The Quest for a Diverse Faculty: Theory and Practice

JOHN HASNAS*

ABSTRACT

For the past half century, universities and professional schools have been on a quest for the academic analog of the Holy Grail—a diverse faculty. In this article, I distinguish two types of diversity: social group diversity and viewpoint diversity, examine the argument made by the advocates of faculty social group diversity, and conclude that it is a strong prima facie *argument for not only faculty social group diversity, but faculty viewpoint diversity as well. I then examine the method universities and professional schools currently employ to increase social group diversity, show that there exists a superior method that, in theory, could cheaply and equitably produce the desired diversity in a single year, and explain why, at present, this method cannot be put into practice. I also examine what is required to attain faculty viewpoint diversity and show that, unlike social group diversity, faculty viewpoint diversity could be quickly achieved at relatively low cost. I conclude by suggesting that universities and professional schools are most likely to realize the benefits of faculty diversity by redirecting their efforts toward making the theoretically superior method of attaining faculty social group diversity practicable while, simultaneously, actively pursuing faculty viewpoint diversity. In doing so, I offer my analog of a map to the Holy Grail.*

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INTRODUCTION

In the fall of 2015, a wave of student protest swept across America's universities. At the University of Missouri, students protesting what they saw as the administration's lack of an adequate response to a racial incident on campus forced the resignation of the university president.[1] At Yale, reports that black women had been barred from a fraternity party followed by an e-mail from an administrator suggesting that students offended by culturally insensitive Halloween costumes should just "look away" led to a "March of Resilience" protest attended by over one thousand students.[2] At Princeton, students took over the university president's office and staged a thirty-two hour sit-in in an effort to force the

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1. Susan Svrluga, *U. Missouri President, Chancellor Resign over Handling of Racial Incidents*, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/missouris-student-government-calls-for-university-presidents-removal/ [https://perma.cc/C8WF-6NXT].

2. *Now Yale Students March Against Racism on Campus Following Scandal over Halloween Costumes and Allegations a Frat Turned a Woman Away from a Party Because She Wasn't White*, DAILYMAIL.COM (Nov. 10, 2015), http://www.dailymail.co.uk/news/article-3310921/Yale-students-march-concerns-racial-sensitivity.html [https://perma.cc/4S2X-N963].

university to expunge Woodrow Wilson's name and image from the university due to his racist ideology.[3] At Brown, students participated in a "blackout" by dressing in all black to express solidarity with all students who experienced racism on campus.[4] Similar protests rapidly spread to other universities across the nation.[5]

As the protests spread, the various student groups assembled wide-ranging lists of demands that they presented to their respective administrations.[6] These lists almost invariably included the demand that the university hire more women and minority professors.[7] Student activists across the country were calling for a more diverse faculty.

Many universities heeded this call. Yale announced a $50 million, five-year, university-wide initiative to enhance faculty diversity.[8] Brown committed $100 million to hiring sixty additional faculty members from historically underrepresented

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3. Susan Svrluga, *Princeton Protesters Occupy President's Office, Demand 'Racist' Woodrow Wilson's Name Be Removed*, WASH. POST (Nov. 19, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/18/princeton-protesters-occupy-presidents-office-demand-racist-woodrow-wilsons-name-be-removed/ [https://perma.cc/G9V2-AQM9].

4. Lynn Arditi, *Brown, PC Students Protest Racial Discrimination on Campus*, PROVIDENCE J. (Nov. 13, 2015), http://www.providencejournal.com/article/20151113/NEWS/151119682 [https://perma.cc/T4T5-CBCK].

5. Alia Wong & Adrienne Green, *Campus Politics: A Cheat Sheet*, ATLANTIC (Apr. 4, 2016), https://www.theatlantic.com/education/archive/2016/04/campus-protest-roundup/417570/ [https://perma.cc/BLK4-CEHA].

6. *See* THEDEMANDS.ORG, http://www.thedemands.org/ [https://perma.cc/C54T-4R3Z] (last visited July 1, 2018).

7. *See, e.g.*, *Demands of Black Voices* (Nov. 20, 2015), https://static1.squarespace.com/static/541e2ec8e4b042b085c464d9/t/56515dfae4b033f56d2481bc/1448173050985/dukedemands.pdf [https://perma.cc/H9G9-KJP3] ("WE DEMAND . . . Increased Diversity in High-ranking Faculty and Administration [:] A. Increase the amount of women, Black, Asian, Latino/a, Native American and Queer people of color serving as faculty. B. Attain representation of women and professors of color in regular ranked and tenured faculty positions equal to their percentage in the student population by 2020.") (demands of "a group of unaffiliated and concerned students" at Duke University); *Graduate Solidarity Statement and Demands*, Concerned Graduate Students of Color at Brown University (Nov. 16, 2015), http://bluestockingsmag.com/2015/11/16/graduatesolidaritystatementanddemands/ [https://perma.cc/HGH9-BWKJ] ("We demand an increase in faculty of color hires and retention."); *Black & Brown Coalition Demands List*, Black and Brown Coalition at New York University, https://docs.google.com/document/d/1lp4uqt_Jxqm70vyWfnqXiDOPd0Wjoq4x77Y0Gf_W_Gw/edit# [https://perma.cc/YN89-6D8H] ("Have NYU make a renewed effort to have a university wide increase in tenure track faculty and administrators of color in every college on campus."); *A Collective Response to Antiblackness*, #WeDemandUNC, https://docs.google.com/document/d/1r1Rp3Tn8sPlfbn_bO3vQXOVRnDpaDvB_ctaBKXvbpNU/edit [https://perma.cc/D7H6-G423] ("We DEMAND more aggressive recruitment of Black faculty and faculty of color."); *The Plan for Dartmouth's Freedom Budget: Items for Transformative Justice at Dartmouth*, Concerned Asian, Black, Latin@, Native, Undocumented, Queer, and Differently-Abled students at Dartmouth College, https://static1.squarespace.com/static/541e2ec8e4b042b085c464d9/t/56515381e4b08f0af88df6cb/1448170369580/Dartmouth_Freedom_Budget_Plan.pdf [https://perma.cc/ATD7-FLEF] ("Make a multi-million dollar commitment coupled with hired positions focused on increasing numbers of faculty/staff of color (i.e. Asian, Black, Latin@, and Native faculty/staff) in all departments and offices at Dartmouth College and the Dartmouth graduate schools (Tuck, Thayer, Geisel)").

8. *Yale Launches Fiveyear, $50 Million Initiative to Increase Faculty Diversity*, YALE NEWS (Nov. 3, 2015), https://news.yale.edu/2015/11/03/yale-launches-five-year-50-million-initiative-increase-faculty-diversity [https://perma.cc/2SXM-6JWV].

groups over the next five to seven years.[9] And Princeton announced that it was "committing funds to support as many as 15 to 20 new hires that diversify the faculty."[10]

Yet the effort to diversify the faculty is nothing new. Colleges and universities have been pursuing vigorous affirmative action in faculty hiring for nearly half a century.[11] Academics have been extolling the importance of a diverse faculty in print for decades.[12] Multi-million dollar diversity initiatives predate the 2015 protests by years.[13] Virtually every major university continually exhorts its search committees to recruit more women and minority faculty.[14]

If a quest is a long and arduous journey in pursuit of a difficult to reach objective, then it is fair to say that the American academy is embarked on a quest for a diverse faculty. And if after fifty years of trying, universities feel compelled to invest hundreds of millions of additional dollars in the effort, then the quest is beginning to resemble a never-ending one.[15] A diverse faculty appears to be the academic analog of the Holy Grail, an object continually sought, but never obtained.

