

Conceptualizing Diversity in Empirical Terms

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It is odd that an empiricist such as myself would be asked to lead off a conference by writing and talking about conceptualizations of diversity. On second thought, it's not so odd: Facts often get in the way of beautiful concepts and theories.

I find most conceptualizations of diversity so empirically implausible that I can't tell whether those who advocate them really believe them. When I presented some of my work at Harvard in 1996, Professor Randall Kennedy suggested that I was taking claims about diversity too seriously. Kennedy provocatively argued, "No one really believes in diversity."¹ In his view at the time, people asserted a rationale they didn't believe because, after *Bakke*,² diversity was all that was left to support affirmative action. As Kennedy commented to me, the Supreme Court closed the door (affirmative action) but left open a window (diversity).

Among the many strengths of Professor Peter Schuck's *Diversity in America* is that it explores these definitional problems: What does diversity mean, and does it make sense? Schuck defines diversity as "those differences in values, attitudes, or activities among individuals or groups that a particular society deems salient to the social status or behavior of those individuals or groups."³

On the wisdom of pushing for diversity, Schuck and I differ: To the extent that diversity in practice is used to promote affirmative action, I favor it as a social policy; with some exceptions, Schuck reluctantly opposes it. But we agree much of the time about the factual problems with most pro-diversity arguments and the hardships that unintended consequences can bring to some diversity programs.

In promoting affirmative action, I tend to favor a combination of

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1. Professor Randall Kennedy was the commentator for my talk, *Measuring Diversity*, in the fall of 1996. I originally recorded the quoted statement in notes. It may or may not represent Kennedy's current thinking.

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

3. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 7 (2003).

characteristics and a rationale mostly disfavored by the courts. In my view, the sort of diversity that law schools should promote is a better representation of groups that were both historically locked out in profound ways and are still substantially underrepresented in academics.

In other words, one must squarely face the need for greater ethnic advancement as a corrective for past cultural deprivation and racism. While the original idea of *affirmative action* was in some senses paternalistic—it is something that those in control of institutions do for those weakened by discrimination—*diversity*, on the other hand, is not supposed to be based on weakness. Rather, each important cleavage is a source of diversity and thus a source of strength. Nor is any group necessarily disadvantaged or advantaged by diversity. All important groups should be well represented, whether they are minorities or majorities.

This seeming neutrality of diversity is often illusory because the last thing that many who favor diversity in law school faculties want is a strong effort to make faculty viewpoints more closely resemble the distribution of political and social opinion in the country. Yet this social engineering rationale carries with it a responsibility—to care about outcomes so that one should not push diversity or affirmative action where it would harm those it is most intended to benefit. In short, I am arguing that the *scope* of affirmative action should be limited by what works, not by what makes social engineers feel good.

If someone asks me what diversity is, my usual reply is: “*Why* do you want to know? To what *use* do you plan to put the definition?”

One can best understand what diversity means or what sorts of diversity are supposed to count if one reads over the diversity statements of various universities, such as Yale,⁴ Harvard,⁵ and Princeton.⁶ In these statements, the

4. Yale’s Graduate School Statement states:

The Office for Diversity and Equal Opportunity is committed to building a supportive graduate school community whereby students of color, women and other underrepresented students are actively recruited to the graduate school and encouraged in their professional, social and intellectual goals and pursuits. The Office for Diversity and Equal Opportunity was established with the premise that expanding the diversity within the student body enhances the intellectual experience and understanding of the entire scholarly community. The Office operates collaboratively with departments and programs to proactively recruit and support the needs of underrepresented students as they pursue graduate study at Yale. The Office is under the administrative direction of Assistant Dean Liza Cariaga-Lo, who works with students, faculty and administrators within the Graduate School and the University to carry out the mission of the Office. In addition, a full-time administrative assistant and Graduate Fellows help develop and implement recruitment and retention programs. An Advisory Committee, appointed by the Dean, meets regularly to offer additional support and vision for the Office’s programmatic efforts. The Office provides support at many levels to students of color and women as they prepare for, begin and complete the graduate education process at Yale. Students are encouraged to visit the Office to find out more about programs sponsored by the Office.

Yale Univ. Graduate Sch. of Arts and Scis., *Office of Diversity & Equal Opportunity (ODEO)*, at <http://www.yale.edu/graduateschool/diversity/> (last visited Nov. 4, 2004).

