MEASURING DIVERSITY:
LAW FACULTIES IN 1997 AND 2013

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"Equality can be measured. It can be put into numbers."[1]
—Jesse Jackson

INTRODUCTION

When the white male Protestants who ran American law schools thought that women and minorities were better suited for sweeping the classrooms than for teaching in them, one did not need statistics to know which groups were underrepresented. Women and minorities were locked out, and Jews were subject to quotas in many law schools and locked out of others.

By the late 1990s, which groups were the most underrepresented in legal academia?[2] After twenty-five years of increasingly vigorous affirmative action hiring, there had been a few pockets of success—enough to merit the first careful comparison of the racial, gender, religious, and political makeup of law faculties with the populations from which professors are drawn. It is time to take a close look at how far we have come and how far we have left to go to reach parity with the general population—or at least with the lawyer population.[3] Addition-

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2. Though this Article is being published in 2015, it was written between 1996 and 2000. Except in the Afterword, which updates the 1997 analysis, the state of law school faculties described in this article refers to the state of affairs in the late 1990s.

3. The existing studies include Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Michael Olivas, *Latino Faculty at the Border*, CHANGE MAGAZINE, May/June

ally, it would help to know which subgroups within the broad traditional diversity categories are the most underrepresented and thus most in need of redoubled efforts on their behalf.

While just about everything about law faculty hiring is contested, nothing is more contested than what is today called "diversity."[4] In some sense, this is strange, because law schools have had a much stronger commitment to hiring women and ethnic minorities than almost any other elite professional schools.[5] Diversity has replaced affirmative action as the model for broadening the makeup of law faculties. Superficially, diversity is a more attractive idea than affirmative action, because diversity appears to be a more neutral principle that applies to all groups equally, while affirmative action is a paternalistic

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1988, at 8; Michael Olivas, *Increasing the Numbers* (presented at American Association of Law Schools Workshop on Minorities in Legal Education: Emerging Voices, Sept. 7–9, 1989); Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 429–30 (1994).

4. *See, e.g.*, Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986); Randall Kennedy, *In Praise of the Struggle for Diversity on Law School Faculties*, 22 SETON HALL L. REV. 1389 (1992); Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22 (1990–1991); Anita L. Allen, *The Role Model Argument and Faculty Diversity*, 24 PHIL. F. 267 (1993); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81 (1990–1991); Ian Haney Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, 1 RECONSTRUCTION 46 (1991); Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105.

Dean Clark of Harvard has argued:

> Those of us who study, teach, or act as deans in law schools realize full well that increasing diversity, while it has brought a more exciting and wonderful world, has also brought friction and tumult. The conflict on campuses between free speech and offensive speech, the debates over political correctness, and the calls for greater diversity in faculty hiring are all manifestations of real demographic change. More generally, demographic changes and changes in the status and role of subgroups lead inevitably to some conflict among groups and uncertainty about the proper parameters of relationships, and this in turn raises the demand for normative ordering.

Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 291 (1992).

5. *See infra* Part V. *But see* Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 207 (1993); Carrington, *supra* note 4; Paul D. Carrington, *Accreditation and the AALS: The Boalt Affair*, 41 J. LEGAL EDUC. 363 (1991); Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992); Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233 (1988).

policy that involves those who control the law schools preferring particular groups for admission or hiring because those groups have been subject to past discrimination. Diversity, however, is a substitute for affirmative action only if the groups benefitted by affirmative action are in fact the most underrepresented groups at law schools.

This Article does a radical thing: it takes the rhetoric of diversity seriously and tests it.[6] My approach is simple: Let's measure proportional representation. When we know what it would look like, then we know better whether that is what we want our law schools to look like. Perhaps if proportional representation is unattractive in its implications, then some other policy may look better. My personal preference is for affirmative action for traditionally discriminated-against groups who are also still grossly underrepresented.

When one looks at the major cleavages in society and compares law faculties to American society generally, some odd conclusions arise. Measured by the number of positions needed to reach parity with the general population, one of the most underrepresented ethnic groups is non-Hispanic white Protestants (more pejoratively known as WASPs), a group that might be thought to be the most powerful ethnic group in the legal academy. Further, the group that accounts for most of the diversity hiring that actually takes place—white female Democrats—is, as of the 1990s, significantly overrepresented compared to that group's proportion of lawyers, workers, and the general population. Indeed, compared with the full-time working population, white female Democrats are more overrepresented in law teaching than white males (when measured by ratios of percentages). Some people that are traditionally thought of as adding diversity to faculties—for example, white Jewish females—are represented in legal academia at seven times their percentages in the general population.

To reach parity with the general population, the average law faculty of 42 members would have to hire only two new African-

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6. There has been very little testing of the demographic underpinnings of affirmative action. *But see, e.g.*, George R. LaNoue, *The Demographic Premises of Affirmative Action*, 14 POPULATION & ENVIRONMENT 421 (1993); John Lunn, *Markets, Discrimination, and Affirmative Action: Economic Theory and Evidence*, in RACIAL PREFERENCES IN GOVERNMENT CONTRACTING (Michael Carvin, Roger Clegg & Walter H. Ryland eds., 1993).

American faculty members. Yet to reach parity with the general population, every law faculty would have to hire 146 Christians tomorrow (bringing the average faculty size to 188 members).

Three groups account for most (or all) of the overrepresentation among racial, gender, religious, and ideological groups in law teaching:

> (1) White Democratic professors (both male and female);
> (2) Jewish professors; and
> (3) Nonreligious professors.

Three groups account for most of the underrepresentation among racial, gender, religious, and ideological groups in law teaching:

> (1) Republicans (both male and female);
> (2) Protestants; and
> (3) Catholics.

Indeed, these three underrepresented groups (Republicans, Protestants, and Catholics) make up 91% of the U.S. population ages 30–75, but only about half of the law professor population. Put another way, people who are neither Christian nor Republican make up only 9% of the U.S. population, but account for about half of law professors (51%).

To obtain the estimates for this study, I analyzed the 1994 Current Population Survey Annual Demographic File,[7] the General Social Survey (GSS) 1972–94, the 1996–97 Association of American Law Schools database of law teachers, and my own sample of 710 law teachers at the top 100 law schools. Combining these statistics, I estimate which racial, gender, religious, and political groups are the most under- and overrepresented in law teaching compared to the U.S. populations of full-time workers, non-institutionalized persons, and lawyers of approximately the same age.

The first three of these cleavages (race, gender, and religion) are protected by the 1964 Civil Rights Act,[8] and the last—party

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7. The 1994 Current Population Survey database was the first to adjust totals using Census estimates of the undercounts of minorities. At the time I began this project, it was the current release.

8. *See* CHARLES A. SULLIVAN ET AL., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 1.8, at 74 (1980); Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies,"* 68 WASH. L. REV. 477 (1993); Louis J. Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59, 87 (1980); Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum*

identification—is one of the chief indicators of political and ideological diversity. Indeed, the relevance of the other demographic factors for faculty hiring is often urged because the law schools are political institutions and different racial and gender groups think differently on political issues. Duncan Kennedy elegantly presents one standard rationale for diversity in law faculty hiring. Referring to his article, Kennedy states:

> It argues for a large expansion of our current commitment to cultural diversity on the ground that law schools are political institutions. For that reason, they should abide by the general democratic principle that people should be represented in institutions that have power over their lives.[9]

Of the myriad of demographic cleavages that might be examined, these four—race, gender, party, and religion—would seem to be among the six most important. Two others that might have been included if data were available are sexual orientation and social class.[10]

I.   SO WHAT: WHICH GROUPS THINK DIFFERENTLY?

In public and academic discourse, it is common to say that races and genders think differently, but political labels are meaningless. Many point to differences in opinions between whites and African Americans.[11] Some scholars have elevated these differences into a view that opinions uncommon among African Americans as a group are inappropriate for individual African Americans to hold.[12]

Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 STAN. L. REV. 1299, 1305–09 (1984); Barbara A. Norris, *Multiple Regression Analysis in Title VII Cases: A Structural Approach to Attacks of "Missing Factors" and "Pre-Act Discrimination,"* LAW & CONTEMP. PROBS., Autumn 1986, at 63, 65–66.

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

10. Age, an important cleavage elsewhere, does not seem to be a particular problem here.

11. *See, e.g.*, Adam Nagourney, *Book paints Democrats' fall in black, white*, USA TODAY, Sept. 9, 1991, at 9A. ("[M]ost black and white voters think differently about political issues: whites worry 'more about the cost of government than its benefits,' while 'blacks habitually favor federal programs.'"); Bob Herguth, *Delmarie Cobb*, CHICAGO SUN-TIMES, Jan. 29, 1996, at 42 ("[T]here's more recognition that African Americans and white Americans do think differently on many issues.").

12. *See* Yxta Maya Murray, *The Cultural Implications of Judicial Selection*, 79 CORNELL L. REV. 374, 385–86 (1994) ("In *Clarence Thomas and the Crisis of Black Political Culture* Manning Marable argues that Thomas' conservative ideology renders him

That blacks and whites think differently has been endorsed by David Duke supporters[13] and criticized or ridiculed by both liberal and conservative commentators.[14] Others have argued that there is a wide diversity of views within the African-American community.[15]

Since Carol Gilligan's groundbreaking work on gender differences in moral reasoning,[16] it has become common to recognize different male and female thinking patterns.[17] Other academics, judges, and journalists have challenged these views as gender essentialism.[18]

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unfit to sit on the Court because it makes him unable to represent African Americans in that position. According to Marable, Thomas' pronounced conservatism and his departure from the liberal views and goals of most African Americans have a direct relationship to his ethnicity. Marable argues that Thomas' politics prevent him from being an authentic ethnically Black person: '[Thomas works] to promote [his] own career . . . . Racially, Thomas remains "black": both by governmental definition and societal recognition . . . . Yet ethnically Thomas has ceased to be an African American, in the context of political culture, social values and ideals, and commitment to collective interests.'") (citations omitted).

13. *See* Lynne Duke & David Maraniss, *Duke Splits Heart of Louisiana Into Black and White,* WASH. POST, Nov. 15, 1991, at A1.

14. *See, e.g.,* Clint Bolick, NATIONAL PUBLIC RADIO (June 3, 1993) ("[Lani Guinier] views America as two hostile and permanent racial, warring camps, and I think that's an alarming proposition . . . ."); EASTLAND, *supra* note 1, at 38 (quoting William Van Alstyne: "Individuals . . . are not merely examples of a group, representatives of a cohort, or fungible surrogates of other human beings; each, rather, is a person whom it is improper to count or discount by race.").

15. *See, e.g.,* Toni Morrison, *Introduction: Friday on the Potomac,* in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY vii, xxx (Toni Morrison ed., 1992) ("It is clear to the most reductionist intellect that black people think differently from one another; it is also clear that the time for undiscriminating racial unity has passed."); Henry Louis Gates, Jr., *Putney Swope Is Dead,* NEWSDAY, Nov. 8, 1992, at 36 ("The truth of the matter is that African Americans are so diverse now that it has become impossible to identify a single black position . . . .").

16. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

17. *See, e.g.,* ALICE H. EAGLY, SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION 94 (1987) ("[W]omen and men think differently about aggression . . ."); Editorial, *With Half a Brain,* N.Y. TIMES, Feb. 22, 1995, at A18 ("Men and women, Yale researchers have found, do indeed think differently, but the picture has changed somewhat. Using sophisticated magnetic resonance technology the researchers found that for certain language tasks, it seems, women use more of their brains.").

18. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives,* 45 STAN. L. REV. 807, 812–13 (1993) (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990)

A remarkable number of journalists and politicians have argued that the labels *conservative* and *liberal* are meaningless.[19] Others have pointed out that the labels are not meaningless; they convey information about a person's views.[20] A similar disdain for political party labels is sometimes expressed.[21]

Those who say that political and party labels are meaningless are seldom sociologists and have not looked at the data. Conservatives and Republicans think differently from liberals and Democrats. No amount of wishing can make these patterns go away. One politician was speaking more metaphorically than biologically when he said: "Democrats and Republicans think differently, like men and women—they think with different sides of the brain."[22]

Sociologists and political scientists have tracked group differences in ways of thinking since the first major national scientific survey of the general public, Samuel A. Stouffer's *Communism, Conformity and Civil Liberties*.[23] In 1955, Stouffer found educational, regional, and gender differences in tolerance for nonconformists.[24] Most other carefully done studies have found group differences in views—for example:

(1) differences in views on science between genders, religions, and occupations;[25]

("[A]ny claim that women think differently is subject to a charge of 'gender essentialism,' which ascribes a unitary voice to women.")).

19. *See, e.g.*, Howard Fineman, *Old Politics and New Labels,* NEWSWEEK, Oct. 14, 1985, at 35 ("Everyone agrees the hoary liberal-conservative labels are meaningless."); *Dissecting the Problems of Labels—and Politics,* SAN DIEGO UNION-TRIBUNE, April 6, 1996, Ed. B-7, at 7 ("Politics are meaningless.").

20. *See, e.g.*, William L. Hathaway, *The Labels 'Liberal' and 'Conservative' Can Still Be Quite Useful,* STAR TRIBUNE, Oct. 1, 1994, at 13A ("Political labels aren't meaningless to everyone. They connect people and politicians with recurring issues and beliefs.").

21. *See, e.g.*, Frank Rich, *So Long To Johnny, America's Sandman,* N.Y. TIMES, May 10, 1992, at H1 ("[T]he Democratic and Republican labels have become meaningless to most voters . . . ."); Jeff Shear, *Rukeyser: Bullish After 20 Years on 'Wall Street,'* WASH. TIMES, Oct. 31, 1990, at E1 (quoting Louis Rukeyser) ("I think words like Republican and Democrat, liberal and conservative, which people react to so emotionally and violently, are for the most part meaningless labels used by politicians to get us mad at each other . . . .").

22. Mary McGregory, *Dr. Foster and Mr. Dole,* WASH. POST, June 25, 1995, at C1.

23 . SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES (1955).

24. *Id*. at 192.

25. Mary Frank Fox & Glenn Firebaugh, *Confidence in Science: The Gender Gap*, 73 SOC. SCI. Q. 101 (1992).

(2) differences in views on homosexuality based on age, education, and urbanization;[26]

(3) differences between religions on views regarding civil liberties, racial and gender equality, AIDS, and government spending on the environment and the poor;[27]

(4) differences in views on abortion based on education, religion, and occupational prestige;[28]

(5) differences in views on abortion based on gender, education, and political views;[29]

(6) differences in views on gender equality in politics based on gender, marital status, education, and employment;[30]

(7) differences in views on many subjects based on political views;[31]

(8) differences in views on crime based on race and political views;[32]

(9) differences in tolerance, moral views, and politics based on religion;[33]

(10) racial differences in views on religion, race, and government spending;[34] and

(11) differences on a wide range of views based on age, education, gender, occupation, race, and religion.[35]

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26. Patrick Irwin & Norman L. Thompson, *Acceptance of the Rights of Homosexuals: A Social Profile*, 3 J. HOMOSEXUALITY 107 (1977).

27. ANDREW M. GREELEY, RELIGION AS POETRY (1995).

28. Lucky M. Tedrow & E.R. Mahoney, *Trends in Attitudes Toward Abortion: 1972–1976*, 43 PUB. OPINION Q. 181 (1979).

29. Michael Hout, *The Terms of Debate: Changing Responses to Abortion Questions, 1972–1989* (August 1990) (unpublished paper presented to the American Sociological Association).

30. Stephen Earl Bennett & Linda L.M. Bennett, *From Traditional to Modern Conceptions of Gender Equality in Politics: Gradual Change and Lingering Doubts*, 45 W. POL. Q. 93 (1992).

31. JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM (1990).

32. Steven F. Cohn & Steven E. Barkan, *Conflict and Consensus in the Determination of Punitive Attitudes Toward Criminals* (August 1987) (unpublished paper presented to the American Sociological Association).

33. Tom W. Smith, *America's Religious Mosaic*, 6 AM. DEMOGRAPHICS 19 (1984); Andrew M. Greeley, *Who Are the Catholic 'Conservatives'?*, AMERICA, Sept. 21, 1991, at 158; Kathleen Murphy Beatty & Oliver Walter, *Religious Preference and Practice: Reevaluating Their Impact on Political Tolerance*, 48 PUB. OPINION Q. 318 (1984).

