality Cases*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 221, 223 (2010) (“The time has come for courts to consider religion, to stop ignoring relevant constitutional principles simply because it is the popular religion that is supported through legislation, to recognize the impact of particular religious thought on the rights of all Americans, and to remedy the latent religious undertones of the same-sex marriage debate. The time has come for America’s courts to walk us down the aisle towards equality for all people.”); Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER SOC. POL’Y & L. 1, 1 (2015); Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 135–36 (2012) (“[R]egardless of what lawmakers opposed to same-sex marriage may be willing to state publicly as their reasons for voting against same-sex marriage, courts should find that laws prohibiting same-sex marriage violate the Establishment Clause and uniformly should be struck down.”); Gary J. Simson, *Religion, Same-Sex Marriage, and the Defense of Marriage Act*, 41 CAL. W. INT’L L.J. 35, 39 (2010) (quoting Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 378 (2006),

overwhelmingly difficult to find articles in support of the conservative viewpoint,<sup>104</sup> although the isolated article taking this position can be found in journals associated with conservative, religious perspectives from faculty at similarly conservative schools.<sup>105</sup>

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which asserts that laws prohibiting same-sex marriage perpetuate religious discrimination, and that "it is hard to comprehend how a reasonable observer could avoid perceiving such laws as communicating a substantial endorsement of religion"); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1197 (2005) (tinting his conclusion "Conclusion, Including Why I Still Support Same-Sex Marriage"); Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133, 1136 (2014) ("[For] many heterosexuals, particularly those of a traditionalist bent, same-sex marriage has to be seen to be believed in—that is, people who find the abstract concept of same-sex marriage unfamiliar and off-putting may be more likely to change their mind when they see same-sex couples practicing a domestic life that, well, looks just like a family."). Even in publications from traditionally conservative schools, this position is advocated. See Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages*, 20 BYU J. PUB. L. 275, 276 (2006) (advocating the "assimilation" theory as a way forward for proponents of same-sex marriage). It is even possible to find symposia issues where this position is the central topic. See Symposium, *Georgetown Gay Rights Coalition 25th Anniversary Symposium*, 15 GEO. J. GENDER & L. 411 (2014).

See also Tyler S. Whitty, Note, *Eliminating the Exception? Lawrence v. Texas and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813, 838 (2005) ("While the prohibition of same-sex marriage has in some respects been ingrained into the minds of the public, upon close examination there is little or no satisfactory rationale for maintaining such a prohibition."). This note is particularly interesting because it includes a list of arguments in favor of banning same-sex marriages, but all of the citations to articles raising those arguments are in works that overwhelmingly support same-sex marriage. See *id.* at 831–36 nn.103–49 (citing works such as Charlene Gomes, *The Need for Full Recognition of Same-Sex Marriage*, HUMANIST, Sept.–Oct. 2003, at 15, 19; DAVID A. J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 3 (1999); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123 (1996).

<sup>104</sup> There are a large number of articles that focus on issues other than the merits of same-sex marriage, and many others that take an apparently objective approach. Most of these focus on factual questions, such as whether changes in the law produce positive changes in society, or on procedural or constitutional issues, such as federalism and state rights. Not all of these articles appear as pro-same-sex marriage, although they similarly do not generally come out against it. See, e.g., Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 WASHBURN L.J. 79, 101–06 (using the history of the creation of the judiciary to demarcate the boundaries of judicial power to declare overreaches of the judiciary in same-sex marriage cases as illegitimate).

<sup>105</sup> For an example of conservative scholarship on this issue from the Ave Maria Law Review, see Lynn D. Wardle, *The Future of the Family: The Social and Legal Impacts of Legalizing Same-Sex Marriage*, 13 AVE MARIA L. REV. 237, 237 (2015). Professor Wardle is the Bruce C. Hafen Professor of Law at the J. Reuben Clark Law School of Brigham Young University. Both Ave Maria Law School and Brigham Young University are religiously affiliated universities with expressly conservative mission statements framed in terms of traditional religious beliefs. Ave Maria School of Law describes itself as offering "an outstanding legal education in fidelity to the Catholic Faith as expressed through Sacred Tradition, Sacred Scripture, and the teaching authority of the Church." *Ave Maria School of Law Mission*, AVE MARIA SCH. L., <http://www.avemarialaw.edu/campus-life/catholic-law-schools/> (last visited Sept. 9, 2017). The BYU Law School mission "is to teach the laws of men in the light of the laws of God." *Mission & Goals*, BYU L., <http://law.byu.edu/site/mission/> (last visited Mar. 2, 2018).

## V. THE BENEFITS OF IDEOLOGICAL DIVERSITY

As mentioned earlier, the lack of conservative scholars on law faculties has an impact on classroom discussion, on the sharpening of debate, of creating a welcoming environment where all attitudes are considered respectfully, and upon the scholarship, discussions, and symposia that are a part of a robust academic environment.<sup>106</sup> If one really believes that diversity in legal education is important, it is important to give more than lip service to the idea there is a value to gathering colleagues whose attitudes and perspectives challenge and sharpen thinking, thereby improving the level of academic discourse. This kind of diversity is also the precise thing that creates an atmosphere of tolerance of differing perspectives that could enable students to feel more comfortable in expressing and defending conservative values and positions in and out of class.