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9. *Brown Releases Final Action Plan to Create a Diverse and Inclusive Campus*, NEWS FROM BROWN (Feb. 1, 2016), https://news.brown.edu/articles/2016/02/diap [https://perma.cc/876D-86BE].

10. *Forging Faculty Diversity*, PRINCETON ALUMNI WKLY. (Apr. 22, 2015), https://paw.princeton. edu/article/forgingfacultydiversity [https://perma.cc/CVP8-6DK9]. Similar initiatives were undertaken by the University of Michigan. *See* Emily DeRuy, *The University of Michigan's Plan to Increase Diversity*, ATLANTIC (Mar. 17, 2017), https://www.theatlantic.com/education/archive/2017/03/the-university-of-michigans-slow-painful-plan-to-increase-diversity/519903/ [https://perma.cc/W96N-N46N]; Hub Staff Report, *Johns Hopkins Announces Faculty Diversity Initiative*, HUB (Nov. 30, 2015), https://hub.jhu.edu/ 2015/11/30/facultydiversityinitiative/ [https://perma.cc/X5KH-JBSU].

11. Orlando Taylor, et al., *Diversifying the Faculty*, PEER REVIEW, Summer 2010, https://www.aacu. org/publications-research/periodicals/diversifying-faculty [https://perma.cc/VD8K-DJVQ] ("The diversity of college and university faculties has been a subject of discussion, debate, and priority for several decades—particularly since the 1960s, when equity in higher education became a national priority as a result of the civil rights movement.").

12. *See, e.g.*, Derrick A. Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L. REV. 319 (1986); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PENN. L. REV. 537 (1988); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

13. For example, Harvard launched a $50 million initiative in 2005. Alan Finder, *Harvard Will Spend $50 Million to Make Faculty More Diverse*, N.Y. TIMES (May 17, 2005), https://www.nytimes. com/2005/05/17/education/harvard-will-spend-50-million-to-make-faculty-more-diverse.html [https:// perma.cc/A847-9Y32]. Columbia launched an $85 million initiative in 2005. *University Commits Another $100 Million to Faculty Diversity*, COLUMBIA NEWS (Oct. 6, 2017), http://news.columbia.edu/ content/UniversityCommitsAnother%24100MilliontoFacultyDiversity [https://perma.cc/95HF-BD4F], and the University of Pennsylvania launched a $100 million initiative in 2011. Anna Pan, *Penn Releases Diversity Action Plans: The University Will Spend an Estimated $100 Million Recruiting Diverse Faculty*, DAILY PENNSYLVANIAN (Aug. 1 2012), http://www.thedp.com/article/2012/08/penn-releases-diversity-action-plans [https://perma.cc/3L7J-35MM].

14. For example, until recently, Georgetown University's official memorandum governing faculty searches contained the admonition that "Every faculty search is a diversity search, and everyone involved in every search has an obligation to think and act on that assumption." Provost's Memorandum: Ordinary Faculty Searches and Offers, March 5, 2012 (on file with the author).

15. As I write this, we are fourteen years into the twenty-five year period that the Supreme Court predicted would be all that was required to attain academic diversity, something that appears rather doubtful given the current level of student protest over the lack of diversity on campus. *See* Grutter v.

In this essay, I explore why this is the case and suggest a way of ending the quest. I begin in Part I by distinguishing between two types of diversity: social group diversity and viewpoint diversity. In Part II, I examine the argument made by the advocates of faculty diversity and suggest that it is a strong *prima facie* argument for both social group and viewpoint faculty diversity. In Part III, I examine what is required to attain faculty social group diversity. To do so, I identify the drawbacks of the method universities and professional schools currently employ to increase faculty diversity, show that there exists a superior method that, in theory, could cheaply and equitably produce the desired diversity in a single year, and explain why, at present, this method cannot be put into practice. In Part IV, I examine what is required to attain faculty viewpoint diversity. Unlike social group diversity, I show that viewpoint diversity could be quickly achieved at relatively low cost. Finally, I conclude by suggesting that universities and professional schools are most likely to realize the benefits of faculty diversity by redirecting their efforts toward making the theoretically superior method of attaining faculty social group diversity practicable while simultaneously actively pursuing faculty viewpoint diversity. In essence, I offer the analog of a map to the Holy Grail; doing so with the full realization of the skepticism such maps inevitably engender.

I. Two Types of Diversity

In this essay, I discuss two distinct types of diversity: social group diversity and viewpoint diversity. Social group diversity refers to diversity with regard to membership in various socially significant groups such as race, sex, religion, national origin, sexual orientation, and disability. Efforts to increase the social group diversity of a faculty are efforts to ensure that the faculty contains non-negligible numbers of people from underrepresented social groups. Such efforts would be designed to increase the number of people of color, women, people of non-Christian and non-Jewish faiths, members of the LGBT community, and people with disabilities on the faculty.

Viewpoint diversity refers to diversity with regard to one's philosophical, ideological, or political beliefs and commitments. Efforts to increase the viewpoint diversity of a faculty are efforts to ensure that a wide variety of different intellectual viewpoints are represented on the faculty. Thus, a viewpoint diverse faculty would be one in which there are non-negligible numbers of faculty holding utilitarian, deontological, pragmatic, and Aristotelian philosophical viewpoints; Marxist, progressive/liberal, conservative, and classical liberal ideological viewpoints; and Democratic and Republican political viewpoints. In the contemporary academic milieu, efforts to increase viewpoint diversity would be designed to increase the number of faculty holding conservative and classical liberal ideological viewpoints, and Republican political viewpoints.

Bollinger, 539 US 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

Today, and for the past forty years, all administratively sanctioned efforts to increase faculty diversity have been efforts to increase social group diversity. I am unaware of any university or college that has undertaken an organized effort to increase viewpoint diversity.

II. The Argument for Diversity

A. The Nature of the Argument

Diversity is not synonymous with affirmative action. Affirmative action is the policy of giving preferential treatment to members of underrepresented groups. Diversity may serve as a ground for affirmative action. The value of a diverse workforce or student body or academic faculty can provide a rationale for affirmative action. However, there are other potential grounds for affirmative action that are unrelated to the value of diversity. One can argue for affirmative action on the ground that it is necessary to remedy the effects of past invidious discrimination, or to provide reparations for historical injustices, or to combat ongoing conscious or implicit biases, or to realize some conception of social justice. Diversity is simply one reason why affirmative action may be justified.

The argument for diversity is a consequentialist argument. Few would argue that diversity is valuable in itself or is a requirement of justice. Diversity is an instrumental value. It is valuable purely for the benefits it provides. A diverse faculty is valuable to the extent the academic benefits that derive from it outweigh the costs associated with it. Hence, the argument for a diverse faculty is an empirical one that requires the examination of its putative academic benefits.

B. The Benefits of Faculty Diversity
1. Social Group Diversity

To date, almost all the arguments for a diverse faculty are arguments for social group diversity.[16] To a large extent, the arguments for faculty social group diversity parallel the arguments for student social group diversity, with the benefits of the former overlapping with and reinforcing the benefits of the latter. So let us begin by considering the benefits of having a diverse student body.