34. ROBERT C. SMITH & RICHARD SELTZER, RACE, CLASS, AND CULTURE: A STUDY IN AFRO-AMERICAN MASS OPINION (1992).

Only one of the studies cited above, James Davis's unpublished GSS topical report,[36] attempts a comparative analysis of the strength of various demographic variables on opinions and attitudes. Writing in 1979 (using 1972–77 GSS data), Davis concludes that race is the most important predictor of attitudes, while the other demographic variables range from weak to strong predictors, depending on the attitude being measured.[37] Only occupational prestige shows very little power to predict attitudes.[38]

In the late 1990s I did a study of which demographic groups thought more differently on a wide range of issues in the 1996 General Social Survey.[39] I first looked at nine public issues (those that the public considered the most important issues facing the country, such as crime, the economy and inflation, government spending, and jobs).[40] Across these nine issues, the largest differences of opinion were for political groups (conservative Republicans versus liberal Democrats), followed by ethnic groups (for example, whites versus African Americans), religious groups (Jews versus fundamentalist Christians), and educational groups (those who had not completed high school versus those who had graduate or professional degrees), followed by age, occupational, and gender groups.

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35. JAMES A. DAVIS, BACKGROUND VARIABLES AND OPINIONS IN THE 1972–1977 NORC GENERAL SOCIAL SURVEYS: TEN GENERALIZATIONS ABOUT AGE, EDUCATION, OCCUPATIONAL PRESTIGE, RACE, REGION, RELIGION, AND SEX, AND FORTY-NINE OPINION ITEMS (General Social Survey Topical Report No. 2, 1979).

36. *Id.*

37. Further, Davis divides religion into just two groups: Catholic and Protestant. For academics, the real cleavages are Jewish, nonreligious, and Christian (which may or may not need to be broken down further). In academia, the numbers of Jewish and nonreligious professors are sometimes larger than the numbers of Catholics, and the Protestant-Catholic differences in views tend to be smaller than the ones between Christians and others.

38. *Id.* at 77.

39. *See* James Lindgren, *What Groups Think* (Aug. 1, 2001) (unpublished manuscript) (on file with author) (examining which demographic groups think most differently across a wide range of issues—those thought most important by blacks and whites, rich and poor, young and old, male and female, Republicans and Democrats, Christians and Jews).

40. The items were cuts in government spending, governments providing health care, help for the poor, the legalization of marijuana, fighting inflation over providing jobs, government jobs for all who want them, the morality of premarital sex, whether courts deal harshly enough with criminals, and confidence in the people running educational institutions.

I then repeated the analysis for eleven issues that are perennial issues before the Supreme Court or were roughly the subject of prominent Supreme Court cases in the late 1990s.[41] A similar (but not identical) pattern resulted for this group of legal issues. Here the hierarchy of importance for viewpoint diversity was (1) politics, followed by (2) religion, followed by (3) education and race, followed by (4) gender, occupation, and age. Turning to ten questions expressing respondents' views on life,[42] the most important differences were between those who had not completed high school and those who had graduate or professional degrees, followed by political groups.

Over all thirty issues examined, the largest differences were between political groups, followed by education, race, and religion. Gender was a relatively less important determinant of views. This work suggests that politics and religion (like race) are moderately strong predictors of views, while gender is a relatively weak predictor.[43] Accordingly, religious and political diversity are probably more important for viewpoint diversity than gender diversity and roughly as important as racial diversity. Thus this Article's finding that Republicans and Christians are more consistently underrepresented on law faculties than African Americans or women are particularly important if the goal is really viewpoint diversity, rather than affirmative action for traditionally locked-out groups.

II.   WHAT IS DIVERSITY?

Diversity has replaced affirmative action as the model for broadening the makeup of American universities. Superficially, diversity is a more attractive idea than affirmative action because diversity is a neutral principle that applies to all groups equally, while affirmative action is a paternalistic policy that involves those who control the universities preferring particular

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41. The eleven legal issues were school prayer, pornography, physician-assisted suicide, gun control, preferences in hiring women, ethnic congressional representation, confidence in the Supreme Court, abortion, school busing, the death penalty, and whether to allow gay professors.

42. I examined such questions as whether life is exciting (rather than routine or dull), whether people can be trusted, how happy the respondent is, whether the respondent has been angry in the last week, fear of crime, hours spent watching television, and whether men benefit from traditional marriages.

43. *See* Lindgren, *supra* note 39.

groups that have been subject to past discrimination. Yet diversity is a substitute for affirmative action in university hiring only if several premises are true—among them that the groups chosen for diversity hiring provide diversity. They must think differently than other groups and their differences should be relevant in some way. Indeed, the very neutrality that makes diversity so attractive opens the door for basing hiring on other sorts of diversity than simply race and gender diversity.

Second Circuit Judge Guido Calabresi, when he was Dean of Yale Law School, enumerated the sorts of diversity that might be relevant in law faculty hiring:

> (1) age diversity, (2) diversity between teachers and scholars, (3) subject matter diversity, (4) diversity of orientation as between theory and practice, (5) diversity in theory of law, (6) diversity in extra-legal framework applied to legal analysis . . . (7) racial, religious, ethnic, gender and sexual orientation diversity . . . (8) *ideological or political diversity*.[44]

Though there are different ways to understand diversity, I see three strands of diversity theory, which in the hands of practitioners are usually entangled. The first meaning of diversity is a form of eclecticism—or disparagingly, tokenism. Call it the Noah's Ark approach: Let's have a few women, a few African Americans, a few other minorities, a few Christians, a few Jews, a few Republicans, and so on. Just having different points of view represented is the important thing—it is a matter of relative indifference how well they are represented. Accordingly, if there are no Republicans on a faculty, that would be a problem, but so long as there are a couple of Republicans on a faculty, that would be fine, since their point of view would be represented. This approach to diversity is usually attacked as tokenism, at least when applied to ethnic minorities.

The second strand of diversity theory is the main one—the proportional representation view. The crucial issue here is not disadvantaged groups, but underrepresented ones. No groups are favored all the time; it depends on which ones are underrepresented. Proportional representation is considered the approximate test of fairness, though few people urge exact

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44. Guido Calabresi, *Diversity in Faculty Hiring* 2 (July 31, 1990) (unpublished manuscript), *quoted in* Alex M. Johnson, Jr., *The New Voice of Color,* 100 YALE L.J. 2007, 2046 n.165 (1991) (emphasis added).

proportional representation. The goal is a roughly equal distribution of demographic groups in jobs; a workforce should "look like America." Indeed, the significant underrepresentation of groups is typically assumed to be the result of discrimination by the employer. Here diversity itself is a positive good; every person benefits by its presence and any underrepresented group may claim its protection. The goal is equality of results, not a supposed equality of opportunity.[45]

As defended by Walter Dellinger, the head of the Office of Legal Counsel during the Clinton administration, diversity theory is based "on what seems to be a commonsense proposition that in the aggregate, increasing the diversity of a student body is bound to make a difference in the array of perspectives communicated at a university."[46] Terry Eastland contrasts remediation, the heart of affirmative action theory, with diversity:

> Diversity . . . has nothing to do with the past. It does not presume that its beneficiaries are disabled; it does not regard (or insult) them as shackled runners. Instead, diversity regards all of us as just fine the way we are. Our virtue is our diversity . . . .[47]

Even white groups can potentially benefit from this proportional representation version of diversity theory. In the government's brief in *United States v. Piscataway Board of Education*,[48] Deval Patrick argued, "Potentially, the same interest in faculty diversity could tip the balance in favor of a white teacher if the composition of a department would otherwise have included no white teacher."[49] President Bill Clinton agreed that diversity theory should be understood to favor whites if they are underrepresented: "As long as [the rationale] runs both ways or all ways . . . I support that decision."[50] He goes on to

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45. *See* Dinesh D'Souza, The End of Racism: Principle for a Multiracial Society 220–25 (1995).

46. *See* Eastland, *supra* note 1, at 81 (citation omitted).

47. *Id.* at 109. Eastland opposes proportional representation diversity: "Ultimately, the problem with proportionalism is that it treats groups, not individuals, and it is individuals who take tests, achieve grade point averages, choose colleges, majors, and careers—and who also may defy racial and ethnic classifications." *Id.* at 84.

48. 832 F. Supp. 836 (D.N.J. 1993).

49. Eastland, *supra* note 1, at 114.

50. *Id.*

say that a white teacher might be retained "to preserve racial diversity" if he or she were the only white faculty member.[51]

Justice Powell, an early adopter of diversity theory, argued that diversity was not limited to race and ethnicity; rather, there might be many other characteristics that would contribute to educational diversity.[52] Under this predominate view, it is important to know which forms of diversity are important. For example, fat people or short people or blue-eyed people might be underrepresented or discriminated against in a particular job, but they may—or may not—bring any different points of view relevant to diversity. The crucial points then are to know which groups are underrepresented and which groups think differently. This Article examines the first of these issues: which demographic groups are underrepresented. I have examined the second issue elsewhere.[53]

The third meaning of diversity is essentially affirmative action—remedial preferences for historically disadvantaged groups. This approach has little directly to do with diversity, since it is based instead on remedying harm, not on seeking diversity.[54] It favors disadvantaged groups, whether or not they add significant diversity. This approach is sometimes attacked as paternalistic and as problematic for groups that are mostly recent arrivals in this country (like Latinos and Asians). In this strand, the term *diversity* is a misnomer; its proponents really mean affirmative action.

III.   DATA SOURCES

The best data on the racial and gender makeup of law teachers are collected by the Association of American Law Schools (AALS). Not only is the nonresponse rate extraordinarily low, but considerable effort has been made to fill in missing information. Richard White, the AALS's staffer in charge of its sta-

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51. *Id.*

52. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978) (opinion of Powell, J.).

53. *See generally* Lindgren, *supra* note 39.

54. Eastland argues: "The founding rationale of affirmative action was to remedy the ill effects of past discrimination against blacks, but this rationale did not easily fit the other groups. So affirmative action was redefined and rejustified in terms of overcoming 'underrepresentation' and achieving 'diversity.'" EASTLAND, *supra* note 1, at 199.

tistics, reports that nonrespondents have essentially the same demographic characteristics as respondents.[55] This is consistent with the usual findings of survey researchers, a conclusion that allows missing data to be excluded from the analysis.

Yet because slightly more males than females are nonrespondents, I have stratified the sample, first determining the male-female breakdown, then determining the racial makeup of each sex using those professors who provided ethnic information. By breaking down gender first and then ethnicity, I have obtained a more accurate estimate of the gender breakdown of law teachers and a smaller (and probably more accurate) estimate of the minority professor percentage than is reflected in the AALS responses. I have also made two other moves that tend to induce lower numbers of minority professors than is generally reported in AALS public data releases. I have excluded schools below the top 100 as assessed by faculty in *US News & World Report*. This move particularly reduces the Hispanic professor percentages by about half, because the three Puerto Rican law schools are omitted. Further, I included only categories that tend to be tenured or tenure-track: professors, associate professors, assistant professors, deans, associate deans with a professorial rank, assistant deans with a professorial rank, and head librarians. These decisions yield a more modest percentage of minority professors and women than one often sees from official sources: 10.9% minority and 25.9% women in the 1996–97 year at the top 100 schools.

The AALS racial and ethnic categories are less than ideal because Hispanic origin is not actually asked. Rather, the categories Chicano, Puerto Rican, and other Hispanic are offered as full ethnic descriptions in opposition to white and African American. While in the general population many Hispanics list themselves as both Hispanic and white (since separate questions are asked), in the AALS data, very few people are so listed. Probably, some law professors who were whites of Hispanic origin chose white when forced to choose on the AALS form.

Thus, comparing AALS Hispanic categories to the Current Population Survey categories is likely to overstate the amount of Hispanic underrepresentation in law schools.

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55. Personal communication with Richard White, Staff member, AALS (Aug. 1996).

Although treating Hispanics as an ethnic category equivalent to racial ones is consistent with the mindset of most law professors, it is inconsistent with the approach of the U.S. Census in the 1990s, which asked separate questions on race and Hispanic origin. Further, the Census data overstate the number of Hispanics who might possibly be in the broadest construction of the pool. According to self-reports to the U.S. Census, in 2000 about half of adult Hispanics spoke English less than fully fluently.[56] Therefore, the Hispanic disparities (which are often the largest ethnic disparities revealed in this study) are overstated by an overbroad definition of the pool and an under-broad definition of Hispanic law professors.

The U.S. Census collects data on race, Hispanic origin, and gender, as well as on occupations (such as lawyers, judges, and law professors). The race and gender data in this study are generated from the March 1994 Current Population Survey (CPS), which is the Annual Demographic File. The CPS is the government's main source of information on jobs and unemployment in the United States. The CPS is weighted to correct for the 1990 Census's undercount of minorities. It surveys the U.S. Noninstitutionalized Population, the same group used for computing unemployment figures. When I refer to the racial or gender makeup of the general population or of the full-time working population, I am referring to the numbers and percentages in this sample for ages 30–75.[57]

Data on the religious and political makeup of lawyers, workers, and the general population are taken from a standard source of demographic information, NORC's General Social Survey (GSS), taken over the years 1982–94 for minorities, 1988–94 for non-Hispanic whites, and 1972–94 for lawyers. Increasing the time window for minorities and lawyers was used as a surrogate for oversampling to increase the reliability of

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56. 47.5% of persons over the age of 18 who speak Spanish or Spanish Creole at home indicated that they speak English "very well" on the 2000 U.S. Census. *See* U.S. CENSUS BUREAU, ABILITY TO SPEAK ENGLISH BY LANGUAGE SPOKEN AT HOME FOR THE POPULATION 18 YEARS AND OVER: 2000 (2004), *available at* http://www.census.gov/programs-surveys/decennial-census/2000-census/data/tables/phc-t-37.html#eighteenyears [http://perma.ccv/8D9J-UTTF].

57. In my sample of 710 law professors, the age range was 29–80. In choosing an age range for comparison, I deleted the outlying 0.5% on each end, reducing the range for the comparison groups to ages 30–75.

estimates for small groups. NORC surveys scientific samples of the English-speaking non-institutionalized U.S. population.

Although the GSS has been used in thousands of academic studies over the years, it has a couple weaknesses for my purposes. First, by surveying only English-speaking Americans, it undoubtedly gives a somewhat inaccurate view of groups with substantial numbers of non-English speakers, such as Hispanics. For example, non-English speaking Hispanics might be more Catholic than English-speaking ones. Second, since I needed enough demographic data to generalize about small groups, I used data from 1982 through 1994.[58] This method tends to suppress the substantial shift toward the Republican Party over that time and a smaller trend toward secularism. Thus, to the extent that this study shows substantial underrepresentation of Republicans in law teaching—and it does—the true underrepresentation of Republicans is probably larger. Third, the number of lawyers in the GSS data was quite small (only 129 subjects). Conclusions about the religious and political preferences of lawyers must, accordingly, be judged with extreme skepticism.

Data on the religious and political makeup of law teachers were collected in a survey of law teachers conducted from October 1993 through February 1994. I used a systematic probability sample of 1080 law professors at the top 100 schools and received 710 responses (66%) answering all race, gender, political, and religious questions.[59] A modified version of Don Dill-

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58. I went back further, to 1972, in the lawyer data.