It is of course true that the reality of overwhelmingly liberal law faculties does not necessarily translate to liberal views pervading the classroom experience.<sup>107</sup> Faculty members are free to approach the law as objectively as possible,<sup>108</sup> to advocate for positions or from perspectives that they themselves do not personally share,<sup>109</sup> or to bring conservative positions into the classroom either through outside speakers or assigned materials.<sup>110</sup> Aside

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<sup>106</sup> See *supra* notes 55–58, 60–62, 64–66, 68, 93 and accompanying text for a discussion of the ideological imbalance among students, faculty, and legal scholarship.

<sup>107</sup> For a thoughtful exposition on some of the considerations that go into the decision of whether to attempt to make class discussions ideologically neutral, see Susan N. Herman, *Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist*, 41 TULSA L. REV. 637, 639–40 (2006). Professor Herman writes:

The idea that balance is always a necessary solution suggests that imbalance is actually a problem in the classroom, in legal academic publications, or in public fora. Is this true, and how much does context matter even if it is true? Should we seek balance by providing students with antidotal experiences in our classrooms, or in other venues with teachers, scholars, and speakers who have different viewpoints, or can we assume that the marketplace will balance our ideas without our engineering?

*Id.*

<sup>108</sup> Professor Peter Schuck, of Yale Law School, asked in 2005, “how do we know that faculty members, whatever their personal beliefs, teach in a biased fashion?” *Id.* at 650 (citing Peter H. Schuck, *Leftward Leaning*, AM. LAW., Dec. 2005, at 78). The answer is, of course, that we do not. We only have suspicion, and the reports of ideologically conservative students who, for whatever reason, feel disenfranchised.

<sup>109</sup> For example, a staunch supporter of a woman’s right to choose might nonetheless present the case that the government should restrict or even prohibit abortions on a variety of grounds. Similarly, a firm believer in government regulation of the environment could choose to present the role of the government from the perspective of someone who believes in smaller, less intrusive government and instead would rely on free market influence to address problems.

<sup>110</sup> Professor Herman suggests these, as well as the possibility of engaging the opinions of a variety of students. Herman, *supra* note 111, at 650. The extent to which students are equipped or even willing to

from anecdotal evidence that this does not appear to be happening, at least at the most elite institutions,<sup>111</sup> there are reasons why these approaches are unlikely to be completely satisfactory. First, not all academics agree that an objective presentation is preferable.<sup>112</sup> Additionally, those who seek to present both sides to issues may not really be doing justice to the viewpoints that they themselves do not possess.<sup>113</sup> Failure to be open about potential personal bias may also be regarded as a subterfuge by those who are free to do online searches to learn about outside affiliations of law professors, and to read their scholarship.<sup>114</sup>

An alternative approach is to have schools associated with particular ideologies that students are free to self-select if they want a more familiar or supportive environment.<sup>115</sup> Henry Manne took this approach when he was working to develop a law and economics oriented curriculum at George Mason Law School.<sup>116</sup> Manne expressly disclaimed any interest in “‘balance’ or any concern with ideology at all.”<sup>117</sup> On the other hand, he did want an entire faculty devoted to the Law and Economics paradigm, which was not then available anywhere else.<sup>118</sup> Certain schools, notably some of those associated with particular religious groups, have mission statements that promote this approach, offering a place where conservative viewpoints are

debate faculty members who have often spent years specializing in the particular field being discussed is, naturally, subject to doubt.

<sup>111</sup> See *supra* notes 59–63 and accompanying text.

<sup>112</sup> Professor Henry Manne, credited with founding the American law and economics movement, once said: “I think the best teaching, and therefore the best preparation for lawyering, is done by professors who are intellectually committed to the views they propound and who present their case as strongly as they can.” Herman, *supra* note 111.

<sup>113</sup> It is difficult to fully and persuasively articulate views you do not hold.

<sup>114</sup> Professor Herman explains her ultimate decision to disclose her personal bias, and her affiliation with the ACLU, as follows:

On balance, I have concluded that it is better to disclose my ACLU affiliation to my students at the beginning of a semester, because then, at least, students will have equal knowledge about me, whatever that knowledge is worth, and because I do not wish to send the message that my affiliation is something to be hidden.

Herman, *supra* note 111, at 651.

She also acknowledges that she is unsure that she can truly be neutral, “or that [she] can even identify how [her] activism influences [her] . . . .” *Id.* at 657 (indicating she is skeptical about objectivity in teaching, scholarship, or as a public intellectual given in part because law students are capable enough to accept or reject ideologies present in the classroom).

<sup>115</sup> See Sam Favate, *Looking for a Law School to Fit Your Politics?*, WALL ST. J.: L. BLOG (Oct. 11, 2012, 12:42 PM), <https://blogs.wsj.com/law/2012/10/11/looking-for-a-law-school-to-fit-your-politics/>.

<sup>116</sup> Rick Garnett, *More on Diversity in Law Schools*, PRAWFBLAWG (Dec. 8, 2005), [http://prawnsblawg.blogs.com/prawnsblawg/2005/12/more\\_on\\_diversi.html](http://prawnsblawg.blogs.com/prawnsblawg/2005/12/more_on_diversi.html) (quoting Henry Manne).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

prevalent.<sup>119</sup> This does not address the problem that public institutions in general, and most elite institutions in particular, have the liberal bent so clearly documented in a variety of studies.<sup>120</sup> In addition, the reality is that we should all want our students to have access to a balanced, finely-honed depiction and discussion of “the” law, where it is, where it is going, and where it should be heading. We don’t want, or at least the general idea is that we do not want, one-sided depictions and discussions. Certainly, to the extent that diversity is valued, it ought to be a value everywhere.