Advocates of social group diversity usually identify four main benefits that are derived from having a diverse student body. They claim that student social group diversity improves the classroom learning environment, promotes cross-cultural understanding, enhances America's economic competitiveness, and helps realize the values of democratic governance.

The first claim is that a diverse student body provides a more effective classroom learning environment. This is because learning requires the robust exchange

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16. This is almost certainly due to the attention devoted to landmark Supreme Court cases such as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003) that address the constitutionality and legality of the use of race-based affirmative action in university admissions.

of ideas which is facilitated when people of differing social backgrounds participate in the discussion.[17] A diverse student body gives students the opportunity to learn from the experiences and perspectives of those different from themselves, which creates a richer educational experience.[18]

This benefit is obviously reinforced by having a diverse faculty as well as a diverse student body. Women and minority faculty can bring "an entirely different set of perspectives, experiences, and knowledge to bear on classroom discussion" of issues such as sexual assault, racial profiling, and myriad issues of political, legal, and ethical significance.[19] And if students can learn from the different experiences and perspectives of their fellow students, they certainly can learn from the different experiences and perspectives of their professors.

The second claim is that a diverse student body promotes cross-cultural understanding. This is because being exposed to people from different backgrounds breaks down unfair stereotypes and promotes understanding of those who come from different social circumstances.[20] This, in turn, promotes mutual respect, "encourages critical thinking, and . . . helps students learn to communicate effectively with people of varied backgrounds."[21]

Once again, this benefit is greatly amplified by having a diverse faculty. What could more effectively break down unfair stereotypes than seeing women and racial and ethnic minorities in the role of professor? Having women and minorities in the role of teacher and intellectual mentor certainly promotes mutual respect and requires students to communicate civilly and effectively with people from different backgrounds.

The third claim is that a diverse student body enhances America's economic competitiveness. It does this by better preparing students for today's global business environment in which one's customers and business partners will be of all races, religions, and ethnicities. A wide consortium of American businesses argue that "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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17. *See Grutter*, 539 U.S. at 330 ("'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds'" (citations omitted)).

18. *See On the Importance of Diversity in Higher Education*, AMERICAN COUNCIL ON EDUCATION (June 2012), http://www.acenet.edu/news-room/Documents/BoardDiversityStatement-June2012.pdf [https://perma.cc/AWA4-3P9F] ("Diversity enriches the educational experience [because w]e learn from those whose experiences, beliefs, and perspectives are different from our own, and these lessons can be taught best in a richly diverse intellectual and social environment."); *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (2000), https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB742/0/DIVREP.PDF [https://perma.cc/UJX4-ULYK].

19. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1560 (2011).

20. The Supreme Court has recognized that student diversity "promotes 'crossracial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Grutter*, 539 U.S. at 330 (citations omitted).

21. AMERICAN COUNCIL ON EDUCATION, *supra* note 18.

viewpoints."[22] But, if this is the case, then studying under professors with diverse backgrounds is probably even more valuable than merely interacting with a diverse group of fellow students.

The fourth claim is that a diverse student body helps realize the values of democracy. This is because "[e]ducation within a diverse setting prepares students to become good citizens in an increasingly complex, pluralistic society."[23] But, of course, the diversity of the academic setting is enhanced by both the diversity of the student body and the diversity of the faculty. Further, for a democratic government to retain its legitimacy, positions of political authority must be seen to be open to all members of society, which requires that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[24] This, in turn, requires that "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide [the necessary] training."[25] To the extent that such confidence is enhanced by the existence of a diverse student body, it is also enhanced by the existence of a diverse faculty.

Advocates for faculty social group diversity also claim that a diverse faculty provides at least two additional benefits that are distinct from those derived from having a diverse student body; specifically, that faculty social group diversity provides students from socially disadvantaged groups with valuable role models and improves the overall quality of academic scholarship.

Students from socially disadvantaged groups often internalize widely-held negative stereotypes of their limitations or inferiority. Seeing people like themselves in positions of intellectual authority can help such students overcome the self-doubt and other inhibitions that result from such internalization. By providing students with role models that demonstrate that people from all backgrounds can achieve intellectual excellence and are worthy of respect, faculty diversity can give students from socially disadvantaged backgrounds the confidence they need to succeed in their academic and professional endeavors.[26]

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22. *Grutter*, 539 U.S. at 330. *See also* Brief of the United States Students Association as Amicus Curiae in Support of Respondents at 18, Fisher v. University of Texas, 133 S. Ct. 2411 (2013) ("the joint amicus brief submitted by sixty five leading businesses—including major companies such as General Electric Company, General Mills, Inc., The Dow Chemical Company, Johnson & Johnson, The Procter & Gamble Company, and Xerox Corporation—explained that workers at all levels of an institution must have the skills to work well with diverse individuals, and that the ability to elicit different ideas and creatively combine them to reach solutions at work is an important proficiency that must be fostered through teaching future workers in a diverse educational environment.").

23. AMERICAN COUNCIL ON EDUCATION, *supra* note 18. *See also Grutter*, 539 U.S. at 330 (Because "'education . . . is the very foundation of good citizenship,' . . . the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . [to ensure] that public institutions are open and available to all segments of American society.").

24. *Grutter*, 539 U.S. at 331.

25. *Id*.

26. *See Johnson*, *supra* note 19, at 1558 ("The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color–and most effectively teaches them

Finally, advocates for faculty social group diversity claim that a diverse faculty would improve the overall quality of academic scholarship. This is not because there is a qualitative difference between scholars on the basis of sex, race, or ethnicity, but because there would be a wider range of perspectives brought to bear on academic questions. "Differences of perspective, experience and knowledge can influence . . . scholarship just as they can affect teaching."[27] When representatives of disadvantaged communities are excluded from university faculty, scholarship receives "contributions . . . from only a small number of people with ties to those communities."[28] A diverse faculty would increase the number of such otherwise excluded contributions, thereby increasing the "variety of positions, debates and styles of . . . academic writing that everyone would identify as resulting from the rise of minority . . . culture."[29] This, in turn, would enrich scholarly discourse.

Thus, advocates of faculty social group diversity claim that a diverse faculty improves classroom learning, promotes cross-cultural understanding, better prepares students for the contemporary global marketplace, promotes the values of democracy, provides women and minority students with valuable role models, and broadens and improves the quality of academic scholarship. In my judgment, this constitutes a strong *prima facie* case for undertaking efforts to increase the social group diversity of university and professional school faculty.

2. Viewpoint Diversity

Recognizing that the advocates of faculty social group diversity have produced a strong *prima facie* argument, of course, tells us nothing about whether the argument will ultimately be successful. Critics may dispute whether the putative benefits are realized[30] or argue that there are costs associated with faculty diversity that outweigh the enumerated benefits.[31] Or they may argue that even if the benefits outweigh the costs, considerations of justice restrain efforts to produce a diverse faculty.[32]

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that they in fact belong in law school and the legal profession, as well as that they have the ability to be topflight lawyers, scholars, judges, and policy makers."). *See also* Hodes Research, *The PHD Project: Survey of Professors* (2008).

27. *Johnson*, *supra* note 19, at 1558.

28. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 715 (1990).

29. *Id*.

30. *See, e.g.*, Ian Maitland, *Why the Business Case for Diversity Is Wrong*, 16 Geo. J.L. & Pub. Pol'y 731 (2018).

31. For example, critics may argue that using sexual, racial, or ethnic preferences to diversify the faculty may dilute the overall quality of the faculty because in many fields there are less highly qualified minority candidates available, or that using such preferences will raise unfair doubts about the abilities of those who receive them and produce resentment among those passed over because of their sex, race, or ethnicity.

