

THE UNEASY CASE FOR INTELLECTUAL DIVERSITY

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Wouldn't it be ironic if, at an academic conference on "intellectual diversity," everybody thought and said pretty much the same things?

I suspect that the near-universal consensus view on the value of intellectual diversity in law school faculties runs along the lines of the following: In an academic institution, and especially in a law school, intellectual diversity—diversity of views and values, diversity of opinions expressed and discussed, diversity of approaches—is a value of paramount importance. Without true intellectual diversity, there can be a stifling uniformity of thought that is antithetical to the very idea of a university. Without intellectual diversity, ideas cannot be tested in the crucible of committed opposition; theories suffer from the brittleness of not being tested; positions become flaccid and flabby because they are unexercised by the intellectual workout of contending with thoughtful, rigorous dissent. Especially for a field like law, which in the Anglo-American tradition is virtually defined by the adversary method—the proposition that truth emerges best from the clash of vigorous, committed opposing viewpoints—diversity of intellectual perspective is an essential

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For more than a generation, The Federalist Society has been *the* leading force for creating a more open, intellectually diverse academic environment in the nation's law schools. I hope that what I have to say here is, at some level, consistent with the mission and spirit of the Federalist Society. But I will at the same time challenge, or at least question, some of the premises underlying the idea of intellectual diversity.

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feature of education and training. Lack of intellectual diversity harms students. They suffer in their educations by not being exposed to, and challenged by, competing views. They cease to think. They become lobotomized automatons, consuming a steady diet of uniform thought—thought that, because of its own flabbiness, has ceased to be thought at all. Minority views within the student body—the perspective of the not-fully-indoctrinated remnant, the resistance—are suppressed almost casually. Those holding non-conforming views become discouraged, repressed. Eventually, they give up.

And a final piece of the standard consensus: There is rampant hypocrisy *about* “intellectual diversity” among the very academics who, usually, embrace it so enthusiastically. They do not practice what they preach. Professors champion the abstract value of intellectual diversity at the same time that they seek to clone themselves in faculty hiring processes, and resist competing ideas in the classroom or the faculty lounge. Whatever they say, professors mostly want colleagues who think along the same lines as they do and who support their premises and worldviews. The result, where intellectual diversity does not prevail, is that academia becomes intellectually skewed, decisively, in favor of one particular cluster of ideological commitments. Today, that orthodoxy is modern left-liberalism.

So goes the prevailing consensus. And there is, of course, much truth to it—*much* truth. There is often good reason why a prevailing consensus is a prevailing consensus, and the consensus sketched above exists for good reason. Intellectual diversity *is* a good and useful thing. Its absence is a notable characteristic of weak scholarly communities, making for weaker scholarship and for relatively impoverished teaching and learning. Everyone in the prevailing Academic Orthodoxy favors intellectual diversity, in theory, but fights it in practice.

But might I be allowed to offer a mildly dissenting view, at least for the sake of argument (and “intellectual diversity”)? Might I suggest that intellectual diversity in legal academia is an *overrated* commodity? That it is overvalued in theory *as well as* undervalued in practice? Might I suggest that the value of intellectual diversity is distinctly secondary and instrumental? That intellectual rigor and quality, and the search for intellectual “*Truth*,” (with a capital T) are the true prime values, and that these values are not necessarily furthered by the quest for “di-

verse views," *simpliciter*, but flow more reliably from other academic values, virtues, and attributes? And that the primary value of the argument for intellectual diversity, today, is that it serves as a good and effective rhetorical trope with which to bludgeon the currently entrenched Illiberal Academic Orthodox Establishment in the terms of a value they pretend to embrace?

In this Essay, I offer four somewhat interrelated propositions that, taken together, make a limited case against the prevailing orthodoxy about intellectual diversity. I offer them as suggestions, in the spirit of provocation. They are intuitions submitted for consideration—diverse views, if you will, about intellectual diversity. They suggest that the case for intellectual diversity is not as easy as it might at first seem.

I.

My first and most fundamental proposition is that intellectual diversity is a *subordinate, instrumental* value. It is not of value for its own sake. The object of intellectual inquiry is Truth, not diversity. Intellectual diversity is an instrumental value in service of the larger value of the pursuit of Truth, which is the primary value and ultimate goal. Sometimes intellectual diversity furthers the search for Truth, and sometimes it does not. Where intellectual diversity furthers the quest for intellectual Truth, it should be valued; where it impairs the pursuit of intellectual Truth, it should not be valued.

In principle, one should never value intellectual diversity *over* intellectual Truth. One should never deliberately water down *known* Truth with *known* Error, in order to advance the believed overriding value of "diversity of views." Only a fool would truly think it vital to intellectual integrity to give Round Earth and Flat Earth views equal time, equal weight, or equal respect. One should only desire the competition of diverse views in order better to pursue Truth (or to challenge Error).