5. Harvard University’s Statement on Diversity, by Harvard President Lawrence H. Summers,

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primary rationale for pursuing racial and ethnic diversity offered by universities is that such a policy will promote viewpoint diversity. Harvard's statement asserts: "Diversity contributes to educational excellence by enabling outstanding students, faculty, and staff of all backgrounds to come together and learn from one another."⁷ After mentioning recruiting and encouraging "students of color, women and other underrepresented students," Yale's Graduate School states: "The Office for Diversity and Equal Opportunity was established with the premise that expanding the diversity within the student body enhances the intellectual experience and understanding of the entire scholarly community."⁸

Princeton's more extensive statement makes similar arguments:

reads:

A number of questions have been asked in recent days about the University's position and my own views on diversity. I thought a brief statement might be helpful in this regard.

I take pride in Harvard's longstanding commitment to diversity. I believe it is essential for us to maintain that commitment, working to create an ever more open and inclusive environment that draws on the widest possible range of talents. Our approach to admissions, cited as a model in the nation's highest court, advances our compelling interest in racial and other forms of diversity. Diversity contributes to educational excellence by enabling outstanding students, faculty, and staff of all backgrounds to come together and learn from one another. I look forward to working with colleagues at Harvard and elsewhere to promote ever greater opportunity for all.

With regard to the Afro-American Studies program at Harvard, we are proud of this program collectively and of each of its individual members. We would very much like to see the current faculty stay at Harvard and will compete vigorously to make this an attractive environment.

Lawrence H. Summers, *Statement on Diversity at Harvard University*, at <http://www.president.harvard.edu/speeches/2002/diversity.html> (Jan. 2, 2002).

6. Princeton's Statement on Diversity and Community reads:

In May of 1994 Princeton approved the following statement of our goals and aspiration in the important areas of diversity and community.

Princeton University is a community devoted to learning. We actively seek students, faculty, and staff of exceptional ability and promise who share in our commitment to excellence in teaching and scholarship, and who will bring a diversity of viewpoints and cultures. By incorporating a broad range of human experiences and a rich variety of human perspectives, we enlarge our capacity for learning, enrich the quality and texture of campus life, and better prepare for life and leadership in a pluralistic society.

As a community, we respect the dignity, individuality, and freedom of each member. At the same time, we strive to be a place where individuals and groups learn with and from each other. We aim to foster a sense of shared experience and common purpose, along with a collective responsibility for each other's well-being and for the well-being of the university as a whole.

Although we acknowledge the difficulties inherent in creating a community of individuals who are different from each other, we remain unwavering in our commitment to both diversity and community in a context of academic excellence. We seek to enable all members of this community to pursue their educational, scholarly, and career interests in an environment that recognizes both the distinctiveness of each person's experience and the common humanity that unites us all, and permits us to take full educational advantage of the variety of talents, backgrounds, and perspectives of those who live and work here.

Princeton Univ. Office of Human Res., *Statement on Diversity and Community*, at <http://www.princeton.edu/hr/handbook/divers.htm> (last modified June 20, 2001).

7. Summers, *supra* note 5.

8. Yale Univ. Graduate Sch. of Arts and Scis., *supra* note 4.

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We seek to enable all members of this community to pursue their educational, scholarly, and career interests in an environment that recognizes both the distinctiveness of each person's experience and the common humanity that unites us all, and permits us to *take full educational advantage of the variety of talents, backgrounds, and perspectives* of those who live and work here.⁹

Many people, including the university officials who composed these statements, seem to be operating on the assumption that the groups that have been discriminated against historically are the same groups that are under-represented in universities and further that these two presumptively coextensive sets of groups are coextensive with the groups that would provide more viewpoint diversity if their numbers were increased in academia. Anyone who thinks about this set of propositions should realize that they are highly unlikely, at least on the faculty side.

Which groups would provide the most viewpoint diversity if added to the typical law faculty? On most law faculties, the groups that would provide the most viewpoint diversity would be Republicans, conservatives, and evangelical or fundamentalist Christians—none among the groups that were traditionally locked out by the United States' racist and sexist practices of discrimination.

Which groups are the most over-represented in law teaching? Mostly Jewish and atheist law professors and members of the Democratic Party, yet Jews were discriminated against in the United States and were subject to hate crimes, and still are. Anti-Jewish sentiment, moreover, may have been getting worse in the last few years, especially among students, the young, and street demonstrators.¹⁰ Yet Jews are overrepresented in law teaching by a ratio of about thirteen to one,¹¹ compared to the full-time working population.

9. *Id.* (emphasis added).

10. See, e.g., Anti-Defamation League, *Anti-Israel Activity on American College Campuses*, at http://www.adl.org/Israel/campus_antiisrael/default.asp (last visited Nov. 4, 2004).