59. First, a list of the top 100 law schools was derived from the April 1993 *U.S. News & World Report* study. Because of methodological problems with the overall ranks in that study and the absence of precise ranks for most schools (schools below the top 25 are listed by quartile), only the *U.S. News* rankings by academics were used. Ties were resolved using the practitioner ranks. A systematic or pseudo-simple random sample of 1080 law professors from those 100 law schools was drawn from the 1992–93 AALS Directory. Only professors, associate professors, assistant professors, and acting professors were included. Deans, librarians, program directors, chairs, named professors, and joint appointees were included if they appeared to have regular faculty appointments. Most faculty denominated with "clinical" titles were excluded, as were those denominated "emeritus," "adjunct," "lecturer," or "visiting." This would roughly comprise the tenured and tenure-track faculty, but because of ambiguities in listing, the sample may exclude a few clinical professors with tenure, and did include a few professors not on the tenure track or with courtesy appointments in their law schools. Some of these professors declined to participate for these reasons, reducing the nominal response rate. Also slightly reducing the response rate were some professors who

man's Total Design Method was used to implement the survey and obtain the high response; indeed, the response was high enough that the third and final mailing of the survey was canceled. The questions asked were modified versions of Census or General Social Survey questions to allow comparisons. The party identification questions were particularly successful in getting Independents to indicate whether they leaned Republican or Democratic.[60] The data appear to be of high quality, especially when I adjust the results for religion and politics by postweighting them with AALS gender and ethnic data.[61]

Table 1
Data Sources and Sample Sizes

POPULATION	RACE	GENDER	PARTY ID	RELIGION
Law Professors	AALS 1996–97 (n=4,222)	AALS 1996–97 (n=4,222)	Survey 1993–94 (n=710)	Survey 1993–94 (n=710)
Lawyers	1994 Current Population Survey (n=413)	1994 Current Population Survey (n=413)	Gen. Social Surv. 1972–94 (n=129)	Gen. Social Surv. 1972–94 (n=129)
Full-Time Working Population	1994 Current Population Survey (n=37,612)	1994 Current Population Survey (n=37,612)	Gen. Social Surv. 1982–94 (n=4,988)	Gen. Social Surv. 1982–94 (n=4,988)

had left law teaching, retired, or who were traveling outside of the country on sabbaticals.

60. Those leaning Democratic or Republican were classified as Democratic or Republican, rather than Independent. This was particularly justified for law professors, where Independents and members of other parties are often not in the middle of the spectrum, but rather to the left of the Democratic Party. Indeed, there were more socialists in my survey than there were white female Republican Protestants (the largest four-way group in the U.S. population). As to religion, there were also more Buddhists and more "pagans," who believe in many gods, than white female Republican Protestants.

61. Thus, for example, if women or minorities were less likely to respond to the survey, this would have little effect, since the gender and race totals and percentages are taken from AALS data. If, however, those minorities or women who responded were different than those minorities and women who did not, that would affect results.

General US Population	1994 Current Population Survey (n=76,971)	1994 Current Population Survey (n=76,971)	Gen. Soc. Surv. 1988–94 (whites); 1982–94 (minorities) (n=9,065)	Gen. Soc. Surv. 1988–94 (whites); 1982–94 (minorities) (n=9,065)

One must understand that, while the gender and ethnic professor information is probably very accurate for all groups other than Hispanics, the political and religious professor information is less so. For that reason, while I provide ethnic and gender breakdowns for all minority groups in the data, I do not provide the religious and political breakdown for each minority group (Asians, Native Americans, Hispanics, Other Race), but rather for two ethnic minorities—African Americans (blacks) and Other Minority.

The foregoing is intended to express two things:

(1) These are the most careful estimates yet done on the demographics of law teaching—and standard sources of data were used.

(2) These are, nonetheless, only *rough estimates.* The tables in this paper give a false sense of precision. The problems of comparability of questions and sampling techniques between four different data sources leads to many small sources of error in the estimates. Some sources of error should reduce the measured underrepresentation of minorities; more sources of error should increase it. Thus, when I was faced with a close decision on methodology, I tried to make the choice that likely critics would find most congenial to their views.

IV.   RACE, GENDER, RELIGION, AND PARTY

Diversity hiring in law schools is usually reduced to gender and race. Table 2 shows how well groups defined by race, gender, party identification, and religion were represented in the legal academy in 1997 compared to both the general population and the full-time working population. As the U.S. Census explains, there are two common ways to express a difference: one is the simple difference between the two rates being measured;

the other is a ratio of one figure to the other.[62] Table 2 uses both methods. Table 3 uses the first method (differences of percentages); Table 4 uses the second method (ratio of percentages). Because underrepresentation in law teaching implies efforts to correct the condition, in some tables I have also indicated for each group the number of teaching slots that the group is short of parity with the comparison population if members of that group were the exclusive future hires of a faculty of average size of 42.

As can be seen in Table 2, measured by a simple difference of percentages with the U.S. full-time working population, Republicans and Protestants are the most underrepresented groups, followed by women and Catholics. Among ethnic minorities, Hispanics (and the tiny "Other Race" category) are the most underrepresented measured by ratios. Though Asians in law teaching are at only 61–66% of parity with the general and working populations, the differences are not large enough to be statistically significant. Table 2 shows part of what one might expect—whites and males are overrepresented and minorities and females are underrepresented.

My data do not further break down Hispanics into fully fluent in English and not fully fluent, but if one were to control simply for English fluency, English-speaking Hispanics would be represented more on the level of nonwhite ethnic groups—still underrepresented, but less so.

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62. As the Census explains: "Percentages, Rates, and Ratios: These measures are frequently presented in census products to compare two numbers or two sets of measurements. These comparisons are made in two ways: (1) subtraction, which provides an absolute measure of the difference between two items, and (2) the quotient of two numbers, which provides a relative measure of difference." U.S. DEPT. OF COMMERCE 1990 CENSUS OF POPULATION AND HOUSING, PUBLIC USE MICRODATA SAMPLES: UNITED STATES, TECHNICAL DOCUMENTATION, at B-51 (1993).

Table 2
Proportion of Law Professors by Ethnicity, Gender,
Political Party, & Religion

Group	Law Profs (1996–97)	Full-time Working Pop. (1994) (30–75)	Population (1994) (30–75)	Difference: Prof%–Working Pop.%	Ratio: Prof%/Working Pop.%	New Hires to Reach Parity on a Faculty of 42	Difference: Prof%–Pop.%	Ratio: Prof%/Pop.%	New Hires to Reach Parity on a Faculty of 42
Ethnicity									
Asian	1.9%	3.1%	2.8%	-1.2%	0.61	1	-1.0%	0.66	0
African American	6.4%	10.7%	11.0%	-4.3%	0.60*	2	-4.6%	0.58*	2
Hispanic	2.3%	7.6%	8.0%	-5.3%	0.31*	2	-5.7%	0.29*	3
Native American	0.3%	0.5%	0.6%	-0.2%	0.53	0	-0.3%	0.47	0
Non-Hispanic White	89.1%	78.2%	77.7%	10.9%	1.14*	-	11.4%	1.15*	-
Other Race	0.2%	0.8%	0.7%	-0.6%	0.24	0	-0.5%	0.26	0
Gender									
Female	25.9%	40.3%	51.9%	-14.4%	0.64*	10	-25.9%	0.50*	23
Male	74.1%	59.7%	48.1%	14.4%	1.24*	-	25.9%	1.54*	-
Party									
Democratic	80.4%	46.2%	48.8%	34.2%	1.74*	-	31.6%	1.65*	-
Independent	6.4%	12.8%	12.6%	-6.4%	0.50*	3	-6.2%	0.51*	3
Republican	13.2%	41.0%	38.6%	-27.8%	0.32*	20	-25.4%	0.34*	17
Religion									
Catholic	13.7%	26.0%	26.1%	-12.3%	0.53*	7	-12.4%	0.52*	7
Jewish	26.7%	2.0%	1.9%	24.7%	13.33*	-	24.8%	13.90*	-
No Religion	26.3%	8.3%	7.4%	18.0%	3.16*	-	18.9%	3.57*	-
Other Religion	1.1%	3.1%	2.9%	-2.0%	0.35*	1	-1.8%	0.38*	1
Protestant	32.3%	60.5%	61.8%	-28.3%	0.53*	30	-29.6%	0.52*	33

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

* Differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

A.   Underrepresented Groups Compared to the U.S. Full-Time Working Population and the General Population

When the analysis gets more sophisticated, the results get more interesting. In the following Tables, I show results for groups that are significantly misrepresented in law teaching. Table 3 shows the most underrepresented groups in terms of absolute differences in the percentages in each group. For example, on line 4 of Table 3, white Protestants are 28.1% of the law professor population, but 48.4% of the U.S. full-time working population, ages 30–75. The difference is 20.4%, about a fifth of a faculty. Significance testing was done using a two-tailed Fisher's Exact Test for 2x2 tables and a critical value corresponding to *p* < .05.[63]

Table 3
The 40 Most Underrepresented Groups of Law Professors
Compared to the Full-time Working Population,
Ranked by % Differences

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996-97)	Full-time Working Pop. (35-70)	Difference: Prof%- Working Pop.%	Ratio: Prof%/ Working Pop.%	New Hires to Reach Parity on a Faculty of 42
1				Protestant	32.3%	60.5%	-28.3%	53%	30
2			R		13.2%	41.0%	-27.8%	32%	20
3	Non-Hispanic White		R		12.8%	37.2%	-24.4%	34%	16
4	Non-Hispanic White			Protestant	28.1%	48.4%	-20.4%	58%	17
5			R	Protestant	7.5%	27.1%	-19.7%	28%	11
6	Non-Hispanic White		R	Protestant	7.1%	25.5%	-18.4%	28%	10
7		F		Protestant	7.5%	25.8%	-18.3%	29%	10
8		F	R		0.5%	14.9%	-14.5%	3%	7
9		F			25.9%	40.3%	-14.4%	64%	10
10	Non-Hispanic White	F		Protestant	5.7%	19.9%	-14.2%	28%	8
11		M	R		12.7%	26.1%	-13.4%	49%	8
12	Non-Hispanic White	F	R		0.3%	13.5%	-13.1%	2%	6

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63. In Tables 3–11, only significant results are reported.

13				Catholic	13.7%	26.0%	-12.3%	53%	7
14	Non-Hispanic White	M	R		12.5%	23.7%	-11.2%	53%	6
15		F	R	Protestant	0.1%	10.5%	-10.3%	1%	5
16		M		Protestant	24.7%	34.8%	-10.0%	71%	6
17	Non-Hispanic White	F	R	Protestant	0.0%	9.8%	-9.8%	0%	5
18		M	R	Protestant	7.3%	16.7%	-9.3%	44%	5
19	Non-Hispanic White	F			21.5%	30.8%	-9.3%	70%	6
20	Non-Hispanic White	M	R	Protestant	7.1%	15.7%	-8.6%	45%	4
21	Non-Hispanic White			Catholic	11.0%	19.2%	-8.2%	57%	4
22			R	Catholic	2.3%	9.7%	-7.4%	24%	3
23		F		Catholic	3.5%	10.5%	-7.0%	33%	3
24			R		6.4%	12.8%	-6.4%	50%	3
25	Non-Hispanic White	M		Protestant	22.4%	28.5%	-6.1%	78%	4
26	Non-Hispanic White		R	Catholic	2.3%	8.1%	-5.8%	28%	3
27	African American			Protestant	3.3%	9.0%	-5.7%	36%	3
28	Non-Hispanic White	F		Catholic	2.1%	7.7%	-5.6%	27%	3
29		M		Catholic	10.2%	15.5%	-5.3%	66%	3
30	Hispanic				2.3%	7.6%	-5.3%	31%	2
31		F	D	Protestant	7.2%	12.4%	-5.1%	59%	2
32			I	Protestant	1.7%	6.8%	-5.1%	24%	2
33	African American		D	Protestant	2.8%	7.5%	-4.8%	37%	2
34	Non-Hispanic White		I		5.3%	10.0%	-4.7%	53%	2
35		F	I		0.5%	4.9%	-4.5%	10%	2
36	African American				6.4%	10.7%	-4.3%	60%	2
37	Non-Hispanic White		I	Protestant	1.3%	5.5%	-4.2%	24%	2
38	Other Minority			Catholic	1.8%	6.0%	-4.2%	30%	2
39		M	I	Catholic	2.1%	6.3%	-4.2%	34%	2
40	Non-Hispanic White	F	I		0.3%	3.9%	-3.5%	8%	2

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

*All differences significant at *p* < .05, using a 2-tailed Fisher's Exact Test

In Table 3 the most underrepresented groups are not minorities. Rather, *all* of the twenty-six most underrepresented groups are white (or predominately white). Over half of the top twen-

ty-six are Republican and most are also Christian.[64] The most underrepresented group overall is Protestants, followed by Republicans. Given the political power in the 1990s of groups such as the Christian Coalition, the underrepresentation of Protestants is not without political implications. Indeed, Irving Kristol in *Neo-Conservatism* argues that the characteristic that distinguishes British conservatism from American neo-conservatism is that the latter is religious at its core.[65] The second most underrepresented *ethnic*[66] group in law teaching is non-Hispanic white Protestants—pejoratively, "WASPs"—the group that is traditionally thought of as the dominant group in American society.

Table 3 also shows what would be needed in faculty hiring to reach parity with the full-time working population ages 30–75, if a faculty of average size hired exclusively members of the underrepresented group. For Protestants to reach parity, one would have to increase the size of each of the top 100 faculties by more than half, hiring 30 new Protestants on each of 100 faculties. If one wanted Christians[67] overall to reach parity, one would have to hire 128 Christians on each faculty to reach parity (because of nonreligious and Jewish overrepresentation). In contrast, by hiring just two more African Americans (row 36) on each faculty, African Americans would be fully represented on law faculties. One would have to hire ten women or twenty Republicans to reach parity.

Table 4 shows the breakdown of the most underrepresented groups in law teaching, ranked by a ratio of percentages. For example, female Republicans (line 8) are 14.9% of the working population of ages 30–75, but only 0.5% of the law professor population. The ratio of these two percentages is .5% to 14.9%, which equals .03 (or 3%). This means that female Republicans in law teaching are at only 3% of their percentages as compared to the general population of the same age.

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64. *But see generally* John T. Noonan, Jr., *A Catholic Law School,* 67 NOTRE DAME L. REV. 1037 (1992).

65. IRVING KRISTOL, NEO-CONSERVATISM: THE BIOGRAPHY OF AN IDEA 375–81 (1995).

66. Here I mean a group defined in whole or part by ethnicity or race.

67. I have not used "Christian" as a category in these tables, but rather Protestant and Catholic.

Table 4
The 40 Most Underrepresented Groups of Law Professors
Compared to the Full-time Working Population, Ranked by
Ratios

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996-97)	Full-time Working Pop. (35-70)	Difference: Prof%- Working Pop.%	Ratio: Prof%/ Working Pop.%
1	Non-Hispanic White	F	R	Protestant	0.0%	9.8%	-9.8%	0%
2	Non-Hispanic White	F	I	Protestant	0.0%	2.4%	-2.4%	0%
3		F	I	Catholic	0.0%	1.5%	-1.5%	0%
4			R	Other Religion	0.0%	1.1%	-1.1%	0%
5	Non-Hispanic White		R	Other Religion	0.0%	0.8%	-0.8%	0%
6		F	R	Protestant	0.1%	10.5%	-10.3%	1%
7	Non-Hispanic White	F	R		0.3%	13.5%	-13.1%	2%
8		F	R		0.5%	14.9%	-14.5%	3%
9		F	R	Catholic	0.2%	3.4%	-3.3%	5%
10		F	I	Protestant	0.1%	2.9%	-2.8%	5%
11	Non-Hispanic White	F	R	Catholic	0.2%	2.8%	-2.6%	6%
12	Other Minority		R		0.2%	3.0%	-2.8%	8%
13	Non-Hispanic White	F	I		0.3%	3.9%	-3.5%	8%
14		F	I		0.5%	4.9%	-4.5%	10%
15	Other Minority	M	R		0.2%	1.9%	-1.6%	13%
16	Other Minority	F		Protestant	0.2%	1.3%	-1.1%	18%
17	Other Minority	M		Catholic	0.8%	3.6%	-2.8%	23%
18		M		Other Religion	0.5%	2.3%	-1.7%	24%
19			R	Catholic	2.3%	9.7%	-7.4%	24%
20	Non-Hispanic White		I	Protestant	1.3%	5.5%	-4.2%	24%
21			I	Protestant	1.7%	6.8%	-5.1%	24%
22	Other Minority		I		0.5%	1.8%	-1.3%	27%
23	Non-Hispanic White	F		Catholic	2.1%	7.7%	-5.6%	27%
24	Hispanic	F			0.8%	2.8%	-2.0%	27%
25			R	Protestant	7.5%	27.1%	-19.7%	28%
26	Non-Hispanic White		R	Protestant	7.1%	25.5%	-18.4%	28%
27	Non-Hispanic White		R	Catholic	2.3%	8.1%	-5.8%	28%
28			I	Catholic	1.0%	3.4%	-2.4%	28%

29	Non-Hispanic White	F		Protestant	5.7%	19.9%	-14.2%	28%
30		F		Protestant	7.5%	25.8%	-18.3%	29%
31	Other Minority			Catholic	1.8%	6.0%	-4.2%	30%
32	Other Minority			Protestant	1.0%	3.1%	-2.2%	31%
33	Hispanic				2.3%	7.6%	-5.3%	31%
34	Non-Hispanic White		I	Catholic	0.8%	2.5%	-1.7%	32%
35			R		13.2%	41.0%	-27.8%	32%
36	Hispanic	M			1.6%	4.9%	-3.3%	33%
37		F		Catholic	3.5%	10.5%	-7.0%	33%
38		M	R	Catholic	2.1%	6.3%	-4.2%	34%
39	Non-Hispanic White		R		12.8%	37.2%	-24.4%	34%
40	African American	F	D	Protestant	1.3%	3.9%	-2.5%	34%

Data sources:
AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)
1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)
1994 Current Population Survey, U.S. Census, ages 30–75
General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers
*All differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

Table 4 shows that even when a ratio approach is used, ethnic minorities hold only about a quarter of the top forty spots on the list of the most underrepresented groups. Republicans, Christians, and Independents hold all of the top twenty-three spots on the list. In Table 4, the most underrepresented group of substantial size is white female Republican Protestants. In the full-time working population ages 30–75, there are more white female Republicans than there are African Americans and Native Americans combined. Yet most law professors I consulted in the late 1990s could not name more than one white female Republican law professor.

