



By Kenneth Lee

Time to Fight Back:

An Anti-Discrimination Campaign Waiting to Happen?

Imagine opening your newspaper one morning and reading a Supreme Court opinion that puts a startling new twist on an old civil rights tactic. The Court declares that some prominent university has violated equal opportunity laws by “engaging in a pattern of employment discrimination...against Republicans and Christian conservatives. Of the university’s 1,828 professors, there are only eight Republicans and five Christian conservatives. Such statistical evidence of gross political and ideological imbalance has been taken as a telltale sign of purposeful discrimination in many previous civil rights cases. In this case as well it provides *prima facie* evidence that individual rights are being systematically violated on arbitrary grounds. Justice demands compensatory action to protect the rights of these groups.”

Is this a right-wing pipe dream? It may not be as far-fetched as you think.

The Supreme Court has already issued opinions using virtually those same words—only the opinions refer to “under-represented” racial minorities rather than beleaguered Republicans and Christian conservatives. The simple legal logic underlying much of contemporary civil rights law applies equally to conservative Republicans, who appear to face clear practices of discrimination in American academia that are statistically even starker than previous blackballings by race.

For years, conservatives have complained that universities dominated by left-wing administrators and faculties consistently

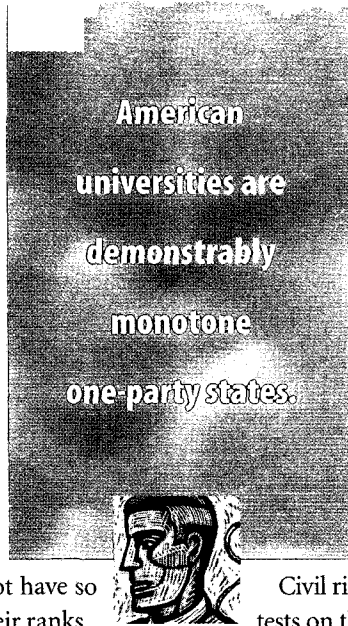
avoid hiring or tenuring academics with conservative views. Anecdotal evidence of such discrimination abounds. Take John Lott, author of *More Guns, Less Crime*, an influential and best-selling book published by the University of Chicago Press. At only 26, Lott received his Ph.D. from UCLA and five years later became chief economist at the United States Sentencing Commission. He has published over 70 scholarly articles, a number that even the most prolific professors rarely match in their entire careers.

Yet Lott has failed to receive a single offer for a tenure-track position from any American university, despite sending his résumé to literally hundreds of schools. He instead became an itinerant academic clinging to one-year research fellowships at various institutions. Last year, he found a home as a resident scholar at the American Enterprise Institute. Would Lott have been snubbed by the academic world had his research on guns yielded opposite, more politically correct results? Not a chance.

Peter Berkowitz, then an associate professor of political philosophy at Harvard, was denied tenure even though he had authored two critically acclaimed books. The five-member tenure committee, for instance, was suspiciously stacked with two child psychologists, who are presumably more familiar with Saint Nicholas than Saint Thomas Aquinas and other subjects within Berkowitz’s expertise.

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Despite many such examples—plus obvious evidence from campus culture, politics, and daily practice demonstrating that colleges can be hostile environments for people with conservative views—there was until recently no hard, empirical proof of pervasive left-wing bias in our academies. That has changed. As the data arrayed on the preceding pages illustrate, American universities are demonstrably monotone one-party states where only one set of views flourishes. At prominent colleges across the country, the vast majority of professors are committed liberals. Many humanities and social science departments at leading universities do not have so much as a single registered Republican among their ranks.



These stark statistics do more than just confirm what conservatives have always suspected. They potentially may allow Republicans to pursue legal action against universities by using the logic and law of the civil rights movement.

Over the past few decades, studies that show statistical underrepresentation of minorities have become the cornerstone of civil rights litigation. Plaintiffs invariably cite statistical disparities in work forces, bank loans, arrest rates, application acceptances, housing ownership, and scores of other measures as proof of discrimination. Courts were not always receptive to such statistical claims. The Civil Rights Act of 1964 explicitly stated that it did not require the work force to mirror the general population. LBJ's Justice Department assured skeptics that the Civil Rights Act of 1964 would be used only to combat intentional discrimination against individual members of minority groups, not ever to force numerical "racial balance." But as with so many other laws, administrative agencies and courts gradually transformed the plain language of the statute to mean something very different.

In two landmark decisions in the 1970s, the Supreme Court made it considerably easier for plaintiffs to prove discrimination with simple numbers. First, in *International Brotherhood of Teamsters v. United States*, it allowed plaintiffs to claim "disparate treatment"—that is, intentional discrimination—when statistics showed an under-representation of minorities. While cautioning against relying solely on statistics, the Supreme Court stressed that they are "in many cases the only available avenue...to uncover clandestine and covert discrimination by the employer.... It is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." Though commentators like Thomas Sowell pointed out that the Court's reasoning is questionable—many variables other than discrimination can account for representational disparities—this thinking has become an established part of the civil rights legal firmament.

