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# THE CIVIL RIGHTS JUGGERNAUT<sup>†</sup>

*Richard A. Epstein\**

It is a great honor and pleasure to give the annual David Baum lecture on the topic of civil rights. Mr. Baum had an untimely death in 1973, when the set of issues that defined the civil rights movement was very different from what it is today. In 1973, the civil rights movement was still coping with the aftereffects of segregation. It was a period when there was strenuous opposition to the civil rights laws, and a situation in which their defenders, most notably Senator Hubert Humphrey, beat many a strategic retreat in order to secure passage of the law. It was a time at which the decision to include sex as a forbidden category in the law was met with much skepticism, even derision, and which resulted in the inclusion of a Bona Fide Occupational Qualification (BFOQ) Standard for sex, but not for race.<sup>1</sup> It was a time when the question of whether or not to integrate Mrs. Murphy's boarding house raised genuine concern,<sup>2</sup> and the use of disparate impact tests to measure civil rights violations was a highly contested issue.<sup>3</sup>

Even the principle of nondiscrimination in public accommodation was resisted at times. But as the cases came down, the civil rights laws were given expanded purpose. Here are some of the landmark cases, listed in historical order, dealing with major issues such as the consideration of disparate impact,<sup>4</sup> the role of busing to deal with school integration,<sup>5</sup> the identification of protected classes in disparate treatment cases,<sup>6</sup> the narrow construction of the BFOQ sex exception,<sup>7</sup> the elimination of sex-based tables for calculating pensions,<sup>8</sup> the role of

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1. 42 U.S.C. § 2000e-2 (2018).
2. 42 U.S.C. § 2000a(b)(1) (2018), which exempts owner occupied structures with fewer than five tenants from the key provisions of the Fair Housing Act.
3. Senator Hubert Humphrey sought to defend the passage of the Civil Rights Act by minimizing its impact, insisting that "the meaning of racial or religious discrimination is perfectly clear. . . . It means a distinction in treatment given to different individuals because of their race, religion, or national origin." 110 CONG. REC. 5,423 (1964).
4. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (allowing use of disparate impact to establish discrimination).
5. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).
6. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
7. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
8. *City of L.A. Dep't. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (ignoring sex differences in calculating pension benefits).

affirmative action,<sup>9</sup> the decision to allow state human rights laws to integrate large social organizations that discriminated on the basis of sex,<sup>10</sup> and the adoption of the view, originally championed by Catharine McKinnon in *Sexual Harassment of Working Women*,<sup>11</sup> that sexual harassment was prohibited by Title VII of the Civil Rights Act.<sup>12</sup>

Even this short summary makes it clear that the expansions in the 1970s and early 1980s of the various provisions of the Civil Rights Act of 1964 were done to advance the purpose of ending segregation and promoting integration. I continue to feel much uneasiness about these decisions, in part because they move away from the initial “colorblind” standard by creating preferences for protected classes and allowing affirmative action in their favor.<sup>13</sup> But none of these cases, whatever their merits, had the effect of targeting small and isolated businesses and individuals for powerful government sanctions. Instead, the earlier string of successes were targeted to make sure that powerful groups did not themselves engage in various forms of invidious discrimination—here the word “invidious” is used to allow for affirmative action programs but only in favor of protected groups. Today, all too many civil rights commissions especially at the state level function only to pressure small businesses and individuals to conform to a powerful and overriding vision of the “right” view of the evils of discrimination across the board. The situation marks a powerful change from the landscape that existed at the start of the civil rights movement in 1938, when Justice Harlan Fiske Stone warned that lax standards of review would not be sufficient to protect what he termed in *Carolene Products* the “discrete and insular minorities” of today.<sup>14</sup> Today those minority groups are in fact the dominant power-brokers on matters of civil rights, and their influence is all-pervasive, dealing not only with matters of race and sex discrimination, but also with freedom of speech and religion for groups that are not members of the dominant coalition.

It is important to understand that the pervasive modern references to “diversity and inclusion” are not renewed calls to heed the lesson of Dr. Martin Luther King Jr., who proclaimed that what matters is the content of one’s character and not the color of one’s skin. Nor do such references refer to reaching out to make sure that individuals from all groups and all walks of life are included in modern social discourse. Rather, it is evident from the constant insistence that

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9. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (allowing an affirmative action exception to the general colorblind principle, later extended in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

10. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

11. CATHARINE M. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). The key move in her book was to treat harassment not just as an extension of the common law of assault, but as a form of discrimination covered by Title VII of the Civil Rights Act.

12. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

13. For my general critique, see Richard A. Epstein, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 395–96 (1992).

14. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) (internal citations omitted).

diversity and inclusion are compelling state interests that any other concern, including freedom of speech and conscience, must take a subordinate place when pitted against them, if only so that people whose views do not fit this modern conception can be shouted down with the justification that their views are so odious that they do not require refutation. One general theme in this discourse is a strong distaste for capitalism and an embrace of controversial causes as though they embody eternal truths. As an example, Vincent Joseph Scully, Jr. was one of the great figures in art architecture, adored by students and scholars alike. On his death in 2017, Yale University wrote of him, “Beloved teacher, [w]ho helped shape a nation.”<sup>15</sup> But little more than two years later, the Yale Art Department has seen fit to cancel his course:

Decades old and once taught by famous Yale professors like Vincent Scully, “Introduction to Art History: Renaissance to the Present” was once touted to be one of Yale College’s quintessential classes. But this change is the latest response to student uneasiness over an idealized Western “canon”—a product of an overwhelmingly white, straight, European and male cadre of artists.<sup>16</sup>

And of course, there is always a reason for such historical revision, which was offered by Tim Barringer, the chairman of Yale’s Art Department:

Barringer wrote that the emphasis would be placed on the relationship between European art and other world traditions. The class will also consider art in relation to “questions of gender, class and ‘race’” and discuss its involvement with Western capitalism, Barringer wrote. Its relationship with climate change will be a “key theme,” he wrote.<sup>17</sup>

This politicization of art is brought about by an art professor who to all appearances knows next to nothing about the collateral disciplines on which he treads. The sense of indoctrination is palpable. The level of disrespect for the western tradition is intense.<sup>18</sup> Barringer does not believe in the power of competition within Yale and would never let the older course be taught by a younger champion, and offers his own alternative course, which stresses non-Western themes as well. There is surely room for both. Perhaps he well understands that his own offering would not survive the market test among the Yale student body.

This creeping orthodoxy is not confined to any single subject matter. As is evident from the pronouncements of once great institutions like Harvard University and the University of California, that same authoritarian impulse now guarantees that the phrase “diversity and inclusion” is transformed into a commitment to establish, in both hiring and admissions, systematic preferences in favor of

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15. *In Memoriam: Vincent Scully, Beloved Teacher ‘Helped Shape a Nation’*, YALE DAILY NEWS (Dec. 1, 2017), <https://news.yale.edu/2017/12/01/memoriam-vincent-scully-beloved-teacher-helped-shape-nation> [<https://perma.cc/Y56Q-XJC6>].