I do not wish to denigrate the importance of this instrumental function, however. For while it is true in principle that intellectual Truth should always be valued more highly than intellectual diversity viewed as a good in its own right, *in practice* that principle must be accommodated to a harsh reality. That reality is that there are few views that we can confidently say are Flat Earth views—so clearly wrong, or so decisively repu-

diated by incontrovertible evidence or reasoning as not to be worth discussing. This is especially true in the fields of law, literature, humanities, morality, religion, history, social sciences, and philosophy. But it is also true in the fields of natural science and even mathematics, though perhaps to a lesser degree.¹ One can believe in Truth and yet harbor grave doubts that humans will consistently, or ever, get it quite right, and thus favor intellectual diversity strongly as a means of leaving the pathways to Truth open.

At the very least, it is surely the case that *what the other guys say* is indisputably “True” is often quite suspect indeed. I was a faculty member at the University of Minnesota Law School for sixteen years, and more than once was on the losing side (albeit, of course, the correct side!) of a 32-1 faculty vote on fundamental moral and policy propositions. And the other guys surely doubt the Truth of *your* view. (Sometimes they do so by a 32-1 vote.) This is not to say that there is no Truth, that Truth is subjective, or that Truth is a matter of opinion. It is simply to say that Truth is not a product of majority vote or even supermajority vote. Truth does not always prevail. If overwhelming, essentially unanimous consensus within a given academic community is thought the standard by which intellectual Truth is measured, experience suggests it may in fact be better to subordinate the theoretical ideal of academic Truth to the instrumental value of intellectual diversity.

Professor Robert George put the case powerfully and persuasively at the conference in which this Essay was first presented: Groupthink is a pervasive academic disease.² The nature of the

1. The best “science” of ninety years ago embraced, as a nearly incontestable truth, the propriety of eugenics; and the law, bowing to “science”—itself a methodological fad—swallowed eugenics whole. *See, e.g.*, *Buck v. Bell*, 274 U.S. 200 (1927) (embracing eugenicist science as part of justification for upholding a state law providing for involuntary sterilization of the mentally handicapped). *See generally* Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101 (2011); Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119 (2011). We should not doubt that there are scientific “Truths” today that will be exposed as the most embarrassing of errors by future generations, which will in turn propagate false scientific “Truths” of their own.

2. Robert P. George, Professor of Jurisprudence, Princeton Univ., Remarks on Panel III: Effects: should law schools care about intellectual diversity?, at the Harvard Federalist Society’s Intellectual Diversity and the Legal Academy Conference

disease is such that if an academician is deeply afflicted with it, he or she usually does not know it. Moreover, human nature is such that people have a great deal of trouble evaluating evidence, arguments, and reasoning objectively, on questions or issues about which they care deeply; there is a limit to the ability of even the most open-minded of academics to be self-critical. A pre-commitment to intellectual diversity as a primary academic value is thus a good, perhaps even essential, vaccine, or antidote, to academic Groupthink.

Even where one thinks one has the Truth, there is an enormous instrumental value to not closing off the intellectual debate over “settled” issues. Accordingly, the more one believes in Truth, the more one will tend to recognize the value of intellectual diversity as an instrumental tool integral to the Truth-seeking process.

But Truth is the goal. Intellectual diversity is a *means* to a larger, more fundamental end.³

II.

That leads to my second proposition for consideration: Greater intellectual diversity within most law school faculties (and this holds true for other faculty departments, too, especially in the humanities and social sciences) is not important so much in its own right—that is, as a matter of *principle*—as it is important as a *means* of providing a beachhead against the dominance of Untruth, Error, Extremism, and Nonsense in General that so characterizes the faculties of many law schools and other university departments today. Or, to switch metaphors slightly: The true value of what we call “intellectual diversity” is that it furnishes a bayonet with which to stab Error and Falsity. To the extent those twin evils infect legal academia, intellectual diversity thrusts the sharp blade of Truth into the body of Error. But the

(Apr. 5, 2013), *available at* <http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/>.

3. A related problem with making an idol of Intellectual Diversity is that doing so tends to suggest, subtly but surely, that all ideas are created equal or at least must be treated as if equal. Intellectual diversity tends to relativize Truth, by making it a matter of diverse opinions. This, in itself, must be regarded a false proposition, if one believes in Truth.

ultimate object is, or should be, to kill Error, not to live peacefully alongside it. The point of the argument from intellectual diversity is not to bring peace, but a sword.

The thrust of the bayonet comes, usefully enough, at the precise point of a chink in the intellectual armor of entrenched liberal academia today—right at the spot where academic liberalism is most vulnerable to attack: the rhetoric of “diversity.” Ask almost any liberal academic these days whether he or she believes in diversity, including intellectual diversity, and the answer will be an immediate “yes.” Respect for difference—toleration of different views, attitudes, lifestyles, and values—is among the leading tenets in the (stated) liberal intellectual creed. How, then, can liberals oppose intellectual diversity, including the development and expression of conservative, religious, and libertarian viewpoints, without self-contradiction, cognitive dissonance, and intellectual implosion? In principle, they cannot fairly do so. That is what makes the trope of intellectual diversity so useful a rhetorical weapon to wield against liberal orthodoxy.