In addition to this "disparate treatment" theory of discrimination, the Supreme Court also accepted the novel notion of "disparate impact" in *Griggs v. Duke Power Company*. According to this theory, even a neutral hiring practice or procedure can be found discriminatory if it results in a disproportionate impact on minority groups. The plaintiff in a disparate impact case need not even allege that the employer has a biased bone in his body. Evidence that minorities are adversely affected by any policy may be sufficient to hold the employer liable for discrimination.

Civil rights groups have challenged the use of standardized tests on these grounds, claiming that since minority students score lower on the SAT it is biased by definition. Laws and enforcement practices that lead to heavy minority arrests are similarly attacked. The legal logic of disparate impact has seeped right down into our everyday political parlance: Activists constantly use this civil rights language to force political changes. Fatimah Jackson, a professor of anthropology at the University of Maryland, recently complained that human genome research disproportionately and "opportunistically" benefits whites at the expense of minorities, because most of the genes in the study come from Caucasians.

By simple logic, both disparate treatment and disparate impact theories support a legal case against universities for discriminating against conservative Republicans. Republican academics might protest their lot using disparate impact logic that points to a particular hiring practice or procedure that adversely affects members of the GOP. If a school department relies heavily on the number of articles published in left-leaning journals in hiring professors, Republicans might argue that such a practice disproportionately hurts conservatives whose works are rarely accepted by the left-wing press.

The disparate treatment alternative is even more obvious. The gross under-representation of conservatives in university faculties lends credence to the view that schools have in plain fact discriminated against Republican academics. As the Supreme Court suggested in *International Brotherhood*, one would expect university faculties to reflect the political and ideological composition of the larger populace, and roughly as many Americans identify themselves as Republicans as Democrats.

Students at Harvard Law School sued the school in the early 1990s with the help of civil rights activists because it had only five black professors of 66 total faculty members. "For years, students have petitioned Harvard Law School to end its discriminatory practices and to make serious commitments toward creating a diverse faculty," one student member of the Harvard Law School Coalition for Civil Rights explained. "We have negotiated. We have protested. We have taken to the streets. Today, we take Harvard to court." If minority professors at Harvard Law School are under-represented in relation to the general popula-

tion, then Republican professors at places like Harvard are a nearly extinct species.

While these potential legal actions may seem like a logical extension of civil rights precedents, there are several significant hurdles that would hamper such lawsuits. First, Republican academics could not pursue a discrimination lawsuit under federal law because the Civil Rights Act of 1964 does not outline political affiliation as a protected status. Some states and localities, however, have extended civil rights protection to party membership. The District of Columbia, for instance, bars discrimination on the basis of race, gender, sexual orientation, or political affiliation.

Second, under both disparate treatment and disparate impact theories, the employer is at least in theory entitled to explain away the inference of discrimination, though the employee has an opportunity to rebut the employer's explanation as a mere pretext for discriminating. Third, political party affiliation is not always the most accurate proxy for ideology. Some Republicans, like New York mayor Michael Bloomberg, hold views to the left of many Democrats. Finally, courts in recent years have slowly swung the pendulum back against innovative extensions of civil rights law, making it more difficult for plaintiffs to pursue discrimination lawsuits.

Yet even if Republicans fail in courts of law, they can triumph in the court of public opinion by establishing the parallel between discrimination by ideology and bias directed toward race or sex. This reality is shrewdly grasped by operators like Jesse Jackson, who regularly bludgeons opponents with the specter of exorbitant legal fees, a potential lawsuit loss, and heaps of negative publicity unless they cave in to his demands, even if the lawsuit itself appears to have little merit. After MCI and WorldCom announced their merger some years ago, the Rainbow/PUSH Coalition filed objections to the merger with federal regulators, and Jackson accused the companies of displaying "distaste for black labor." Although Jackson's complaint was highly frivolous in substantive and legal terms, the companies appeased his demands rather than risk negative publicity.

When Jackson led a media charge against Coca-Cola, demanding that "Coke's board of directors must look like its consumer base," he publicly exhorted the company not to fight back legally. "The right thing is to reach an honorable and fair settlement. Those who choose to dance or deny a resolution of the lawsuit are not serving you well. Law bills going up, stock prices going down."

Republicans can learn a lesson or two from this. Armed with the alarming statistics on the preceding pages about the lack of ideological diversity on college campuses, Republicans can browbeat universities into making their faculties more diverse. Americans realize the extent to which liberals and leftists dominate faculties. Exposing universities to the glare of publicity

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might at least force them to concede that hiring employees from only one side of the political spectrum is a problem to be avoided whenever possible.