Yet another point worth making is that, even if classrooms are overwhelmingly liberal, this may not have a significant impact on students and their perspectives.<sup>121</sup> It is certainly true that plenty of law graduates manage to retain their conservative tendencies, even after attending the most liberal of law school. For proof of this statement, we need look no further than the Supreme Court. Some of the most conservative justices in recent years graduated from Harvard, including Justice Scalia and Chief Justices Roberts and Rehnquist, while conservative Justices Alito and Thomas both graduated from Yale Law School.<sup>122</sup> Judge Richard Posner once remarked in response to the McGinnis study discussed earlier in this article<sup>123</sup> that he does not think the “liberal bias of law school faculties has much impact on the students.”<sup>124</sup> On the other hand, it is not unreasonable to suspect that systematic exposure to liberal points of view will have some sort of impact on students. As one commentator explained, “[i]t seems likely that professors’ decidedly liberal ideology has a significant influence on what their students think. After all, spending two to four hours a week for over three months listening to an articulate, knowledgeable, skilled rhetorician expound on the law must have some persuasive effect.”<sup>125</sup>

All of this aside, however, there is an even more important reason to make viewpoint diversity the focus of attention, especially in the context of

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<sup>119</sup> By way of example, both the Ave Maria and BYU law school mission statements are excerpted earlier. See *supra* note 109.

<sup>120</sup> See *supra* notes 59–63, 66–67 and accompanying text.

<sup>121</sup> See generally McGinnis et al., *supra* note 95.

<sup>122</sup> Biographies of current and still living Supreme Court Justices may be found on the official website of the Supreme Court of the United States. *Current Members*, SP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 15, 2018). Chief Justice Rehnquist’s and Justice Scalia’s biographical data may be found at [biography.com](http://www.biography.com). *William Rehnquist*, BIOGRAPHY, <http://www.biography.com/people/william-rehnquist-9454479#early-life-and-career> (last visited Mar. 2, 2018); *Antonin Scalia*, BIOGRAPHY, <http://www.biography.com/people/antonin-scalia-9473091> (last visited Mar. 15, 2018).

<sup>123</sup> See *supra* notes 112–15 and accompanying text.

<sup>124</sup> Liptak, *supra* note 42.

<sup>125</sup> Peter H. Schuck & Brian Leiter, *Do Law Schools Need Ideological Diversity*, LEGAL AFF. (Jan. 23, 2006), [http://legalaffairs.org/webexclusive/debateclub\\_diversity0106.msp](http://legalaffairs.org/webexclusive/debateclub_diversity0106.msp).

faculty hiring at law schools. Academia is supposed to be based on a free and open exchange of ideas.<sup>126</sup> We pride ourselves on being open-minded and intellectually curious, as well as intellectually honest.<sup>127</sup> Law schools in particular are expected to be training grounds for a profession where a sense of ethical morality is of the highest importance. The last thing we should want to do is adopt a pretextual excuse to “get around” the requirements of the law. We want neither to engage in a subterfuge to hide our real motives nor to engage in dishonesty to evade the dictates of the law. This, too, has been noted before. “The race-based ‘diversity’ rationale is even more disturbing for what it shows us about the modern university. In light of its educational missions, a university has a particular obligation to logical argumentation, and a duty to reject subterfuge.”<sup>128</sup> The reality is that if law schools claim to support diversity, when all they really want is to address racial imbalances or inequalities of opportunity outside academia, this is doing “a disservice to academic values.”<sup>129</sup>

## VI. HOW DO WE GET THERE?

Under current Supreme Court jurisprudence, we have been told that targeted racial preferences are impermissible (although race can be one “plus factor” among many),<sup>130</sup> and there is little (if any) support for direct preferences for conservative law professors over others who, aside from ideology, would seem to be better qualified. In fact, advocating for

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<sup>126</sup> “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 312 (1978) (citing *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

<sup>127</sup> See *Law Professors in the Discharge of Ethical and Professional Responsibilities*, ASS’N AM. L. SCH., <https://www.aals.org/members/other-member-services/aals-statements/ethics/> (last visited Mar. 17, 2018) (“The scholar’s commitment to truth requires intellectual honesty and open-mindedness. Academic freedom enables and encourages a professor to state arguments and conclusions frankly, even if unpopular.”).

<sup>128</sup> McGinnis & Schwartz, *supra* note 53.

<sup>129</sup> Liptak, *supra* note 42 (quoting Peter H. Schuck, a Yale law professor and the author of *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2006)). “We have a higher responsibility to our students, ourselves and our disciplines,” he said, “that our preference for ideological homogeneity and faculty-lounge echo chambers betrays.” *Id.* For another list of potential ways in which pervasively liberal law faculties might have a significant, and unanticipated impact, see McGinnis et al., *supra* note 95, at 191–99 (listing as concerns the potential influence of law professors’ joint public statements on issues of public concern, their potentially biased stock of legal ideas, and their ability to influence the reputation of judges).

<sup>130</sup> See *infra* note 147.



preferential treatment on the basis of ideology would be less effectual than spitting into the wind.<sup>131</sup>

First, there is little evidence that conservatives are in favor of preferential treatment. They generally oppose any affirmative action in its other incarnations and seem equally likely to do so in this context.<sup>132</sup> Second, it would be almost impossible to develop a universally-viable test of ideology.<sup>133</sup> Most measures that have been used are themselves proxies for determining conservative ideology, so that someone who belongs to the Republican Party or attends a fundamentalist Christian church might still turn out to be a closet liberal or secret non-believer. We are also highly reluctant to make inquiries about political affiliations and contributions, and even thinking about looking at that kind of information feels contrary to deeply held beliefs that such matters should be private.<sup>134</sup> Even if we developed some better indicia that might enable us to determine who is a “real” conservative, there are no guarantees of honest responses to any kind of survey (and a potentially large incentive for shading the answers to those that

<sup>131</sup> With apologies to Jim Croce, whose lyrics to *You Don't Mess Around with Jim* offer up the futility of “tug[ging] on superman's cape,” “spit[ting] into the wind,” “pull[ing] the mask off that old lone ranger,” as well as “mess[ing] around with Jim.” JIM CROCE, *YOU DON'T MESS AROUND WITH JIM* (ABC Recordings 1972).