Some liberal academics take the commitment to intellectual diversity seriously; they believe in it, and they act accordingly. These are academic conservatives’ natural allies and should be embraced as such. Their presence on even overwhelmingly liberal faculties serves as a check against the excesses of extremism and the forces of repression. There are of course many such persons on law school faculties, scattered around the country. Among my closest friends and former colleagues at the University of Minnesota Law School I counted several such souls, including Professors Suzanna Sherry (now at Vanderbilt), Dan Farber (now at California-Berkeley), and Guy Charles (now at Duke). They were, at Minnesota, and remain at their present institutions today, true believers in intellectual diversity. Such persons are an unqualified source of academic good at the institutions they inhabit.⁴

4. Some academic liberals take their stated devotion to intellectual diversity to an interesting extreme. They believe, or purport to believe, not only that all ideas are worthy of discussion, but, further, that all ideas and values are *equally valuable*. That is, they embrace complete value, moral, and intellectual relativism. There is no strict right and wrong; there are no correct and incorrect answers; there are only competing viewpoints and arguments, all of which are, in principle, legitimate and entitled to airing and academic debate.

Now, it is clear in practice that, for the most part, Liberal Academia today generally does *not* really believe that all ideas are equal or should be treated as such, for the sake of argument. Rather, Liberal Academia believes that some views have merit and that some do not *and therefore should not be entitled to a seat at the table of debate*. At some level everyone agrees with that position. Does Harvard Law School really need to have on its faculty a representative of and advocate for the view that race slavery was—or, even worse, still would be—a good and proper thing for society and should therefore be protected by our constitutional law? Does Yale really need a Nazi for the sake of intellectual diversity?

The problem with much of liberal legal academia today is that it often tends to think (though “think” might be too strong a term) that a lot of *other* views land in the same category as pro-slavery or pro-holocaust views. For example, the view that same-sex marriage or relationships should not be protected by law; the view that coercive interrogation of enemy war criminal terrorists to obtain information to aid in the protection of innocent lives legitimately falls within the U.S. Constitution’s war powers; or even the view that intentional killing of living human fetuses as a matter of unrestricted choice or convenience is a monstrous injustice.⁵ Some law faculties, perhaps most, con-

This view entails an ironic self-contradiction. The view that holds that all views are equally worthy cannot accept the view that *not* all views are equally worthy, and so does not really hold the view that all views are equally worthy. A belief in absolute, knowable Truth, that would justify exclusion of known Error, is, on this there-are-no-right-answers view, objectively wrong. Nonetheless, the radical equal-status-of-all-ideas view is a tactically useful premise, even to those who reject it, for it can be used against its adherents as a lever (and a place to stand), with which to lift ideas that otherwise would be excluded into the realm of academic debate. To those who believe in Truth, the liberal embrace of intellectual diversity gives Truth a chance. And one need not embrace the extreme all-ideas-are-created-equal view to favor the inclusion of excluded ideas that have a plausible claim on truth.

5. One of the pleasures of writing an essay like this is imagining that it might be read sometime in the future and imagining further the possibility of future generations of readers expressing mild surprise at the views that, back in 2013, were regarded by academia as so far out of the mainstream as not to be worthy of discussion. (Or, they might express surprise at my view that these views ought *not* be re-regarded as so far outside the mainstream as to be unworthy of discussion.) There is a danger that the illustrations I use, while apt today, may become strikingly dated and seemingly anachronistic in the near future. At all events, a note for future (and present) readers: Although the specific examples might change, or provoke disagreement about whether disagreement is legitimate, the broader point remains that there is a tendency within academia, in all eras, to regard the range of “acceptable,”

sider such views to be so far mistaken, dangerous, or hideous as not to be entitled to a seat at the intellectual table. They are simply outside the bounds of legitimate debate; a faculty candidate expressing, or holding, such views, or anything like them, cannot and should not be taken seriously.⁶

This is a regrettable position. But it is in some ways also an understandable one. We all draw these lines; we just draw them in different places. We tolerate a range of views, and perhaps even value intellectual diversity within that range. But outside that range, forget it. The real disagreement that conservatives, libertarians, and persons of religious faith have, or should have, with entrenched liberal academia, is not that liberals *exclude some views*. We all do that (or would if we could). The objection is that today's liberals exclude *the wrong views*, or *too many legitimate views*—that is, that liberal academia draws the lines of tolerance-versus-intolerance, substantively, in the wrong places. The Left is wrong about what it thinks is right.

To be sure, many academics are hypocritical in their nominal embrace of intellectual diversity but actual rejection of it whenever the rubber hits the road. But that is at bottom a product of the tension between the ideas of intellectual diversity and intellectual Truth, and of a failure to recognize that tension. It is not a moral failing unique to liberals. Academic conservatives might well prove vulnerable to the same charge of hypocrisy, were the shoe ever on the other foot. "Intellectual diversity!" tends to be the rallying cry of the minority viewpoint.