The pattern for the general non-institutionalized population (Table 5) is similar to the pattern for the full-time working population, though here women law professors fare a bit worse compared to the general population than they do compared to the working population, a pattern reflecting that many women (particularly white women over 50) did not work outside the home in the mid-1990s. As Table 5 indicates, Hispanics (line 26) and African Americans (line 35) are also among the forty most underrepresented groups, as they are in Table 3.

Table 5
The 40 Most Underrepresented Groups of Law Professors
Compared to the US Population, Ranked by % Differences

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Difference: Prof%– Working Pop.%	Ratio: Prof%/ Working Pop.%	New Hires to Reach Parity on a Faculty of 42
1				Protestant	32.3%	61.8%	-29.6%	52%	33
2		F			25.9%	51.9%	-25.9%	50%	23
3		F		Protestant	7.5%	33.2%	-25.7%	23%	16
4			R		13.2%	38.6%	-25.4%	34%	17
5	Non-Hispanic White		R		12.8%	34.9%	-22.1%	37%	14
6	Non-Hispanic White			Protestant	28.1%	48.5%	-20.5%	58%	17
7	Non-Hispanic White	F		Protestant	5.7%	25.7%	-20.0%	22%	11
8		F	R		0.5%	18.9%	-18.4%	2%	10
9	Non-Hispanic White	F			21.5%	40.0%	-18.4%	54%	13
10			R	Protestant	7.5%	25.8%	-18.3%	29%	10
11	Non-Hispanic White		R	Protestant	7.1%	24.0%	-16.9%	30%	9
12	Non-Hispanic White	F	R		0.3%	17.2%	-16.8%	2%	9
13		F	R	Protestant	0.1%	13.1%	-12.9%	1%	6
14				Catholic	13.7%	26.1%	-12.4%	52%	7
15	Non-Hispanic White	F	R	Protestant	0.0%	12.2%	-12.2%	0%	6
16		F		Catholic	3.5%	13.8%	-10.3%	25%	5
17		F	D	Protestant	7.2%	16.2%	-8.9%	45%	5
18	Non-Hispanic White			Catholic	11.0%	19.5%	-8.5%	56%	4
19	Non-Hispanic White	F		Catholic	2.1%	10.3%	-8.2%	20%	4
20			R	Catholic	2.3%	9.3%	-7.0%	25%	3
21		M	R		12.7%	19.7%	-7.0%	65%	4
22	African American			Protestant	3.3%	9.5%	-6.3%	34%	3
23			I		6.4%	12.6%	-6.2%	51%	3
24		F	I		0.5%	6.6%	-6.2%	7%	3
25			D	Protestant	23.1%	29.0%	-5.8%	80%	3
26	Hispanic				2.3%	8.0%	-5.7%	29%	3
27	Non-Hispanic White		R	Catholic	2.3%	7.8%	-5.5%	29%	3
28			I	Protestant	1.7%	7.1%	-5.4%	23%	2
29		M	R	Protestant	7.3%	12.7%	-5.4%	58%	3

30	African American		D	Protestant	2.8%	8.1%	-5.3%	34%	2
31	Non-Hispanic White	M	R		12.5%	17.8%	-5.3%	70%	3
32	Non-Hispanic White	F	I		0.3%	5.2%	-4.8%	6%	2
33	Non-Hispanic White	M	R	Protestant	7.1%	11.8%	-4.7%	60%	2
34	Non-Hispanic White	F	D	Protestant	5.7%	10.3%	-4.7%	55%	2
35	African American				6.4%	11.0%	-4.6%	58%	2
36	Non-Hispanic White		I		5.3%	9.8%	-4.5%	54%	2
37		F	R	Catholic	0.2%	4.6%	-4.5%	4%	2
38	Non-Hispanic White		I	Protestant	1.3%	5.8%	-4.4%	23%	2
39	Other Minority			Catholic	1.8%	5.8%	-4.0%	31%	2
40		F	D	Catholic	3.3%	7.3%	-4.0%	46%	2

Data sources:
AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank
1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)
1994 Current Population Survey, U.S. Census, ages 30–75
General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers
*All differences significant at *p* < .05, using a 2-tailed Fisher's Exact Test

If comparisons of law professors to the general population were sorted by ratios of percentages,[68] Republicans and Independents would fill all of the top fourteen spots and women would fill eleven of these fourteen slots.

B. *Overrepresented Groups Compared to the U.S. Full-Time Working Population and the General Population*

Proportional representation is a zero-sum game. If someone is on the bottom, someone else must be on the top. Which groups are the most overrepresented in law teaching? Table 6 shows the forty significantly overrepresented groups in law teaching in absolute and relative terms. At the top of the list are white Democrats, the excess accounting for two-fifths of a faculty (40%). All of the thirty-four most overrepresented groups are white (or predominately white), most are Democratic, and most are either Jewish or nonreligious.

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68. The April 14, 2015, draft of this paper contains additional Tables omitted here. *See* James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013* [hereinafter Diversity Draft], Table 6, *available at* http://dx.doi.org/10.2139/ssrn.2581675 [http://perma.cc/JXS5-9QMF].

Table 6
The 40 Significantly Overrepresented Groups of
Law Professors
Compared to the Full-Time Working Population, Ranked by
% Difference

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Difference: Prof%– Working Pop.%	Ratio: Prof%/ Working Pop.%
1	Non-Hispanic White		D		71.0%	31.1%	40.0%	2.29
2			D		80.4%	46.2%	34.2%	1.74
3	Non-Hispanic White	M	D		50.1%	17.5%	32.6%	2.86
4		M	D		55.5%	25.8%	29.6%	2.15
5				Jewish	26.7%	2.0%	24.7%	13.33
6	Non-Hispanic White			Jewish	26.5%	1.9%	24.6%	13.86
7			D	Jewish	23.8%	1.2%	22.6%	19.27
8	Non-Hispanic White		D	Jewish	23.6%	1.2%	22.4%	20.23
9	Non-Hispanic White	M			67.5%	47.4%	20.2%	1.43
10		M		Jewish	20.1%	1.2%	18.8%	16.31
11	Non-Hispanic White	M		Jewish	19.8%	1.2%	18.7%	16.96
12			D	No Religion	22.0%	4.0%	18.0%	5.51
13				No Religion	26.3%	8.3%	18.0%	3.16
14		M	D	Jewish	17.5%	0.7%	16.8%	25.66
15	Non-Hispanic White	M	D	Jewish	17.3%	0.6%	16.7%	27.78
16	Non-Hispanic White		D	No Religion	19.3%	3.1%	16.1%	6.13
17	Non-Hispanic White			No Religion	22.9%	6.9%	16.0%	3.33
18		M			74.1%	59.7%	14.4%	1.24
19		M		No Religion	18.6%	5.9%	12.6%	3.12
20		M	D	No Religion	14.4%	2.5%	11.9%	5.70
21	Non-Hispanic White	M		No Religion	15.9%	4.9%	11.1%	3.27
22	Non-Hispanic White				89.1%	78.2%	10.9%	1.14
23	Non-Hispanic White	M	D	No Religion	12.5%	2.0%	10.5%	6.34
24	Non-Hispanic White	F	D		20.9%	13.5%	7.4%	1.55
25		F	D	No Religion	7.5%	1.5%	6.1%	5.18
26	Non-Hispanic White	F		Jewish	6.6%	0.7%	5.9%	8.97
27		F		Jewish	6.6%	0.8%	5.9%	8.58

28	Non-Hispanic White	F	D	Jewish	6.3%	0.5%	5.8%	11.60
29		F	D	Jewish	6.3%	0.6%	5.8%	11.40
30	Non-Hispanic White	F	D	No Religion	6.8%	1.2%	5.6%	5.78
31		F		No Religion	7.7%	2.4%	5.3%	3.25
32	Non-Hispanic White	F		No Religion	7.0%	2.0%	5.0%	3.48
33		F	D		25.0%	20.4%	4.6%	1.22
34	Non-Hispanic White	M	D	Protestant	13.9%	9.7%	4.3%	1.44
35	African American			No Religion	2.0%	0.4%	1.6%	4.57
36	African American		D	No Religion	1.9%	0.3%	1.5%	5.53
37		M	R	Jewish	1.6%	0.4%	1.2%	3.59
38	Non-Hispanic White	M	R	Jewish	1.6%	0.4%	1.2%	3.59
39	Non-Hispanic White		R	Jewish	1.8%	0.6%	1.1%	2.84
40			R	Jewish	1.8%	0.6%	1.1%	2.78

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

*All differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

If Table 6 were sorted according to a ratio of percentages,[69] all of the twenty-eight most overrepresented groups would be Jewish or nonreligious. Nearly half of these twenty-eight are also white and Democratic. The most overrepresented groups not defined by religion are white male Democrats, white Democrats, male Democrats, Democrats, and white female Democrats. By ratios, the most overrepresented group is white male Jewish Democrats. They are overrepresented by a ratio of nearly 28 to 1. Yet Jews were a traditionally locked-out group. In the 1930s, many law schools had no Jews or had a quota of one or two.[70] If one were serious about proportional representation, then one would wait to hire more white male Jewish Democratic law professors until 97% of them died out or resigned, perhaps taking as long as thirty years. Just to state this possibility shows that the proportional representation notion of diversity, taken seriously, is profoundly anti-Semitic in effect, if not in intent.

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69. *See id.* at Table 8.

70. *See generally* Henry D. Fetter, *Meritocracy and Its Limits: Harvard, Yale, and Columbia Law Schools Before the Second World War, in* ANTISEMITISM ON THE CAMPUS: PAST AND PRESENT 121 (Eunice G. Polack, ed., Academic Studies Press 2011).

Thus, the most *over*represented groups tend to be white or mostly white, just as the most *under*represented groups tend to be white or mostly white. The *over*represented groups tend to be Jewish or nonreligious; the *under*represented groups tend to be Republican, Independent, and Christian.

One sees the same patterns of overrepresentation in Table 7, comparing law professors to the U.S. non-institutionalized general population ages 30–75. Ranked by percentage differences, the most overrepresented group is white Democrats, followed by Democrats. Ranked by ratios, all of the twenty-eight most overrepresented groups are Jewish or nonreligious. [71]

Table 7
The 44 Significantly Overrepresented Groups of
Law Professors
Compared to the US Population, Ranked by % Differences

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Difference: Prof.%– Working Pop.%	Ratio: Prof%/ Working Pop.%
1	Non-Hispanic White		D		71.0%	33.0%	38.0%	2.15
2	Non-Hispanic White	M	D		50.1%	15.3%	34.8%	3.27
3		M	D		55.5%	22.5%	33.0%	2.47
4			D		80.4%	48.8%	31.6%	1.65
5	Non-Hispanic White	M			67.5%	37.8%	29.8%	1.79
6		M			74.1%	48.1%	25.9%	1.54
7				Jewish	26.7%	1.9%	24.8%	13.90
8	Non-Hispanic White			Jewish	26.5%	1.8%	24.6%	14.45
9			D	Jewish	23.8%	1.3%	22.5%	18.30
10	Non-Hispanic White		D	Jewish	23.6%	1.2%	22.4%	19.06
11		M		Jewish	20.1%	0.9%	19.1%	21.56
12	Non-Hispanic White	M		Jewish	19.8%	0.9%	18.9%	22.15
13				No Religion	26.3%	7.4%	18.9%	3.57
14			D	No Religion	22.0%	3.8%	18.2%	5.84

71. *See* Diversity Draft, *supra* note 68, at Table 10.

15		M	D	Jewish	17.5%	0.6%	17.0%	31.34
16	Non-Hispanic White			No Religion	22.9%	6.1%	16.9%	3.78
17	Non-Hispanic White	M	D	Jewish	17.3%	0.5%	16.8%	33.02
18	Non-Hispanic White		D	No Religion	19.3%	3.0%	16.3%	6.44
19		M		No Religion	18.6%	4.7%	13.9%	3.98
20		M	D	No Religion	14.4%	2.2%	12.3%	6.60
21	Non-Hispanic White	M		No Religion	15.9%	3.8%	12.1%	4.16
22	Non-Hispanic White				89.1%	77.7%	11.4%	1.15
23	Non-Hispanic White	M	D	No Religion	12.5%	1.7%	10.7%	7.18
24		F	D	No Religion	7.5%	1.6%	6.0%	4.79
25	Non-Hispanic White	F		Jewish	6.6%	0.9%	5.7%	7.09
26		F		Jewish	6.6%	1.0%	5.7%	6.71
27	Non-Hispanic White	F	D	Jewish	6.3%	0.7%	5.6%	8.84
28		F	D	Jewish	6.3%	0.7%	5.6%	8.50
29	Non-Hispanic White	F	D	No Religion	6.8%	1.3%	5.5%	5.41
30	Non-Hispanic White	M	D	Protestant	13.9%	8.4%	5.5%	1.66
31		F		No Religion	7.7%	2.7%	5.0%	2.87
32	Non-Hispanic White	F		No Religion	7.0%	2.2%	4.7%	3.12
33	Non-Hispanic White	F	D		20.9%	17.7%	3.2%	1.18
34		M	D	Protestant	15.9%	12.8%	3.1%	1.24
35	African American			No Religion	2.0%	0.4%	1.7%	5.52
36	Non-Hispanic White	M	D	Catholic	5.9%	4.2%	1.7%	1.39
37	African American		D	No Religion	1.9%	0.3%	1.6%	6.90
38		M	I	No Religion	2.5%	1.1%	1.4%	2.33
39	Non-Hispanic White		R	Jewish	1.8%	0.5%	1.3%	3.71
40		M	R	Jewish	1.6%	0.3%	1.3%	5.07
41	Non-Hispanic White	M	R	Jewish	1.6%	0.3%	1.3%	5.07
42			R	Jewish	1.8%	0.5%	1.3%	3.56
43			I	No Religion	2.7%	1.6%	1.1%	1.65
44	Non-Hispanic White	M	I	No Religion	1.9%	0.9%	1.0%	2.09

### C.	*The Underrepresented and Overrepresented Groups Compared to Lawyers*

Evaluations of employment discrimination usually use the pool of qualified eligible workers, not the general population, as the proper comparison group.[72] Although the best comparison might be the makeup of the pool of those lawyers with top credentials over the last 40 years, information about this elite group is unavailable. All we have is information about those minimally qualified—lawyers, judges, and law professors in private or government service. In Tables 8 and 9 I compare the law professor population to the population of private lawyers, public lawyers, judges, and law professors of age 30–75. Current Population Survey data were used for race and gender, but the sample size of lawyers was only 413.[73] Even worse, the 1972–94 General Social Survey had only 129 lawyers aged 30–75. Thus, the estimates for lawyers, particularly their religion and party identification, are limited by the small samples. For this reason, the conclusions that one may legitimately draw from these data are tentative.