<sup>132</sup> The same conservative academics who decry the lack of conservative voices often denounce affirmative action even if it would operate in their favor. Consider Professors Jon A. Shields and Joshua M. Dunn, who authored a book entitled *PASSING ON THE RIGHT: CONSERVATIVE PROFESSORS IN THE PROGRESSIVE UNIVERSITY* (2016). Although they call for “affirmative action” for conservative professors, they acknowledge that is mostly tongue-in-cheek. Steve Byas, *Do Conservative Professors Need Affirmative Action?*, NEW AM. (Mar. 23, 2016), <https://www.thenewamerican.com/culture/education/item/22825-do-conservative-professors-need-affirmative-action> (“We don't endorse preferences in graduate admissions and hiring.”). The reluctance of conservatives to call for anything like affirmative action has not gone unremarked. See, e.g., Elie Mystal, *Conservative Law Profs: Just Say You Need 'Affirmative Action' for Intellectual Diversity and We'll End Hiring Discrimination Against You*, ABOVE L. (Jan. 9, 2012, 5:48 PM), <http://abovethelaw.com/2012/01/conservative-law-profs-just-say-you-need-affirmative-action-for-intellectual-diversity-and-well-end-hiring-discrimination-against-you/>.

<sup>133</sup> Studies seeking to document the “conventional wisdom” which suggests that law school faculties are, for the most part, overwhelmingly liberal in outlook, tend to use proxies for ideology such as federal campaign contributions to Democrats vs. Republicans. See McGinnis et al., *supra* note 95; McGinnis & Schwartz, *supra* note 53; see also Lizotte, *supra* note 80 at 649–50 (noting the difficulty of collecting accurate information about ideological viewpoints, albeit in the context of student applications to law schools). It would be impractical to attempt to develop any kind of direct measurement of ideology, and this article does not suggest that we try to do so.

<sup>134</sup> Even when it comes to categories where law schools do collect information, such as gender identity and sexual orientation, all that is collected is self-identification, and no systematic effort is made to ascertain the validity of such self-assessments. Instead, we recognize that there is a right to refuse to disclose, or the right to be “in” as well as the right to be “out.” For one discussion of this right, in the context of New Jersey public schools, see Jeanne LoCicero, *The Right to Be Yourself: LGBT Students in New Jersey Public Schools*, N.J. LAW., June 2013, at 48, 50.

are perceived as desirable).<sup>135</sup> Additionally, there is absolutely no guarantee that a conservative would obediently stay that way.<sup>136</sup> Nor would we want such a guarantee, as one of the ideals of academia ought to be that we all keep open minds about the possibility that we are less than completely correct.<sup>137</sup>

Third, we have spent untold resources chasing after racial diversity, and this paper argues that there is a real possibility that these efforts have to some extent backfired, at least in terms of increasing racially based resentment and hostility.<sup>138</sup> There seems to be little reason to suggest that we should devote the same kinds of resources in terms of time and money to either collecting data, or documenting efforts to address the kinds of imbalances discussed in this article. In addition, in these times of economic austerity for universities and law schools across the nation, there is almost no possibility that funds would be advanced towards such efforts.

Instead of the approaches that have been taken up to this point with regard to race, this article suggests that we, the members of law faculties, most of whom have at least some role in future hiring decisions, consider our actions in light of the apparent reality that law school faculties suffer from a significant lack of ideological diversity.<sup>139</sup> We need to be aware that it is easy

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<sup>135</sup> There are many applicants for every position in law teaching, and most of these individuals have mentors already in the teaching academy. If it becomes known that there is some overt bias towards conservative ideology in the hiring process, it would be surprising if this fact does not become quickly known to candidates for faculty positions.

On the other hand, there are certainly some affirmative things that might be considered. Free market, anti-government, and anti-regulation positions are typically associated with conservative points of view, as are certain positions involving domestic relations that are rooted in the predominantly Christian traditions. A candidate who has written from these perspectives, or has a job talk advocating from these points of view probably has an outlook that would bring diversity to most law faculties. Because of the time required to produce scholarship of thoughtful presentations, this is likely to be a more reliable determinant of ideology than a mere recitation of political affiliation or sympathies.

<sup>136</sup> Consider the apparent shifts in ideology that have been observed following the appointments of some individuals to the United States Supreme Court. One recent scholarly article which studies the ideological positions of Supreme Court Justices since 1937 concluded that "virtually every justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times." Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. REV. 1483, 1486 (2007).

<sup>137</sup> Professor Herman calls for "open-mindedness" as a "better and more realistic goal than objectivity." Herman, *supra* note 111, at 640. She writes: "I believe that we should all strive to keep an open mind and listen to ideas that challenge our own view, whether from students, colleagues, or even those we would classify as our ideological adversaries." *Id.* As law professors, we have a duty to "convey to our students an abiding respect, even awe, for the complexity of law in society, and we should exhibit the ideological humility that this complexity implies." Schuck & Leiter, *supra* note 142.