16. Margaret Hedeman & Matt Kristoffersen, *Art History Department to Scrap Survey Course*, YALE DAILY NEWS (Jan. 24, 2020, 12:31 AM), <https://yaledailynews.com/blog/2020/01/24/art-history-department-to-scrap-survey-course/2/> [<https://perma.cc/59D2-WU8J>].

17. *Id.*

18. Classes in “Art and Politics,” “Global Craft,” “The Silk Road” and “Sacred Places” will be offered instead. *Id.*

women and some minority groups, with the deliberate intention of reducing and marginalizing the position of those who do not share that common vision.<sup>19</sup>

Thus, forty-seven years after Professor Baum's early death, both the agenda and the players in the civil rights movement are far different from what they were in those distant times. I often say to myself, virtually every day, that the news will contain some disturbing story about how it is that the civil rights movement has deviated from its original mission. In this lecture I shall talk about some of the cases that I think should give pause to the way in which we think about civil rights. In doing so, it is also important to recognize that in the last thirty or so years, civil rights claims have come into tension with the ability of individuals to act on their sincere religious beliefs in the conduct of their business, where they are now subject to the same strong claims of "diversity and inclusion." In dealing with this full range of issues, there is no question, that as one who came of age in the 1950s and 1960s, the ugliness in race relations and various forms of religious intolerance that plagued those times have largely vanished from the scene. So, in vanquishing institutionalized segregation, the country has advanced enormously from a once routine and deplorable state of affairs.

Yet all too often it is said that this advance is only superficial, because we have yet to deal with ingrained habits of mind that replicate the worst features of segregation. Thus in her book, *The New Jim Crow*, a most evocative title, Michelle Alexander opens with the trope that on race relations, "the more things change, the more they remain the same."<sup>20</sup> That conceit is said to stem from the fact that black prisoners lose their right to vote after incarceration, albeit on a race neutral basis on the same terms and conditions as white prisoners. One could argue both ways on the question of whether felons should lose their voting rights, either during incarceration or for some period of time thereafter. But no matter what decision is made on that set of questions, the evidence does not support any conclusion that Jim Crow is alive and well, either explicitly or in some craftily disguised form. There is no showing that the disparate impact of the sanctions arises from any differential enforcement of the criminal law, but instead arises from differential rates of criminal behavior, which is of course a topic that deserves further intensive study. There is nowhere any institutionalized activity, overt or covert, that pushes in that direction. But nonetheless it is a convenient fiction to keep alive in order to justify policies that are themselves often racially discriminatory as an ostensible defensive reaction against some supposedly greater peril.<sup>21</sup>

Harsh condemnations like Alexander's also do a massive disservice to the many individuals of all races who have done much to improve the racial climate

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19. See *infra* text accompanying notes 75, 79.

20. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1 (rev. ed. 2011).

21. For a forceful denial of the conventional wisdom of systematic racial bias, see Heather McDonald, *The Myth of Systemic Police Racism*, WALL ST. J. (June 2, 2020, 1:44 PM), <https://www.wsj.com/articles/the-myth-of-systemic-police-racism-11591119883> ("A solid body of evidence finds no structural bias in the criminal-justice system with regard to arrests, prosecution or sentencing. Crime and suspect behavior, not race, determine most police actions.").

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in the United States. We live in an age of full-throated affirmative action, which has now morphed into programs of diversity and inclusion that no longer embrace any ideal of sex- or color-blindness. It is a favorable sign of how much things have changed for the better that today, many police departments are headed by African-American officers and offer extensive programming with an eye to improve race relations. The list of changes in the formal and informal culture of the United States since the days of my youth in the 1950s are mind-boggling, and it badly distorts the historical record to think that the current state of race relations in particular, and civil rights in general, is down deep somehow unchanged from the past. Lest anyone have any doubts about that conclusion, I suggest that they look at any part of the enormous literature that documents the explicit and often brutal forms of segregation and racism that are thankfully largely a thing of the past. I am thinking here of such books such as W. J. Cash, *The Mind of the South* (1941), C. Vann Woodward, *The Strange Career of Jim Crow* (1955), and Isabel Wilkerson, *Warmth of Other Suns: The Epic Story of America's Great Migration* (2010). No one should ever, ever forget or minimize the evil of organized racial repression and segregation in the South.

But this is a new era, and the stark contrast between what happens today and what happened then is most troublesome. It is impossible to deal with all the highways and byways associated with the study of race and gender in the United States. It is not possible to critique all the endless variations of appeals to issues of diversity and inclusion, and in this essay, I shall consciously stay away from the highly contentious issues associated with police enforcement of the full range of criminal sanctions. But even within the area of private law, the mood has changed, so that there are too often these tidal waves of indignation and resentment that do not admit of any dissent or disagreement, and now pose their own authoritarian risks, which is why I write, with much unhappiness, of the New Civil Rights Juggernaut: it is either that you are with us on diversity and inclusion, or you are the target of unrelenting pressure, both from within your home institution and from without. It is no longer permissible to let people with deeply held differences on matters of religion or politics to go their separate ways. It is instead necessary, with some mixture of criticism, abuse, coercion and litigation, to make everyone heel to the modern diktats of appropriate behavior on all matters of race, sex, and religion, even though this modern view has its own pathologies and excesses that stem largely from its refusal to recognize the autonomous choices of others. The root of the term "totalitarianism" stems from those first two syllables "total," which is intended to mean the state exercise of power, in both the hard form—coercion—and the soft form—grants and influence—to control a complex set of national relationships. Hannah Arendt wrote a classic book showing how totalitarianism played out in one era.<sup>22</sup> I fear that it is becoming more necessary to talk about the totalitarian instincts of our own age, which is too often characterized by the position that every purported social consensus deserves unanimous support, thereby leaving no room for dissenters.

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22. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

In order to set the stage, I think that it is incumbent upon me to explain where I sit on the political spectrum. The point is one that raises some serious difficulties because I am generally called a libertarian, which is accurate as far as it goes. Unfortunately, it does not go far enough. There is a deep division between two branches of libertarian thought that need to be recognized. The first of these is the hard-line libertarian position, which claims that the only proper use of the state is to control force and fraud. Under that position, all forms of discrimination against other individuals in all settings are possible, without re-tribution. But the second position, that of classical liberalism, which far more accurately reflects my views, recognizes that there are legitimate state functions that go beyond operating as what is commonly called the “night-watchman state.”<sup>23</sup> Those functions include the use of state power to provide public goods, whether through taxation or eminent domain, and, most critically for these purposes, to control the exercise of monopoly power. In general, this position recognizes the need for state coercion to address so-called collective-action problems, where high transaction costs can block the adoption of some solution that is preferred by all parties, but not achievable through voluntary means. The normative limitation imposed on this application of state power, whether manifested as taxation, regulation, or eminent domain, is that this power should only be used to achieve Pareto improvements—situations where at least one person is better off and no one is worse off. The ostensible radical individualism, or even worse “possessive individualism,”<sup>24</sup> which holds that anyone can do what they want no matter what the consequences to others, so often the popular caricature of libertarianism, is effectively cabined by the classical liberal approach because it only permits individuals to pursue strategies that allow prices, terms, and conditions to be set according to the competitive market.