And as Jackson does with corporations, Republicans can target universities' pocket-books. By informing state legislatures as well as fair-minded alumni about the lack of diversity of ideas on the American campus today, conservatives can tighten the cash spigot until schools take affirmative steps to remedy current imbalances.

In fact, Republicans should appropriate the language and logic of liberals' most sacred shibboleth: affirmative action. Liberals have increasingly relied on the "diversity" rationale to defend racial preferences. "Lack of diversity harms every white or Asian-American student who is here because their education is without the benefit of the perspectives of those now absent students once brought to classroom discussions," stated UCLA professor Gary Blasi in a typical race-based complaint that could be effortlessly extended to the diversity of ideas and political views.

As a purely legal proposition, the diversity rationale for racial preferences remains questionable. The Supreme Court has never accepted diversity as a compelling reason to impose affirmative action on employers, and federal appellate courts are divided on whether it is permissible in educational contexts. Nevertheless, the diversity-über-alles mindset has gained popularity among policymakers, professors, pundits, and the general public. No one wants to appear opposed to "diversity." But if a mix of perspectives is as important as liberals claim, they should be rushing to recruit a more politically and ideologically diverse faculty.

Sadly, that's not something that will ever happen voluntarily. The American university, which likes to call itself a wide-open marketplace of ideas, is in fact a very narrow world with a near monopoly of viewpoints on central cultural and political questions. That's why college students in history classes are taught that anti-communism was nothing more than jingoistic paranoia, why political science professors lecture to students that Republicans, not Democrats, cynically rely on the race card to win elections, and why impressionable young minds all across the country are drilled to think of Presidents like Ronald Reagan and George W. Bush as nothing more than amiable dunces, and their issues nothing more than benighted foolishness.

In the seminal case of *Regents of University of California v. Bakke*, Supreme Court Justice Powell noted that "it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation." It is time we bring back that sort of openness to America's campuses—and stealing a few pages from the civil rights handbook would be a sensible place to start.

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By Larry Schweikart

History to The Left of Us

USA *Today* recently reported on its front page that American high school seniors could not perform even at the most basic level in the subject of history. Less than half the students could identify or explain major events in U.S. history, such as the Monroe Doctrine, Nat Turner's rebellion, or the Bay of Pigs invasion. Why can't Johnny learn history?

The standard culprits deserve blame, including lack of competition in public schools, low standards, and entrenched unions. Another factor in the dismal state of elementary and high-school education however, seeps down from the college level: a pervasive bias that distorts American-history textbooks. A sampling of what passes for history in some of the main college texts will offer a glimpse of the hurdles that confront even unbiased, well-meaning secondary school instructors who rely on these "mainstream" texts. (Due to the familiarity of most readers with events of the last 20 years, I will limit my examples to the final chapters of these books, but the tilt proliferates in the treatment of earlier events as well.)

During the Reagan years, textbook authors tried to minimize the extent of Reagan's surprising 1980 election victory by pointing to overall voter participation. George Tindall and David Shi's popular *America* states that Reagan's "vote total represented only 28 percent of the potential electorate. Only 53 percent of eligible voters cast ballots in the 1980 election." They fail to remind readers that the highest voter participation levels in American history occurred in 1810, when heavy property-ownership requirements meant that only a handful of Americans elected a President. Likewise, Winthrop Jordan and Leon Litwack continue the "low-turnout" mantra in their *The United States* by sarcastically

noting that "the new President entered the White House having received a 'landslide' of only 26 percent of the electorate."

Another line of attack is to depict Ronald Reagan as no more than an actor. Though Daniel Goldfield and his co-authors acknowledge Reagan's masterful communication skills in *American Journey*, they seem obliged to note in a photo caption that "critics questioned his grasp of complex issues." Reagan "was no intellectual," claims the widely-used *American Pageant*, and according to *Nation of Nations*, Reagan made the "conspicuous display of wealth once again a sign of success and power." As if to make absolutely sure students got the point that the Reagan administration benefitted only the "wealthy," the *American Pageant* accompanies its narrative section with a handy chart on "aggregate household income" purportedly showing a massive gap between the rich and poor.

The distortions of the 1980s economic record in these texts would require several issues of *TAE*, but this one rather blatant example ought to suffice: Thomas Bailey et al.'s *American Pageant*, long considered perhaps the best college-level text on U.S. history, devotes not one, but two charts to deficits and the national debt in the 1980s, in which the deficit and debt lines appear to go literally off the map under Reagan's watch. In the chart on the national debt, the bias is even more stark: Large bars across the debt time-line indicate important events in American history ("Depression," "World War II ends," "Vietnam War"). Except the one that crosses the skyrocketing debt. It reads not, say,

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His most recent book is *The Entrepreneurial Adventure: A History of Business in the United States*. He is now working on a (fact-based) textbook of U.S. history.