<sup>138</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (Brennan, J., dissenting) ("State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.").

<sup>139</sup> As Professor Herman acknowledges:

and comforting to hire someone who thinks like we do. It feels right to consider whether someone will be an interesting colleague and will “fit in” with the academic environment we have been helping to create.<sup>140</sup> In addition, psychological research tells us that we have an innate predisposition to like and be attracted to those who are seen as being “like” us.<sup>141</sup> This is the problem of implicit bias. While it is true that whites may be implicitly biased against members of racial minorities,<sup>142</sup> our tendency to gravitate towards individuals who are “like us” also means that we are predisposed to think kindly of people who agree with us. We should be careful not to allow this kind of bias to adversely affect hiring decisions, just as we are generally careful (or try to be careful) not to allow racial considerations to interfere with objectivity about who will serve as the best colleagues at our respective law schools.

Consider the difference in tone between these two ideas. The first possibility is: we should give racial preferences in order to make sure that a sufficient number of persons of color are included on our faculties in order to insure diversity. The second is: we should be aware of our innate

As a member of a law school faculty, I play some role in hiring faculty members and in decisions about reappointments, promotion, and tenure. I agree that having a more diverse range of viewpoints on my faculty would be advantageous—to me, as well as to the students. I would like to have colleagues who will challenge my ideas, and I would like to have colleagues who will fill out the ideological spectrum so that I can worry less about providing students with views that will balance my own.

Herman, *supra* note 111, at 649.

<sup>140</sup> “In hiring committees, liberal faculty might also question their natural preference for like-minded colleagues. (Progressive professors often say that they prefer to hire liberals, all else being equal.)” Jon A. Shields & Joshua M. Dunn Sr., Opinion, *Do Universities Need Affirmative Action for Conservative Professors?*, L.A. TIMES (Mar. 18, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0320-shields-dunn-conservative-affirmative-action-20160320-story.html>.

<sup>141</sup> See, e.g., Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1726 (1995) (suggesting that schools prefer candidates who are “more familiar, more comfortable, more like one's own kind”); Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1670 (1990) (showing that small group dynamics cause self-propagation). In the case of law schools, we also have a demonstrable bias towards hiring our own graduates, those whom we have seen in action, trained, and evaluated with our own biases firmly in place. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 277 (1997) (“Finally, the strong preference that schools awarded their own graduates confirms that hiring is more than just a search for candidates with the strongest objective indicia of achievement. The ‘inbred advantage’ may signal that faculties prefer candidates with the distinctive legal training and intellectual perspectives that their institutions have provided.”).

<sup>142</sup> For example, Yale Professor John Dovidio, has concluded that “unconscious bias is pervasive, and unconscious biases by whites impact nearly every aspect of black lives, including vital areas such as health care and employment.” Robert Mitchell, *Yale Professor Examines Unconscious Biases by Whites*, HARV. GAZETTE (Dec. 7, 2015), <http://news.harvard.edu/gazette/story/2015/12/yale-professor-examines-unconscious-biases-by-whites/>.

predisposition to prefer people who we see as being like us, and of our tendency to prefer individuals who essentially share our world view, in order to insure diversity. The first option, which seems to capture prevailing attitudes and policies about diversity, captures the apparent reality that law schools use diversity to try to improve representation and participation by persons of color. It also suggests that it is only through “preferences” that we will be able to find such individuals because otherwise they might not meet our standards. It implies that such persons have to be “preferred” in order to achieve meaningful diversity. This would be consistent with treating race as a “plus” in and of itself.<sup>143</sup> It does not explicitly consider why it is necessary to look at race carefully, and it seems to suggest that race in and of itself is the important criteria, rather than remedying unconscious bias or achieving particular kinds of diversity in line with educational objectives.

The second sentence adopts the approach this article urges. In this paradigm, there is room for considering race in appropriate circumstances, but each school must start with an assessment of what kinds of diversity would most contribute to that community. As human beings we are innately predisposed to like people who look, act, and talk like us. We should watch out for that and check any initial impulses to be certain that we are not making judgments based on race, ideology, or other characteristics (either positive in favor of some individuals or negative weighing against others). We should also acknowledge that the kind of judgmental bias that appears to have been overlooked far more often in academia, at least based on the lack of ideological diversity present on law faculties today, is that we have been biased against those who disagree with us about policy matters. This is

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<sup>143</sup> The U.S. Supreme Court has apparently adopted this conception of race as a “plus factor,” at least in the student admissions context. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (citing with approval admissions policies in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”). This notion of race as a “plus” continues to be relied upon by the Court. “When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003). In *Fisher I*, the Court specifically characterized *Grutter* as upholding race as “one of many ‘plus factors’” that could be used in an acceptable admissions policy. 570 U.S. 297, 305 (2013). It is not surprising that academic commentators adopt the same terminology. See Suzanne E. Eckes, *Diversity in Higher Education: The Consideration of Race in Hiring University Faculty*, 2005 B.Y.U. EDUC. & L.J. 33, 35 (2005) (noting that courts consider the validity of “the use of race as one of many factors, or as a plus factor, in university admissions”); Higgins, *supra* note 48, at 32–33 (talking about race as a “plus” to be considered with other factors); William D. Evans, Jr., *Reverse Discrimination Claims - Growing Like Kudzu*, MD. B.J., Jan.–Feb. 2004, at 48, 48 (suggesting that the law requires an analysis of “the extent to which ethnicity or race may be a ‘plus factor’ in the academic admission process”).