The adoption of this position relies heavily on the work of Ronald Coase in his 1960 article *The Problem of Social Cost*,<sup>25</sup> which considers transaction costs in the organization of social institutions. It also draws on the 1965 work of Mancur Olson, *The Logic of Collective Action*,<sup>26</sup> which shows how this approach applies to the provision of collective goods, whether through taxation or regulation. Indeed, this approach, which I developed at length in my 1995 book, *Simple Rules for a Complex World*,<sup>27</sup> shapes the way in which I think about the application of the civil rights law, for it requires that one draw the distinction between common carriers, to which duties of nondiscrimination do apply, and competitive markets, to which they do not. It is important, therefore, not to conflate those positions, which was done, for example, by Professor Cass Sunstein in his review of my book *The Classical Liberal Constitution*, which he grandly entitled “*The Man Who Made Libertarians Wrong About the Constitution: How Richard Epstein’s Highly Influential, Highly Politicized Scholarship Cemented Tea Party*

23. Marian Sawyer, *Gender, Metaphor and the State*, FEMINIST REV. Spring 1996, at 119.

24. C.B. Macpherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1962).

25. R. H. Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960).

26. MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

27. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

*Dogma.*<sup>28</sup> One of his punchlines in the review was “[e]veryone knows who Rand Paul’s father is, but in an intellectual sense it is Richard Epstein who is his daddy.”<sup>29</sup>

No way. Indeed, this is a situation in which I am proud to disclaim paternity, for while there is surely some overlap between my substantive positions and those of Rand Paul, our methodological approaches are quite different. He tends to be an intuitive libertarian, and I tend to be one who is explicit about the consequentialist foundations of my position.<sup>30</sup> I regard Paul’s form of libertarian thought as antithetical to my own on many key questions, including all those which involve common carriers.<sup>31</sup> The same is true with respect to the Tea Party, with which I have never had any informal communications or formal associations, and with whom I have never had any philosophical affinity. My positions have long antedated these transient political movements. But the positions of the libertarian and the classical liberal do converge on one critical point, which is the inadvisability of intervening in the outcomes of voluntary exchanges, including those which occur in competitive markets. In these settings, the only coordination problems are those which arise when competitors try to collude. Otherwise in competitive markets, there is no independent need for state provision of public goods.

The focal point of this difference arises in those cases of common carriers and public utilities, where the monopoly position of the service provider typically provides a duty to serve the public on fair, reasonable, and nondiscriminatory terms. The rules that determined how this principle works were some of the most litigated questions of the late nineteenth century, but the purpose of the enterprise was always to figure out how to make firms charge only those rates which approximated, on a risk-adjusted basis, the rates of return that they could earn in competitive markets. It is no accident that the period of greatest social advancement in the United States corresponds to the so-called *Lochner* era, named after *Lochner v. New York*,<sup>32</sup> which covered, roughly speaking, the years between 1870–1940.<sup>33</sup>

Yet, it is a sign of how much these principles were violated at the height of Jim Crow that the one group which was in large measure excluded from these improvements were African Americans. And the reason was that in this case the classical liberal principles that limited the scope of government police power were systematically disregarded. Racial segregation, then pervasive throughout

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28. Cass R. Sunstein, *The Man Who Made Libertarians Wrong About the Constitution*, NEW REPUBLIC (May 18, 2014), <https://newrepublic.com/article/117619/classical-liberal-constitution-richard-epstein-reviewed> [<https://perma.cc/4SYD-U48E>].

29. *Id.*

30. Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y. 711 (1989).

31. Richard A. Epstein, *My Rand Paul Problem*, HOOVER INST. (Feb. 3, 2014), <https://www.hoover.org/research/my-rand-paul-problem> [<https://perma.cc/78T6-VUMX>].

32. 198 U.S. 45 (1905).

33. See ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 25–29 (2016).

Washington D.C., was reinstated in the federal government by Woodrow Wilson, shortly after he took office in 1913.<sup>34</sup> The decision provoked no legal challenge because it was widely thought to fall within the ambit of the police power, even though it did not embody concerns with health, safety, morals, or the general welfare. That unwillingness to take on the Wilson administration rested in large measure on the 1896 decision of *Plessy v. Ferguson*,<sup>35</sup> which among its many sins, improperly barred the use of a nondiscrimination principle by forcing the segregation of white and black customers on trains, which were then quintessential common carriers. Overturning *Plessy* on this point (as well as on segregated schools and anti-miscegenation laws) in *Brown v. Board of Education*<sup>36</sup> was long overdue. But by the same token, it is important not to overshoot the mark when correcting against the evils of the Jim Crow era. The willingness on the part of the modern civil rights advocates to force common carrier status and hence nondiscrimination obligations on *competitive* suppliers is the source of much of the mischief and power of the Civil Rights Juggernaut.

Turning now from the past to the present, let me talk about some recent—recent as of January 1, 2020—cases and events that should give us all pause. Much has happened since that time, but the issues that I address here are still relevant insofar as they reflect widespread attitudes in the United States on critical issues, each representing a step backwards in the struggle to deal with equality on matters of race and sex in the United States. The first question that I shall refer to is the simple issue of whether any person is required to engage in commercial activities that are inconsistent with their sincerely held religious beliefs. I think that the answer to this question is that such compulsion should be regarded as both unacceptable and unconstitutional in any free society, even though there are powerful forces that believe that majoritarian sentiments should be forced on the population as a whole.<sup>37</sup>

The second question that I shall deal with involves the use of defamation actions against those who wrongly accuse others of racial or sexual biases of any sort. Ideally, there should be no need for such actions, but on some occasions today the action for defamation is needed to protect against various forms of discrimination, a sharp change from earlier days when defamation actions were used to prop up segregation, not to bring it down.

The third issue deals with questions of alleged sex discrimination by companies like Google in their hiring of technical personnel so central to the core of its business. In 2017, the company fired one of its programmers, James Damore, for offering the argument that accurate statistical generalizations are essential for making informed decisions under conditions of uncertainty, replacing the idea with a norm that condemns all such generalizations as illicit forms of stereotypes,

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34. For a sharp condemnation of Wilson, see Dick Lehr, *The Racist Legacy of Woodrow Wilson*, ATLANTIC (Nov. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549/> [<https://perma.cc/WTK4-5DZK>].

35. 163 U.S. 537 (1896).

36. 347 U.S. 483 (1954).

37. See, e.g., Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825 (2018).

which again subordinates questions of truth and falsity to the current Civil Rights Juggernaut.

The fourth and final issue involves the imposition of various required statements that applicants must sign to indicate the ways in which their actions will, regardless of their field of study, advance the cause of diversity and inclusion. These forced statements are all too reminiscent of the loyalty oaths against communism that were required in the 1950s and should be greeted with the same kind of constitutional and social hostility. A free society does not make political commitments a *sine qua non* for university (or industry) jobs, and the willingness to impose them represents a sad form of modern totalitarianism.