32. For example, critics may contend that basing hiring and promotion decisions on sex, race, or ethnicity undermines individual dignity or violates an individual right to equal opportunity that requires that employment decisions be made on the basis of one's job qualifications and merit. (For an argument designed to show that there is no adequate moral grounding for such a right, *see* John Hasnas, *Equal*

I do not pursue this matter because my purpose in this essay is not to evaluate the soundness of the argument for faculty social group diversity, but to explore its implications. To that end, I note that to the extent that advocates have produced a strong argument for faculty social group diversity, they have produced an equally strong argument for faculty viewpoint diversity. This is because every benefit ascribed to having a faculty with social group diversity is equally promoted by having a faculty with viewpoint diversity.

The advocates of social group diversity claim that having a faculty that includes members of diverse social groups improves classroom learning by promoting a robust exchange of ideas and providing students with the opportunity to learn from the experiences and perspectives of those different from themselves. But if the robust exchange of ideas is promoted by having a faculty from diverse social groups, it is even more directly promoted by having a faculty with diverse philosophical, ideological, or political viewpoints. Similarly, students can learn from the experiences and perspectives of those with different philosophical, ideological, or political viewpoints just as much as they can from the experiences and perspectives of those with different social group backgrounds.

The advocates of social group diversity claim that having a faculty that includes members of diverse social groups promotes cross-cultural understanding by breaking down unfair stereotypes, promoting mutual respect, and helping students learn to communicate effectively with people unlike themselves. These ends are equally advanced by having a faculty that includes members with diverse philosophical, ideological, or political viewpoints. Engaging with professors who are socialists, libertarians, religious conservatives, or social justice progressives can break down students' stereotypes of these groups and promote understanding across ideological divides. Having Republicans in the role of mentor could promote mutual respect despite partisan differences, and having to speak to and write for professors with different philosophical, ideological, or political viewpoints will certainly make students better able to communicate civilly and effectively with all members of a pluralistic society.

The advocates of social group diversity claim that having a faculty that includes members of diverse social groups enhances America's economic competitiveness because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[33] But this explicitly implies that to realize this benefit we need a faculty that is diverse not only with regard to social group characteristics, but also with regard to viewpoint.

The advocates of social group diversity claim that having a faculty that includes members of diverse social groups helps realize the values of democracy because "[e]ducation within a diverse setting prepares students to become good

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Opportunity, Affirmative Action, and the AntiDiscrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination, 71 FORDHAM L. REV. 423 (2002).

33. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

citizens in an increasingly complex, pluralistic society."[34] But good citizenship requires the ability to interact with and respect not only people with different social group characteristics, but also people with different ideological and political viewpoints. And a faculty that includes people with diverse philosophical, ideological, or political viewpoints will help the members of society "have confidence in the openness and integrity of the educational institutions that provide th[e] training"[35] necessary for participation in democratic governance, just as much as will a faculty that includes people from diverse social groups.

The advocates of social group diversity claim that having a faculty that includes members of diverse social groups provides valuable role models for students from disadvantaged social groups who may internalize negative stereotypes about themselves. But it is not only the members of disadvantaged social groups who can internalize negative stereotypes. Students who hold unpopular philosophical, ideological, or political viewpoints can also be the victims of stereotyping. Libertarians are often caricatured as selfish individuals lacking compassion for the poor; socialists as deluded dreamers out of touch with the reality of human nature; conservatives as intolerant Savonarolas who want to return to the lifestyles of the 1950s. And, in today's highly polarized political environment, Trump supporters are often stereotyped as ignorant dupes or "deplorables" from "flyover" country, and Sanders supporters as Marxist "Sandernistas" who want to destroy the free market. Just as students who are taught by professors from their sexual, racial, or ethnic group can gain the confidence they need to succeed in their academic and professional endeavors, students who are taught by professors who share their libertarian, socialist, conservative, Republican, or other currently unpopular viewpoints can similarly gain the confidence they need for academic and professional success from the experience.

Finally, the advocates of social group diversity claim having a faculty that includes members of diverse social groups improves the quality of academic scholarship by bringing a wider range of perspectives to bear on academic questions. But if including contributions from faculty from diverse social groups would enrich scholarly discourse by increasing the "variety of positions, debates and styles of . . . academic writing,"[36] then so would including contributions from faculty with diverse philosophical, ideological, or political viewpoints, which would even more directly increase the "variety of positions, debates and styles of . . . academic writing."

In short, the case for faculty viewpoint diversity is just as strong (or weak) as the case for faculty social group diversity.

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34. AMERICAN COUNCIL ON EDUCATION, *supra* note 18*; see also Grutter*, 539 U.S. at 330 (Because "'education . . . is the very foundation of good citizenship,' . . . the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . [to ensure] that public institutions are open and available to all segments of American society.").

35. *Grutter*, 539 U.S. at 331.

36. Kennedy, *supra* note 12, at 715.

C. Summary

In providing an impressive list of educational benefits that derive from faculty comprised of members of a diverse range of social groups, the advocates of faculty social group diversity have produced a strong *prima facie* case for such faculty diversity. It is possible that opponents of social group diversity could introduce considerations sufficient to overcome this *prima facie* case, in which case the quest for faculty social group diversity should be abandoned. However, working on the assumption that this is not the case, an important implication of the argument for faculty social group diversity is that the quest for a diverse faculty should be a quest for a faculty that is diverse with regard to both social group membership and viewpoint.

III. ATTAINING FACULTY SOCIAL GROUP DIVERSITY

A. Theory

Working under the assumption that the argument for faculty social group diversity is sound, the question becomes how best to achieve such diversity. The evidence suggests that the current approach to increasing faculty social group diversity is ineffective. If, after a half century of employing this approach, women and minorities are still vastly underrepresented on university and professional school faculties[37] and leading universities conclude that they must devote additional tens of millions of dollars to the effort to diversify the faculty,[38] there is reason for skepticism about the efficacy of the approach. In addition, I argue below that the current approach is inherently unfair in a way that should be avoided if possible.

Is there a better way to pursue faculty social group diversity? On the theoretical level, at least, the answer is yes.

1. Drawbacks of the Current Approach

The current approach to increasing faculty social group diversity is to attempt to fill new teaching positions with members of underrepresented social groups. This approach restricts diversity efforts to the limited number of teaching slots that become open each year. These are predominantly junior, entry-level positions leavened with a small number of senior, tenured positions. Even under the idealized assumptions that there are qualified women or minority candidates for every open position and that all such open positions are, in fact, filled by members of

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37. *Fast Facts: Race/Ethnicity of College Faculty*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=61 [https://perma.cc/MUH2-JWAC]; Josh Young, *The 3 Most Powerful Benefits of a Diverse Faculty*, CAMPUS ANSWERS (Feb. 9, 2017), http://www.campusanswers.com/the-3-most-powerful-benefits-of-a-diverse-faculty/ [https://perma.cc/TZ72-8Q7W]; Jonathan Lai, *Diversity at Colleges? Not at the Front of the Classroom*, PHILA. INQUIRER (Jan. 8, 2017), http://www.philly.com/philly/education/Diversity_at_colleges_Not_at_the_front_of_classroom.html [https://perma.cc/7BMN-PN5Y].