important because social science research suggests that awareness of bias is often the first step to addressing prejudices.<sup>144</sup>

As it stands today, there is plenty of evidence to suggest most law faculty members are aware of racial bias.<sup>145</sup> There is little to suggest that we have taken notice of the bias in favor of liberal points of view when it comes to making faculty hiring decisions.<sup>146</sup> Similarly, data indicates that a conscious

<sup>144</sup> Obviously, it would be impossibly difficult to address subconscious stereotyping and prejudices if they are not even acknowledged. “[O]ne of the worst ways to advance in the battle against racism is to deny the possibility of its continued existence: we cannot address and control behavior that we say doesn’t exist. It is possible to overcome subtle prejudice, but first we have to recognize that the problem remains.” Jason Marsh, Rodolfo Mendoza-Denton & Jeremy Adam Smith, *Introduction to ARE WE BORN RACIST?: NEW INSIGHTS FROM NEUROSCIENCE AND POSITIVE PSYCHOLOGY* 1, 6 (Jason Marsh et al. eds., 2010). Dr. Fiske suggests:

While we may be hardwired to harbor prejudices against those who seem different or unfamiliar to us, it’s possible to override our worst impulses and reduce these prejudices. Doing so requires more than just good intentions; it requires broad social efforts to challenge stereotypes and get people to work together across group lines.  
Fiske, *supra* note 21.

When we have broad and public pushback against such efforts, any chances of success in moving past the worst of unconscious prejudice is diminished. In other words, “[b]oth science and history suggest that people will nurture and act on their prejudices in the worst ways when these people are put under stress, pressured by peers, or receive approval from authority figures to do so.” *Id.*

It therefore seems both intuitive and obvious that we need to work to override any subconscious bias against those who we acknowledge in our conscious thoughts to be of equal worth and value. As one commentator suggested:

Although the research overwhelmingly supports the existence of implicit bias, it also indicates that implicit bias is malleable. We can construct new mental associations to override those in our subconscious. We do this by:  
heightening our awareness of our own implicit biases;  
exposing ourselves to individuals who, and situations that, do not align with our subconscious associations;  
engaging in deliberative rather than off-the-cuff decision making; and  
providing reasoned explanations for decisions that acknowledge the initial impetus of implicit bias.

Sarah Q. Simmons, *Litigators Beware: Implicit Bias*, *ADVOCATE*, Mar.–Apr. 2016, at 35, 36 (2016).

<sup>145</sup> A Westlaw search on September 16, 2016 seeking law review or journal articles that spoke about “implicit bias” in the same sentence as either race, racial, racism, or racist, turned up 897 search results. WESTLAW, [www.westlaw.com](http://www.westlaw.com) (search “‘implicit bias’ /s race racial racism racist”; then follow “Secondary Sources” hyperlink) There were 59 publications with “implicit bias” in the title or subtitle of the work. *Id.* (search “advanced: (“implicit bias” /s race racial racism racist) & TI(Implicit Bias)”). In the first half of 2016, there were six articles satisfying this criterion: Caleb J. Fountain, *Client Perjury, Implicit Bias, and the Problem of Actual Knowledge*, 30 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 49 (2016); Michael J. Higdon, *Beyond the Metatheoretical: Implicit Bias in Law Review Article Selection*, 51 *WAKE FOREST L. REV.* 339 (2016); Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 *CARDOZO J.L. & GENDER* 229, 243 (2016) (including an entire section on the intersection of gender and race); Jennie Bricker, *Bowling Barbarians: An Exploration of Implicit Bias*, *OR. ST. B. BULL.*, May 2016, at 16; Judge Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, *BOSTON B.J.*, Summer 2016, at 3; Simmons, *supra* note 148.

<sup>146</sup> As noted throughout the footnotes in this article, a tremendous amount has been written about

effort can overcome a significant degree of bias, even in the case of racial predisposition, which appears to be innate.<sup>147</sup>

In the past few decades, law school faculties have made significant strides in making sure that we do not inadvertently exclude those who do not share our race or gender,<sup>148</sup> but we have not made equal strides towards

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implicit racial bias. Yet research suggests that “coalition-based preferences trump race-based preferences. For example, both Democrats and Republicans favor the resumes of those affiliated with their political party much more than they favor those who share their race.” Mina Cikara & Jay Van Bavel, *The Flexibility of Racial Bias*, SCI. AM. (June 2, 2015), <http://www.scientificamerican.com/article/the-flexibility-of-racial-bias/>.

One interesting note is that Harvard’s well known implicit bias test allows individuals to assess their implicit biases along several dimensions, including all the following: race, disability, sexuality, gender, age, skin-tone, presidents, Native American, weight, Arab-Muslim, Asian, weapons, and gender-career. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited Mar. 17, 2018). It does not include any assessment on implicit bias on ideological grounds or on any dimension of conservative versus liberal thought. See *id.*

<sup>147</sup> “Emerging research demonstrates that race-based preferences, even those that are automatic, seem to be malleable and dependent on both situational and dispositional factors.” Kubota, *supra* note 22 (citing the following two studies as support for this conclusion: Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERS. SOC. PSYCHOL. REV. 242, 243 (2002) (“[T]he evidence shows that automatic processes can be influenced by the perceiver’s motives and goals, and aspects of the situation.”); Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF STEREOTYPING, PREJUDICE, AND DISCRIMINATION 267 (Todd D. Nelson ed., 2009)).