11. See James Lindgren, *Measuring Diversity* (Nov. 7, 2001) (unpublished manuscript, on file with author) (documenting that, in the mid-1990s, Jews constituted about twenty-seven percent of law professors, but only about two percent of the full-time working population). Religion and party identification were determined in a 1993-94 survey of 710 law professors at the top one-hundred law schools (sixty-six percent response rate), weighted by race and gender figures from the 1996-97 American Association of Law Schools database for those one-hundred schools. Religion and party identification in the general and full-time working public were determined using data in the National Opinion Research Center's General Social Survey [hereinafter GSS] (1988-94 for non-Hispanic whites, 1982-94 for minorities, and 1972-94 for lawyers), weighted by race and gender for those aged thirty to seventy-five in the U.S. Census Bureau's 1994 Current Population Survey (which adjusted for undercounts of minorities in the 1990 Census). The GSS data are available at Nat'l Opinion Research Ctr., General Social Survey, at <http://www.icpsr.umich.edu/GSS/> (last visited Nov. 4, 2004).

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Similarly, Asian-American students are over-represented on many college campuses compared to their numbers in the general population, yet Asian Americans were discriminated against and still are in some areas.

Now consider one of the demographic groups that I belong to—atheists—who are substantially over-represented on law faculties (twenty-six percent in law teaching in the mid-1990s compared to about eight percent in the full-time working population at that time).¹² Yet in the 1991 General Social Survey (GSS), only forty percent of respondents disagreed with the statement “Politicians who do not believe in God are unfit for public office.” Among respondents, twenty-nine percent agreed that atheists were unfit for office, while thirty-one percent neither agreed nor disagreed, didn’t know, or declined to answer.¹³ That’s prejudice.¹⁴

For comparison, in the same year (1991) GSS respondents were also asked: “If your party nominated a woman for President, would you vote for her if she were qualified for the job?” In response, eighty-seven percent said they would vote for a woman, eight percent said no, and five percent didn’t know or declined to answer.¹⁵ When asked the same question about their willingness to vote for an African American, an almost identical pattern resulted: eighty-seven percent said they would vote for an African American, nine percent said no, and four percent didn’t know or declined to answer.¹⁶ These data suggest that the general public is much more willing to bar atheists from public life than African Americans or women, yet atheists are very substantially over-represented in law teaching, not under-represented.

Now consider which are the most under-represented groups in law teaching? The most under-represented large racial, gender, political, or religious groups are Republicans and Hispanics, whose shares of law faculties in the mid-1990s were less than a third of their shares in the full-time working population.¹⁷ If you break down these groups into subgroups, then white female Republicans are almost nonexistent in law teaching,¹⁸ while they are among the largest subgroups when breaking down the general U.S. population by race, gender, and party. Rather than being favored in law school hiring as an under-represented group, white female Republicans are sometimes opposed by those

12. Lindgren, *supra* note 11.

13. I analyzed the 1991 GSS, *supra* note 11 (variable POLSGOD), weighting by adults in household, divided by mean adults in household (1972-2002), divided by a design effect of 1.5.

14. In academics, it may be that evangelical Christians, rather than atheists, are discriminated against.

15. GSS, *supra* note 13 (variable FEPRES).

16. *Id.* (variable RACPRES).

17. See Lindgren, *supra* note 11 (demonstrating that, in law teaching, Hispanics were at about thirty-one percent of parity with the full-time working population and Republicans were at about thirty-two percent of parity).

18. See *id.* (noting that, in the mid-1990s, white female Republicans made up about 0.3% of law professors compared to about 13.5% of the full-time working population).

arguing for diversity because the academic stereotype of a woman is someone left of center—and these women don't fit the stereotype. Yet in the mid-1990s *all* of the substantial under-representation of white women on law faculties compared to the full-time working population was among white Republican women.¹⁹ White Democratic women were over-represented on law faculties compared to the full-time working population of a similar age and the pool of lawyers aged thirty to seventy-five.²⁰

Another thing to recognize is a pluralism of overlapping categories. When I looked at this in the mid-1990s, I discovered that we law professors were all members of both under-represented and over-represented groups in some nontrivial way. As an atheist, I was over-represented in law teaching compared to almost any relevant population. As a white male, I was over-represented in law teaching compared to the full-time working population, but under-represented in law teaching compared to lawyers aged thirty to seventy-five. To take another example, an African American Democratic female would be very substantially over-represented in law teaching compared to lawyers aged thirty to seventy-five and over-represented as a Democrat compared to both lawyers and the working population, but would be under-represented in law teaching as an African American and as a female compared to the working population.²¹

Does this mean that all these pluralist categories magically cancel out and that there is no reason for concern? Absolutely not. My point is not that diversity doesn't matter or that all kinds of diversity are the same, but rather that being under-represented or over-represented is not something that one person possesses or doesn't possess—each individual is both over-represented and under-represented at the same time. To sort out the relevance of these diversity claims, one must engage in careful analysis and justification, considering what the goal and the relevant metric might be. If it's viewpoint diversity that counts most (as most university diversity statements assume), then of the dimensions that I have studied, political diversity is the cleavage that divides Americans the most, followed by race. This pattern holds, not only for a range of political issues, but also for a range of legal issues as well (e.g., abortion rights, gun control, pornography prohibition).²² Less important for viewpoint diversity are age, education, occupational prestige, and gender.²³

Although bringing different viewpoints to bear is the main rationale for diversity, it is not the only one. In *Grutter v. Bollinger*, Justice Sandra Day

19. *See id.*

20. *See id.*

21. *Id.*

22. If one moves to lifestyle issues (such as happiness, trust, or television watching), education becomes more important. James Lindgren, What Groups Think (Aug. 1, 2001) (unpublished manuscript, on file with author).

