

# ESSAY: DEVELOPING APPROPRIATE STANDARDS FOR ACHIEVING DIVERSITY IN FACULTY APPOINTMENTS

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I am writing today to talk about diversity within law school faculties. And when I say “diversity,” I mean all sorts of diversities, not just the ones that most of those who address the issue tend to focus on. I have, for many years, been thinking about the different types of diversities that seem crucial to a law school, and the appropriate ways of achieving them.

Part I lists the categories of diversity that I think are important to considering diversity within law school faculties. It then indicates a problem that inheres with this list. Part II suggests how different schools may view the appropriateness of achieving some of these diversities. And finally, in Part III, I will come to the main thesis of this piece and propose how schools can achieve the diversities they deem desirable.

## I. CATEGORIES OF DIVERSITY

I have come up with eight categories of diversity to be considered in hiring law school faculty. The eight types of diversity I will discuss in this paper are:

1. age diversity: young and old;
2. teacher and scholar diversity: people who are primarily teachers and people who are primarily writers;
3. subject matter diversity: Tax Law, Tort Law, and so on;
4. theory and practice diversity: theoreticians and clinicians, for instance;
5. diversity in theory of law: natural law, “critical” approaches to law, legal realism, “law and . . .”, and so on;
6. diversity in approach to the law: whatever one’s theory of law may be, connecting law primarily to history, philosophy, economics, or some other extralegal field;

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7. personal-characteristic diversity: this is the one most talked about and includes gender and gender identity, race, sexual orientation, and religion (this type of diversity is related to, but a little different from, the age diversity mentioned above); and
8. finally, ideological diversity.

A problem that inheres with this list is that there might be what we could call a ninth category of diversities: the diversity that results from the overlapping of diverse characteristics. Some overlap is inevitable because people rarely bring just one characteristic to the table. Take, for example, a faculty member who is a conservative lawyer-historian who teaches Family Law. This faculty member contributes an ideological position, an approach to law, and a focus on a particular subject matter. But is this type of “combined” diversity significant? What would that school lose if the conservative historian taught another subject and a liberal non-interdisciplinary taught Family Law? Does the school need both? Another school may have an African American female economist who teaches Intellectual Property, a gender-nonconforming historian who teaches Local Law, and a moderate law and economics octogenarian teaching Tort Law. These overlapping diversities are terrific. But what does each characteristic add to the school? Would it matter, for example, if the economist was a philosopher instead?

Some overlap cannot be achieved: old and young (I try, but it does not work). Some overlap is universally desired. We all want to have a teacher who is a truly good scholar and a scholar who is a good teacher. But, I suggest there is no special diversity served by having someone on the faculty who is both. There are some overlaps in diversity that matter more than others. For example, it may be important to have both a conservative and a liberal constitutional law professor, but is it also important to have a conservative and a liberal antitrust professor? Is it worth going out of one’s way to have a Roman Catholic African American female on the faculty? That would be a very interesting diversity. But how significant in terms of diversity is it? How many of these overlaps become a unique diversity, desirable in its own right? It is not an easy question to answer, but one worth considering. For the purpose of this Essay, however, I will focus on my original eight listed diversities.

## II. HOW LAW SCHOOLS VALUE DIVERSITIES

The next question is, how much diversity, and of what sort, does a law school want or need?

Yale Law School in the 1930s thought of itself as a legal realist school.<sup>1</sup> That is what it was; it did not care terribly much about having other legal theories represented. It is said that Professor Myres McDougal was sent off to Illinois by then Professor and eventual Dean Wesley Sturges because it

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1. See generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986).

was not clear that “Mac” was enough of a legal realist.<sup>2</sup> He had, after all, come to Yale from Oxford University.<sup>3</sup> And only when he had supposedly proven himself did Dean Charles Clark bring him back.<sup>4</sup> That is what Yale was at that time. While it was a very interesting law school, it was not truly a great law school.

Similarly, other law schools have advertised their lack of diversity in theory or approaches to law. Antonin Scalia School of Law at George Mason University has described itself as a school that specializes in law and economics, a very particular kind of thing.<sup>5</sup> And there are some schools that specialize in the “practice of law,” saying that this is what they do.<sup>6</sup> Other schools purport to focus on particular fields. Vermont Law School, for a long time, specialized in environmental law and advertised itself specifically to people who were interested in environmental law.<sup>7</sup> A school may well and properly want to specialize. But I do not think that a law school can so limit itself and be truly great.

Nevertheless, it is not necessary for my discussion that all schools treat diversity the same way. Even great law schools will define diversity differently. Somebody once said that Yale Law School thinks it is furthering diversity by having seven or eight different people teaching Freedom of Speech in 1920 because each of them look at the issues involved differently.

I do think the one thing most law schools seem to agree on is that they must have subject matter diversity. And it is kind of interesting to me how important that seems to them. But the one kind of diversity the American Association of Law Schools (AALS) expressly requires is not subject matter diversity but personal-characteristic diversity.<sup>8</sup> The AALS speaks of personal-characteristic diversity as something that is an essential part of a law school and makes it relevant to accreditation.<sup>9</sup>

So, while I think that all great law schools want to be highly diverse in all eight categories previously listed, it remains up to each school to decide the

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2. BONNIE COLLIER, *A CONVERSATION WITH MYRES S. McDOUGAL* 6 (2013), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1005&context=yylsohs> [<https://perma.cc/CV7A-VY4R>].