#### THE ANTIDISCRIMINATION LAWS AND RELIGIOUS LIBERTY

Days before this lecture was given, on March 25, 2019, the Yale Law School, from which I graduated in 1968, announced a policy that appeared to withdraw financial support from students who worked for Christian law firms.<sup>38</sup> The initial impulse for this decision was the strong protest from the student group OutLaws, the school's LGBTQ affinity group, which had denounced the Alliance Defending Freedom (ADF), whose attorney Kristen Waggoner had successfully defended Jack Phillips, the sole proprietor of the Masterpiece Cakeshop in the Supreme Court decision *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>39</sup> The level of disquiet did not end there, as there were concerted efforts by similar groups to insist that any organization that espoused various forms of conservative thought lay beyond the pale. The effort was, and still is, to insist that certain positions are so wrong that they should be excluded from respectable debate without the need for any further explanation.

The public attacks on Philips and Waggoner are symptomatic of the Civil Rights Juggernaut, whereby activists groups, who are so convinced of the inevitable soundness of their substantive views, are prepared to steamroll, by the use of public and private force, all those that disagree with them, no matter the sincerity of those dissenting convictions. Such dissenting individuals have no zone of protected activity, either in business or any other area of public life, in which they can stay true to their own beliefs. Those individuals who claim the right to be left alone are now treated as the illegitimate heirs of segregationists and bigots of the earlier civil rights age. In making these strong claims, the new generation of civil rights advocates ignore the fundamental difference between the forced segregation imposed by government and backed by private force, and the freedom due to everyone to express one's views and to act on one's religious convictions so long as you do not engage in the use or threat of force against others. ADF respected that distinction in its defense of Jack Phillips. Its detractors and critics did not.

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38. Aaron Haviland, *Yale Law School Yanks Stipends from Students Who Work for Christian Firms*, FEDERALIST (Apr. 1, 2019), <https://thefederalist.com/2019/04/01/yale-law-school-yanks-stipends-students-work-christian-firms/> [https://perma.cc/QG8K-M379].

39. 138 S. Ct. 1719 (2018); *Haviland*, *supra* note 38.

This new juggernaut needs to be strongly resisted. ADF (with whom I have collaborated on some of these cases) is known for its conservative stand on a wide range of issues, including same-sex marriage, abortion, gender identity, and of course religious freedom. I do not agree with all the positions of that group, or indeed any other, but it seems odd and dangerous in the extreme for the Southern Poverty Law Center (SPLC) to have denounced this organization as a “hate group,” simply because it strongly disagrees with its substantive positions. Ms. Waggoner wrote a powerful op-ed in the Wall Street Journal on April 3, 2019, in which she took the SPLC to task for its abusive practices, and noted, sorrowfully, that one of its cofounders, its president, and its legal director have all departed under a cloud of scandal about their own forms of unspecified workplace misconduct.<sup>40</sup> Calling someone a hate group, as did the SPLC, is a per se form of defamation that should never be attached to any group that is in good standing before the bar, won the particular case, and has enjoyed success in arguing major cases before the Supreme Court. This condemnation speaks ill of the condemner, not the condemned.

Indeed, the SPLC’s characterization of the ADF is especially odd given that Justice Kennedy, writing the majority opinion for a bitterly divided court in *Masterpiece Cakeshop*, refused to announce any clear principles to determine when a religious person, on grounds of conscience, is allowed to refuse service to a gay couple who requests that they bake a cake celebrating their same-sex marriage. Kennedy’s narrow grounds for the decision was that the Colorado Civil Rights Commission had acted with evident malice against Philips, which meant that its current set of sanctions could not stand.<sup>41</sup>

*Masterpiece* offered no clear instructions on how that dispute should be handled on remand, but the outcome makes all too clear that the Colorado Civil Rights Commission betrayed its role through its own abusive conduct toward Philips; conduct that did not meet the minimum standards of professional decency. That point was highlighted by its injudicious remark that claims of religious liberty are all too often a cloak for such events as the Holocaust.<sup>42</sup> Sadly, that animus, often concealed, is one of the reasons why these cases continue, including the recent decision in *303 Creative LLC v. Elenis*,<sup>43</sup> which raised similar issues as those in *Masterpiece*, with the main issue in *303 Creative* being the validity of a Colorado statute that makes it illegal to publish any electronic or printed communication that indicates that a business’s full and equal provision of services will be denied on the grounds of sexual orientation, while providing

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40. Kristin Waggoner, *We Were Smeared by the SPLC*, WALL ST. J. (Apr. 3, 2019), <https://www.wsj.com/articles/we-were-smeared-by-the-splc-11554332764> [<https://perma.cc/3H7W-EACY>]. Those consequences include harassment and physical assaults, and property damage deliberately caused by those who share SPLC’s beliefs.

41. *Masterpiece Cakeshop, Ltd. V. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

42. “Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use—to use their religion to hurt others.” *Id.* at 1729.

43. *303 Creative L.L.C. v. Elenis*, 405 F. Supp. 3d 907 (D. Colo. 2019).

no exception for narrow notices stating the refusal to provide services for same-sex weddings.<sup>44</sup>

The issues in *303 Creative* are parallel to those in *Masterpiece*. Indeed, I coauthored a brief on behalf of *Masterpiece* in its case, and have signed on to a similar one in *303 Creative*. In both cases, it is always a mistake to use state coercion in a competitive market to violate the religious beliefs of others, given the wide range of choices that are open to those people who are denied service by any individual firm.<sup>45</sup> My own position, which I have consistently defended for thirty years,<sup>46</sup> is that wholly apart from any special religious claim, the anti-discrimination laws are both misguided and unconstitutional when other business or occupational choices are available. That issue is not presented in these cases, as the business owners' consistent behavior demonstrates that they neither seek nor want a blanket exception to providing any services to a class of persons. Both *Masterpiece* and *303 Creative* provide services to gay couples, with very narrow exceptions for specialty works involving same-sex weddings.

Nonetheless, as a matter of principle, it is critical to address the broader claim that there is no need to carve out any special exceptions for religious liberty, which to many people always raises the whiff of an Establishment Clause violation.<sup>47</sup> No one firm constitutes the market, and the proper question is not whether every person can gain service from every provider, but whether some provider or group of providers will come forward to service those individuals whom any given proprietor may turn down. The huge number of firms in all states that specialize in handling same-sex weddings is ample testimony to the power of that position. These firms emerge in all states, whether or not they have any prohibition against discrimination on grounds of sexual orientation, which proves that even without any antidiscrimination law there are ample resources available to satisfy demands from a large, informed, and active market segment. This is but one manifestation of the bedrock proposition that an active market will leave no significant element of demand untouched. Indeed, I am not aware of even a single instance anywhere in which a same-sex couple has been unable to obtain their needed services from the extensive list of firms anxious for their business.

The clear implication of this position is that in the absence of any kind of market failure, there is no need whatsoever for government intervention in order to make sure that every firm serves every segment of the market. What matters is the number of choices available to consumers, and if that number is large, the number of unavailable choices is of no social consequence at all. This argument for market sorting is even stronger when the particular vendor has strong religious beliefs that back up his or her decision, and is willing—as is the case in all these disputes—consistent with both their own religious convictions and the civil rights laws to provide a wide array of services to gay and lesbian individuals.

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44. Colo. Rev. Stat. § 24-34-601(2)(a) (2014).

45. Brief of Amici Curiae Law and Economics Scholars in Support of Petitioners at 22–23, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4118065.