23. *Id.*

O'Connor (writing for the majority) bases her support for the University of Michigan's admissions program first on viewpoint diversity: "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."²⁴ Along the same lines, O'Connor approvingly quotes the district court: "'[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"²⁵

O'Connor then develops a different argument that speaks more of remedial affirmative action than of diversity:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.²⁶

I like this argument better because it recognizes the special salience of race and does not hide behind the seemingly neutral blind of viewpoint diversity, though obviously it comes close to adopting the remedial argument that the court has usually rejected as a ground for affirmative action: Without particularized proof of discrimination against the plaintiffs, which is lacking in the typical case, remedying past societal discrimination is usually irrelevant.

What about religion and politics? Is it also "necessary that the path to leadership be visibly open to talented and qualified individuals of every" religion and political orientation, or is it just "race and ethnicity" that counts? If the former, then elite universities are failing miserably in developing and nurturing Republicans, conservatives, and evangelical Christians, particularly as faculty members.

But if not all sorts of diversity are the same—and they are not—then we must brush aside the platitudes about viewpoint diversity and face the remedial issue squarely. Race and gender are different in part because women and African Americans were formerly largely excluded from faculty positions by elite universities and professions in this country, while Republicans and most denominations of Christians were not. It is precisely because of this history of discrimination that society needs to be concerned about "the path to

24. 539 U.S. 306, 321 (2003).

25. *Id.* at 333.

26. *Id.* at 332 (citation omitted).

leadership.”²⁷

Yet if we are genuinely concerned about what leads women and minorities to succeed in society, then we must address the empirical questions inherent in this conceptualization of diversity as well. Both the majority and the dissenting opinions in *Grutter* pointed to some well-conducted empirical studies, some suggesting that affirmative action was working well to promote achievement by women and historically disadvantaged minorities, some suggesting that it was not. The state of the social science research is far from converging at this early stage.

Even those of us who favor affirmative action must be open to research suggesting what works and what does not. Does affirmative action actually help open up positions of influence in society, as works by Professor Richard Lempert²⁸ and Professors William Bowen and Derek Bok²⁹ seem to suggest? Or does affirmative action prevent too many African Americans from succeeding at the schools they attend, as new work by Professor Richard Sander suggests?³⁰ Or are both assertions substantially true? What about the “critical mass” argument? Many minority students want to attend schools where there are more (rather than fewer) students of the same ethnicity. But do minorities actually do better as a result of being around more students of the same ethnicity, either in school or after graduation? And what effect on the exchange of ideas results from having a typical affirmative-action program compared to a very aggressive one?

These are empirical questions whose results will vary by time and place and yet their answers should be studied in the field to try to ascertain how to tweak the policies that we have adopted. Once we commit ourselves to a major program of social engineering, it is important to know what our engineering is producing.

My primary purpose in this Essay is to suggest that the groups that would provide the most viewpoint diversity in academics (particularly on faculties) are not the same as the groups that have been discriminated against or the groups that are most under-represented. When we talk of diversity in the future—and we will—we should recognize that affirmative action is not the same as diversity. Promoting intellectual diversity would often point away from hiring more minorities and toward hiring more Republicans or evangelical Christians. Conversely, promoting further ethnic and gender diversity,

27. *Id.*

28. See Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

29. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1999).

30. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. (forthcoming Nov. 2004).

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particularly in faculty hiring, often would not foster a wider range of intellectual or political views—or more representative ones. Indeed, if most of the women and ethnic minorities who are actually hired on law faculties tend to lean toward the Democratic Party, the faculty overall may become less representative of the diversity of views in the wider public. Without clear thinking, promoting “diversity” can unintentionally produce less intellectual diversity rather than more.

As Peter Schuck observes in *Diversity in America*:

Our public and private institutions adopt preferences for certain forms of diversity (e.g., skin color, surname, and athleticism) while ignoring or even discouraging other diversities that are—or in my view ought to be—more closely linked to these institutions’ goals. Faculties that should thrive on viewpoint diversity seem to have little taste for it³¹

Indeed.

31. SCHUCK, *supra* note 3, at 316.