38. See *supra* text accompanying notes 8–10.

underrepresented social groups, it would still take years, if not decades, to obtain a diverse faculty under this approach.

There are both quantitative and qualitative reasons for this problem. The quantitative reason is obvious. By limiting diversity efforts to open positions, only a small number of professors from underrepresented social groups can enter the professoriate each year. This creates a bottleneck that slows the diversification process to a crawl. The qualitative reason is that most of the open slots are junior, entry-level positions. This concentrates the women and minorities who do enter the professoriate in relatively less powerful and less influential positions, keeps them there for the seven years it usually takes to get tenure, and washes out those who do not get tenure. This bottleneck helps explain how decades of diversity efforts could have produced so little progress.

It also helps explain why diversity efforts are so expensive. If diversity hiring is limited to open positions, then the only way to accelerate the rate of diversification is to create more open positions. But it costs millions of dollars to fund every new slot. That is why Yale, Columbia, and Brown set aside $50, $85, and $100 million respectively to advance their diversity agenda.[39]

In addition to being slow and expensive, the current approach to increasing faculty social group diversity is also inequitable. This is because it places all of the burden of increasing faculty diversity on the young white males seeking academic positions and none of the burden on the white males who currently occupy those positions.

Advocates of diversity usually claim that the lack of social group diversity in university and professional school faculties resulted at least in part from the fact that, in the past, the academic world was either consciously or unconsciously biased against women and members of minority groups.[40] The claim is that the predominantly white male professoriate applied standards of merit that favored people like themselves, and illegitimately discounted the value of the scholarship of women and people of color. If this claim is correct, then the farther back in time we go, the more biased the academic world was.

As affirmative action in faculty hiring slowly increased the diversity of the faculty over the past few decades, the unconscious (and conscious) biases in favor of white male job candidates have been at least somewhat reduced. Therefore, the older the white male professor is, the more his appointment was a result of unfair bias and the less legitimate it is. In addition, the closer we get to the present, the more those seeking employment as professors attained their qualifications in an academic world that was fairer to women and people of color. All the new PhDs

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39. See *supra* text accompanying notes 8-10 and note 13.

40. Note that I am not asserting that this is the basis of the argument for diversity. Some advocates of affirmative action make a justice based argument that hiring preference should be given to women and members of minority groups to compensate for the effects of past invidious discrimination or unconscious bias. The diversity argument does not rest on such a claim, but is based solely on the claimed educational benefits that flow from a diverse faculty. I refer to the claim of past bias only to highlight the unfairness of the current approach to increasing faculty diversity.

currently on the academic job market attained their degrees in an academic environment that includes affirmative action for admission to both undergraduate and graduate or professional school, and have been evaluated and prepared by a somewhat more diverse and hence somewhat less biased faculty than those who were educated in past decades.

There can be no doubt that the attainment of faculty social group diversity requires reduced career prospects for white males pursuing an academic career. This being the case, it seems patently inequitable to require the young white males seeking entry level academic positions who obtained their degrees under a less biased system to bear 100% of the burden of such reduced prospects while older white male professors who obtained their academic appointments under a more biased system suffer no reduction to their career prospects at all. A method of diversifying the faculty that makes the present generation of white males pay for the sins of the previous generations while the previous generations continue to enjoy the fruits of those sins is hardly an equitable one.

2. An Alternative Approach

Please consider the following alternative approach to attaining faculty social group diversity. Imagine that each university and professional school commissioned a group of its finest social psychologists, sociologists, and statisticians to review its faculty to determine how many women and people of color would have to be added to each department or school to achieve a properly diverse faculty.[41] Using this information, each school determines how many white male professors must be eliminated from each department and school to create the number of open positions required to attain the desired social group diversity.[42] Each school then takes steps to eliminate this number of white male professors and replace them with women and minority scholars.

The steps taken to create the openings should be as non-coercive as possible. White male professors nearing the end of their careers could be offered attractive early retirement packages; those in the middle of their careers, enticing severance packages. Further, a large percentage of those who advocate for increasing the social group diversity of the faculty are themselves tenured and tenure track white male professors. Although it might be asking too much to suggest that such professors voluntarily resign from their positions, it does not seem unreasonable to ask them to place their name in a lottery that would determine who should give up his position. Surely it is reasonable to expect

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41. I take no position on what constitutes a "proper" amount of social group diversity. Advocates of such diversity are free to insert whatever standard they support—a "critical mass," demographic proportional representation, etc. It must be the case that some amount of social group diversity is enough. For purposes of this essay, the proper amount is whatever the advocates of social group diversity believe it to be.

42. This calculation would include the number of new positions that could be filled by women and minorities, so that the burden of attaining faculty diversity was shared by both current and prospective white male professors.

such professors to have sufficient strength of their convictions to accept a 10% or 15% risk of losing their jobs to gain the important educational benefits that they advocate for. If they do not, how can they justify imposing a much higher risk of never even having a teaching position on their younger white male brethren?

It is to be hoped that this combination of incentives and voluntary commitment to principle would produce the requisite number of openings. However, if an insufficient number of the tenure track and tenured white male advocates of social group diversity are willing to help shoulder the costs of the policy they support, then universities and professional schools might have to involuntarily terminate the least productive white male members of the faculty where they are contractually able to do so. In some circumstances, this might require ending some tenure lines in order to shift resources to where they can be better used to promote diversity. But in all cases, universities should undertake the most compassionate system of spreading the risk among the white male professoriate.

Consider the advantages of this method of pursuing social group diversity over the current approach to doing so. First of all, it produces a diverse faculty in only one hiring season. The elusive goal of the past half century is finally attained in but a single year. Secondly, it is relatively inexpensive. Whatever the costs of the early retirement or severance packages, they are many times less expensive that the tens of millions of dollars needed to attain diversity exclusively through the creation of new positions. The universities that are currently budgeting $50, $85, or $100 million for their diversity efforts could realize massive savings by adopting the proposed alternative system. And finally, the alternative system is much more equitable. Rather than imposing 100% of the cost of attaining diversity on the younger white males who have benefitted the least from unfair biases against women and people of color, the proposed alternative requires the older white males who have benefitted the most from such biases to share the burden of attaining a more diverse faculty.

3. Conclusion

On a purely theoretical level, the proposed alternative method of creating faculty social group diversity is more effective and more equitable than the method currently being employed. Therefore, all else being equal, universities and professional schools should adopt the proposed alternative in place of the current method of pursuing faculty social group diversity.

B. Practice

Now for the bad news. All else is not equal. Universities and professional schools cannot adopt the more efficient and more equitable method for attaining faculty social group diversity because it is illegal. Specifically, it is a violation of Title VII of the Civil Rights Act of 1964.

Stimulated by the Supreme Court's decisions in the cases of *Gratz v. Bollinger*[43] and *Grutter v. Bollinger* in 2003, the past fifteen years has seen much discussion of the legality of pursuing social group diversity in higher education. *Grutter* held that the Equal Protection Clause of the Fourteenth Amendment permits public universities to consider an applicant's race in their admission decisions for the purpose of promoting a diverse student body.[44] Title VI of the Civil Right Act of 1964, which prohibits discrimination in programs that receive federal assistance, applies the same standard to almost all private universities.[45] Thus, all institutions of higher education in the United States may consider social group characteristics in order to increase the diversity of their student bodies. None of this is relevant to the question of faculty diversity.