46. Epstein, *supra* note 13.

47. For my early defense of this position, see Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 388–96 (1990).

Perhaps groups like Yale's OutLaws are correct in their substantive views, but if they are, then they should be prepared to debate their opponents in public and not resort to denunciation or strongarm tactics in order to force its rivals off the field. They will have a hard time persuading a neutral observer that they should be allowed to maintain their dominant position by continuing to censor all dissenters.

There is yet another way to look at this situation, which is to consider the old standard for equitable jurisdiction over the balance of hardships. In *Masterpiece*, the gay couple, Charlie Craig and David Mullins, sought to obtain a wedding cake from Jack Phillips. They were turned down, receiving from Phillips suggestions as to where else they could purchase the cake. In fact, they found nearby another vendor who met their needs, a vendor they selected from one of the many bakers that served gay couples.<sup>48</sup> But what happened to Jack Phillips? Craig and Mullins referred the case to the Colorado Civil Rights Commission, which continued with its investigation of the case even though Craig and Mullins were no longer a part of it, having obtained their needed services elsewhere. Their actual costs of walking down the block were close to zero. So then why make a huge production by turning over the case to a result-oriented body stacked with advocates from one side only? Such Commissions are to this day the worst type of tribunals to deal with these issues, given that they are specialized bodies already pre-committed to a given point of view. The evident bias of the specific panel in question should give rise to serious due process concerns. At this point, Phillips was subjected to heavy legal expenses, emotional trauma and public abuse, including threats of violence. The notion that everyone has to knuckle under to a given social conception of "good" is a dangerous form of state monopoly control where none is needed. Indeed, whenever there is a social consensus that certain groups should receive particular kinds of services, there is all the *more* reason not to force the lone dissenters into the dominant mold.

In response, it is often asked what should be done if the baker in fact possessed some form of monopoly power. That suggestion is a nonstarter with 99.99% of the population, and in general it is always dangerous business to make social policy that starts with the extreme outlier only to apply it awkwardly to conventional cases. The apparent logic for this result is the correct major premise that when the duties of a common carrier attach, all customers are then entitled to service at fair and reasonable rates. It is of course possible to imagine cases in which there is only one baker for the entire northern territory of Alaska in some isolated community. But those outlandish cases are a dot on the larger landscape. And even in these cases, the wayward baker is not a common carrier. A common carrier is supposed to provide only standardized services—power, electricity, or a seat on a train—cakes that are individual creations do not fall into that group. Indeed, if someone did not have any baker nearby, it is always possible to bake

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48. See also Elizabeth Kiefer, *This Married Couple Just Won A Major Victory for LGBT Rights*, REFINERY29 (Aug. 14, 2015, 12:30 PM), <https://www.refinery29.com/en-us/2015/08/92392/colorado-lgbt-rights-victory-masterpiece-cakeshop> [<https://perma.cc/L2SV-5ZSJ>] ("After their story spread across the Internet, the couple was inundated with cake offers—even from China," Craig noted.").

the cake for one's self, rely on a friend or neighbor, or ship it in from a remote location. It stretches the notion of common carrier beyond recognition by thinking that it has the remotest application to the confines of Lakewood, Colorado, the situs of *Masterpiece Cakeshop*.

Clearly, the traditional sources of obligation do not even begin to deal with Jack Phillips, or virtually any of the multitude of the cases of this sort. It is therefore extremely important to be careful about the use of state force in those settings where such intense feelings are at stake. Recall that in all these cases the antidiscrimination laws do not impose—nor should they impose—a universal obligation of service on all persons at all times. It is therefore pertinent to note that all of the statutes dealing with sexual orientation do not impose any obligation on gay parties to serve evangelical Christians at their cakeshops, even though the opposite obligation incumbent on evangelicals remains in full force. In these cases, the standard common law rule applies so that parties denied service are left to their own resources no matter how offended or inconvenienced they may be made by the denial of service. Their want of any religious commitment is utterly beside the point. It should therefore be a point of real concern to have selective interventions under the civil rights laws, where the evangelicals have to serve the gay rights activists but not the other way around. The overall situation should be one where the basic common law rules trump the misguided extension of the antidiscrimination laws.

The decision in *Masterpiece* illustrates a rising tension that dates back to the misguided decision of Justice Antonin Scalia in *Employment Division of Oregon v. Smith*,<sup>49</sup> where he held, in a way that set the stage for *Masterpiece Cakeshop*, that the touchstone for dealing with religious liberty cases was the neutrality principle, whereby members of a religious group could not be subject to punishments that were not imposed upon their nonreligious counterparts. That principle is surely part of any sound approach to religious liberties, but it is hardly sufficient unto the day, for there are many cases in which the equal application of the same rule will have far heavier impacts on the members of religious groups. The simple example is a requirement that all persons in military service be required to eat pork products as part of their daily rations, even if they have religious objections to the practice. The well-established practice prior to *Smith* was to allow for accommodations for religious liberties so long as the collateral burdens of that accommodation were restricted. That test would surely require that adjustments in diet be made for soldiers, except perhaps in cases of abject emergency. But it would not require the government to respect the wishes of a religious person that wanted to light candles in a trench at night that could be used to guide enemy fire.

To reach his dubious conclusion, Justice Scalia had to dispatch two earlier decisions, *Sherbert v. Verner*,<sup>50</sup> and *Wisconsin v. Yoder*,<sup>51</sup> both of which demonstrated the Supreme Court's willingness to accept such accommodations. He did

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49. 494 U.S. 872 (1990).

50. 374 U.S. 398 (1963).

51. 406 U.S. 205 (1972).

so on the grounds that those cases involved some amalgam of religious and speech liberties, even though the spirit of accommodation should reach each liberty separately. *Yoder* allowed the Amish the freedom to take their children out of public schools notwithstanding the state interest in the education of all young. *Sherbert* held that a Seventh-day Adventist was entitled to an accommodation under South Carolina's employment law because of the faith's religious prohibition against work on the Sabbath. Both of these decisions involved weighty interests on both sides, which sadly was not the case in *Smith*. It was therefore no surprise that even as of 1990, *Smith* proved unwholesome to both religious offenders and civil libertarians, necessitating the introduction of the Religious Freedom Restoration Act,<sup>52</sup> which sought to restore, imperfectly, the earlier balance by explicitly treating *Sherbert* and *Yoder* as the benchmarks against which these issues should be measured. But a generation later, the consensus about the law was shattered when the American Civil Liberties Union announced in 2015 that it could no longer support the statute because, in its view, the law had become "a sword to discriminate against women, gay and transgender people and others."<sup>53</sup> Yet not a syllable was said about the interests on the other side, which again marks the lapse into totalitarian instincts that bore full fruit with the treatment of Jack Phillips's Masterpiece Cakeshop by the Colorado Civil Rights Commission.