Yet even by this excessively broad construction of the "pool," women and most minorities are either at parity or overrepresented in law teaching. Since on average African Americans receive lower grades in law school,[74] one would expect them to be underrepresented in law teaching compared to the lawyer population, even if there were no discrimination in hiring. Yet the data in Tables 8 and 9 show that most minorities and Democratic women are *over*represented in law teaching compared to lawyers more generally. The most obvious explanation—

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72. *See* Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption,* 26 CONN. L. REV. 997, 1013 (1994).

73. The number of African-American lawyers ages 30–75 in the Current Population Survey is suspiciously low (1.7%). If one adds the African-American lawyers less than 30 years old to the counts, the percentage of African-American lawyers jumps to about 3%. The 1990 Census had closer to 3.5% African-American lawyers in the 29–80 age group. Thus, using the 1994 Current Population Survey, despite its admirable adjustments for nonresponse, probably overstates the overrepresentation of African Americans by underestimating the percentage of African-American lawyers.

74. *See* U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 26 (2007) (testimony of Professor Richard H. Sander), *available at* http://www.usccr.gov/pubs/AALSreport.pdf [http://perma.cc/45QE-SPWW] (noting that "the median black student performs in the first-year at about the 7th percentile of the median white student").

though not the only one—is that affirmative action is strong enough to overcome discrimination in the hiring decision itself.

When one compares Table 8 with earlier Tables, some interesting patterns emerge. The race, party, and religion patterns are the same. Republicans and Christians are still underrepresented, and all of the most underrepresented groups are white or predominately white. However, the gender pattern is opposite. Compared to the lawyer population, more of the underrepresented groups in law teaching are male (eleven groups) than female (seven groups).

If Table 8 were sorted to rank differences between law professors and lawyers by ratios,[75] ethnic minorities would still not be the most underrepresented groups. The top ten spots would be held by groups that are Republican and white (or predominantly white), as well as mostly female. Minorities would hold only two of the thirty-four spots on the list. For example, Latinas are 2.4% of lawyers but only 0.8% of law professors.

When one examines the most overrepresented groups compared to lawyers in Table 9, the pattern is somewhat similar to that for the working population. The twenty most overrepresented groups are mostly white, Democratic, and Jewish or nonreligious—as well as more frequently male than female. If Table 9 were sorted by ratios,[76] one would see that three of the seven most overrepresented groups in law teaching are minorities. African Americans, for example, are overrepresented at 3.6 times their percentages in the lawyer population.[77] African-American females are significantly overrepresented at 4.6 times their percentages in the lawyer population. Further, the largest group recruited as diversity hires in the 1980s and 1990s, white female Democrats, is significantly overrepresented (21% of law professors versus only 9% of lawyers).

These findings are consistent with the idea that, on balance, significant affirmative action has taken place for some groups, since they already more than reflect their numbers in the lawyer population. Other data, however, are better for determining how much affirmative action is occurring.   Some law profes-

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75. *See* Diversity Draft, *supra* note 68, at Table 12.

76. *See id.* at Table 14.

77. If (unweighted) 1990 Census data were used instead of (weighted) CPS data, the overrepresentation of African Americans in law schools would still be twice the lawyer population.

sors have mentioned the supposed increasing political diversity of law faculties, though their frame for comparison may have been the 1950s.[78]

Table 8
The 34 Significantly Underrepresented Groups of
Law Professors
Compared to Lawyers, Ranked by % Differences

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Difference: Prof%- Working Pop.%	Ratio: Prof%/ Working Pop.%
1	Non-Hispanic White		R		12.8%	40.2%	-27.4%	32%
2			R		13.2%	40.2%	-27.0%	33%
3	Non-Hispanic White	M	R		12.5%	29.1%	-16.6%	43%
4		M	R		12.7%	29.1%	-16.4%	44%
5	Non-Hispanic White			Catholic	11.0%	26.2%	-15.3%	42%
6				Catholic	13.7%	27.5%	-13.8%	50%
7	Non-Hispanic White		R	Protestant	7.1%	20.1%	-13.0%	35%
8			R	Protestant	7.5%	20.1%	-12.6%	37%
9	Non-Hispanic White	M		Catholic	8.8%	21.5%	-12.6%	41%
10		M		Catholic	10.2%	21.5%	-11.3%	47%
11			R	Catholic	2.3%	13.2%	-10.9%	18%
12	Non-Hispanic White		R	Catholic	2.3%	13.2%	-10.9%	18%
13	Non-Hispanic White	F	R		0.3%	11.1%	-10.8%	3%
14		F	R		0.5%	11.1%	-10.6%	4%
15	Non-Hispanic White			Protestant	28.1%	38.6%	-10.5%	73%
16				Protestant	32.3%	42.7%	-10.4%	76%
17		M		Protestant	24.7%	34.3%	-9.6%	72%
18	Non-Hispanic White	M		Protestant	22.4%	31.4%	-9.0%	71%
19	Non-Hispanic White	M	R	Protestant	7.1%	14.6%	-7.5%	49%
20		M	R	Protestant	7.3%	14.6%	-7.2%	50%

78. *See, e.g.*, Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 780 n.101 (1992); Clark, *supra* note 4, at 291; Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground*," 91 MICH. L. REV. 2075, 2112 (1993).

21	Non-Hispanic White	M	R	Catholic	2.1%	9.2%	-7.0%	23%
22		M	R	Catholic	2.1%	9.2%	-7.0%	23%
23	Non-Hispanic White	M			67.5%	73.5%	-6.0%	92%
24	Non-Hispanic White	F	R	Protestant	0.0%	5.6%	-5.6%	0%
25		F	R	Protestant	0.1%	5.6%	-5.4%	3%
26	Non-Hispanic White				89.1%	93.4%	-4.3%	95%
27		F	R	Catholic	0.2%	4.0%	-3.8%	4%
28	Non-Hispanic White	F	R	Catholic	0.2%	4.0%	-3.8%	4%
29	Non-Hispanic White			Other Religion	0.7%	3.9%	-3.2%	18%
30				Other Religion	1.1%	3.9%	-2.8%	28%
31	Other Minority		D	Protestant	0.7%	2.8%	-2.1%	26%
32	Hispanic	F			0.8%	2.4%	-1.6%	32%
33	Non-Hispanic White		R	Other Religion	0.0%	1.6%	-1.6%	0%
34			R	Other Religion	0.0%	1.6%	-1.6%	0%

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

*All differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

Table 9
The 28 Significantly Overrepresented Groups of
Law Professors
Compared to Lawyers, Ranked by % Differences

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70) %	Difference: Prof% – Working Pop.%	Ratio: Prof%/ Working Pop.%
1			D		80.4%	53.2%	27.3%	1.51
2	Non-Hispanic White		D		71.0%	47.8%	23.2%	1.49
3			D	No Religion	22.0%	7.0%	15.0%	3.15
4				No Religion	26.3%	11.3%	15.0%	2.33
5		F	D		25.0%	11.2%	13.7%	2.22
6		M	D		55.5%	41.9%	13.5%	1.32
7			D	Jewish	23.8%	10.8%	13.0%	2.20

8	Non-Hispanic White			No Religion	22.9%	10.0%	12.9%	2.28
9	Non-Hispanic White		D	Jewish	23.6%	10.8%	12.8%	2.18
10	Non-Hispanic White		D	No Religion	19.3%	7.0%	12.3%	2.76
11	Non-Hispanic White	F	D		20.9%	8.7%	12.2%	2.39
12				Jewish	26.7%	14.7%	12.0%	1.82
13	Non-Hispanic White			Jewish	26.5%	14.7%	11.8%	1.80
14	Non-Hispanic White	M	D		50.1%	39.1%	11.1%	1.28
15		M		No Religion	18.6%	7.7%	10.9%	2.42
16		M	D	Jewish	17.5%	7.7%	9.9%	2.29
17		M	D	No Religion	14.4%	4.6%	9.8%	3.14
18	Non-Hispanic White	M	D	Jewish	17.3%	7.7%	9.6%	2.26
19		M		Jewish	20.1%	10.7%	9.3%	1.87
20	Non-Hispanic White	M		Jewish	19.8%	10.7%	9.1%	1.85
21	Non-Hispanic White	M		No Religion	15.9%	7.7%	8.3%	2.08
22	Non-Hispanic White	M	D	No Religion	12.5%	4.6%	7.9%	2.71
23		F	D	No Religion	7.5%	2.4%	5.2%	3.17
24	African American				6.4%	1.7%	4.6%	3.64
25	Non-Hispanic White	F		No Religion	7.0%	2.4%	4.6%	2.93
26	Non-Hispanic White	F	D	Protestant	5.7%	1.6%	4.1%	3.57
27	African American	F			3.0%	0.6%	2.3%	4.64
28	African American	M			3.4%	1.1%	2.3%	3.07

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

* Differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

Table 10
The 29 Core Underrepresented Groups of Law Professors Compared to the Working, Lawyer, and General Populations

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Population (30–75)	Lawyers (30–75)	Mean Underrep.	Mean Ratio
1			R		13.2%	41.0%	38.6%	40.2%	-26.8%	33%
2	NonH. White		R		12.8%	37.2%	34.9%	40.2%	-24.6%	34%
3				Protestant	32.3%	60.5%	61.8%	42.7%	-22.8%	60%
4	NonH. White			Protestant	28.1%	48.4%	48.5%	38.6%	-17.1%	63%
5			R	Protestant	7.5%	27.1%	25.8%	20.1%	-16.9%	31%

6	NonH. White		R	Protestant	7.1%	25.5%	24.0%	20.1%	-16.1%	31%
7		F	R		0.5%	14.9%	18.9%	11.1%	-14.5%	3%
8	NonH. White	F	R		0.3%	13.5%	17.2%	11.1%	-13.6%	2%
9				Catholic	13.7%	26.0%	26.1%	27.5%	-12.8%	52%
10		M	R		12.7%	26.1%	19.7%	29.1%	-12.2%	52%
11	NonH. White	M	R		12.5%	23.7%	17.8%	29.1%	-11.1%	55%
12	NonH. White			Catholic	11.0%	19.2%	19.5%	26.2%	-10.7%	52%
13		F	R	Protestant	0.1%	10.5%	13.1%	5.6%	-9.6%	2%
14	NonH. White	F	R	Protestant	0.0%	9.8%	12.2%	5.6%	-9.2%	0%
15			R	Catholic	2.3%	9.7%	9.3%	13.2%	-8.4%	22%
16		M		Protestant	24.7%	34.8%	28.6%	34.3%	-7.8%	77%
17	NonH. White		R	Catholic	2.3%	8.1%	7.8%	13.2%	-7.4%	25%
18		M	R	Protestant	7.3%	16.7%	12.7%	14.6%	-7.3%	51%
19	NonH. White	M	R	Protestant	7.1%	15.7%	11.8%	14.6%	-6.9%	51%
20	NonH. White	M		Catholic	8.8%	11.4%	9.2%	21.5%	-5.2%	72%
21		M	R	Catholic	2.1%	6.3%	4.7%	9.2%	-4.6%	34%
22	NonH. White	M	R	Catholic	2.1%	5.4%	3.9%	9.2%	-4.0%	39%
23		F	R	Catholic	0.2%	3.4%	4.6%	4.0%	-3.8%	4%
24	NonH. White	F	R	Catholic	0.2%	2.8%	3.9%	4.0%	-3.4%	5%
25	Hispanic	F			0.8%	2.8%	4.1%	2.4%	-2.3%	26%
26				Other Religion	1.1%	3.1%	2.9%	3.9%	-2.2%	33%
27	NonH. White			Other Religion	0.7%	1.8%	1.8%	3.9%	-1.8%	32%
28			R	Other Religion	0.0%	1.1%	1.0%	1.6%	-1.2%	0%
29	NonH. White		R	Other Religion	0.0%	0.8%	0.9%	1.6%	-1.1%	0%

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

*All differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

Table 11
The 23 Core Overrepresented Groups of Law Professors
Compared to the Working, Lawyer, and General Populations

Rank	Ethnicity	Gender	Party	Religion	Law Profs (1996–97)	Full-time Working Pop. (35–70)	Population (30–75)	Lawyers (30–75)	Mean Overrep.	Mean Ratio
1	NonH. White		D		71.0%	31.1%	33.0%	47.8%	33.7%	1.97
2			D		80.4%	46.2%	48.8%	53.2%	31.0%	1.63
3	NonH. White	M	D		50.1%	17.5%	15.3%	39.1%	26.1%	2.47
4		M	D		55.5%	25.8%	22.5%	41.9%	25.4%	1.98
5				Jewish	26.7%	2.0%	1.9%	14.7%	20.5%	9.68
6	NonH. White			Jewish	26.5%	1.9%	1.8%	14.7%	20.3%	10.04
7			D	Jewish	23.8%	1.2%	1.3%	10.8%	19.4%	13.26
8	NonH. White		D	Jewish	23.6%	1.2%	1.2%	10.8%	19.2%	13.82
9				None	26.3%	8.3%	7.4%	11.3%	17.3%	3.02
10			D	None	22.0%	4.0%	3.8%	7.0%	17.1%	4.83

11		M		Jewish	20.1%	1.2%	0.9%	10.7%	15.8%	13.25
12	NonH. White	M		Jewish	19.8%	1.2%	0.9%	10.7%	15.6%	13.65
13	NonH. White			None	22.9%	6.9%	6.1%	10.0%	15.3%	3.13
14	NonH. White		D	None	19.3%	3.1%	3.0%	7.0%	14.9%	5.11
15		M	D	Jewish	17.5%	0.7%	0.6%	7.7%	14.6%	19.77
16	NonH. White	M	D	Jewish	17.3%	0.6%	0.5%	7.7%	14.4%	21.02
17		M		None	18.6%	5.9%	4.7%	7.7%	12.5%	3.18
18		M	D	None	14.4%	2.5%	2.2%	4.6%	11.3%	5.15
19	NonH. White	M		None	15.9%	4.9%	3.8%	7.7%	10.5%	3.17
20	NonH. White	M	D	None	12.5%	2.0%	1.7%	4.6%	9.7%	5.41
21	NonH. White	F	D		20.9%	13.5%	17.7%	8.7%	7.6%	1.71
22		F	D	None	7.5%	1.5%	1.6%	2.4%	5.7%	4.38
23	NonH. White	F		None	7.0%	2.0%	2.2%	2.4%	4.8%	3.18

Data sources:

AALS, 1996–97 database (for top 100 schools: Profs, Asst. & Assoc. Profs., Head Librarians, and Deans with professorial rank)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate)

1994 Current Population Survey, U.S. Census, ages 30–75

General Social Survey, 1988–94 for whites, 1988–94 for minorities, 1972–94 for lawyers

*All differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

D. *The Core Diversity Groups and the Core Overrepresented Groups*

In the legal academy, whether a group or subgroup is underrepresented often turns on which comparison population is used as the benchmark. But some groups are significantly underrepresented, no matter which comparison population is used. These twenty-nine core diversity groups are those that are significantly underrepresented compared to the U.S. full-time working population, the U.S. non-institutionalized population, and the lawyer population.

The last two columns in Table 10 are simple means of the percentages underrepresented and the ratios of representation for law professors compared to general, full-time working, and lawyer populations. As Table 10 shows, most of the core diversity groups are Republican and Christian, and all but one are white or mostly white. The lone exception is Latinas, who are significantly underrepresented compared to all three relevant populations.

Sometimes a lack of diversity in a workforce is attributed to the "tyranny of the majority." Under this view, the largest groups in society exercise their power to ensure that they are overrepresented in good jobs, leading to the underrepresentation of minorities. Yet some of the core underrepresented groups are among the largest in the general population—

Protestants (61.8%), white Protestants (48.5%), Republicans (38.6%), and white Republicans (34.5%).

Table 11 presents the twenty-three core overrepresented groups, those that are significantly overrepresented across the board. The last two columns in Table 11 are simple means of the percentages overrepresented and the ratios of representation for law professors compared to general, full-time working, and lawyer populations. What is most striking is that all of the twenty-three core overrepresented groups are white or mostly white, all but five are Jewish or have no religion, and a majority are Democratic.

V.   Discussion and Possible Normative Implications

In this Article, I merely hint at the normative implications of these data. In part, my purpose is to show that sometimes facts are normatively stronger arguments than normative arguments themselves.[79] If instead of doing this study, I were to argue that affirmative action is a more coherent policy than diversity as proportional representation, I suspect that I would persuade almost no one. But by showing the implications of diversity—that in diversity hiring we should prefer white Protestants and white Republicans to African Americans—I show that diversity as proportional representation is not what many people really want.