Grutter and Title VI are concerned with the admission of students to universities. This has nothing to do with whether universities can consider race and gender in deciding whom to hire as faculty. Faculty hiring is an employment decision. Employment decisions are governed by Title VII of the Civil Rights Act, which applies to both public and private universities. And, with the narrow exception of temporary plans designed to remedy "conspicuous racial [or gender] imbalances in traditionally segregated job categories,"[46] Title VII does not permit employers to make any hiring, promotion, termination, or other employment decisions on the basis of race, color, religion, sex, or national origin.[47]

Under Title VII, universities may undertake strenuous efforts to assemble the most diverse pool of applicants possible. They may specifically recruit African-Americans, women, and other minorities to apply for faculty positions. But once the applicant pool has been assembled and the selection process has begun–once the search committee begins compiling its list of candidates for further consideration, deciding whom to put on the short list for on-campus interviews, and ultimately, whom to hire—Title VII prohibits any consideration of the candidate's race, color, religion, sex, or national origin.[48]

This means that even if universities could eliminate the requisite number of white male professors, they could not legally give preference to non-white males in filling the open slots. The most that universities and professional schools could

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43. 539 U.S. 244 (2003).

44. *Grutter*, 539 U.S. at 343.

45. Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582 (1983); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

46. United Steelworkers v. Weber, 443 U.S. 193, 209 (1979).

47. Diversity initiatives are, by definition, forward-looking efforts to attain educational benefits, not the narrowly tailored, temporary, remedial affirmative action plans permitted by *Weber*.

48. *See* Shuford v. Al. State Bd. of Educ., 897 F. Supp 1535, 1553 (M.D. Ala. 1995). *See also* Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997). Preferential treatment in the selection process is legally permitted only in the context of an affirmative action plan that satisfies the *Weber* requirements. Preferential treatment in assembling the applicant pool is not so limited. For a more detailed explanation of the legal significance of the distinction between assembling the applicant pool and selecting candidates from the pool, see Kate McCormick, *The Evolution of Workplace Diversity*, 44 HOUSTON LAWYER 10 (2007).

legally do is to widely publicize the openings and vigorously encourage women and minorities to apply. What they definitely cannot do is to intentionally select women and minority scholars to fill the slots because they are women and minorities. Thus, the theoretically superior alternative cannot be put into practice.

In fact, the theoretically superior alternative would actually be less effective in practice than the current approach. Initially, this may seem counter-intuitive because the law applies to the current approach just as much as it would to the proposed alternative. Under the current approach, hiring committees may engage in vigorous efforts to convince women and minority scholars to apply for open positions, but once the selection process begins, they may not give preference to non-white males in filling those open slots. In this respect, the current and proposed alternative approaches appear to be rendered equally ineffective by the law. So how could the current approach be more effective?

The reason is that the proposed alternative requires the overt, declared intention to hire professors on the basis of legally prohibited social group characteristics, while the current approach creates the opportunity and temptation to covertly elide the legal restrictions. This is because the overwhelming majority of the professors who serve on faculty search committees are not attorneys and are unfamiliar with the restrictions Title VII of the Civil Rights Act place on such searches. If they are instructed to pursue faculty social group diversity, they naturally assume that they may give preference to non-white males in deciding whom to hire. Thus, a university can advance its objective of increasing faculty social group diversity merely by refraining from instructing its faculty on the requirements of the Civil Rights Act. And this is precisely what many universities and professional schools do.

Consider, for example, Georgetown University. Every year, the Provost's office distributes a memorandum containing instructions on how to conduct faculty searches that "is to be shared in its entirety with department chairs and other faculty with responsibility for faculty searches and hiring in your schools so that all search committee chairs will begin work with the benefit of this guidance."[49] Prior to 2013, this memorandum contained the Provost's statement that "I approved the recommendations of the 2009-10 Diversity Initiative working groups that we be more deliberate, thorough, and successful in hiring to diversity at every level. . . . I look to you to impress strongly on hiring offices the unvarying mantra that every search is a diversity search."[50] This was reiterated in the section of the memorandum providing "ten key guidelines," the third of which stated, "Every faculty search is a diversity search, and everyone involved in every search has an obligation to think and act on that assumption."[51] Yet nowhere in the

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49. Georgetown University, Office of the Provost: Ordinary Faculty Searches and Offers (March 5, 2012) (on file with the author).

50. *Id*. at 2.

51. *Id*. at 3. The memo also requires all search committees to prepare a memo describing their search strategies for review by the Provost with "care and attention," an affirmative action plan for approval by Georgetown's Office of Institutional Diversity, Equity & Affirmative Action, and receive approval of its

memorandum was it explained to the faculty that the Civil Rights Act prohibited consideration of race, color, religion, sex, or national origin once the applicant pools had been formed and the selection process begun. As a result, the professors on the search committees—many of whom were themselves supporters of increasing faculty social group diversity—naturally assumed that not only was it legally permissible to give hiring preference to women and minorities, but also that they were being instructed to do so, and acted accordingly.[52]

In addition, even when Universities provide their search committees with accurate information about the Title VII restrictions, the professors on the committees who believe in the importance of increasing social group diversity can nevertheless give women and minorities hiring preference simply by voting in accordance with their personal beliefs in spite of the law. Although they may be inhibited by their knowledge of the law from articulating the reason for their vote, nothing can stop them from voting as they see fit.

Thus, the current method of pursuing faculty social group diversity, which does not require an explicit commitment to give illegal hiring preference to women and under-represented social groups, can be more effective in practice than the proposed alternative approach, which does. By leaving room for both universities and professional schools as institutions and members of faculty search committees as individuals to covertly evade the legal restrictions of the Civil Rights Act, the current approach can advance the goal of faculty social group diversity in a way that the theoretically superior alternative approach cannot.

C. Conclusion

In theory, universities and professional schools could obtain faculty social group diversity in a single year by eliminating the required number white male professors and replacing them with women and members of other under-represented social groups. Such a program would achieve faculty social group diversity more rapidly, less expensively, and more equitably than the current

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diversity efforts before scheduling any campus interviews. *Id.* at 4. Further, to ensure that the committee's diversity efforts have been sufficiently vigorous, "[t]he Dean will consult with the Provost as appropriate on cases where it may seem that an extended search is required and might well send some committees back for further consideration of other applicants in the pool among other remedies before interviews are scheduled." *Id.*

52. The memorandum was carefully drafted never to explicitly state that social group characteristics be considered in the selection process. Thus, it spoke in terms of "[p]roducing strong pools [that] will . . . improve the chances of recruiting and retaining the very best diverse faculty possible" and "hiring that results from recruitment efforts so resourceful and effective that the natural result of selecting for the best talent is to bring a broader range of peoples and backgrounds to the campus and community." *Id.* at 3. However, in the absence of an explanation of the Title VII restrictions, the distinction between applicant pools and selection processes was lost on the members of the search committees. I was personally in attendance at a meeting of all search committee chairs at which one assured our dean, "Don't worry. We will only bring in women candidates this year."

Note that in 2013, the Provost's memorandum was revised to provide an accurate description of the requirements of the Civil Rights Act to the faculty.

method that limits diversity efforts to the limited number of new slots that become open each year. However, such a program would also require universities and professional schools to explicitly acknowledge that they intend to give hiring preference to women and minorities in filing the open slots, which would be a direct violation of Title VII of the Civil Rights Act of 1964. Hence, this method of pursuing social group diversity cannot be put into practice.