The immediate source of the ACLU's wrath was the deeply divided Supreme Court decision in *Burwell v. Hobby Lobby Stores*.<sup>54</sup> The bottom line in the case was that the conservative majority of the Supreme Court resisted the demands that a universal guarantee of contraceptive coverage be imposed on employers whose genuine religious beliefs refused to accept such imposition. Quite simply, the argument was that the state has many ways to supply the coverage out of general revenues without forcing reluctant parties to provide healthcare they found objectionable as a matter of personal faith. The tragedy in a case like *Hobby Lobby* is the utter want of any accommodation and the willingness to treat principled religious decisions as naked acts of retribution. The ingenious nature of these cases was illustrated by the extent to which the Obama Administration was prepared to go in dealing with the contraceptive mandate under the Affordable Care Act, where in *Zubik v. Burwell*,<sup>55</sup> it was prepared to allow religious institutions to escape the mandate only if they authorized the government to bring suit against their insurers who in turn would be prevented from raising insurance premiums against the religious groups. But under standard religious principles, the authorization of an immoral act is a but-for cause of complicity. Sadly, the government did not appear to recognize that the simple solution in these cases

52. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb).

53. Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5\\_story.html](https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html) [https://perma.cc/XRJ4-CBFX].

54. 573 U.S. 682 (2014).

55. 136 S. Ct. 1557 (2016) (per curiam).

was to provide for the necessary care out of the government's general revenues. It is only the desire to hurt religious institutions, not to benefit women in search of contraceptive devices, that explains the government's position. *Masterpiece Cake* is only the latest, but not the last, of the authoritarian threats to religious liberties.

#### OBERLIN COLLEGE AND DEFAMATION

The incident at Yale with which I opened this Article took place nearly two years ago, but unfortunately, the Civil Rights Juggernaut continues to push hard to drive its opponents from the public debate. Shortly after I gave this lecture, an incident at Oberlin College showed how fragile the principles of civic peace can be. Gibson's Bakery is a long-time local establishment near the Oberlin College campus, which had for over one hundred years enjoyed a close working relationship with the College, its faculty and its students. But on the evening of November 9, 2016, one day after Donald Trump won the 2016 presidential election, a black student attempted to steal a bottle of wine from Gibson's. When the owner, Allyn Gibson, sought to restrain the thief, he was left flat on his back, having been attacked by the thief and his two female companions.<sup>56</sup> No one denies that the incident took place just as I have described it, as all three of the offending parties signed statements to that effect.

Yet the huge racial turmoil and demonstrations that followed treated Gibson's as though it were at fault, and condemned Gibson's in no uncertain terms as a "RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION."<sup>57</sup> Oberlin's Vice President for Communications, Ben Jones, chimed in: "F—em . . . they've made their own bed now."<sup>58</sup> Oberlin students posted these claims of racial profiling on campus buildings, together with a resolution urging Oberlin President Marvin Krislov (who has since resigned) and Dean Meredith Raimondo to "condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery."<sup>59</sup> Everyone concedes that racist practices deserve strong condemnation. It is for just that reason that false charges of racism, which are intended to deflect attention from the wrongful conduct of one's friends, are so odious.

As the charges remained unabated, Gibson and Gibson's family resorted to a defamation action to recover their loss of trade and custom.<sup>60</sup> The lawsuit itself marks a deep irony in the transformation of race relationships from an earlier

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56. OBERLIN POLICE REPORT, INCIDENT 16-00621, <https://legalinsurrection.com/wp-content/uploads/2016/11/Oberlin-Police-Dept-Incident-Report-Gibsons-Bakery.pdf> [<https://perma.cc/8YWS-KB4B>].

57. Isaac Stanley-Becker, *Protests at Oberlin Labeled a Bakery Racist. Now, the College Has Been Ordered to Pay \$11 Million for Libel*, WASH. POST (June 10, 2019, 5:58 AM), <https://www.washingtonpost.com/nation/2019/06/10/oberlin-college-gibsons-bakery-libel-million-racist/> [<https://perma.cc/X9TV-W5N7>].

58. Michelle Malkin, *Oberlin's Racial Hucksterism Comes Home to Roost*, CREATORS SYNDICATE (June 19, 2019), <https://www.creators.com/read/michelle-malkin/06/19/oberlins-racial-hucksterism-comes-home-to-roost> [<https://perma.cc/Q9K9-SG5U>].

59. Abraham Socher, *O Oberlin, My Oberlin*, COMMENT. MAG. (Sept. 2019), <https://www.commentarymagazine.com/articles/abraham-socher/o-oberlin-my-oberlin/> [<https://perma.cc/2TZZ-4RDY>].

60. Stanley-Becker, *supra* note 57.

generation, in which a segregationist government used defamation actions to maintain its own power. By far the most famous defamation lawsuit of the twentieth century is *New York Times v. Sullivan*,<sup>61</sup> which arose out of a famous advertisement published in the *New York Times*, entitled “Heed their Rising Voices,” which outlined a set of government abuses practiced by Montgomery County, Alabama in response to the civil rights protests of the day. The advertisement documented the violent responses to civil rights protests throughout the south, including Orangeburg, South Carolina, Montgomery County, and elsewhere. L. B. Sullivan, who was an elected Commissioner of Montgomery County, brought suit against the *New York Times* on the grounds that the advertisement contained certain error of facts on minor points—the police did not ring the campus, they were located nearby—and so on. Even though Sullivan was not mentioned by name in the advertisement, he was awarded \$500,000 (in 1960 dollars) for defamation, without the showing of any actual injury. The Alabama Supreme Court affirmed the judgment in an opinion that inspired no confidence.<sup>62</sup> The United States Supreme Court could not intervene on state court grounds, but it could invoke the First Amendment to set limits on the ability to convert innocent speech into defamation, which is exactly what it did. The Court was surely right in overturning the Alabama judgment, even if the grounds on which the decision rested were not ideal.<sup>63</sup> The risk of ruination through litigation was far too great.

But note the obvious difference in the mission in the two generations of defamation cases. The 1964 suit was designed to make sure that the entrenched powers heard the voices of others. The pattern of behavior of the students at Oberlin College was designed to suppress and intimidate. The jury responded with a huge verdict in favor of Gibson’s of some \$44 million, which had to be pared back to comply with statutory limitations.<sup>64</sup> But the entire episode shows just how profoundly the balance of power has shifted in these cases, as even some sober voices in the Oberlin Community recognized.<sup>65</sup> The power lies with activist groups on college campuses that do not reflect more general social attitudes. Yet the common trope today is to assume that groups that have dominance in practice are oppressed in theory so that their actions can always be justified in the name of fighting against powerful, if hidden, forms of institutional racism. It is high time that no group should be able to feign weakness in order to gain favor,

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61. 376 U.S. 254 (1964).

62. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

63. For my views, see Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

64. Assoc. Press, *Judge Slashes Gibson’s Bakery \$44 Million Settlement*, CLEVELAND.COM (June 28, 2019), <https://www.cleveland.com/news/2019/06/judge-slashes-gibsons-bakery-44-million-settlement.html> [<https://perma.cc/RSP2-S8AX>].