This study is consistent with the conclusion that affirmative action overcomes discrimination in the hiring process because African Americans are overrepresented in law teaching compared to the legal profession generally: all lawyers (in public and private practice), judges, and law professors.[80] Further, this comports with other research suggesting that affirmative action exists in faculty hiring.[81] For example, Deborah Jones Merritt

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79. The "Is-Ought" distinction is highly overrated. It is difficult for almost any genuine argument to make the inductive leap seem necessary. Why not provide the facts and let each person supply her own version of a leaping argument?

80. Minorities as a composite group are overrepresented compared to lawyers; Women (ratio of 1.13) are at rough parity (their overrepresentation is statistically insignificant). Comparisons with the more extensive 1990 census data on lawyers would show significant overrepresentation of women and minorities on law faculties.

81. Richard White's study shows that greater proportions of women and ethnic minorities are hired out of the AALS resume pool each year than are white males. *See* White, *supra* note 3, at 429. In the 1990s, roughly a quarter of new hires have been ethnic minorities and about half are women.

and Barbara Reskin report that white women and minority men fare better than white men in getting jobs at elite institutions. However, they also report that minority women fare as badly as white men.[82] They also show that in the years 1986–91, women and minorities joined the tenure track at rates higher than their graduation rates in then-recent law school classes.[83]

There is a widespread assumption that but for discrimination, the distribution of jobs in American society would be proportional.[84] Indeed, researchers often describe other patterns of job distribution as indicating "disparate impact," as if the hiring decision were the cause of differences in job distributions. [85] This view ignores other contributing causes, such as differences in culture, past discrimination, continuing discrimination, and affirmative action.

Since we are unlikely to see a world entirely free from discrimination, the best tests of whether groups would be equally

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Also, I collected some unpublished experimental data showing that minority and female resumes were rated higher than the identical white male resumes. For otherwise identical resumes, white females were rated 6.06 on a 0–9 scale, while white males were rated 5.13. For otherwise identical resumes, African-American males were rated 7.74, while white males were rated 5.94. For otherwise identical resumes, Latinos were rated 7.62, while non-Hispanic white males were rated 5.88. All of these results are significant using a separate variance t-Test at $p <$ .0000005. These data were collected as part of the survey that I conducted in 1993–94 in collecting the demographic data reported here.

82. *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth about Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 274 (1997); Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 102 (1995); Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENT. 145, 151 (1994); Deborah Jones Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2301 (1992).

Without redoing their analysis, it is difficult to check their conclusions, but the fact that they appear to control for lifestyle choices *before* determining whether there are any disparities to report may (or may not) explain the one counter-intuitive result (concerning minority women). In other words, by controlling for criteria unrelated to job qualifications, it is possible to create or suppress disparities. On the other hand, my data are broadly consistent with Merritt and Reskin's results in that my data also show that white women and minority males generally fare better than minority women.

83. *Sex, Race, and Credentials*, *supra* note 82, at 234.

84. *See generally* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

85. *See, e.g.*, Norman Redlich, *Law School Faculty Hiring Under Title VII: How a Judge Might Decide a Disparate Impact Case*, 41 J. LEGAL EDUC. 135, 136 (1991).

distributed in its absence are whether any groups that have been victims of past discrimination are overrepresented, whether any groups lacking the dominant position to hire their own are overrepresented, and whether any powerful groups are underrepresented.

By several measures, Jewish groups are the most overrepresented, yet historically they have been discriminated against. Jews are still a minority in law teaching; they do not have the power to dominate hiring. How can a group that lacks power to control hiring become so overrepresented?[86] The simplest answer is culture. Any system that assumes equal distribution of jobs in the absence of discrimination either ignores culture or assumes a Stalinist style mandating of results.

In the topsy-turvy world of law teaching, the most underrepresented ethnic group (in terms of the number of slots needed to achieve parity) is the so-called dominant group in America: non-Hispanic white Protestants. And the most overrepresented group is white male Jewish Democrats, a group that was traditionally discriminated against because it was Jewish.

If we want to make further gains in ideological and political diversity, we cannot just continue to hire the same types of diversity candidates. Schools that want political and ideological diversity may have to seek out more Republican women and minorities or focus their white male hiring on the more conservative half of the country. Otherwise, the result will be less ideological and political diversity, not more.

The underrepresentation of Republicans is particularly striking. My data call into question the current practice among many law faculties of avoiding women or minorities who lean Republican. One argument that I have heard expressed several times is that women and minorities on the left bring more diversity to a faculty because their views are farther from traditional white male views.[87] As one future law school dean put it in a memo arguing in favor of a woman candidate whom I was also backing, the candidate was a "female in more than her plumbing."[88] Students

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86. *See generally* Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853 (1995).

87. *See, e.g.*, Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1633–35 (1990).

88. Telephone conversation with Philip Hamburger, Professor of Law, Columbia Law School.

have discriminated against female law and economics scholars openly on these grounds (for example at Berkeley), arguing in effect that they are somehow not "authentic" females.[89] And I have seen support for particular minorities or women evaporate when hiring committee members suspected (sometimes incorrectly) that a woman or minority candidate might be a Republican.

Another argument that one sometimes hears is that political diversity within a faculty's minority or female community is desirable only when there are enough left-wing minorities or women to permit hiring some in the middle or on the right.[90] Until then, it is best to hire only "authentic" minorities or women. But the data here show that Independent and Republican minorities are even more underrepresented than Democratic minorities and that the entire underrepresentation of women compared to the working population is among Republican women.[91] This finding suggests that left-wing views of white women are more than fully represented on law faculties and that more hiring of Democratic women might lead to less ideological diversity rather than more.

The overrepresentation of traditionally dominant groups in law teaching has usually been thought to be a "tyranny of the majority" problem.[92] The assumption is that the larger groups in the U.S. population are overrepresented. Yet consider the ten largest groups in the U.S. general population (ages 30–75), ranging from 33.2% to 61.8% of the population. Among these ten largest groups in the U.S. general population, only one group (Democrats) is significantly overrepresented in law teaching compared to all three comparison populations; the other nine—whites, Protestants, Republicans, males, females, white males, white females, white Republicans, and female

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89. This term "authentic" was applied by the Berkeley Asian American student group to describe politically left or radical faculty candidates, even though Asian Americans as a group in the general population are only slightly more Democratic than whites. *See* Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 148 (1994). The term comes from Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1431 n.64 (1991) (describing "authentic" representatives of a minority group); *see also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102–09 (1991) (same).

90. *See supra* Table 2.

91. *See supra* Table 4.

92. THE FEDERALIST NO. 51 (James Madison).

Protestants—are underrepresented or at parity in law teaching compared to one or more of the comparison populations.[93]

This pattern is even stronger when the U.S. population is broken down by all four demographic categories—race, gender, party identification, and religion. Among the ten largest (four-way) subgroups (making up 3.8–12.2% of the general population), all are either at parity or underrepresented in law teaching, compared to at least one of the benchmark populations. Indeed, the largest four-way subgroup, comprising 12.2% of the general population, is white female Protestant Republicans. In my sample of 710 law professors there should have been 86 such people, but there were none. Since doing my survey, I have been able to identify only one member of this rare species who was a law professor in the mid-1990s, when to match parity with the general population there should have been 513 at the top 100 law schools. When I presented an earlier version of this Article at the law schools of Boston University, Chicago, Georgetown, Harvard, Illinois, Stanford, UCLA, and Yale, no one in the audience was able to name more than the one professor I had already identified. Thus, there is no substantial support for the notion that law schools experience a "tyranny of the majority" problem—unless one were to consider that large tyrannous group to be Democrats.

This study suggests that our binary view of underrepresentation should be replaced by a more pluralist view. Even if we confine ourselves solely to race and gender groups, we are all members of at least one important group that is underrepresented and one important group that is overrepresented. For example, non-Hispanic whites are overrepresented in law teaching compared to the general and working populations and underrepresented compared to the population of lawyers.[94] Conversely, ethnic minorities combined are both significantly under and overrepresented in the opposite pattern.[95]

When one adds politics, the pattern gets even more complicated. White male Republicans are one of the core underrepresented groups, significantly underrepresented against all three comparison populations (as are Republicans, white Republi-

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93. *See supra* Tables 7 and 8.
94. *See supra* Tables 6–8.
95. *See supra* Tables 3, 4, 5, and 9.

cans, and male Republicans), yet whites and males are overrepresented compared to the general and working populations, though not compared to the lawyer population.[96]

In short, underrepresentation usually turns on whether the relevant comparison population is lawyers on the one hand, or the working or general populations on the other. If you find it offensive that white males would try to pick up the mantle of the virtuous victim, that is precisely my point. White males are a diversity group when compared to the lawyer population, yet they are not an affirmative action group—an unpleasant fact for diversity theory.

This study also calls into question the idea of diversity. Diversity has replaced affirmative action as the model for broadening the makeup of law faculties. Superficially, diversity is a more attractive idea than affirmative action. Diversity appears to be a more neutral principle that applies to all groups equally, while affirmative action is a paternalistic policy that involves those who control the law schools preferring particular groups that have been subject to past discrimination. Yet diversity is a substitute for affirmative action only if affirmative action groups are the most underrepresented. Perhaps they once were in law teaching, but no longer. If minorities and women are less underrepresented than other large groups who do not share the same history, then true diversity hiring would not necessarily lead to racial or gender integration. Indeed, if law schools are firmly committed to diversity hiring, they should hire the diversity groups that are significantly underrepresented in law teaching compared to both lawyers and the general population: chiefly white Republicans, Protestants, and Catholics.[97]

When can we say that we have done well enough in law teaching to begin to phase out affirmative action generally, or to eliminate it for the groups at parity with some measure? In other words, what is the end goal? The primary beneficiaries of affirmative action in the 1980s and 1990s were African-American males and white Democratic females. Full proportional representation for all groups logically entails at least soft quotas on overrepresented groups, most prominently Jews,

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96. *See supra* Tables 3–9.

97. Even if one were to choose only the general population as the comparison group, law schools committed to diversity hiring should spend their next few years mostly hiring white female Republican Protestants and Catholics.

rendering proportional representation anti-Semitic in effect if not in purpose. If law schools were seriously committed to full proportional representation, law schools could not hire Jews or atheists for decades.

If something less than full proportional representation were to be tolerated, what is the proper goal? If the goal is parity with the percentage of lawyers, then we can declare victory and end affirmative action in law school hiring for almost all groups,[98] because full parity has already been reached for most large race and gender groups compared to lawyers.[99] Similarly, if the goal for minorities is reaching the level of the traditional dominant group (non-Hispanic white Protestants), then we can also declare victory for almost all groups, since women and almost all minorities are roughly as well represented as non-Hispanic white Protestants are.[100] With full parity with the lawyer population reached and full parity with the working population not reached but within sight for most groups, what next?

Affirmative action in law schools might be studied for ways to export its success to other areas of the U.S. job market. If a business with lifetime tenure and minuscule job turnover can bring minorities and women to the same proportions as white Anglo-Saxon Protestants in just two decades, then there is hope elsewhere. Of course, other areas of the job market are not likely to enjoy the same level of commitment to affirmative action as law schools have, where even most conservatives favor it.[101] The success of affirmative action may be a positive side effect of Democratic control of law schools.

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98. Those who do not see affirmative action as a necessary evil, but as a tolerable good, urge permanent affirmative action (since we might slip back). *See* Note, *Rethinking* Weber*: The Business Response to Affirmative Action,* 102 HARV. L. REV. 658, 668 (1989).

99. *See supra* Table 7.

100. *See supra* Tables 2, 3, 6, and 9.

101. Most conservatives who have served as faculty appointments chairs at the law schools at which I taught favored affirmative action, including one of the primary founders of the Federalist Society. While there are no major studies of the views of conservative law professors, I have surveyed a couple of small groups that a priori one would expect to lean Republican or conservative. In November 2002, I surveyed six faculty and lawyer Federalist Society members participating in a panel on diversity. Earlier in 2002, I surveyed twenty-two law and economics scholars at a Midwestern Law and Economics Association meeting. A majority of both samples favored affirmative action. *See generally* James Lindgren, *Heresy and the Political Mainstream* (July 29, 2005) (on file with author).

In this paper, I have used diversity in its most common sense: proportional representation. This is sometimes expressed as trying to hire a faculty that looks more like America. If this view of diversity is incoherent and anti-Semitic as applied to law teaching, then what other senses of the word diversity might be more attractive?

CONCLUSION

> Especially at a time when we are constantly told of the virtues of 'diversity'—i.e., that persons of different groups have different perspectives and attitudes—one would think that it would be similarly recognized that they may have different interests and abilities as well. At the least, it should be recognized that there is no reason *a priori* to structure our legal system with the presumption that they are identical.
>
> —Kingsley R. Browne[102]

The results of this study are surprising—at least to those who have not thought critically about race and gender. Religious and political underrepresentation is usually greater than racial underrepresentation. Women are strongly underrepresented compared to the full-time working population, but all of that underrepresentation is among Republican women, who are almost locked out of law faculties.[103]

Three groups account for most (or all) of the overrepresentation in legal education:

(1) White Democratic professors (both male and female),

(2) Jewish professors, and

(3) Nonreligious professors.

Together, these three groups represented over 80% of the law professor population in 1997, but only 38% of the general population.[104] Put differently, those who were neither white Democrats, nor Jews, nor nonreligious made up 62% of the general population in the 1990s, but less than 20% of law professors.

Three groups account for most of the underrepresentation in legal education:

(1) Republicans (both male and female),

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102. Browne, *supra* note 8, at 505.

103. *See supra* Table 4.

104. *See supra* Table 7.

(2) Protestants, and

(3) Catholics.

These three underrepresented groups make up 91% of the U.S. population, but only 49% of law professors.[105] Reversing these totals, the 9% of the U.S. population that is neither Christian nor Republican generates 51% of law teachers.

In law teaching, this study shows that trying to use diversity as a proportional representation version of affirmative action makes little sense. Diversity and affirmative action overlap, but the most underrepresented groups are white Republicans and Christians, not African Americans. Often one must choose between diversity and affirmative action. I choose affirmative action—at least for those groups that were historically locked out and are still strongly underrepresented. For groups that approach or exceed full parity with their percentages in the U.S. population (for example, white Democratic women), victory has already been won. For these groups, efforts to preserve gains may be needed, but perhaps attention should turn to racial and gender equity in life within the law school,[106] rather than to efforts to get in the door.

Further, at least for law professors, this study rejects the "central assumption" of discrimination testing—that in the absence of discrimination, groups would be randomly distributed. Even many white male groups are significantly underrepresented. Indeed, either culture is a large determinant of who gets law teaching jobs or American law schools are engaged in a massive war on Christians and Republicans—or perhaps some combination of culture and discrimination drives results.

I find diversity an attractive idea. It is only the facts that get in the way. Affirmative action looks much more attractive than diversity when you are faced with a choice between true diversity hiring (chiefly white male and female Republicans and Christians) and true affirmative action hiring (African-American women, Latinas and Latinos, Asian women, Native American women, and Republican women).

In law faculty hiring, diversity is a misnomer. For those of us committed to desegregating the law schools, diversity de-

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105. *See supra* Table 4.

106. *See* Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, the Life of One Blackwoman in the Legal Academy*, 28 Harv. C.R.-C.L. L. Rev. 259, 261–62 (1993).

scribes neither what we are doing nor what we want to do. Indeed, nothing would be more destructive to the goal of full racial desegregation than true diversity hiring—using the available spots to aggressively hire white male Republicans and Christians along with and instead of minorities—and freezing out Jews from the law schools for at least two generations. That would be real diversity hiring, hiring designed to make the law school faculties look like America. And it would usher in an era of injustice and exclusion in law faculty hiring exceeded only by the era that affirmative action replaced.

Diversity is the catchphrase of the day because it masquerades as neutral. Affirmative action, which is itself a euphemism for compensatory ethnic and gender preferences, is a policy that no longer hides its commitment to social engineering. Affirmative action is a policy that society does *for* a group, because society has done bad things *to* that group, and because the effects of that bad treatment (and usually the bad treatment as well) continue into the present day. Diversity, on the other hand, is a policy that purports not to favor any particular group—or more precisely, favors whichever group is underrepresented. It usually takes proportional representation as its measure and conflates ethnic with intellectual and political diversity. Yet for most law faculties, hiring more racial minorities means making their faculties less politically representative by increasing the faculty's orientation to the left.