Also, in theory, the current method of pursuing faculty social group diversity should be equally impracticable. Giving hiring preference to women and minorities is a violation of Title VII regardless of the scale on which it is implemented.

This is not the case in practice, however. Unlike the proposed alternative, the current approach does not require universities and professional schools to make an overt commitment to violate the Civil Rights Act. This makes it possible for the institutions to give *de facto* hiring preference to women and minorities simply by not acquainting the members of its faculty with the nature of the Title VII restrictions. In addition, individual members of search committees can always disregard the requirements of the Civil Rights Act and give illegal hiring preference to women and minorities as long as they do not give this as the reason for their vote. Therefore, as counter-intuitive as it may seem, the current approach is probably the most effective method of pursuing faculty social group diversity in the current legal environment.

IV. ATTAINING FACULTY VIEWPOINT DIVERSITY

A. Empirical evidence

There is considerable evidence that most university and professional school faculties lack viewpoint diversity. Several recent studies demonstrate that the American professoriate is overwhelmingly skewed ideologically and politically toward liberals/progressives and Democrats.

The Heterodox Academy documents that in 2014 only 12% of university and college professors were ideologically conservative compared to 60% liberal/progressive and 28% moderate; and further, that a significant proportion of the 12% were professors in engineering and other professional schools so that "the percent conservative for the major humanities and social science departments is closer to 5%."[53] A recent study of the political affiliations of professors of economics, history, psychology, journalism/communications, and law from 40 of the nation's top universities found that registered Democrats outnumbered registered Republicans by a ratio of 11.5 to 1.[54] Further,

53. *The Problem*, HETERODOX ACADEMY, https://heterodoxacademy.org/the-problem/ [https://perma.cc/6R4N-DJF5] (last visited July 1, 2018).

54. History, journalism, and psychology had Democrat to Republican ratios of 33.5 to 1, 20 to 1, and 17.4 to 1 respectively. Mitchell Langbert, Anthony J. Quain & Daniel B. Klein, *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON J. WATCH 422, 433 tbl. 2 (2016).

[t]he reality is that in most humanities/social-science fields a Republican is a rare bird. In fact, registrants either to the Green Party or Working Families Party equaled or exceeded Republican registrants in 72 of the 170 departments (that includes Economics). That is, in 42 percent of the departments, Republican registrants were as scarce as or scarcer than left minor-party registrants.[55]

A series of studies have shown that the legal professoriate is similarly overwhelmingly comprised of liberals/progressives and Democrats. A 1998 study of 832 entry level hires from 1986 to 1991 showed the group to be 75% liberal to 10% conservative.[56] A 2005 study of voter registration records of 254 California law school professors showed that 80% were registered Democrats and 20% registered Republicans.[57] A 2005 study of the political donations of 1215 law professors from the top 21 law schools showed that 81% donated to Democrats compared to 15% to Republicans.[58] A 2016 study of 1011 law professors from the top 16 law schools showed that 86% were liberals compared to 14% conservative or libertarian.[59] And most recently, a comprehensive study of 10,040 law professors found that the group split 85% liberal to 15% conservative with 54% of the conservative professors ranked as moderate conservatives compared to only 27% of the liberal professors ranked as moderate liberals.[60]

A 2012 study of social and personality psychology academics found that 85% identified themselves as liberal, 9% as moderate, and only 6% as conservative.[61] Interestingly, the authors of the study also found a willingness among the liberal respondents to admit that they would discriminate against conservatives in faculty hiring decisions.[62]

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55. *Id*. at 425–26.

56. *See* D. J. Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHICAGO-KENT L. REV. 765 (1998).

57. *See* C.F. Cardiff & D. B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237 (2005).

58. *See* J. O. McGinnis, M. A. Schwartz & B. Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005).

59. *See* J. 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 (2016).

60. Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, Nw. Public Law Research Paper No. 1712 at 6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953087, [https://perma.cc/QH53-MTGB].

61. Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSPECTIVES ON PSYCHOLOGICAL SCI. 1 (2012).

62. *Id*. at 6; *see also* José L. Duarte, Jarret T. Crawford, Charlotta Stern, Jonathan Haidt, Lee Jussim & Philip E. Tetlock, *Political Diversity Will Improve Social Psychological Science*, 38 BEHAVIORAL AND BRAIN SCI. 130 (2015) ("Inbar and Lammers . . . found that most social psychologists who responded to their survey were willing to explicitly state that they would discriminate against conservatives. Their survey posed the question: 'If two job candidates (with equal qualifications) were to apply for an opening in your department, and you knew that one was politically quite conservative, do you think you would be inclined to vote for the more liberal one?' Of the 237 liberals, only 42 (18%) chose the lowest scale point, 'not at all.' In other words, 82% admitted that they would be at least a little bit prejudiced against a conservative candidate, and 43% chose the midpoint ('somewhat') or above. In

B. Theory

As noted in Section III, the argument for viewpoint diversity is precisely as strong as the argument for social group diversity. Yet, despite a half-century of vigorous efforts to increase faculty social group diversity, no university or professional school has undertaken any organized effort to increase faculty viewpoint diversity. There is no "current approach" to increasing faculty viewpoint diversity to evaluate or to contrast with any theoretical alternative proposal. This leaves us free to directly consider how universities and professional schools could most effectively increase faculty viewpoint diversity.

Accordingly, imagine that each university and professional school commissioned a group of its finest social psychologists, sociologists, and statisticians to review its faculty to determine how many professors with under-represented philosophical, ideological, or political viewpoints would have to be added to each department and school to achieve the optimal level of viewpoint diversity.[63] Each school would then undertake conscious efforts to add the required number of faculty. Such efforts would obviously include giving explicit hiring preference to candidates with the under-represented viewpoints for all open positions. For example, a school could recruit applications for its open positions exclusively from candidates with under-represented viewpoints until its numerical goal is reached. Less radically, a school could adopt a policy of hiring two professors with under-represented viewpoints for every professor with the dominant viewpoint that is hired—say, two new conservative/classical liberal/Republican professors for every new liberal/progressive/Democratic professor.

Schools could also attempt to create additional openings by offering attractive early retirement packages to professors near the end of their careers and enticing severance packages to mid-career professors who hold over-represented viewpoints. Any such opening created could then be filled with professors with under-represented viewpoints. Although there would be an expense associated with this, keep in mind that the educational benefits of viewpoint diversity are identical to the benefits of social group diversity for which universities and professional schools are willing to spend tens or hundreds of millions of dollars. Thus, this could be a relatively low-cost way of realizing the desired educational benefits.

This may be as much as universities and professional schools can do to promote faculty viewpoint diversity. The schools' commitment to academic freedom would bar them from involuntarily terminating any professor on the basis of his or her philosophical, ideological, or political viewpoint. And there is no reason to believe that large enough numbers of liberal/progressive/Democratic professors

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contrast, the majority of moderates (67%) and conservatives (83%) chose the lowest scale point ('not at all').").

63. Once again, I take no position on what constitutes the optimal level of viewpoint diversity. Advocates may quibble over how much viewpoint diversity is needed to realize the benefits identified in the argument for diversity. Nevertheless, some amount of viewpoint diversity is required. For purposes of this essay, the optimal level may be set at any point that the interested party believes to be appropriate.

would be willing to enter a lottery to determine which of them should voluntarily resign to create space for those who hold under-represented viewpoints. There is not the same level of wide-spread support and personal commitment for viewpoint diversity among current university and professional school professors as there is for social group diversity. Indeed, more than one in three professors admitted that he or she would discriminate against conservatives in faculty hiring decisions.[64] There is no sense in calling on people to have the strength of their convictions unless they actually have the convictions.