65. David Marwil, *College’s Appeal in Gibson’s Case Misguided, Avoidable*, OBERLIN REV. (Nov. 8, 2019), <https://oberlinreview.org/19829/opinions/colleges-appeal-in-gibsons-case-misguided-avoidable/> [<https://perma.cc/VH79-4L3Z>]. I urge the College to refrain from appealing the Gibson’s case. Instead, Oberlin must turn inward and reflect on what led to this unfortunate state of affairs in the first place. The behavior of the College, by which I mean students and administrators alike, revolves around the false premise that Gibson’s was a racist institution. The College’s actions towards Gibson’s were arrogant and mean-spirited throughout.

either through the press or the courts. The civil rights laws do not exempt any group from the basic norms of civility.

#### GOOGLE AND STEREOTYPES

One constant theme of the modern civil rights movement is that we should be aware of the dangers of stereotypes, a word that has an unfailingly negative connotation in the modern literature on discrimination. A charge of stereotyping can be too easily used to condemn anyone who wants to use an accurate statistical generalization about differences between groups, differences which can be derived from the accumulated differences in individual traits. There is little doubt that there is some degree of natural variation in traits among individuals within any given group, and hence, it must be possible for there to be differences in the distribution of these traits across groups. The larger question is how to draw inferences from individual differences to differences between groups.

The simplest way in which to do this is to array all members of the group from top to bottom, say by height. To make the example easier, without affecting the soundness of the analysis, assume that there are two groups with the same number of individuals. Now arrange each group by declining height and then compare. The group differences are accurate if there is a one-to-one correspondence such that the  $n$ -th person in the first group is always taller (or shorter) than the  $n$ -th person in the other. It then becomes correct to say that members of the first group are, as a rule, taller than those in the second group. Note that this cautious statement is consistent with the observation that some individuals in the second group are taller than those in the first group. Note too it is possible to further refine any inquiry into group differences so that it does not only look to rank order, but also seeks to estimate the magnitude of the shifts—to make in other words, not only ordinal, but also cardinal comparisons. Thus it is also possible to attach numbers for the height of each person, which then makes it possible to make statements of means and variances, which then gives some accurate measure of the size of those differences.

By using this method, it is possible to construct distributions with means and variances for both groups in order to show the relationship between the groups. Both the mean and the variance matter. What cannot be done is to infer from any standard distribution that all members of the first group are taller than those of the second. To make that mistake is to assume that the variance between the groups is zero. To be sure, if there is only one bit of information available, say membership in first compared to the second group, then the rational decision maker looking for a taller person will *always* choose someone in the first group, but in so doing will consciously make huge numbers of mistakes that can be avoided by having *more information* about the complete distributional patterns of both groups.

Once that information is provided, it is possible to predict the decisions as to what persons will be selected from each group. At this point, it is useful to

note that the two distributions create a kind of tournament,<sup>66</sup> and it is instructive to see how a market that cares only about the relevant trade-offs between candidates work when successive rounds of promotions are made, so that the winners of the first tournament advance into the second round and so on. The result will always be that if the first group has a higher mean and a greater variance, it will have, no matter where the cut-off point is set, a higher fraction of individuals in the second group than it did in the first, and that this winnowing process will continue, until the bitter end where only members from the final group are chosen. This approach applies to all sorts of cognitive or physical skills, in all walks of life, including athletics and academics.<sup>67</sup> These performance standards are obviously more complex than a simple height measure, but in order to make *any* decision they must all be combined into a single index, which in turn requires some weight be attached to each relevant variable. There is nothing about a statistical analysis that weds the decision makers in the second round to follow the numbers alone. They can make whatever adjustments they want. But what they cannot do is to alter the results of the data and hold constant the quality of the pool over time. That trade-off cannot be escaped. It is a social decision, not a technical one, of whether to make these adjustments, and if so, to what degree.

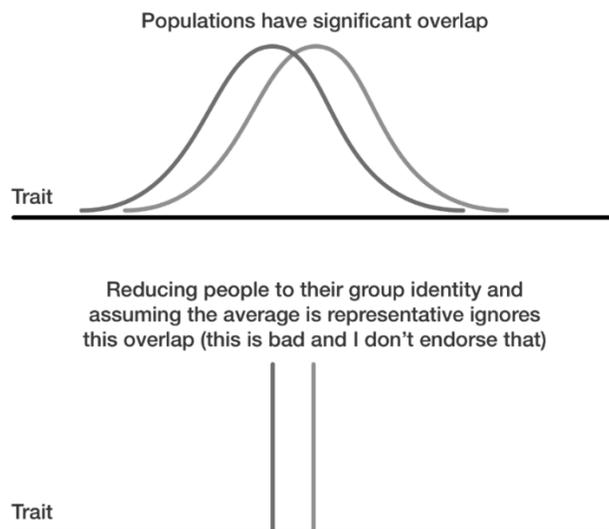
This kind of statistical discussion is fraught with social anxieties whenever matters turn to race or sex, but it becomes a dangerous state of affairs when true information is dismissed because the message is unpalatable to the dominant social groups. In this regard, it is illustrative to mention the response at Google by its employees when one of its mid-level employees, James Damore, posted the essay *Google's Ideological Echo Chamber*,<sup>68</sup> which made just these points in a memo that contained this simple but instructive pair of graphs:

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66. See Edward P. Lazear & Sherwin Rosen, *Rank-Order Contracts as Optimal Labor Tournaments*, 89 J. POL. ECON. 841 (1981).

67. For a discussion of this issue on connection with aptitudes and skills in areas as diverse as baseball, track and chess, see DAVID EPSTEIN, *THE SPORTS GENE: INSIDE THE SCIENCE OF EXTRAORDINARY ATHLETIC PERFORMANCE* (2014).

68. JAMES DAMORE, *GOOGLE'S IDEOLOGICAL ECHO CHAMBER: HOW BIAS CLOUDS OUR THINKING ABOUT DIVERSITY AND INCLUSION* (2017), <https://drive.google.com/viewerng/viewer?url=https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf> [<https://perma.cc/U8EW-SPM3>].



The bottom graph illustrates a stereotype because it makes it appear that every member of the green group is superior to every member of the blue group. As noted, that practice will be followed in those cases where there is no information about individual cases, which in the aggregate will yield the more optimal outcome. The top curve is not a stereotype at all, but an accurate and complete account of the distribution of the relevant attributes of individual members of the two groups. As such, its use should be praised, not condemned even by Sundar Pichai, Google's CEO, who decided to fire Damore for "advancing harmful gender stereotypes in our workplace." According to Pichai, "[t]o suggest a group of our colleagues have traits that make them less biologically suited to that work is offensive and not OK."<sup>69</sup> Those last two words are his fashionable way of saying that Damore's conduct was morally reprehensible.

It is hard to exaggerate the level of intellectual confusion that his simple remark embodies. Pichai must know statistics, but he does not ask the question of whether the analysis is true or if the underlying fact pattern is accurate—which are the only questions that matter to any intellectual inquiry. He could, of course, argue, as is surely the case, that other emotional or social factors influence performance, but in a highly technical area these are likely to have less of an impact than they are in business or law where relationship skills are also likely to matter. But these critical social skills are not likely to bridge any large technical gap. It is also important to note that the observed differences, even if validated, do not provide us with any explanation as to their source, which could stem from an uncertain mixture of biological and social factors, especially those influencing

69. Sundar Pichai, *Note to Employees from CEO Sundar Pichai*, GOOGLE KEYWORD (Aug. 8, 2017), <https://www.blog.google/outreach-initiatives/diversity/note-employees-ceo-sundar-pichai/> [<https://perma.cc/9T5Z-BQGC>].

development at early ages.<sup>70</sup> For these purposes, however, the question is not the origin of the differences, but instead their predictive effect on performance levels. There is a large body of social science literature that concludes over large portions of the distribution that observed differences between the sexes are of little or no importance.<sup>71</sup> The absolute differences are often small, and other factors tend to influence heavily the success or failure of individuals.