The correct, principled position is that the reason it is wrong to exclude certain views is not because it is *always* wrong to exclude *any* view, but because it is wrong to exclude *these* views—views that, substantively, ought to be regarded as falling within the range of fair debate because they possess a plausible, arguable claim to intellectual Truth. And that is, ultimate-

fairly debatable views, too narrowly, due to an academic era's dominant views as to what fairly lies within the range of the debatable.

6. Indeed, I have heard and seen the view expressed—and supported by a substantial number of faculty members at a top twenty public law school—that a person holding or expressing such views is simply not "competent" to be a law professor. Some people stating this view probably believe it; others use it more cynically, because they think it somehow sounds more tolerant than the forthright position that they wish to exclude views with which they strongly disagree.

ly, a judgment about what views are True, or at least have a sufficiently plausible claim to Truth as to merit a place at the table of intellectual debate in the pursuit of Truth. It is an argument that proceeds from the premise that there is such a thing as intellectual truth. And it is an argument that arrives at the conclusions it does because of a truth claim concerning the proper bounds of plausible truth claims.

That, then, is the ground where the battle over intellectual diversity should be fought: *What are the proper bounds of plausible truth claims?* What is the range of answers to intellectual questions within which it is right to permit debate, because such debate in fact furthers the quest for Truth rather than indulges incontrovertible Error? The reason that conservatives, libertarians, and persons of faith rightly argue that today's boundaries of debate should be expanded is because, in many academic communities today, the boundaries are so narrowly drawn—sometimes absurdly so—as to exclude many propositions and positions that we think are, or may be, substantively True.

III.

To review quickly before pressing on: When push comes to shove, Truth is more important than intellectual diversity. Intellectual diversity is a subordinate value in the service of the pursuit of Truth. As such, much of the value in the rhetoric of intellectual diversity is that it provides an opening for Truth's resistance to Error. The object of the game, however, is for Truth to defeat Error.

It follows from these propositions, I think, that if one believes he already possesses the Truth, it becomes rational—or at least understandable—to seek to exclude from the debate views one regards as so deeply erroneous, misleading, and pernicious that they cannot function as anything other than a threat to Truth. The argument for intellectual diversity can only carry one so far, before it runs head-on into collision with truth claims.

Relatedly, it makes a certain amount of sense for persons who believe they are in possession of true views to *fear* aggressively competing views, not only because they consider such views *wrong*—truth undermining—but also because those who assert them appear to believe, intensely, that their false views are in fact true. In such a case, one can reasonably fear that the

forces of Error, given the chance, would exclude from debate the forces of Truth, undermining it yet more decisively and maybe even permanently. (That, after all, is what *you* would do if you were fervently devoted to the wrong side, just as it is what you seek to do in your devotion to the right side.)

The Intellectual Truth versus Intellectual Diversity tension resembles in this respect the classic game-theory game of "Prisoner's Dilemma." The game is familiar: Two suspects in a criminal gang are separately interrogated and cannot communicate with each other. If they implicitly "cooperate" with each other in telling the police nothing, both are somewhat better off: they receive somewhat lower sentences. If one prisoner "defects," he gets off entirely while his partner in crime bears a *much* more severe sentence. Each prisoner thus has a strong individual incentive to defect at the expense of the other. But if *both* defect, they both receive high sentences, though in most versions of the game not as high a sentence as one would get if he remains silent while his partner defects; the worst outcome is to be the sucker who sticks to the tacit agreement while the other guy defects.

"Intellectual Diversity" only works as a cooperative game in which contending positions subordinate their views of intellectual truth to the value of debate. And, like the Prisoner's Dilemma, the incentives are loaded against cooperation for anyone who believes in Truth, and especially so if one is ahead in the game and thus may have the power to drive one's opponents out of the field of play entirely. The payoff is first-best when one pursues one's own ideological agenda and excludes one's opponents'—and yet somehow can persuade one's intellectual adversaries that such an agenda must be tolerated in the name of respect for intellectual diversity. (You "defect," your adversary "cooperates.") The payoff is worst for those who embrace intellectual diversity while their adversaries pursue their wrong-headed vision of intellectual truth and simultaneously suppress true, dissenting views. (You cooperate while your adversary defects.) And the payoff is bad for everyone if both sides reject intellectual diversity. (Nobody cooperates in the game of toleration; competing truth claims bludgeon one another in full-on internecine academic warfare.) In the true Prisoner's Dilemma situation, neither side knows what the other will do. The academic context is at least somewhat different, or so one would

hope. There is often good information about adversaries' strategies and choices, which affects the game. It also affects the game that there are repeat players and repeated plays.