Yet even in the absence of the ability to create enough openings to create a viewpoint diverse faculty in a single year, the steps that can be taken could produce the desired degree of viewpoint diversity in a comparatively short period of time. In theory, there is no reason why universities and professional schools cannot attain the optimal level of faculty viewpoint diversity within a few hiring seasons.

C. Practice

With regard to faculty viewpoint diversity, there is no bad news. Whatever can be achieved in theory can be achieved in practice.

This is because there is no legal impediment to the pursuit of faculty viewpoint diversity. Title VII of the Civil Rights Act does not bar employers from making employment decisions on the basis of the applicant's or employee's philosophical, ideological, or political viewpoint. Title VII prohibits only employment decisions based on one's race, color, religion, sex, or national origin. Hence, one's philosophical, ideological, or political viewpoint is not a legally protected class. Employers are entirely free to make hiring decisions on the basis of an applicant's viewpoint.[65] Therefore, it is perfectly legal for universities and professional schools to give hiring preference to applicants for faculty positions who hold under-represented viewpoints.

The advocates of diversity claim that a diverse faculty improves classroom learning, promotes cross-cultural understanding, better prepares students for the contemporary global marketplace, promotes the values of democracy, provides students with valuable role models, and broadens and improves the quality of academic scholarship. Universities and professional schools can realize these benefits virtually cost free merely by actively recruiting faculty with under-represented philosophical, ideological, or political viewpoints. All that is required is the willingness to do so.

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64. *See* Inbar & Lammers, *supra* note 60, at 6.
65. Viewpoint is also not a protected class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It should be noted, however, that state law could restrict a university's ability to give hiring preference on the basis of political party affiliation. See, e.g., District of Columbia's Human Rights Act of 1977, § 2-1401.11.

CONCLUSION

The advocates of faculty social group diversity have provided a strong *prima facie* argument for the claim that universities and professional schools can reap significant educational benefits from faculty social group diversity. In doing so, they have simultaneously provided an equally strong *prima facie* argument for the claim that universities and professional schools can reap significant educational benefits from faculty viewpoint diversity. Under the assumption that this *prima facie* argument is not overridden by other considerations and proves to be sound, it makes sense for universities and professional schools to take steps to attain both social group and viewpoint faculty diversity.

The analysis undertaken in this essay suggests that the steps universities and professional schools are taking in pursuit of faculty social group diversity are ill-chosen and involve a serious misallocation of resources. The major impediment to achievement of faculty social group diversity is Title VII of the Civil Rights Act of 1964.[66] Regardless of how much money universities and professional schools spend in their efforts to recruit faculty from under-represented social groups, these efforts will be rendered relatively ineffective by the legal prohibition on considering social group membership in the hiring decision. This is almost certainly why a half century of diversity efforts has produced such unsatisfactory progress.

Universities and professional schools currently have hundreds of millions of dollars earmarked for efforts to increase faculty social group diversity. Rather than throw good money after bad, universities and professional schools would be better advised to shift these resources into lobbying for the legislative reform of the Civil Rights Act[67] to allow schools to make race-, color-, religion-, sex-, and national origin-conscious hiring decisions for the purpose of increasing faculty diversity. Such a legal reform would allow universities and professional schools to utilize the theoretically superior method of pursuing faculty social group diversity described in Part II, and achieve such diversity in a single year.

Yet beyond mere considerations of effectiveness, there are important moral reasons for universities and professional schools to redirect their efforts into legal reform. This is because the current approach to pursuing faculty social group diversity is laden with perverse incentives that can have a corrupting influence on both institutions and individuals. At the institutional level, universities and professional schools are aware that the better informed their faculty are about the requirements of the Civil Rights Act, the more difficult it will be to honor their commitment to increase faculty social group diversity. This creates the strong temptation to refrain from educating the members of their search committees about the restrictions of Title VII in the hope that they will unknowingly give

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66. And other federal, state, and local anti-discrimination statutes and ordinances that add to the number of protected classes; e.g., sexual orientation, age, disability, etc.

67. And other relevant federal, state, and local anti-discriminations statutes and ordinances.

illegal preference to candidates from under-represented social groups.[68] And at the individual level, it creates the equally strong temptation for members of search committees who are both committed to increasing faculty social group diversity and aware of Title VII's restrictions to covertly give women and minority candidates the same illegal preference.

Both the schools as institutions and the professors as individuals must be at least somewhat discomforted by the fact that their efforts to evade the requirements of the Civil Rights Act of 1964 are an analog of the efforts of Southern schools to evade the requirements of *Brown v. Board of Education*[69] in the 1950s. Implicit in the effort to evade the effect of Title VII is the belief that social group-conscious hiring to increase faculty diversity is ethically appropriate. Surely the institutions and individuals who advocate for faculty social group diversity would be more comfortable lobbying to bring Title VII in line with what they believe to be the morally correct position than they are with covertly encouraging the violation of, and, in fact, violating the Civil Rights Act.

Further, continuing the current approach to increasing faculty social group diversity can have significant adverse practical consequences as well. This is because the most effective way to circumvent the restrictions of Title VII is to create new positions that would only appeal to women or minority scholars or for which women and minority scholars are more likely to be the most qualified applicants; for example, positions in women's studies, critical race theory, queer studies, etc. Yet, for many institutions, such positions may not be the ones that are most needed or best advance their educational mission. In such cases, the drive to diversify the faculty can skew the development of the institution's curriculum away from the path dictated by the institution's educational values, needs, and mission.

Under the approach universities and professional schools currently employ to increase faculty social group diversity, they are tempted to duplicitously suborn illegal behavior, incur great expense, and skew the development of their curriculum for very little progress toward their desired goal. Under a reformed Civil Rights Act that permitted social group-conscious hiring to promote diversity, they could openly and honestly pursue an inexpensive, equitable, and highly effective method of attaining faculty social group diversity without impairing their curricular development or educational mission. I suggest that in these circumstances, universities and professional schools that wish to increase faculty social group diversity should shift their efforts from circumventing the Civil Rights Act to reforming it.

In the meantime, universities and professional schools can still reap the rewards of faculty diversity by taking the steps described in Part IV to quickly attain faculty viewpoint diversity. As demonstrated in Part II, the educational benefits that flow from social group faculty diversity also flow from viewpoint

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68. Georgetown University employed this tactic until 2013.
69. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).

faculty diversity. Thus, even in the absence of the desirable level of faculty social group diversity, universities and professional schools can still improve classroom learning, promote understanding across ideological and political divides, improve students' preparation for the global marketplace, promote the values of democracy, provide students with valuable role models, and broaden and improve the quality of academic scholarship by increasing faculty viewpoint diversity. And they can do this relatively quickly and at relatively low cost.

Universities and professional schools have been embarked on a quest for a diverse faculty for the past half century. In this essay, I have suggested that this quest has failed to obtain its objective because the searchers have been looking in the wrong place. Rather than seeking to diversify the faculty in the face of the restraints of the Civil Rights Act, they should have been seeking to reform the Civil Rights Act to permit the type of social group-conscious decision-making that would allow them to attain the desired diversity in a single year, while simultaneously undertaking vigorous action to increase faculty viewpoint diversity. That, at any rate, is my map to the Holy Grail of faculty diversity.