3. *See id.* at 4.

4. *See id.* at 6.

5. Henry N. Butler, *A Message from the Dean*, GEO. MASON U. ANTONIN SCALIA L. SCH., <https://www.law.gmu.edu/about/dean/> [<https://perma.cc/8VHQ-BGB8>] (last visited Nov. 15, 2018); *see also* Todd J. Zywicki, *Keynote Address: Is There a George Mason School of Law and Economics?*, 10 J.L. ECON. & POL’Y 543, 543 (2014).

6. *See, e.g., Our Programs*, PACE ELISABETH HAUB SCH. L., <https://law.pace.edu> [<https://perma.cc/WL5K-8WKE>] (last visited Nov. 15, 2018) (stating that the school offers “a unique path to practice curriculum”).

7. *Environmental Law Specialization*, VT. L. SCH., <https://www.vermontlaw.edu/academics/specializations/environmental-law> [<https://perma.cc/ZS29-UMPZ>] (last visited Nov. 15, 2018).

8. *Bylaws*, ASS’N AM. L. SCHOOLS, <https://www.aals.org/about/handbook/bylaws/> [<https://perma.cc/QF3B-K3QG>] (last visited Nov. 15, 2018) (“A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex.”).

9. *See generally Diversity, Equal Opportunity and Affirmative Action*, ASS’N AM. L. SCHOOLS, <https://www.aals.org/about/handbook/good-practices/diversity/> [<https://perma.cc/H4S2-QLNX>] (last visited Nov. 15, 2018).

crucial details. Different schools will have different views as to how many of these matter, which are the most important, and which combinations really matter in making a law school what it wants to be.

### III. APPROPRIATE STANDARDS

We come then to the main point of this paper: What are the appropriate standards for faculty appointments to attain diversity?

If you ask almost any law school what the standard for appointment is, the school will answer “excellence.”<sup>10</sup> It will say, we appoint people who are excellent. Now, the first thing to realize is that the measure of “excellence” differs widely from school to school. For example, to be considered excellent at Yale is to be someone who has a real chance of breaking paradigms.<sup>11</sup> That is quite different from what is considered excellent at Harvard. Harvard seems to want somebody who dominates a field and pushes it further.<sup>12</sup> Now, it may be that a school like Yale has a comparative advantage in trying to get paradigm breakers and Harvard a comparative advantage in getting people who are genuinely original in moving a field further (without worrying about whether they completely redo it). This advantage may be why these schools in practice define excellence as they do. I tend to think so. And other law schools will likewise define excellence in line with their vision of themselves.

In the end, excellence probably means what makes a particular school look good in relation to its competitors. For example, an appointment may meet a school’s excellence standard if its competitors will say “damn good appointment.” But all of this shows just how different “excellence” really is.

More crucially, what is considered excellent also differs within every school. It is not a unitary standard. And anyone who thinks that it is a consistent standard should go back and look at appointments that have been made in any given school. Such a look will readily show just how different that standard has been in practice.

For example, a school may have a subject matter that is oversubscribed, meaning the school already has a large number of people teaching that subject. This oversubscription does not mean the school will never make an appointment in that area, but the appointment will have to be a superstar. And that is different from mere excellence.

This is true even in a place like Yale that claims it does not slot-fill. When it comes to the ninth person who wants to teach Constitutional Theory of the

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10. See *Law School Hiring*, FAC. LOUNGE, [http://www.thefacultyounge.org/law\\_school\\_hiring/](http://www.thefacultyounge.org/law_school_hiring/) [https://perma.cc/8EGY-7A3B] (last visited Nov. 15, 2018).

11. See *Our Faculty*, YALE L. SCH., [https://law.yale.edu/faculty?combine=&field\\_type\\_value=Faculty](https://law.yale.edu/faculty?combine=&field_type_value=Faculty) [https://perma.cc/N8KU-XVUU] (last visited Nov. 15, 2018) (noting that the faculty of Yale Law School is comprised of “prominent scholars” and “leading specialists”).

12. See John F. Manning, *Dean’s Welcome*, HARV. L. SCH., <https://hls.harvard.edu/about/deans-welcome> [https://perma.cc/GV4D-LZNM] (last visited Nov. 15, 2018) (“HLS combines genuine excellence and wonderful diversity on a scale that is unmatched anywhere. No law school has done more to shape law or legal education.”).

First Amendment in the 1920s, it is not that Yale will not make that appointment. But to be appointed, such a scholar has to be much more than the excellent kind of person Yale normally goes after. Law schools are not as rigid on this as arts and science departments, where if a field, broadly defined, is full, there will be no room except for someone who is even more than a superstar. Great law schools tend to have more flexibility. And yet, at some point, even they change their standards.