If the game theory analogy is sound, the best strategy for believers in Intellectual Truth is to cooperate with their intellectual adversaries in agreeing to a joint strategy of each side suppressing its own devotion to Truth in favor of a mutually cooperative embrace of Intellectual Diversity that refuses to exclude competing views, at least within an agreed range. (Of course, working out the parameters of that range can be the tricky part.) In that way, Truth at least has a fighting chance. This strategy works if the adversary agrees not to defect from the cooperative enterprise. If one's intellectual adversary will not cooperate, the best simple strategy (or so I am advised by knowledgeable game-theory folks) is "tit-for-tat" retaliation: Play in accordance with your opponents' last move; signal your willingness to cooperate in the enterprise of intellectual diversity if they will, but also your determination not to cooperate if they do not. Stated in terms of the battle of ideas: One should tolerate intolerable ideas as a strategy when necessary and effective for getting the Truth a fair hearing. But one should never tolerate intolerable ideas when those who advance them will simply seize on your foolishness to try to suppress your own (True) views and drive them out of the marketplace of ideas.

Thus, my third proposition flows as a corollary from the first two: *Sometimes it is necessary and desirable to tolerate certain intolerable views, at least temporarily, as a strategy for pursuing Truth.* This is not because intolerable ideas are any the less intolerable. It is because they are, nonetheless, *prevalent*. The only effective strategy is to engage intolerable ideas in debate. The way to give Truth a chance to win is to play the Intellectual Diversity move in tandem with one's opponents, no matter how horrible and Truth-defeating one finds their views. Some views must therefore be tolerated within academic debate out of necessity, not because they possess any plausible claim to validity or Truth, but because it is not yet possible to exclude them from the argument. In such a context, Intellectual Diversity is the best strategy, if (and only if) your intellectual opponents also agree to it, in theory and in practice.

Note that this does not deny the ideal of intellectual Truth. Nor does it deny that intellectual Truth is more important in

principle than intellectual diversity. It merely acknowledges the reality that, when Truth is behind in the game, it is precisely then that it is strategically most justifiable to embrace intellectual diversity as an instrumental value in the quest for Truth. Nor, finally, does this mean that defenders of Truth must somehow concede to Error a status of moral equivalence with Truth. On the contrary, one must always be, and feel, permitted—obligated even—to condemn Intolerable Error as such. That simply needs to be one of the terms of a *détente* that accepts intellectual diversity as a truce between competing visions of Truth.

Again, all of this applies only within a given range, and the real-world problem lies with defining that range. Recall my examples of Harvard not hiring a pro-slavery legal scholar and Yale not hiring a Nazi. These are illustrations of situations where essentially-universally-agreed Truth has obliterated the case for any intellectual diversity with respect to competing views. A general commitment to intellectual diversity need not embrace thoroughly repulsive and utterly discredited views that no thoughtful person would today regard as worthy of serious debate.

The problem comes when repulsive, ought-to-be-thought-discredited views remain very much within the contemporary bounds of accepted, even respected, academic discourse and when different people have opposing views of what falls into such a category. It is an uncomfortable historical fact, for example, that slavery, racism, fascism, anti-Semitism, and eugenics were not always viewed as disreputable intellectual positions. When Lincoln debated Douglas in Illinois in 1858, slavery was very much the subject of debate. Eugenics was all the rage in the 1920s—almost an intellectual epidemic.⁷ Fascism took root among large segments of the populations of Europe in the 1930s. Racial segregation was a contested issue in mid-twentieth century America. Slavery, fascism, eugenics, and segregation surely were no less objectively wrong in their intellectual heydays than they are now. The intellectual theories used to justify and defend such wrongs were no less false simply because they were widely accepted and believed. Does that mean that defense of slavery, for example, was a respectable

7. See VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 24 (2008); see *supra* note 1.

intellectual position at the time, properly worthy of indulgence in the name of intellectual diversity? Was it right or wrong for opponents of slavery to tolerate and respectfully debate their opponents in the 1850s (as Lincoln did)? Or was the only proper response vitriolic moral condemnation of and refusal to engage with one's opponents (as modeled by William Lloyd Garrison and other radical abolitionists)?

Looking back, I submit that the only thing that could have warranted "toleration" of such hateful, intellectually-nonsense views in public discourse was the fact that there was no practical alternative at the time. Truth simply could not declare Error outside the bounds of reasonable discussion. Under the circumstances, Truth would have been laughed out of the room. Its advocates would have been dismissed as lunatics, lacking in both reason and respectability. Indeed, many anti-slavery advocates were so characterized.⁸ The better strategy was to engage in debate and champion the merits of tolerating a diversity of views, all entitled to be heard.

Now consider an analogous issue today: abortion. The above discussion strikes me as the only plausible argument for toleration, within academic debate today, of "pro-choice" views with respect to abortion: the position that pregnant women should have an essentially unlimited legal right to kill their living, unborn human children when they are still embryos or fetuses gestating in the womb. Such pro-abortion-choice views, and the arguments advanced in academic debate to support them, seem to me comparable to different eras' arguments in defense of slavery (or even genocide). I believe the subject is likely to be so viewed in the future.⁹

The pro-abortion-choice view is not one that should be thought intellectually or morally respectable. A belief that the unborn living human being is not a distinct human life—the

8. *See infra* note 13.