Using the data in this Article to make faculties look exactly like America would be a gross misuse of what I am attempting to do. Such a policy would itself be inhumane, racist, and anti-Semitic in effect if not in purpose. The information presented here itself is more or less neutral. What you and I do with it is not. That said, I think the data point to a few conclusions:

(1) Diversity does not equal affirmative action. The diversity groups are not the same as the affirmative action groups.

(2) Hiring women and minorities of the sort usually hired will increase the variety of viewpoints on the left but will make law faculties less representative of the views of the general public.

(3) We tend to think of law schools as dominated by white males, but it would make more sense to think of law schools as dominated by white Democrats, since they are more overrepresented—whether measured by numbers, ratios, or viewpoints.

(4) The underrepresentation of Christians and Republicans is probably too large to be the result simply of discrimination. Culture probably also plays an important role.

(5) The central assumption of discrimination theory that substantial statistical disparities are usually the result of discrimination is a questionable assumption in law teaching.

(6) Theoretical and normative questions can often be profitably explored by empirical work. Sometimes the facts challenge a theory in a way that normative arguments alone seldom do.

We live in the shadow of an ideal world—a world in which everything is distributed equally to all races, ethnic groups, genders, religions, and political parties. If this proportional distribution ideal lived only in the hearts of millions of people around the world, it would probably generate little conflict. But the positive corollary of this vision is that any deviation from parity for groups probably results from unjust discrimination. In doing careful computations of the representation of groups, I was not trying to achieve a more brutally mechanistic version of sorting by ethnicity, gender, religion, and politics. Instead, I did this study because I believe that the way to change people's minds is not by argumentation, but by changing their understanding of the world. I would like to promote a general increase in telling the truth when speaking about diversity in law faculty hiring. And I would like to undermine the equation of proportional representation with justice or fairness.

VI.   AFTERWORD: LAW FACULTIES IN 2013

A.   *Ethnicity and Gender in 2013*

Since I first analyzed the makeup of law faculties in 1996—finding that only 13% of law professors leaned Republican, while 80% leaned Democratic[107]—several studies have reached similar conclusions about the skewed political orientation of law faculties. Deborah Jones Merritt surveyed faculty hired between 1986 and 1991, finding that 75% of them self-identified as liberal and only 10% as conservative.[108] John McGinnis stud-

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107. See *supra* notes 1–106 and accompanying text.

108. Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998) (75.4% moderately or strongly liberal, 10.0% moderately or strongly conservative, 14.6% "middle-of-the-

ied tenured and tenure-track professors at twenty-one top law schools who had contributed money to candidates in the 1992–2002 election cycles.[109] Fully 81% contributed wholly or predominantly to Democrats; only 15% contributed wholly or predominately to Republicans.[110] Contributing faculty at each of the top four law schools (Yale, Harvard, Stanford, and Columbia) contributed less than 10% to Republicans.[111] In this Issue of the *Harvard Journal of Law & Public Policy*, James Phillips shows that law faculties are much more Democratic in their donation patterns than practicing lawyers.[112]

The most recent comprehensive release of data on the ethnicity and gender of law faculties by the ABA is a table representing the fall term of the 2013–14 academic year.[113] All U.S. law schools are included, not just the top 100, and the ethnic categories differ somewhat from the 1990s categories and the usual Census ones. To get a large sample of lawyers for comparison, I used the 2011–13 American Community Surveys, conducted by the U.S. Bureau of the Census.[114] Unlike for every other decennial census for at least a half century, the Census Bureau has decided not to release data from the 2010 Census in a form useable by researchers, leaving the American Community Survey (ACS) as the largest current source of quality employment data released by the U.S. government. For the ACS, I included only

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road"). I am indebted to Lee Otis for providing me with a written summary of these and similar studies.

109. John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1169 (2005).

110. *Id.* at 1177.

111. *Id.*

112. *See* James 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).

113. AMERICAN BAR ASS'N, ABA APPROVED LAW SCHOOL STAFF & FACULTY MEMBERS, GENDER & ETHNICITY: FALL 2013, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_school_staff_gender_ethnicity.xlsx [http://perma.cc/9SZQ-K6A3].

114. *See* Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder & Matthew Sobek, INTEGRATED PUBLIC USE MICRODATA SERIES: VERSION 5.0 [Machine-readable database], MINN. POPULATION CTR., UNIV. OF MINN. (2010), https://usa.ipums.org/usa/index.shtml [https://perma.cc/H88E-6786]. For each year of the ACS, one out of every 100 Americans is sampled. *See* UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: SAMPLE SIZE, https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/sample-size/index.php [http://perma.cc/H9LU-VYT4].

people ages 30–75 who were employed and working full-time and who spoke only English or who described themselves as speaking English "very well."[115] The sample size for ethnicity and gender was 2,625,934 respondents. Within that sample, there were 26,466 lawyers.

Table 12 gives only the ethnic and gender breakdowns, comparing the 2013 ABA data on law faculties to the ACS data on the English-fluent, full-time working population ages 30–75 overall and the subset of those workers who were lawyers. Note how close these race and gender groups in law teaching are to parity with the lawyer population. Assuming an average tenure-track faculty size of about forty people, only three groups are more than a half-a-faculty-member away from full parity. If faculties didn't fire anyone and added only whites, each faculty of forty would need to hire nineteen new white faculty members to reach parity with their proportion of the lawyer population. If instead hiring were focused on the other substantially underrepresented groups, each faculty would have to hire either seven white males or four males to reach parity with lawyers of a similar age. Note that none of the traditional affirmative action groups (for example, women and minorities) are even one slot underrepresented on law faculties compared to the pool of lawyers. Indeed, on average, African Americans and all minorities combined are about two faculty members overrepresented on every faculty compared to the lawyer population.

Compared to the English-fluent full-time working population, there are five groups that are more than one slot underrepresented in law teaching: females (7 slots short of parity), white females (4 slots short), combined minorities (4 slots), minority females (4 slots), and Hispanics (2 slots). If one controlled for graduate and professional degrees, the disparities for the latter three categories would probably entirely (or mostly) disappear.

The only group significantly overrepresented compared to both lawyers and the working population is Asian males and they are less than a trivial 1% above parity (2.6% of law professors compared to 2.2% of workers and 1.8% of lawyers). That

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115. I weighted responses by the person weight variable PERWT, reduced to reflect the actual sample size, rather than the entire U.S. population of more than 300 million people. For lawyers, I also screened out those who did not have graduate or professional degrees, since some judicial and law office support staff seem to be included in the ACS lawyer totals.

amounts to less than half a faculty member on every faculty. The only groups that are significantly underrepresented compared to both lawyers and the working population are the three small groups made up of those reporting "two or more races." Again, this difference is so small that it represents less than half a faculty member on a typical faculty of forty.[116] Further, while the government has a category for "other race," the ABA does not, but the ABA lists foreign nationals as a separate category without identifying their ethnicities.[117] Except for the small "two or more races" categories, in proportional terms the most underrepresented group in law teaching compared to lawyers is white males, yet their faculty share is not far below parity at 88% of their share of lawyers.

Many large groups—such as males, females, and non-Hispanic whites—are significantly underrepresented against one comparison population but significantly overrepresented compared to the other. In proportional terms, the three African-American groups and the three Native American groups are each overrepresented in law teaching at ratios of more than two-to-one compared to the lawyer population, though the absolute numbers of Native Americans are very small in any event.

Compared to the English-fluent full-time working population (ages 30–75), the most underrepresented groups in ratio terms were the "two or more races" categories (a result that is probably mostly a carryover from how schools counted race in the past). Because these groups are so small, on a typ-

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116. That difference is probably at least in part an artifact of how the ABA data were collected, with some schools probably not fully switching over to the newer way of counting. For example, I have heard anecdotally that some law schools may still be listing a professor of mixed white and African-American heritage as simply African American.

117. I did not treat foreign nationals as minorities in the law professor data, while I included "other race" as minorities in the ACS data, a coding decision that not only seems justified but would tend to cut against the thesis of this Article. The ABA data chart was unclear in another respect: while the chart included a small number of faculty with known gender and unknown ethnicity, the ABA's total of 7,109 professors included 20 more than the cell totals. A note said, "Summation of ethnicities might not equal to the Total column due to non-responses." *See* ABA Faculty Report, *supra* note 113, at Sheet 1. If their ethnicities were unknown, why weren't they already in the "unknown ethnicity" column? Faced either with inventing 20 people with unknown ethnicities and adding them to the existing "unknown ethnicity" cells or with leaving the cell counts as is, I chose the latter. Thus, the ABA total was 7,089, composed of the tenured and tenure-track faculty and the head deans.

ical faculty of forty these multi-race categories are less than a half slot short of parity.

The next most underrepresented groups compared to the working population are the three Hispanic categories, which ranged from 48% of parity for Latinas to 58% of parity for Latinos.[118] This gap for Hispanics disappears if one controls for education. Within the English-fluent full-time working population, Hispanics constitute 4.8% of those with graduate and professional degrees, compared to a nearly identical 4.7% of law professors. Every other large group is at least 73% of parity with the working population and 88% of parity with the lawyer population. After the Hispanic groups, the next most underrepresented large groups are the three minority (combined) groups at 73–77% of parity, followed by women at 80% of parity. To reach parity with the working population, every faculty would have to hire seven women or four ethnic minorities.

As Table 12 shows, affirmative action has been such a success that all large ethnic and gender groups are at a minimum approaching parity with the lawyer population. Except for some very small groups of less than 2% of the population, in 2013, there is no group defined solely by ethnicity or gender that shows substantial underrepresentation in law teaching compared to lawyers, and only Hispanics (at about 54% of parity) show any substantial underrepresentation in law teaching compared to the English-fluent full-time working population. Even Hispanics—the only large ethnic group to be substantially below parity with the English-fluent working population— are at full parity with their percentages among lawyers and at full parity with the highly educated working population.

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118. Even though the ABA has a new category for foreign nationals, it was unclear how many schools were actually using the category to exclude Hispanics from the ABA's law faculty Hispanic totals. For that reason, I decided not to exclude foreign nationals from the ACS working population totals, a decision that made Hispanics appear to be more underrepresented in legal education than they otherwise would be. I did, however, exclude those who did not report speaking English very well because law professors are drawn almost entirely from the pool of workers who are fluent in English, and if one does not control for language, it is easy to mistake a lack of fluency for discrimination. That decision should make a substantial difference in the results.

Table 12
The Ethnicity and Gender Representation of Law Professors
(Fall 2013)
Compared to Lawyers and the English Fluent Full-Time
Working Population, Ages 30–75

Ethnicity	Gender	Law Profs	Full-time Working Pop.	Lawyers	Difference: Prof-Working Pop.	Ratio: Prof/Working Pop.	New Hires for Parity on a Faculty of 40	Difference: Prof-Lawyers	Ratio: Prof/Lawyers	New Hires for Parity on a Faculty of 40
	F	35.9%	45.1%	32.4%	-9.2%	.80*	7	3.5%	1.11*	
	M	64.1%	54.9%	67.6%	9.2%	1.17*		-3.5%	.95*	4
Non-Hispanic White		79.3%	73.4%	85.8%	5.8%	1.08*		-6.6%	.92*	19
Non-Hispanic White	F	26.2%	32.2%	25.7%	-6.0%	.81*	4	0.5%	1.02	
Non-Hispanic White	M	53.1%	41.3%	60.2%	11.8%	1.29*		-7.1%	.88*	7
Minority (combined)		19.9%	26.6%	14.2%	-6.7%	.75*	4	5.7%	1.40*	
Minority (combined)	F	9.4%	13.0%	6.7%	-3.5%	.73*	2	2.7%	1.40*	
Minority (combined)	M	10.5%	13.6%	7.4%	-3.1%	.77*	1	3.0%	1.40*	
African American		9.7%	11.4%	4.5%	-1.7%	.85*	1	5.3%	2.17*	
African American	F	5.3%	6.2%	2.4%	-0.9%	.85*		2.9%	2.21*	
African American	M	4.5%	5.3%	2.1%	-0.8%	.85*		2.4%	2.13*	
Asian/Pac. Islander		4.4%	4.1%	3.7%	0.3%	1.08		0.7%	1.18*	
Asian/Pac. Islander	F	1.8%	1.9%	1.9%	-0.1%	.97		-0.1%	.94	
Asian/Pac. Islander	M	2.6%	2.2%	1.8%	0.4%	1.17*		0.8%	1.44*	
Hispanic		4.7%	8.7%	4.2%	-4.0%	.54*	2	0.5%	1.11	
Hispanic	F	1.9%	3.8%	1.6%	-2.0%	.48*	1	0.2%	1.15	
Hispanic	M	2.8%	4.9%	2.6%	-2.1%	.58*	1	0.2%	1.08	
Native American		0.6%	0.6%	0.2%	0.1%	1.11		0.4%	2.80*	
Native American	F	0.3%	0.3%	0.1%	0.0%	1.11		0.2%	2.94*	
Native American	M	0.3%	0.3%	0.1%	0.0%	1.12		0.2%	2.67*	
2 or More Races		0.4%	1.6%	1.4%	-1.2%	.27*		-1.0%	.31*	
2 or More Races	F	0.2%	0.8%	0.7%	-0.6%	.26*		-0.5%	.29*	
2 or More Races	M	0.2%	0.9%	0.8%	-0.6%	.28*		-0.5%	.32*	
Other Race			0.1%	0.1%						
Other Race	F		0.1%	0.0%						
Other Race	M		0.1%	0.1%						
Non Resident Alien		0.6%								
Non Resident Alien	F	0.2%								
Non Resident Alien	M	0.5%								
Unknown Ethnicity		0.2%								
Unknown Ethnicity	F	0.1%								
Unknown Ethnicity	M	0.1%								
Total n			7,089	2,625,934	26,466					

Data Sources:

ABA Fall 2013 data (tenured faculty, tenure-track faculty & the dean); n=7089

2011, 2012, & 2013 American Communities Survey, employed full-time working population, ages 30–75, fluent in English, n=2,625,934

2011, 2012, & 2013 American Communities Survey, employed full-time lawyers, ages 30–75, fluent in English, n=26,466

* Differences significant at *p* < .05, using a 2-tailed Fisher's Exact Test

B. Politics and Religion in 2013

With ongoing affirmative action, law faculties have now achieved parity with lawyers of the same age for all large traditional affirmative action groups. Less is known about progress on the religious and political front. In Table 13, I compute the demographic makeup of law faculties under the *assumption* that white men, white women, minority men, and minority women on law faculties today each have the same political and religious orientation as they did in the mid-1990s.[119] This seems like a plausible assumption about politics (though admittedly it is far from certain), since there are today still very few minority and women professors who are openly Republican.[120] As in the 1990s, today most of the law professors who at least lean Republican are white males; the 1990s survey results showing that 18.5% of white male law professors lean Republican still seems about right for the 2010s, in my experience.

Of the six law schools in which I have taught, my impression is that two have become more Republican (Northwestern and Virginia), and four have become more Democratic (Chicago, Texas, Chicago-Kent, and Connecticut). I am aware of only five schools among the top 100 that now have percentages of Republican-leaning faculty that approach or exceed their percentages in the full-time working population (George Mason, Notre Dame, Pepperdine, Virginia, and Northwestern), though there may well be others. One rough test of ideological diversity is whether a faculty has more Republicans than ethnic minorities. The English-fluent full-time working population (ages 30–75) is 27% minority and 38% Republican; the lawyer population of a similar age is 14% minority and 31% Republican (Table 13).

I have less of a feel for changes in the percentages of Christians. Since the late 1990s, the general public has become

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119. Note that because white males are a smaller percentage of law faculties today than in the late 1990s, the percentage of Republicans in the estimates actually drops from 13% in 1997 to 11% today. To show what would happen if we assumed growing numbers of Republicans, I also show the results if the odds of being Republican grew by 50%. *See infra* notes 126–27, and accompanying text.