For this paper, though, what is more important in terms of the application of different standards is what happens when a school is trying to achieve diversity. Let me give you an example. Many years ago, George Mason—holding itself out as a law and economics school—stated that it would not appoint someone who did not have a doctorate in economics. That was a crucial part of its standard of excellence. However, it appointed a tax guy who not only did not have a doctorate in economics, but who had never really studied economics. I asked about this appointment and the answer I received was “we can’t *not* have a tax person.” That is, subject matter diversity was so important that the school was willing, seemingly without even thinking deeply about it, to deviate from its usual standard.

When I was on an AALS accreditation committee, George Mason was being questioned about its lack of women and African American faculty members. The school’s answer was that there were very few women and African American lawyers who also had a doctorate in economics. I then said: “But you’re willing to do it for tax. Why are you not willing to do it for these diversities? In effect, you are telling me that one diversity is more important to you than another. I’m not saying this can’t be valid, but I want you to justify it in terms of your school’s vision of itself and the AALS’s requirements.”

In fact, it seemed to me then (and still seems to me) that George Mason had it exactly backward. A school can deal with subject matter diversity by appointing visiting lecturers to cover the field for a time. But it cannot deal with personal-characteristic diversity in the same way. Visiting lecturers help to some extent. But they do not supply personal-characteristic diversity in the same way as having a regular, tenured faculty member.

The representative from George Mason did not answer my question at the time, and I soon after left the committee, so I do not know what ultimately happened. But the school was clearly applying different standards in different situations.

The most important difference in standards that law schools apply is the difference between the standard for promoting junior faculty to tenured positions and the standard for hiring professors laterally to tenured positions. I do not think that there is a school in the country that does not have a much easier standard for promotion than it does for making lateral appointments. We sometimes deny that this is so at Yale, but it is true there too.

Every single law school I know of has a different standard, and there is good reason for it. Thus, when you appoint a junior, if you are at a place like Yale, you hope that the junior will be a paradigm breaker, someone who is a

“genius.” You try to get that person early because it is much harder to get such a person laterally. So you look for the juniors who may become the Akhil Amars, the James Forman Jrs., or the Harold Kohs of their field. You look for them and you hire them without tenure. Some of those that you hire young turn out to be paradigm breakers, and, inevitably, others turn out “just” to be damn good, wonderful teachers, scholars, and citizens, but not people whom you would go out and try to steal from other places.

So, what is one going to do? Not promote those who turned out to be *just fine*, but not paradigm breakers? If a school does that, it will not be able to get any of the juniors it originally wanted to get. Why should a promising junior take the risk? And, perhaps even more importantly, if a school fails to promote them, it will destroy its faculty’s collegiality. Both of these are very good reasons for having a different standard, and we all take them for granted and employ a different standard. But, in fact, these are no better reasons to have a different standard than the need to have diversity.<sup>13</sup>

In other words, having a different standard in promoting juniors than in making lateral tenure appointments is justified because it helps a school. But so does diversifying. Why, then, should we not apply the *promotion standard to lateral appointments* that give us any of the diversities I listed?

And that is of course the thesis of this paper. I believe that, as to six of the eight diversities that I listed, a school should apply a promotion standard to get diversity by hiring laterally. And I also believe that no one can justifiably say to a school that applying a promotion standard is going below its standard of excellence to get diversity. The school is simply applying a standard that it regularly employs. And it is doing so for a reason that is very, very good.

I have said that I would apply this modified lateral standard—the promotion standard—in order to further six of the eight types of diversity I have listed. Which are the two that I would not treat that way?

The first is theory and practice diversity. There, my standard is separate but equal. Separate but equal—I use that pejorative-laden phrase intentionally to cause people to worry. It is both something that I think is worth doing in that area and it causes the problems that separate but equal always causes. As I will discuss, though, I think those problems can be dealt with.

The other area in which I would not apply the modified standard may well be highly controversial. I do not think one should apply a more favorable standard in order to get ideological diversity. I do believe that ideological diversity is every bit as important as the others, but I have reasons for concluding that one probably should not deviate from the ordinary lateral appointment standard in this area. I will discuss them shortly.

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13. It is sometimes said that the difference between a promotion and a lateral-appointment standard is that a faculty knows some relevant facts—such as teaching ability—when it promotes, but takes a risk as to these facts with lateral appointments. And so, the faculty is justified in requiring more as to what is known (i.e., quality of scholarship) in the latter. That may well be an additional “good reason,” though it can be diminished by having laterals be appointed only after having a visiting appointment.

As to the others, personal-characteristic and age diversity, subject matter, teacher-scholar, theories of law, and approach to law, I would apply the promotion standard to lateral appointments that would further diversity.

It is interesting that those people who are big on applying a more favorable standard to achieve subject matter diversity, and will do it in that area without thinking about it (and will do it also to further diversity in theories and approaches to law), are often the people who are most opposed to doing something analogous to achieve personal-characteristic diversity. Conversely, those who are most willing to apply a favorable standard to achieve diversity in personal characteristics (and will do it also to further diversity in theories and approaches to law) are least interested in anything of the sort where it would serve to get actual subject matter diversity. I do not know what it is that causes people, individual teachers, to break in that way. My own view, though, is that they are both wrong because all of these diversities are essential to being a truly great law school.