9. My views on the moral and legal comparability of today's abortion law regime to such infamous historical precedents as slavery and the Holocaust are set forth at length in prior writing. *See generally* Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 196 (Jack M. Balkin ed., 2005); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *NOTRE DAME L. REV.* 995 (2003); Michael Stokes Paulsen, *The Unbearable Wrongness of Roe*, *PUB. DISCOURSE* (Jan. 23, 2012), <http://www.thepublicdiscourse.com/2012/01/4577/>.

same biological organism that will or would be, after birth, successively, a human infant, child, adolescent, and eventually adult—is almost incomprehensibly stupid as a matter of medical and biological science. It is a Flat Earth view; it does not deserve to be taken seriously. A belief that the unborn *are* human beings, but nonetheless need not be treated as such, but may be killed at will to serve the needs of other human beings, is almost incomprehensibly evil as a matter of philosophical and moral opinion. The closest precedents for it are the views held by persons in earlier eras that Africans, or Jews, though in form human, were subhuman in the sense of not being worthy of equivalent moral status with other human beings, and so could be used or disposed of in whatever way individuals or governments deemed appropriate.¹⁰ Pro-abortion views are, I believe, like pro-slavery or neo-Nazi views.

It follows, I think, that the “pro-choice” position ought not, in propriety, be regarded as tolerable within academic discourse. I believe (or hope) that the pro-life position may someday come to be viewed as so self-evidently right that it will become almost inconceivable—shocking, appalling—to embrace as if respectable those holding the opposite view. Once the pro-life position prevails, those asserting such pro-abortion views rightly will be regarded as having no proper place at the table of legitimate debate. A “pro-abort” will be viewed much as a neo-Nazi or Ku Klux Klan member is viewed today. A respectable law school would not be thought at all intolerant for not having an abortion supporter on its faculty, for almost no one

10. Consider the language of Chief Justice Taney’s infamous opinion for the Court in *Dred Scott v. Sandford*, declaring that public opinion had long held African-Americans to be “beings of an inferior order” who were “so far inferior” to white human beings as to have “no rights which the white man was bound to respect.” 60 U.S. 393, 407 (1857).

A milder form of this type of argument, with respect to abortion, is that, even conceding the human fetus’s moral status as a human being, the autonomy of the pregnant woman—a right not to be chained by pregnancy to support the life of another—nonetheless supplies an interest that may justify the killing of such human beings. See generally Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). Although this argument may have some salience in circumstances in which pregnancy poses direct physical harm to the mother, on a self-defense theory, it fails completely as a general justification for a plenary general right to abortion, which is the regime that exists under current law. See Paulsen, *The Worst Constitutional Decision of All Time*, *supra* note 9, at 1020–21.

could (any longer) conceive of such a view being taken seriously as a moral or legal proposition. Harvard and Yale need not, for the sake of intellectual diversity, have someone on their law faculties who supports a plenary right to kill human infants in utero. That would be as monstrous, as absurd, as insisting that a law faculty have a committed Nazi on its roster.

The bitter irony, of course, is that the present situation in legal academia is very nearly precisely the reverse. As pointed out by a participant at the conference where an earlier draft of this paper was first presented, Yale Law School appears to have no law professors on its faculty who take the pro-life position: Every member of the Yale law faculty supports a legal right to abortion.¹¹ In one sense, this is incredible. No respectable law school today—and, perhaps against the weight of the evidence, I would like to count my alma mater in this category—possessing a modicum of commitment to intellectual diversity, should fail to have *even one* faculty member representing pro-life legal or policy views.¹²

But in another sense, this is not so incredible a stance at all. If one is committed to the pro-abortion-choice position as Truth, on the basis of a firmly held ideology, one might well regard committed pro-life views as beyond the range of reasonable toleration. And even if one is pro-abortion-choice but regards the pro-life position as otherwise intellectually respectable and thus fairly debatable, one might well regard the strong pro-life position as a dangerous threat to the survival of the pro-abortion-choice position. In general, if you view an opposing position as one that, were it to prevail, would utterly annihilate the intellectual respectability of what you believe to be True, that opposing position may become yet more strongly in your mind an intolerable one, not itself meriting toleration within the sphere of debate. And like abolitionism in the nineteenth

11. Sherif Girgis, *How the Law School Can Succeed—An Invitation*, 37 HARV. J.L. & PUB. POL'Y 187, 188 (2014). If there is an exception, I would like to know about it; the dissenter would seem to be a silent one.