120. PEW RESEARCH CTR., A DEEP DIVE INTO PARTY AFFILIATION 2–3 (2015), http://www.people-press.org/files/2015/04/4-7-2015-Party-ID-release.pdf [http://perma.cc/M7G9-2ZZG].

somewhat less Christian,[121] and it is possible that the same has happened in legal education. On the other hand, the two groups whose percentages have grown most in law teaching—minorities and women—were somewhat more religious in the general public than white males,[122] so it is also possible that law faculties have become slightly more Christian today. Because of these uncertainties, Table 13 reports all the results for groups defined by one or two of the demographic cleavages—ethnicity, gender, party, and religion—not just the statistically significant ones.[123]

Table 13
The Ethnicity, Gender, Party, & Religion of Law Professors
(Fall 2013 estimate)
Compared to Lawyers and the English-Fluent Full-Time
Working Population, Ages 30–75

Rank	Ethnicity, Gender, Party, Religion	Law Profs (%)	Full-time Working Pop. (%)	Lawyers (%)	Difference: Prof-Working Pop. (%)	Ratio: Prof / Working Pop.	New Hires for Parity on a Faculty of 40	Difference: Prof –Lawyers (%)	Ratio: Prof / Lawyers	New Hires for Parity on a Faculty of 40	Consistently Over/Underrep.
1	NonH. White, Christian	34.0	56.7	59.4	-22.7	.60*	21	-25.4	.57*	25	▼
2	Christian	46.7	77.9	67.9	-31.2	.60*	56	-21.2	.69*	26	▼
3	NonH. White, Republican	10.2	33.7	30.9	-23.5	.30*	14	-20.7	.33*	12	▼
4	Republican	11.0	37.8	31.3	-26.8	.29*	17	-20.3	.35*	12	▼
5	Republican, Christian	8.3	33.0	27.1	-24.7	.25*	15	-18.9	.30*	10	▼
	[Republican if odds of being Republican rose 50%]	15.6	37.8	31.3	-22.2	.41*	14	-15.7	.50*	9	▼
6	Male, Christian	30.3	40.6	45.0	-10.3	.75*	7	-14.7	.67*	11	▼
7	Male, Republican	10.2	23.1	23.3	-12.9	.44*	7	-13.1	.44*	7	▼
	[Christian if odds of being Christian rose 50%]	56.7	77.9	67.9	-21.1	.73*	38	-11.1	.84*	14	▼
8	Female, Republican	0.8	14.7	8.0	-13.9	.05*	7	-7.3	.09*	3	▼
9	Non-Hispanic White, Male	53.1	41.3	60.2	11.8	1.29*		-7.1	.88*	7	

121. PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 3 (2015), http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf [http://perma.cc/55BD-6U77].

122. *See id.* at 51–52, 80–81.

123. In other words, because significance testing (here using Fisher's Exact Test) does not reflect non-sampling sources of error—and these sources of uncertainty are even larger here than usual—less weight than usual should be given to whether a difference is statistically significant.

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10	Non-Hispanic White	79.3	73.4	85.8	5.8	1.08*		-6.6	.92*	19	
11	Female, Christian	16.3	37.3	22.9	-21.0	.44*	13	-6.5	.71*	3	▼
12	Male	64.1	54.9	67.6	9.2	1.17*		-3.5	.95*	4	
13	Other Religion	1.3	2.5	3.9	-1.1	.54		-2.6	.34*	1	
14	NonH White, Independent	4.3	14.8	6.5	-10.5	.29*	5	-2.3	.66	1	
15	Minority, Jewish	0.4	0.1	2.6	0.4	6.18*		-2.2	.17*	1	
16	Female, Independent	0.8	9.7	2.8	-8.9	.08*	4	-2.1	.27*	1	▼
17	NonH White, Other Religion	0.6	1.1	2.2	-0.5	.55		-1.6	.28	1	
18	Independent	6.2	21.2	7.8	-15.0	.29*	8	-1.6	.79	1	
19	Democratic, Other Religion	1.3	1.4	2.9	-0.1	.93		-1.6	.46	1	
20	Male, Other Religion	0.4	1.6	1.8	-1.2	.26*		-1.4	.24	1	
21	Female, Other Religion	0.9	0.9	2.1	0.0	1.03		-1.2	.43		
22	Independent, Christian	4.1	15.2	5.2	-11.1	.27*	5	-1.1	.79		
23	Minority, Other Religion	0.7	1.4	1.7	-0.6	.53		-1.0	.43		
24	Republican, Jewish	1.5	0.6	2.3	0.9	2.60*		-0.8	.63		
25	Republican, Other Religion	0.0	0.4	0.6	-0.4	.00		-0.6	.00		
26	Independent, Other Religion	0.0	0.6	0.4	-0.6	.00*		-0.4	.00		
27	Republican, No Religion	1.3	3.8	1.3	-2.5	.33*	1	0.0	1.01		
28	Minority, Republican	0.8	4.1	0.4	-3.3	.20*	1	0.4	1.84		
29	Democratic, Christian	35.9	29.7	35.5	6.2	1.21*		0.4	1.01		
30	Male, Independent	5.5	11.5	5.0	-6.1	.47*	3	0.5	1.10		
31	Non-Hispanic White, Female	26.2	32.2	25.7	-6.0	.81*	4	0.5	1.02		
32	Independent, Jewish	0.9	0.2	0.4	0.7	4.69*		0.6	2.46		
33	Minority, Independent	1.9	6.4	1.3	-4.4	.30*	2	0.7	1.52		
34	Independent, No Religion	2.8	5.1	1.8	-2.4	.54*	1	1.0	1.56		
35	Female, Jewish	8.1	0.6	6.5	7.5	13.13*		1.6	1.24		
36	Minority, Female	9.4	13.0	6.7	-3.5	.73*	2	2.7	1.40*		
37	Minority, Male	10.5	13.6	7.4	-3.1	.77*	1	3.0	1.40*		
38	Female	35.9	45.1	32.4	-9.2	.80*	7	3.5	1.11*		
39	Male, Jewish	16.0	1.1	12.1	14.9	14.54*		3.9	1.32*		
40	Minority, Christian	12.7	21.1	8.5	-8.5	.60*	4	4.2	1.49		
41	Minority, No Religion	6.0	4.0	1.4	2.1	1.52*		4.7	4.41*		▲
42	Minority, Democratic	17.1	16.1	12.5	1.1	1.07		4.7	1.38		
43	Jewish	24.1	1.7	18.6	22.4	14.03*		5.5	1.29		
44	Minority	19.9	26.6	14.2	-6.7	.75*	4	5.7	1.40*		
45	Democratic, Jewish	21.7	1.0	15.9	20.8	22.69*		5.8	1.36		
46	Non-Hispanic White, Jewish	23.7	1.6	16.0	22.0	14.38*		7.7	1.48*		▲
47	Male, No Religion	16.8	11.6	8.7	5.2	1.45*		8.0	1.92*		▲
48	Male, Democratic	47.8	20.2	39.4	27.6	2.36*		8.5	1.22*		▲
49	Female, No Religion	10.3	6.3	0.9	4.0	1.63*		9.4	11.98*		▲
50	Female, Democratic	34.1	20.8	21.5	13.3	1.64*		12.6	1.58*		▲
51	NonH White, No Religion	21.0	13.9	8.2	7.1	1.51*		12.8	2.56*		▲
52	NonH White, Democratic	64.8	25.0	48.4	39.8	2.59*		16.4	1.34*		▲
53	Democratic, No Religion	23.0	9.0	6.5	14.0	2.56*		16.4	3.51*		▲
54	No Religion	27.0	17.9	9.6	9.1	1.51*		17.5	2.82*		▲
55	Democratic	81.9	41.0	60.9	40.9	2.00*		21.0	1.35*		▲
	Total n	710–7089	4,064–2,625,934	199–26,466							

Data Sources:

ABA Fall 2013 data (tenured faculty, tenure-track faculty & the dean); n=7089 (ethnicity & gender)

2011–13 American Communities Survey, employed full-time working population, ages 30–75, fluent in English, n=2,625,934 (ethnicity & gender)

2011–13 American Communities Survey, employed full-time lawyers, ages 30–75, fluent in English, n=26,466 (ethnicity & gender)

1993–94 Survey of Law Professors at top 100 schools (710 responses, 66% response rate; party & religion)

General Social Surveys, 2006–12 for English-speaking full-time working population (party & religion); n = 4064

General Social Surveys, 1985–2012, and American National Election Surveys, 1990–2012, for lawyers; n=199

* Differences significant at $p < .05$, using a 2-tailed Fisher's Exact Test

Though changes in party and religion are accounted for in the full-time working population (using 2006–2012 General Social Survey data), for lawyers the party and religious data represent a broader period (the 1985–2012 General Social Surveys and the 1990–2012 American National Election Studies), and for law professors the party and religious data reflect my 1993–94 survey of 710 law professors at the top 100 law schools.[124] Thus, while the ethnic and gender data are relatively current across the board (as are the political and religious data on the working population), the political and religious data on lawyers and law professors are not. In Table 13 the party and religious data for law professors are computed by applying old but high quality 1993–94 law professor survey data of 710 professors to nearly complete 2013 ABA ethnicity data, category by category.

The party and religious data for lawyers are based on high-quality representative samples of the U.S. non-institutionalized public included in the 1985–2012 General Social Surveys and the 1990–2012 American National Election Studies. Unfortunately, there were only 199 lawyers ages 30–75 in these two sources,[125] which makes the results less reliable than would be ideal. Further, there is a trend in the lawyer data over the last decade toward more Democrats, which is suppressed by using a long enough period to get a sample large enough to reduce sampling error. Not capturing this trend would tend to inflate the size of the political gap between lawyers and law professors (though not between the working population and law professors).

For this and other reasons, I have added two additional categories to Table 13: One added category assumes that the odds of a law professor being Republican today is 50% higher than the estimate without this adjustment, the other assumes that the odds of a law professor being Christian today is 50% higher than it would be without this adjustment.[126] There is no reason

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124. See *supra* notes 55–74 and accompanying text. Note that my survey was of the top 100 law schools, while the current ABA data is for all U.S. law schools. Also, for 2013 I combined Catholics and Protestants into the Christian category because their representation was nearly identical in 1997.

125. I further screened out those lawyers who did not have graduate or professional degrees, but to keep the sample size up I retained lawyers who were not currently employed full-time.

126. The best estimates in Table 13 are 46.7% Christians and 11.0% Republicans, which translates into odds of .875-to-1 for Christians and .123-to-1 for Republi-

to suppose that either of these two variations is true, but I wanted to illustrate that the results are robust even if there had been large increases in the odds of a professor being Republican or Christian since the 1990s.

Table 13 shows the estimated party and religious makeup of law faculties in 2013 if the orientations for each ethnicity and gender stayed about the same as they were in the mid-1990s. Thus, the changes in religion and politics from the 1997 estimates to the 2013 estimates in Table 13 reflect the differences in the ethnic and gender makeup of law schools presented in the 2013 ABA data.[127]

Unlike Table 12, which showed that, compared to lawyers, parity in legal education had been reached for all large ethnic and gender groups, Table 13 shows that some large political and religious groups are probably still strongly underrepresented. Compared to lawyers, the five most underrepresented groups are white Christians, Christians, white Republicans, Republicans, and Republican Christians. To reach parity on a faculty of 40, one would have to hire 10 to 26 of each of these targeted groups. To reach parity with the English-fluent full-time working population, schools would have to hire 14 to 56 of each of these groups. For example, every law faculty of 40 would have to hire 56 Christians to get their numbers up to their share of the general full-time working population of a similar age.

In proportional terms, the most underrepresented large group in legal education is female Republicans, which is at only 5% of parity with the working population and 9% of parity with the lawyer population. As Table 13 shows, on law faculties there are about 10 times as many Jewish women as Republican women, though in the full-time working population there are about 24 times as many Republican women as Jewish women. This means that the odds (and probability) of a Jewish female member of the full-time working population being a law professor is 254 times higher than the odds (and probability) of a female Republican member of the full-time working population being a law profes-

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cans. A 50% increase in the odds for each raises the odds to 1.31-to-1 for Christians and .185-to-1 for Republicans, which corresponds to probabilities of 56.7% for Christians and 15.6% for Republicans.

127. Note that in Table 13, the sum of non-Hispanic whites and minorities is only 99.1% because there are 0.9% of law professors whose ethnicity is unknown or who are foreign nationals. If we had data on the ethnicity of the foreign nationals, it is likely that the minority totals would increase proportionally more than the white totals.

sor. Further, female Democrats are among the core overrepresented groups, overrepresented in law teaching compared to both the working and the lawyer populations. Yet at many schools, landing another Jewish Democratic woman is still treated as a hire that naturally promotes diversity.

Even if we assumed that the odds of a law professor being Republican were 50% higher than my best estimate (based on 1990s professor political and religious data and 2013 ABA ethnic and gender data), the underrepresentation of Republicans is still quite stark. Without the 50% boost in the odds of being Republican, faculties are at 29% of parity with the working population and 35% of parity with the lawyer population. To reach parity, each faculty of 40 would have to hire 12 to 17 Republicans (Table 13). With a 50% boost in the odds of a law professor being Republican, faculties would still be at only 41% of parity with the working population and 50% of parity with the lawyer population. And to reach parity each faculty would still need to hire 9 to 14 Republicans (Table 13).

C.   Closing Remarks

In the 2010s, the dominant group in legal education remains Democrats, both male and female. Democrats make up nearly 82% of law professors, but only 41% of the English-fluent full-time working population of a similar age.

In some respects law school faculties have become more representative of lawyers and the general working population. All large ethnic and gender affirmative action groups are at parity with the population of lawyers of a similar age, and most are approaching parity with the full-time working population. In other respects, law schools have become much less representative of the general public. In the 1980s and 1990s, one sometimes heard admonitions to hire only "authentic" women and minorities, that is, only those who leaned to the left. Conservative women and minorities were treated as somehow inauthentic.

One of the main purposes of diversity hiring is supposed to be that demographic groups have different views based on their differing experiences, to which everyone should be exposed. That purpose was a problem even in 1997, since 67% of law professors then were white males, but overwhelmingly these white male professors did not hold the typical political

views of white males in the general population, a group who tended to vote Republican.

As for the 22% of law professors in 1997 who were white females, they overwhelmingly favored the Democratic Party, but at least most white women at that time voted Democratic. That has changed dramatically. By 2012, white females on balance had switched parties, now tending to vote more Republican than Democratic.[128] Exit polls in 2012 reported that white women voted 56% for Mitt Romney and only 42% for Barack Obama, a huge 14% difference—and Obama won.[129] Today, when whites make up 79% of law professors, both white females and white males are now unrepresentative of typical white males and females.

After four decades of hiring to make law faculties more representative of American society, they are probably less representative ideologically than they have been for several decades. While the one-fifth of law professors who are minorities offer political views that are roughly in line with most minorities in the general public, the four-fifths of law professors who are white are now out of step with the political views of the majority of white men and the majority of white women. Politics and religion, like race, are moderately strong predictors of views, while gender differences are relatively small predictors.[130] Thus for viewpoint diversity, religious and political background is roughly as important as race, and probably more important than gender.

Diversity hiring does not necessarily lead to a diversity of viewpoints, and with regard to political views, it usually leads in the opposite direction. If, as a society, we are to engage in social engineering, we need to pay more attention to realities and to think more critically about what we are actually accomplishing. We should study our success with affirmative action to learn how it can be exported to other fields, but we should also study our failure to promote diversity of viewpoints to learn how to reverse it. As Randy Barnett once said, "The last thing that the forces of diversity want is diversity. They want

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128. *See, e.g.*, David C. Wilson, *The Elephant in the Exit Poll Results: Most White Women Supported Romney*, HUFFINGTON POST (Nov. 8, 2012), http://www.huffingtonpost.com/david-c-wilson/the-elephant-in-the-exit_b_2094354.html [http://perma.cc/95T8-8BUF].

129. *Id.* White men voted for Romney by 62% to 35%. *Id.*

130. *See supra* notes 39–43 and accompanying text.

different voices as long as they are all saying the same thing."[131] Now that the important work of race and gender integration has succeeded on law school faculties—with the traditional affirmative action groups now matching or exceeding their percentages in the broader lawyer population—the next step should be to desegregate law schools politically

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131. Telephone conversation with Randy Barnett (Feb. 27, 1997).