There are obviously problems, legal problems, with respect to each. The right-wing equal protectionists contend that one cannot favor personal-characteristic diversity. I never bought that position, but it is certainly being argued today. Age diversity obviously runs into Age Discrimination in Employment Act (ADEA) problems.<sup>14</sup> On the other hand, I do believe there is a great advantage in not just having octogenarian torts teachers. The AALS, instead, is much more concerned, and understandably so, with personal-characteristic diversity.<sup>15</sup> And it does suggest that accreditation may depend on achieving it. It may also look to subject matter diversity. But the AALS does not worry terribly much about the other forms of diversity. The American Bar Association (ABA) has recently paid a great deal of attention to practice, as against theory, diversity. But, all these legal and organizational pressures, although important, are not the topic of this piece.

Before I turn to why I would treat two of my eight diversities differently from the others, it may be worthwhile to spend a little time on why I treat theory of law and approach to law separately, and each as demanding attention. I think that there really is a difference in the theory of law that one has—natural law, legal process, formalism, “law and . . .”—and that a great school should want diversity of such theories. But I also believe a great school should seek people who look at different theories of law from the perspective of different outside disciplines. One should not want all “law and . . .” people to be law and economics scholars or legal philosophers. Similarly, one does not want all critical legal theorists or legal realists to be historians of law or sociologists.

I have two stories that speak to the point. When I became Dean of Yale Law School in 1985, I told my faculty colleagues at Yale, which at the time was having some trouble hiring, that we were going to do a lot of good hiring.

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14. See 29 U.S.C. § 623 (2012).

15. See *Recruitment and Retention of Minority Law Faculty Members*, ASS'N AM. L. SCHOOLS, <https://www.aals.org/about/handbook/good-practices/minority-law-faculty-members> [<https://perma.cc/5JHW-62RZ>] (last visited Nov. 15, 2018).

I knew I would be good at it and that I would be able to get the money to do it. I also told them that the first ones we would appoint would probably all be law and economics people, with different theories of law and in different subject matter areas, but all economics oriented. I said this because I believed that, given the school's and my own strength, we could hire the very best in legal education who approached law that way. And we did. But I also told my colleagues: "do not worry, when we have demonstrated that we can hire the best, that we no longer have problems in hiring, we will be right back with philosophers, historians, and all other '-ologists.'" And so we did.

My other tale has to do with my own scholarly history. When in 1965, I, already having tenure, was writing *The Costs of Accidents*,<sup>16</sup> I was invited by Konrad Zweigert, then the God of European law, to the Max Planck Institute in Hamburg to explain what I was doing. I went there and I talked about my work. At the end of my presentation, Zweigert leaned forward and said, "That is very interesting, Calabresi, but you must realize that it is not law and it is not legal scholarship." I answered rather rudely, "It may not be now, but it soon will be." The two people on either side of him laughed. He looked at them, as only a Herr Professor can, and they stopped in mid-laugh. But, in time, each of them became head of the Max Planck. And, as I have often said, what happened later is that law and economics not only became law and legal scholarship, but to many scholars, in more than one university in the United States, it became the *only* thing that was law and legal scholarship. Having seen it both ways, I expect, is a reason why I believe that diversity in approaches to law is crucial.

Of course, how much a school that is lacking any of these diversities can do to broaden itself will depend on how much that school can afford. Finances will also in part determine how particularized any school will be in defining diversity: whether, in other words, the school will go beyond my eight categories and worry about what I earlier termed a possible ninth category, consisting of overlapping diversities. And this will be true as to each of the diversities I have listed. For example, can a school afford to define diversity so as to treat as different, and worth extra effort to have, an African American woman because she is Catholic? Can a school afford to treat having a scholar who teaches The First Amendment in 1920 and one who teaches The First Amendment in 1950 as adding important subject matter diversity? Both of these will depend on the school's resources and priorities. To the extent that a school can afford them, though, at least the eight diversities I listed are all desirable and necessary. And to the extent that a school can hire somebody who is teaching elsewhere, and whom the school would promote were that person already on the faculty, then, I believe, the school has a duty to try to make that appointment.

My focus in this Essay is on lateral appointments. I think it is less important to focus as much on original, junior appointments. I believe that each kind of diversity is more easily achieved as to original nontenured

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16. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

appointments, and, therefore, that no modification of standards is needed there. Because society has broadened, it is now easier to make appointments of juniors that have personal-characteristic diversity. The pool has become much larger as past prejudices have diminished. That is, while our past histories may narrow the pool of lateral candidates who are diverse in personal characteristics, that history affects the pool for junior, original appointees less. And, there is no reason to think that paradigm breakers (or however a school defines excellence) cannot be found in the pool of diverse juniors.

Similarly, junior appointees can be pushed into different subject matters. That is the dean's job. As a result, I think that as to the initial junior appointments, the problem can be dealt with adequately without playing with standards.

But lateral, senior appointments are crucial. A school is defined by the people it has at the top, and hence its diversity is reflected in the degree of diversity it has at the top. For these reasons, I have focused on the standards schools should use to hire laterally.