12. It is surely not the case that there are no “intellectually qualified” persons holding such views. It is far more probably the case that Yale considers such a view not intellectually respectable enough to present—a view that might double back to create a belief that a person holding such a view is not intellectually qualified to be a Yale Law School professor. *See supra* note 6.

century, the logic of the pro-life position, were it to prevail, could well lead to the evisceration of the pro-abortion-choice position and its eventual complete de-legitimatization within public intellectual discourse.¹³

In part because the issue is so polarizing, and its stakes so high, abortion is an excellent paradigm case for thinking through the arguments for intellectual diversity and recognizing their limits: Truth is the goal; intellectual diversity is but a means to that end. Within some (itself debatable) range, there are some clearly *wrong* answers—views, theories, arguments, positions—that need not and should not be represented, or even tolerated, in intellectual debate. A commitment to Truth may well justify the exclusion of known, egregious Error from debate—and especially so where Error, were it to prevail, would exclude Truth from debate. Thus it makes sense that pro-abortion-choice and anti-abortion views, for example, would seek to censor each other.

But where Truth claims compete (as is the case with abortion), or where Truth is behind in the race (as is the case with abor-

13. Compare in this respect the pro-slavery view as it came to evolve in the early-to-mid-nineteenth century. As many historians have noted, there came an ideological turn, at some point in the early-to-mid-nineteenth century, away from the view that slavery was a regrettable, but necessary, evil to the view that slavery was a positive good for slaves and a natural right of slaveholders, derived from inherent racial differences. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 114–24 (1978); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 56–57 (1988). That view was, to some degree, a reaction against the aggressive anti-slavery moralizing of hard-core northern abolitionists. We today recognize the abolitionist view as unquestionably right and the pro-slavery view as unquestionably wrong. But the pro-slavery South was correct in its evaluation of the stakes: The abolitionist view, were it to prevail, could not peacefully coexist with the institution of slavery. If abolitionism were to win, slavery would lose, permanently. The intellectual debate would be over.

It is noteworthy that, for a long while—at least from 1820 to 1860—abolitionist, anti-slavery views were widely regarded as so extreme, so tendentious, so infused with religious premises, so far beyond the pale of the socially and intellectually respectable, so dangerous and incendiary, that they were considered unfit subjects for discussion, even in the U.S. Congress. For the definitive work on the exclusion of anti-slavery discussion from congressional debate from the 1830s to the 1850s, see WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 76 (1996) (“The vast bulk of the American people, in the North as well as the South, found the abolitionists at least as repugnant as did their representatives in the Capitol in Washington. They were, in the 1830s, not just a minority, but a very small minority that was despised, scorned, and actively opposed.”). See also FEHRENBACHER, *supra* at 120–24.

tion), intellectual diversity may be the better policy, at least temporarily. When Error predominates, the argument for intellectual diversity—the broadest possible toleration of debate—becomes compelling as a strategy for getting the Truth heard. This means that intolerable error becomes, for better or worse, a necessary part of intellectual debate. As a strategic necessity, intellectual defense of the awful—of slavery, of abortion, of oppression of all different kinds—may sometimes need to be *accepted* as part of academic debate, at least until Truth wins out.

IV.

My fourth proposition about intellectual diversity is somewhat different from the other three. It is simply this: *Not all academic institutions should embrace the idea of intellectual diversity for their institutions.* I have two sub-propositions here.

First, there should be intellectual diversity *among* academic institutions, not merely *within* them. Intellectual diversity, to the extent valuable as an instrumental matter in the quest for intellectual truth, is perhaps most valuable in the form of intellectual diversity among excellent, high-quality academic institutions. This provides for the competition of ideas at the higher level of institutions; it provides students and faculty with a meaningful range of choice; and it may well provide major islands of Truth in oceans of Error—enclaves, bastions, bulwarks.

For institutions to function as islands of Truth, they have to be committed to what they understand to *be* Truth. For enclaves of difference to be enclaves of difference, they have to really *be different*—distinctive in their commitments and viewpoints. That might mean that such institutions should *resist* the sirens' song of "intellectual diversity" as the guiding principle for steering their own ships. Intellectual diversity should not be made a value higher than Truth itself. To whatever extent a university is truly and genuinely committed to certain core values, principles, beliefs, and truths, it should advance those things and *not* academic "diversity" in opposition to what it believes the right, the true, and the just. For it to do otherwise would be to abandon, at least to some degree, its distinctive institutional commitments and concede that what it claims to

be Truth is really not necessarily true after all.¹⁴ Further, the ironic consequence of a failure of institutions to maintain distinctive institutional identities is to weaken intellectual diversity. If all universities or law schools identically pursued the supposed higher value of intellectual diversity within their institutions, that would become the leading value represented by *all* such institutions. There would thus be *less* overall intellectual diversity, *less* choice, *reduced* systemic competition of ideas, and *fewer* enclaves of institutional intellectual resistance to the dominant social waves and intellectual fads of the day.

To take a personal example from the two law schools where I have been a tenured faculty member: If the University of St. Thomas, a Catholic Christian law school dedicated in concept to integrating core religious faith principles into its teaching and scholarship about law, looks pretty much just like the University of Minnesota Law School, the state school up the street, what would be the point? One would not (or should not) think that St. Thomas had succeeded in its mimicry; one would (or should) think it had abandoned any pretensions that its animating purpose had any real claim to being the Truth.