As explained by Dr. Mendoza-Denton, an expert in the field of psychology and prejudice, “in-group” and “out-group” distinctions “are highly malleable.” Jaret, *supra* note 21. Exposure to people from groups you are not used to mixing with can help, “[h]aving someone you admire in public life speak out against prejudices can help shape your own attitudes,” and laws that “signal a social norm” can all help individuals revise their predisposition to favor only people we see as being “like” us. *Id.* We need to “broaden our contacts to include people who aren’t like us.” *Id.* This means race, but in the academic academy, it also means conservatives. See also Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53 (2006) (presenting evidence that implicit pro-white bias remained consistent among age groups ranging from kindergarten to adulthood, but explicit pro-white bias decreased in older age groups); Sophie Lebrecht et. al., *Perceptual Other-Race Training Reduces Implicit Racial Bias*, PLOS ONE (Jan. 21, 2009), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0004215> (training white individuals in recognition of black faces reduced implicit bias).

<sup>148</sup> “[D]iversity hiring in law schools has been a great success, at least as to ethnicity and gender. All large traditional affirmative-action groups in law teaching are now at or above parity with full-time lawyers, and such groups as women, minorities, and minority women are significantly over-represented in law teaching compared to working lawyers.” Jim Lindgren, *Law Faculty Diversity: Successes and Failures*, WASH. POST (Mar. 21, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/law-faculty-diversity-successes-and-failures/?utm\\_term=.fd2f542833ba](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/law-faculty-diversity-successes-and-failures/?utm_term=.fd2f542833ba) (citing James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013* (Nw. L. & Econ., Research Paper No. 15-07, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2581675](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581675)). Lindgren’s research is now published. See Lindgren, *Measuring Diversity*, *supra* note 65. This study used data on tenure-track faculty from 1997 and 2013 from the ABA and the 2011–2013 American Communities Survey to ascertain demographic information about the nation’s population of lawyers. The ultimate conclusion of Professor Lindgren’s paper is that “[a]fter four decades to make law faculties more representative of American society, they are probably less representative ideologically than they have

welcoming those whose ideological views do not accord with our own. This paper suggests that it is time this changed. Members of law faculties have a powerful role in the hiring of new faculty. While there does not appear to be any empirical data supporting this assertion, it is highly likely that, in the course of faculty hiring discussions, virtually every member of a law faculty has heard comments like, “she would fit in well, here,” or “he would be a great colleague,” or “I would enjoy reading that candidate’s scholarship.” Instead of that, how often do faculty members think about whether a candidate would really add to the mix of ideas, or sharpen the debate, or present a different perspective for consideration?<sup>149</sup> This article suggests that being aware of the bias towards people who think like us, and acknowledging that a lack of ideological diversity on law faculties is a problem, would be a significant step towards solving the problems discussed in this article.

In fact, appointments committees and law faculties embarking on the incredibly challenging but crucial role of hiring new faculty members should talk explicitly and frankly about diversity, implicit bias, and what efforts are being made to address imbalances in each individual school’s community. Certainly, if there is a law faculty that lacks any representation of people of color, or of women, those deficiencies absolutely need to be discussed. But it is not enough to note that a particular group is missing. For example, I would not expect to hear something like, “Hey, we have no Satanists, Carol; do you think we have to hire one of those?” Instead, the dialogue has to be about what the lack of representation means for the community. Blacks have

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been for several decades.” *Id.* at 150.

<sup>149</sup> In job talks, how many candidates for a typical position focused on domestic relations discuss papers advocating for greater rights for LGBT individuals? How many talk about the need to preserve traditional marriage? In looking for individuals to talk about employment issues, how many are anti-union? How many are pro-employer rights, as opposed to protective of employee interests? In environmental law positions, how many candidates are anti-regulation and property-rights focused as opposed to advocating for increased environmental activism? My experience suggests that the typical slate of candidates brought back to law school campuses, year after year, have a profound ideological bias towards the left. In one sense, that is comforting for most academics, because those are generally the positions that most of us hold. But when the interests of diversity are considered, this is also quite disturbing.

Part of this may be attributable to the candidates themselves. Perhaps conservatives self-select away from academia, or perhaps conservatives at heart mask their true inclinations in order to be seen as more acceptable. If the latter of these two options is true, one would expect to see a significant increase in the number of conservatively-slanted views being expressed after tenure, and this does not appear to be the case. The possible problem of self-selection, where conservatives rarely choose to enter the market, was that this idea was once used to explain why so few racial minorities were hired. The claim was that there were not any to be found, but it turns out that when efforts to include them in the academy were instituted, there are a larger number of interested and qualified individuals from a variety of races interested in teaching. Until similar efforts at reaching conservatives are made, it is impossible to know if they can be attracted to law school faculty positions.

special insights about life in our society. Women do as well. But, so do conservatives, in a huge way. Ignoring the potential that conservative scholars offer for improving the quality of discourse and thinking in law schools pretty strongly suggests we have not been looking at diversity as much as we have been using that as a buzzword to allow us to try and address racial inequality.

The suggestions offered here are not the same as suggesting that we continue using race as a “plus” in hiring considerations, and merely add (or purport to add) conservative outlooks to the things that we consider to the mix. Rather, we need to be consciously aware that we are predisposed to like members of our own race unless we have worked to overcome that bias (usually through sustained effort and interaction with people whose racial profiles are different from our own), and that we are similarly likely to unconsciously prefer people who think like us. We need to truly ask how much a given faculty candidate will add to the mix of viewpoints and perspectives that can enrich the law school community for students and others. We can and should continue to be vigilant to be sure that subconscious bias is not nudging us away from hiring people of color, or women, but we need to be especially vigilant at insuring that we are not turning away from individuals who simply disagree with us on the conservative-liberal ideological spectrum, because it certainly looks like we have been allowing that to happen for a long time. And law schools are the poorer for it.