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I must now explain why I would not apply a promotion standard to lateral hiring to achieve two of the eight listed diversities.

I would not do it as to theory and practice diversity because I think that the skills there are sufficiently different that if a school tries to get somebody who is a pretty good clinician and writes scholarly articles pretty well, it will get someone who is likely to be mediocre on both counts. As a result, a school should seek to get, as clinical teachers, the best available hands-on practitioners who know what really good clinical work is. A school should not worry about whether they have written a single damn thing. I feel the same way as to theoreticians. If they are truly good theorists, the fact that they have never set foot in a courtroom should not keep them from being hired (and I am here being autobiographical of course, but any number of great scholars like Bruce Ackerman will do as well). This approach will give a school the best theoreticians available.

Great schools need both great practice-oriented teachers and top-flight theoreticians. And both are readily available so long as one does not ask that they be excellent in more than one of the two characteristics. Hence if we keep clinical and academic appointments separate, there is no need to modify standards. The way a school gets excellence in both is the way we have done it at Yale Law School. Yale is the most theoretical of law schools academically, but it also has the most hands-on clinical program. Its clinical programs and its clinical professors are even more hands-on than NYU's (another school with a great clinical program). At Yale, precisely because we are so theoretical on the academic side, we seek and succeed in getting clinicians who are simply truly fine clinical practitioners.

This, of course, is a separate-but-equal approach to achieve diversity. And any separate-but-equal approach creates problems because separate often

means *not* equal. Moreover, in America, given our history of separate and fiercely unequal treatment of African Americans, the very words “separate but equal” sound infamous. Interestingly, this is not the case in Europe, which, lacking our history, often reacts quite positively to such approaches. Still we have to live and deal with all that separate but equal connotes here.

To make matters worse, separateness that is not equal has frequently been a problem with the way clinicians have been treated in law schools. The only way a school can make such an approach work is if that school is genuine about equality. The school must truly recognize that clinicians are as important to the school and should be treated as well as the theorists. I consider this one of my great achievements as dean. I made the salary of the clinicians equivalent to the salaries of top academic professors. I got “Named Chairs” for clinicians and gave them sabbaticals. I made their views dominant in the making of all clinical appointments. As a result, clinicians now get treated with as much respect as all others on the faculty.

There are many places where separate but equal in this area has not worked. So it is dangerous. But I believe that if one is really serious about equality, separate but equal can work in this area. Of course, it works best when one gets some individuals who are genuinely good at both practice and theory. In that case, the school should gladly recognize that fact and appoint them to both categories. They become both clinical professors and academic professors. Yale has recently done that as to James Forman, Jr.<sup>17</sup> He is clearly top-of-the-line under Yale’s “excellence” standard for both. Such an occasional union of practice and theory serves to emphasize the respect given to both, and thereby to make separate-but-equal treatment succeed.

And so I come to what I think is the most controversial diversity area: ideology. Let me start by emphasizing what I said earlier. I believe that ideological difference is as important in a law school as each of the other kinds of diversity I listed. Lawyers are not mathematicians and it is very important that there be law school teachers who are far right, far left, far center, far this, far that, and far the other. This is essential if we are going to give our students the kind of legal education they need. So why not say that schools should further ideological diversity in the same way that I urge in other diversities? I have two reasons.

The first is the impression I have that, if a school self-consciously tries to hire people laterally because of their ideological differences, that school will tend to create factions in the faculty. Self-consciously seeking the other characteristics does not seem to do that.

Appointment decisions are the most heated ones that faculties make. They are what faculties get the most mad about, and they can result in losing important faculty members. Yale lost Grant Gilmore for a number of years because he was mad about an appointment. But losing even the most important faculty members, while costly, can be overcome. Creating factions

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17. *James Forman, Jr.*, YALE L. SCH., <https://law.yale.edu/james-forman-jr> [<https://perma.cc/S2SY-Z585>] (last visited Nov. 15, 2018).

that solidify destroys a school. Still, the dean can do a lot in most appointment situations to avoid the creation of factions.

The dean has a fair amount of control over the timing of appointment discussions, and can use that control to reduce the chances of faculty factions being created. I used to do this all the time. Assume I had an appointment coming up, about which I knew that Robin and John fiercely opposed each other. It seemed likely that they would walk out of the meeting with Robin saying something like: “John is a blankety-blank scoundrel, conniving, cheating, etc.” And John might be saying the same about her. They might even go out and slam doors, shouting at each other. (Once, before I became dean, I walked down the halls after an appointments meeting slamming doors and shouting at Tony Kronman. We were screaming at each other because of an appointment we disagreed about.) As dean, I would make sure that the next appointment that came up was one in which Robin and John were on the same side, so they would come out marveling at how wise, how thoughtful, how careful, the other was, while getting mad at someone else. As a result, factions did not form. (Similarly, Tony Kronman and I remained good friends after that incident. And I was delighted to have him succeed me as dean).

My experience has been, however, that when a faculty focuses on ideology directly, it is very difficult to avoid the creation of permanent splits. And so, direct attention to ideology is dangerous. It would still be worth doing, however, if there were not ways of achieving ideological diversity indirectly. I believe there are.