This brings me to my second sub-proposition about institutional intellectual diversity, one that works hand-in-glove with the preceding point: *Constitutionally, private institutions are differently situated than public, state-sponsored institutions, with respect to intellectual diversity.*

Private universities, in particular, should be free to pursue their visions of the Truth and not feel constrained by notions of intellectual diversity to tolerate what they regard as Error. In First Amendment terms, a private university is an “expressive association” that rightfully may maintain its own distinctive voice and view, consistent with what it views as the right, true, just, and good.¹⁵ It ought not feel that it need tolerate—or

14. Of course, an institution sensibly could stake the claim that its most fundamental, overriding intellectual commitment was to Intellectual Diversity—presumably as a *means* to the ultimate end of Intellectual Truth, or as a *check* against the drift toward Error. That itself might be its ultimate “Truth” claim and thus its distinctive institutional commitment. But that itself is a choice, and one with consequences.

15. On the rights of private institutions to maintain their distinctive identities and on questions of the propriety and manner of their doing so, see Michael Stokes Paulsen, *Freedom of Speech at a Private Religious University*, 2 U. ST. THOMAS J.L. & PUB. POL’Y 104, 106–07 (2008) (embracing the right of a religious university to maintain a distinctive

worse, be coerced by law to tolerate—the expression of views antithetical to its core message or beliefs.¹⁶ For such institutions to indulge “intellectual diversity” may be akin to giving Round Earth and Flat Earth viewpoints equal time. Different private universities will reach different conclusions. If a private university believes that all, or a broad range, of views should be embraced in the name of intellectual diversity, it should be free to act on that view. If a private university believes that not all views are correct, sound, true, or right, it should be free to act on *that* view as well.

Public universities are a different matter. They are not properly regarded as private expressive associations possessing First Amendment rights; rather, they are government institutions that should be regarded as *limited public forums*—common carriers for the expression of diverse views held by the types of private speakers and groups they exist to serve.¹⁷ There is thus a strong constitutional basis for viewing state university law schools and private university law schools differently with respect to intellectual diversity. True intellectual diversity means the freedom and responsibility of private law schools to pursue the Truth and to latch on, tenaciously, to the Truth when they believe they have found it, as a matter of such private institutions’ First Amendment constitutional freedom. And true intellectual diversity means the obligation of public law schools not to exclude competing viewpoints—as a matter of First Amendment constitutional requirement.

identity through its own speech and policies with respect to on-campus expression but suggesting that free-speech policy generally might be the preferred manner of exercising such institutional expression rights). See also Michael Stokes Paulsen, *How Yale Law School Trivializes Religious Devotion*, 27 SETON HALL L. REV. 1259, 1260–62 (1997) (regretting but defending Yale Law School’s exclusion of a Christian religious freedom organization from campus recruiting because the Christian organization had a statement of faith to which it asked its potential employees to subscribe).

16. The Supreme Court’s dreadful 5-4 decision in *Christian Legal Society v. Martinez* is a departure from these principles. 130 S. Ct. 2971 (2010) (holding that a private religious group can be required to admit members not in agreement with the religious group’s core faith principles, as a condition of the group’s access to public facilities). See generally Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284 (2012) (arguing that the holding of *Christian Legal Society* is a negation of First Amendment rights).

17. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university’s exclusion of a religious student group violated the Free Speech Clause principle that the state may not punish, prohibit, or penalize speech based on its content).

Without telling too many tales out of school, my experience as a faculty member at both types of law schools has been that the situations are sometimes reversed. University of Minnesota Law School, notwithstanding stated commitments to intellectual diversity, in practice often sought to exclude from intellectual debate viewpoints with which most faculty members disagreed. The institution not infrequently pursued and inculcated a dominant viewpoint in teaching, in faculty hiring, and in public positions. On the other hand, the University of St. Thomas School of Law, my present institution, is in many respects a bastion of academic freedom and intellectual diversity, occasionally (some might lament) at the sacrifice of consistency in adherence to important faith principles.

All in all, then, my answer to the question posed for this panel—“should law schools care about intellectual diversity?”—is a mixed one: Some law schools should be *more* concerned about intellectual diversity, and some should be *less* concerned.

V. CONCLUSION

The specific point about institutional diversity connects back to my general skepticism about the case for intellectual diversity—the overall theme of this essay. Academics sometimes make a fetish of intellectual diversity without thinking hard enough about its purpose, justification, and limits: Its purpose is the pursuit of the overriding goal of intellectual Truth. Its justification is as a subordinate, instrumental vehicle for achieving that goal and as a useful weapon against otherwise entrenched Error. And its limits are reached where the Truth has become well settled, where the instrumental value of debate is no longer served, or where a private expressive association wishes to stand firmly for particular values and ideas.