One final point is worth making here. This article does not suggest that we are anywhere close to achieving a color-blind society. The experiences of most blacks and other persons of color are markedly different from those of most whites.<sup>150</sup> While the racism of the Jim Crow era may have disappeared from mainstream America, we continue to live in a society plagued with not only the residual effects of institutionalized racism, but the reality of implicit bias that continues to divide us.<sup>151</sup> Unfortunately, using the mantra of

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<sup>150</sup> See, e.g., *On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, PEW RES. CTR. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> (demonstrating the stark disparity between the views of whites and blacks on various aspects of racial equality, such as the considerably higher number of whites than blacks believing the United States has already made the necessary changes to give blacks racial equality with whites).

<sup>151</sup> See Matthew Clair & Jeffrey S. Denis, *Sociology of Racism*, in 19 THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 857, 859 (James D. Wright ed., 2015) In elaborating on different types of racism, Clair and Denis write:

[N]ew forms of racism . . . are expressed not in avowed racist attitudes but rather in contextually specific moral and symbolic principles that stereotype subordinated racial groups as undeserving and thereby justify existing racial inequalities . . . . Another explanation for persistent racial discrimination and inequality despite the decline in overt racist attitudes can be found in the growing literature on implicit bias. An implicit bias is an unconsciously



“diversity” to attempt to remedy these problems creates a plethora of additional problems. One, it makes us complicit in a manipulative subterfuge. We are not really valuing diversity; we are seeking to remedy past injustice and lingering racism. That kind of dishonesty has a huge cost to the reputation of institutions of higher learning. Second, it means that we do not really get to achieve the benefits of diversity, because that isn’t really what we have been seeking. The need to look at diversity honestly and openly, and the potential benefits of doing so, is the primary focus of this article. But in addition to that, the current approach prevents us from considering that there might be constitutional alternatives that allow us to act openly to seek to address the problems of implicit racial bias.

Under current constitutional jurisprudence, it is not permissible to use race-conscious admissions or presumably hiring policies to remedy past injustice or simply to seek a racially balanced community.<sup>152</sup> In fact, race is not supposed to be considered unless there are demonstrable “educational benefits” from doing so, and in the case of diversity, it is supposed to be only one of a number of factors.<sup>153</sup> However, the role of institutions of higher learning in our society is broader than merely educating future generations of students. If education of students was the sole mission, we would not value or require faculty scholarship, faculty research initiatives, or service and outreach. Institutions of higher learning have a broader purpose and function, and that includes addressing current problems in society. One of the points made in this article is that we can overcome implicit bias if (1) we acknowledge it, (2) we make a conscious effort to overcome it, and (3) we are exposed to evidence that our bias is unjustified. The best way to make that happen in the context of race is to make sure that we talk openly and frankly about the nature of bias and modern racism, to talk about the problems it causes and the benefits of addressing those issues, and then to work to create communities where we interact regularly with persons of color so that our innate predisposition to prefer those of our own race is overcome through personal experience.

This not the same as saying we need a diverse community in order to improve educational discourse. This article has sought to provide evidence that while diversity matters, race should matter less than ideology, at least when it comes to seeking diverse law faculties. Instead, the value of race-conscious decisions might be in a different direction completely. The focus

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triggered belief in the inferiority of, or negative attitude toward, a group(s).”

*Id.*

<sup>152</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

<sup>153</sup> *Id.*

would not be on remedying past injustice, or adding different voices to the academic community. Instead, it would involve an honest assessment of the extent to which innate bias does impact our society, as well as a conscious decision to encourage cooperation and interaction. This could result in some very different considerations about the value of race-conscious policies, and the value of adding persons of color to academic communities. Adding black voices who then insist on separate “safe spaces” and the right to have clubs and groups which exclude members of other races might increase diversity at the institution, but it would not at all be consistent with the possible approach that this article suggests. In the opinion of this author, based on the available data, we are all innately racist,<sup>154</sup> and simple diversity does not seem to address that problem.

I do not purport to be a constitutional scholar. I certainly cannot predict the future direction that the Supreme Court might take with regard to race. But, there are benefits to everyone from exploring whether or not approaching the needs of law schools apart from racial representation would work, and those benefits are unlikely to come if we continue to proclaim that we are seeking broad-based diversity, while hoping that such initiatives solve the problems we are not even openly admitting we want to address. In addition, insofar as we really do believe in the value of diversity, we need to admit that race is not the dimension along which we fail the worst, at least in the context of seeking law faculties where differing perspectives are represented.

Before concluding that this is an impossible task, given that there is no clearly defined criteria by which to evaluate whether a faculty candidate is conservative, ask if your hiring committees look for job experience in conservative think tanks, or whether they seek out prior scholarship taking an anti-regulatory stance or advocating conservative positions. When you watch faculty presentations by those seeking to join your faculty, ask if you are subconsciously favoring views with which you agree, rather than ones that diverge from your ideological positions. Faculty hiring is difficult. Doing it right is more so, but it is hard to think of things that can make a greater difference to the legal education we offer students.

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<sup>154</sup> Charles R. Lawrence III encapsulated this notion when he wrote:

Americans share a common historical heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions out of nowhere. To the extent that this cultural belief system has influenced all of us, we are all racists.

*The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).