My contention, and I am not 100 percent happy with it, is that if a faculty is genuinely concerned with subject matter, approach, and theory diversity, then it will get an adequate amount of ideological diversity as well. How this works will differ over time. In the 1930s, constitutionalists were by and large conservative,<sup>18</sup> while antitrust people were on the left.<sup>19</sup> If a faculty was careful to have both fields well covered, it was likely also to cover “left” and “right.” The same would be true as to theories of law. In the United States in the 1930s, formalists were conservative<sup>20</sup> and “law and . . .” people were “dangerous” lefties.<sup>21</sup> Such correlations change, of course. Thus, in the 1970s, constitutionalists were often lefties,<sup>22</sup> and antitrust teachers were frequently righties.<sup>23</sup> Similarly, “law and . . .” theorists in the 1970s often were conservatives.<sup>24</sup>

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18. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 665–67 (1990).

19. See Edward O. Correia, *Antitrust and Liberalism*, 40 ANTITRUST BULL. 99, 109 (1995) (citing John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225, 225–27 (1935)).

20. See Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 344–46 (2014).

21. See Justin Desautels-Stein, *A Context for Legal History, or, This Is Not Your Father's Contextualism*, 56 AM. J. LEGAL HIST. 29, 32–33 (2016).

22. See Ronald K. L. Collins & David M. Skoller, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 189 (1988).

23. See Correia, *supra* note 19, at 102–03.

24. See Desautels-Stein, *supra* note 21, at 33.

When a faculty diversifies as to subject matter, theory, or approach to law, it is not making appointments that are strictly ideological. The greatest of the legal realists, Arthur Corbin, was a conservative and still was fully a legal realist.<sup>25</sup> And a pretty good law and economics guy, Guido Calabresi, was something of a lefty at a time when most law and economics scholars were not. If all of this is so, my contention is that a faculty that is really serious about achieving diversity in subject matter, theory, and approach to law will get an adequate amount of ideological diversity as well. And significantly, it will get that without having the particular focus on ideology that I think is destructive. Because of the semi-hemi-demi-correlation, it does not work out badly. And these diversities will also bring about ideological diversity.

There is a problem, though. How should we define ideological difference? If ideological difference, to be sufficient, is not simply membership on a faculty as a whole, but must also be ideological difference within particular fields, my approach may not work. For example, in the 1980s, Yale Law School had any number of conservatives on the faculty. But they were almost all lawyer-economists. And many were teaching antitrust. Somebody could have properly said, Yale does not have a single constitutional law conservative on its faculty. My approach might lead only to such an inadequate result. If it is important to have diversity within subject matter fields, within theory, and within legal approach, my indirect way may well fail.

But over time, the indirect approach may achieve even this more nuanced ideological diversity. I do not think much of originalism, but it certainly is an important current legal theory. And, by and large, originalists today tend to be conservative. Moreover, they tend to be conservative as to constitutional law. Once again, the correlation is not total. In a way, Hugo Black was an originalist but he certainly was not a conservative. If a faculty says, we ought to have some originalists on the faculty for diversity reasons, and then uses the promotion standard to hire an originalist laterally, today that faculty would likely also meet the abovementioned, more nuanced, definition of ideological diversity.

I am not sure. And I guess if it did not work, I would be willing to face the problem of ideological diversity head on because I think that such diversity is truly important. But avoiding the risk of factions still makes me hope that even the more nuanced—within field—ideological diversity can be adequately achieved indirectly.

#### CONCLUSION

These then are my two exceptions to applying the promotion standard to lateral appointments in order to achieve diversity. As to all the other types of diversity, I see no excuse for not doing so. And because I see no excuse for not doing it, I think there is a duty to employ that standard in such cases. And I believe it to be a duty that applies across the board.

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25. KALMAN, *supra* note 1, at 139–40.

A “great” faculty can make do for a time—if it cannot find those who meet even that standard—by appointing lecturers, visitors, and so on. But the faculty should be aware that diversity is not achieved equally well as to different diversity categories through the use of lecturers. One can achieve some subject matter diversity by having a visiting lecturer teach bankruptcy. But having an African American woman as a lecturer is nowhere near the same with respect to personal-characteristic diversity as having such a person there as a permanent member of the faculty.

There are some categories of diversity where substitutes will do more or less for a while. There are others where they will not. But the aim as to all ought to be permanent tenured lateral appointments at a standard that nobody can properly criticize because it is a standard that the school applies all the time in making promotions. And applying such a standard will allow a faculty to be the kind of diverse institution that it believes it should be and that any school that wants to be considered a great school must achieve.

That said, let me end by reiterating that while I have views as to what kinds of diversity are important, my analysis of standards does not depend on those views. In other words, each school will, and should, decide for itself what kind of diversities matter to it. There is nothing inherently wrong with George Mason wishing to define itself as a law and economics school, with Yale in the 1930s viewing itself as a bastion of legal realism, or with a school believing it should be primarily an environmental law or a practice of law place. A “great” school may want more. But that is neither here nor there as far as this Essay is concerned. My point is simply this: as to the kinds of diversity a school decides it wants, or is in some sense required to have, there are ways of achieving that diversity through careful adherence to standards, but properly modified ones.

#### APPENDIX: TRANSCRIPT\*

PRESIDENT EMERITUS JOHN SEXTON: In the present context, I am certain that in your mind finding appropriate representatives of the black community of America is more important than finding appropriate representatives of the Italian community.

JUDGE GUIDO CALABRESI: Yes.

PRESIDENT EMERITUS SEXTON: So how would you elaborate what your priority in categories would be?

JUDGE CALABRESI: I didn’t because I saw what is on the program for this afternoon and figured it would be addressed then. I think it mattered for a very long time that I was the only practicing Roman Catholic on the Yale Law School faculty. Priority will change with time: I mean, when I came on women were as or more important than African Americans because it was

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\* This discussion followed the author’s presentation of this Essay at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 *FORDHAM L. REV.* 859 (2018).

such an outrage. Hispanics, crucially important now, were not as important as African Americans, I think, because historically they are more like Italians were before.

Steve Carter is for affirmative action but has said quite clearly that it cost him something because some people have said: maybe you were appointed because you were an African American.<sup>26</sup> Maybe he was. I don't know. There's no one smarter than Steve Carter on a plain intellectual level, and if some people think he's not smart . . . well, stupid them. And, by the way, if affirmative action costs some people something—and it does—think of the costs to those left out without it. Frankly, I don't mind the costs to those African Americans who were so brilliant they would make it regardless of anything because they've got a lot going for them. And I feel that way because of the affirmative action I received. You know, I got affirmative action all the way through because Italians were just beginning to be considered. I once wrote I saw no reason to give affirmative action to the Yale-educated son of the Yale-educated Governor of Puerto Rico. I was wrong and let me tell you why.

Do any of you know Frank Iacobucci,<sup>27</sup> former dean of Toronto Law School, president of Toronto University, one of the great Canadian scholars, and a member of the Toronto Supreme Court? When I first met him he said: "you know, Guido, I owe you a lot." I said: "that's interesting, we've never met." He said: "I was going to school at Toronto and fell in love with the law. I told my parents I'm going to be a law professor. They said you can't, you're an Italian Canadian." (This was Toronto in the 1950s and 1960s, not Toronto today.) "The next day I saw that Guido Calabresi had become Professor of Law at Yale, the youngest in the school's history, and I said, 'if it can happen to an Italian at Yale, it can happen to me in Toronto.'" My own view is that this affirmative thing is much more about what we need than anything about the individual.

PROFESSOR ROBIN WEST: Should there be a different standard between what's required for promotion from within and what's required for lateral appointments? When you promote from within you're recognizing not only that person's accomplishments, but also that person's emergence as a full member of the community. When you bring in someone laterally that person better be a superstar because we're going to be stuck if the person turns out to be a jerk.

JUDGE CALABRESI: Of course, it is more dangerous to make a lateral appointment of any sort because you don't know the person. My rubric as dean was excellence but with humanity and decency, and that has always been; I hope that's on my tombstone. Yale's tradition has been to make lateral appointments only after the person has come as a visitor. And we have

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26. See generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

27. *The Honourable Frank Iacobucci*, CC, QC, LL.D., LSM, TORYS LLP, <https://www.torys.com/people/iacobucci-the-honourable-frank> [https://perma.cc/7ZGY-HNSW] (last visited Nov. 15, 2018).

almost always required a visit. During the time I was dean, we never made an offer to a person while the person was a visitor that that visitor did not accept. That is, the community thing works both ways—we were using it both as a hiring tactic and as a way of getting to know them.

PROFESSOR WILLIAM NELSON: Two questions. It seems to me that one of the great ideological issues of the day is whether personal-identity diversity is good to have. And, have you thought about extending this to student diversity as well as faculty diversity?

JUDGE CALABRESI: I have no doubt that personal-identity diversity is one of the issues of the day. I have no doubt that there has been a campaign of the racist Right to do this—to avoid integration—and on that I'm fierce and ideologically committed. I think this is the South playing the South's game as it did after the Civil War and I have no patience with it. I do not think there is anything against affirmative action in the language of due process or the history of equal protection if you want to be an originalist. Even my nephew, Steven Calabresi, believes that originalism in terms of equal protection had affirmative action;<sup>28</sup> you cannot look at it in any other way. Personally, I got a lot of affirmative action as an Italian. It isn't until affirmative action starts being given to blacks that the whole fuss starts to come out.

PROFESSOR DANIEL COQUILLETTE: When I was dean, the Asian Pacific law student group came in and said they were worried because they believed Boston College was trying to increase diversity by lumping together African American, Asian American, and Latino applicants. They were worried that as the number of Asian American applicants continued to increase rapidly, the diversity standard would turn into a quota. The second thing they said was that, while Asian American applicants shared racial characteristics, we're not the same. Some of us come from the wealthiest families in America. They argued you have to look at us as being very different.

I did not have a good answer at the tip of my tongue. All I could say was that because of the way you look, all of you may suffer discrimination because of your Asian background. They were not happy with that and they were afraid of quotas. Looking now, Asian American enrollments are growing<sup>29</sup> and we don't have enough Asian Americans on faculties.<sup>30</sup> I wondered what you have to say about that?

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28. See generally Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429.

29. See Scott Jaschik, *The Numbers and the Arguments on Asian Admissions*, INSIDE HIGHER ED (Aug. 7, 2017), <https://www.insidehighered.com/admissions/article/2017/08/07/look-data-and-arguments-about-asian-americans-and-admissions-elite> [<https://perma.cc/LQ2V-R8GX>] (noting that Asian Americans tend to “fare well beyond their numbers in admission to top colleges”—with Asian Americans comprising 22 percent of Harvard University's freshman class in 2017 yet only making up about 5 percent of the population at public high schools).

30. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89, 143 (2016).

JUDGE CALABRESI: Now and for the next period of time, the notion that there might be so many Asian Americans looking for faculty appointments that it would hurt diversity to name all of them is not really there. I do agree very much that how you lump people together is very important. I've always been troubled by the fact that Filipinos, to their tremendous disadvantage, tend to be lumped with Asian Americans rather than with Hispanics, which in most ways historically is how they were treated by the United States. The pressure with Asian American students to do the equivalent of quotas is there, however, and I think we have to fight it.

PRESIDENT EMERITUS SEXTON: I want to add two angles that might be helpful to thinking about this. There's a book by Bill Bowen, former president of Princeton, about admission of athletes to elite colleges. His data revealed that 40 percent of the men admitted to Amherst and Williams were admitted by coaches without reference to the admissions committee.<sup>31</sup> Data for Harvard, Princeton, and Yale show very high SAT scores and class standings for the general student body and completely separate, non-overlapping data for the recruited athletes, who were also a less racially diverse group than the general student body.<sup>32</sup> People forget that every kid on Long Island is playing lacrosse, tennis, or golf. People think of legacies first, but the big scandal is around recruited athletes.

My second point is about subsidiaries. A key number in university budgets is personnel: in most places, 60 percent of the overall budget is for personnel and 40 percent of that is faculty, sometimes 50 percent. So when you're looking at these huge budgets, how you allocate your faculty resource money is key and that depends on whether you believe the accounts being given to you. When I sat in the Dean's Council in the early 1990s, every dean claimed that his or her school was excellent, and three-fourths of them were obviously wrong. The danger is that B+ deans tend to appoint B- faculty; the best deans are A- because they are not afraid to surround themselves with people better than they are, A+ people. And this gets into this principle of subsidiarity.

One issue at NYU Law School was clinicians. Under Norman Dorsen's guidance, what we did at NYU was to make sure clinicians had the same rights, the same compensation, the same dignity. They got to vote on everything including tenure votes to the academic chamber as we called it, but we counted the votes differently. It gave dignity.

PROFESSOR NELSON: But not power.

PRESIDENT EMERITUS SEXTON: Well, yes and no. It actually gave power to the academic faculty over clinical appointments because you had to get a majority of the whole faculty on an appointment or promotion matter and two-thirds of your own chamber. So given the relative numbers that made the academic faculty feel that they were still in control. But on legislative matters, everybody voted equally.

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31. See generally WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003).

32. *Id.* at 142.

JUDGE CALABRESI: On athletics, I'm inclined to agree with you. It is a scandal in any number of places. Back to law school, Yale admissions were unusual because every file that got through a first cut—maybe 1500 to 2000—was read by three faculty members in piles of one hundred and given a grade of four, three, two, or one. Children of alums got an extra point. Everyone read one or two hundred files except the head of the admissions committee, who was too busy, and the dean, who wasn't trusted on admissions. I got a call asking whether we could admit the son of the head of the judiciary committee; my answer, I don't do admissions. That we gave an extra point was a useful thing to tell alums that we don't care whether you give money or have money, but we are a family and we do this openly. After I stopped being dean the system was changed, and there is now more pressure for some alum children who have connections and so on to get in.

PRESIDENT EMERITUS SEXTON: I will say that my predecessor at NYU, Norman Redlich, was pure, even purer than you describe. I adopted a different approach. We never sold a seat. I gave applicants I was interested in a ranking of one, two, three, and four. What I wanted from the admissions committee was an honest answer about whether the person could do the work. If they could do the work, and admitting that student would create \$20 million in financial aid, I would do it. We did not, in the case of that offer, because the student was not good enough. But, if he had been judged by the committee as sufficiently capable, we would have.

JUDGE CALABRESI: We would not, probably because we could afford not to.

PRESIDENT EMERITUS SEXTON: Right. It's easy to say.

JUDGE CALABRESI: We had an issue about whether the children of faculty members who had gone to a law school other than Yale should receive an extra point. In the end, Harry Wellington decided no. So we also stopped giving the point to Yale graduates on the faculty. But what if the faculty member's wife was a Yale Law School graduate? Obviously the child got the point.

PRESIDENT EMERITUS SEXTON: We gave the top, number one ranking, during my time as dean to the child of anyone who had worked at the Law School for more than ten years, and that included security guards, janitors; so it ended up number one had some really great stories attached to it that were highly defensible.