The data that are relevant to the Google experience and that of other top tech companies, however, do not lie at the middle of the distribution, but at its top tail. A powerful 2016 study performed by the Duke University Talent Identification Program provides useful insight.<sup>72</sup> This study analyzed 320,000 American students in the seventh-grade, each of whom had scored in the top 5% on an initial standardized test. Once selected, the students were then given an “above-level test,” either the SAT, ACT or EXPLORE standardized exam. Aggregating the results from the 2011–2015 administrations of the exams, the study found that relating to mathematical performance, males were between two to three times more likely than women to score on the right tail of the distribution, here defined as 700+ on the SAT Math section and 24+ on the ACT Math section. This is a notable improvement, as only three decades prior, the ratio was as high as thirteen-to-one in favor of men. Conversely, however, the same data set revealed that relating to verbal performance, women were approximately 1.5 times more likely than men to score on the right tail of the distribution, here defined as 700+ on the SAT Verbal section and 32+ on the ACT English section, a finding that was durable across the previous three decades. The study concludes by noting that “large performance differences at early ages can help create large representation gaps in various domains of study in postsecondary school as well as occupational choice.”<sup>73</sup>

Clearly, these data need to be interpreted with caution. There is likely to be some correlation between the top examinations and performance levels. But it is also possible that the SATs are too weak a screen to sort out who can do the highest-level of quantitative work. It is not necessary to resolve all these questions here, but it is appropriate to note that unless and until issues are sorted out, it would be a mistake to attribute all the observed differences to some explicit or latent discrimination. It is also important to note that the differences in performance are surely not dependent exclusively on “math” or “verbal” abilities defined as above, but can turn on matters of attitude as well as aptitude, which in turns leaves open the troublesome question of whether a strong aptitude is one of the determinants for a favorable attitude. But each of these caveats do not

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70. James J. Heckman et al., *The Rate of Return to the High Scope Perry Preschool Program*, 94 J. PUB. ECON. 114, 115–16 (2010) (estimating a social rate of return of 7% to 10% for each dollar invested in the education of a child between 3 and 5 years of age in high quality programs).

71. See, e.g., N.J. Mackintosh, *Sex Differences and IQ*, 28 J. BIOSOCIAL SCI. 559, 560 (1996); Johannes Rojahn & Jack A. Naglieri, *Developmental Gender Differences on the Naglieri Nonverbal Ability Test in a Nationally Normed Sample of 5–17 Year Olds*, 34 INTELLIGENCE 253, 253 (2006) (“The NNAT [Naglieri Nonverbal Ability Test] did not reveal meaningful gender differences at any stage between the ages of 6 and 17 years.”).

72. Matthew C. Makel et al., *Sex Differences in the Right Tail of Cognitive Abilities: An Update and Cross Cultural Extension*, 59 INTELLIGENCE 8 (2016).

73. *Id.* at 14.

falsify the results. They only put them in context. So at the very least, these data, and others like them, tend to undercut any claim that the differential performance levels at Google and other firms are based solely on discrimination. Indeed, given the strong commitment to diversity and inclusion in companies like Google, it is a real stretch to attribute the uneven representation of men and women in the company to some form of implicit bias, given that their explicit preferences cut manifestly in the opposite direction. The assertion that all observed differences in occupational outcomes are merely the result of stereotypes is simply unsupported by the available data.

Moreover, any erroneous diagnosis of differences in outcomes in turn leads to a dangerous cure, which is the implementation of sex-specific remediation programs, which predictably have only limited value. This is because at the high levels of performance demanded, additional inputs of training yield only small gains to those who are not already in the tiny top group. So Damore was correct to note that the millions spent on diversity programs to introduce explicit sex classifications into the Google workplace also results in the systematic denial of certain opportunities to White and Asian men. It is not possible to artificially restrict the consequences of using false premises to make institutional judgments, such that internal relationships on race and gender become ever more strained—at least until dissenters like Damore are silenced, and in his case, forced out of the firm entirely. It is of course possible to try to address the differences between sexes in an organization through educational outreach programs, which Google does on matters just like these by supporting STEM and technology programs for girls.<sup>74</sup> But Google has no market power in the educational space, and boys who have these interests will find, perhaps at some higher cost, the needed opportunity to hone their own skills. The net effect, therefore, is that Google's policies do a great disservice to the cause of good human relations, for whenever false charges of discrimination are made either by or against the firm, it makes it all the harder to conduct dealings with presumptions of good faith.

#### ACADEMIC LOYALTY TESTS

The last topic that I wish to address concerns an issue that cuts closest to my field, which is university education. There has been, without question, a profound and welcome change in the composition of students and faculty since I first entered Columbia College in the fall of 1960. Patterns of immigration into the United States, the greater achievement of women in multiple professional areas, and an increased recognition that success in the marketplace requires global firms to engage with all segments of the marketplace have in tandem changed the composition of the workforce, which is now able to draw on a larger, deeper, and more diverse talent pool than ever before. The normal pressure of market forces has the same desirable consequences in this setting as in any other

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74. Richard A. Epstein, *Innovation and Inequality: The Separability Thesis*, 39 HARV. J.L. & PUB. POL. 1, 18–19 (2016); see also GOOGLE'S WOMEN TECHMAKERS, <https://www.womentechmakers.com/> (last visited Aug. 11, 2020).

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labor market. The university that attaches the highest value to any given prospective faculty member will, as a first approximation, create opportunities for academic excellence and advancement, even if other potential institutions disagree with the assessment of a particular faculty member's qualifications. Wholly apart from any application of the civil rights law, a vast number of incremental changes by multiple institutions will alter forever the face of all institutions of higher learning.

So the question then arises, what can any program of diversity and inclusion add to this development? If such a program warned all people, regardless of race and gender, to be aware of their implicit biases, it could serve as a useful cautionary function that could at the margins improve the overall selection process. But the current situation is decidedly the opposite, given the selective claims of implicit bias as being applicable to some groups, not all. Diversity and inclusion are now a bedrock value inside universities that displaces all other considerations, including those of excellence in intellect and teaching. The paean to diversity was evident in *Students for Fair Admissions v. President and Fellows of Harvard College*,<sup>75</sup> where District Court Judge Allison Burroughs rebuffed a challenge by Asian students who claimed that they were, relative to their qualifications, underrepresented in the College. The outcome of the case was telegraphed in its opening gambit:

It is somewhat axiomatic at this point that diversity of all sorts, including racial diversity, is an important aspect of education. *See Brown v. Board of Education*, 347 U.S. 483 (1954). The evidence at trial was clear that a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community.<sup>76</sup>

The legal citation to *Brown* indicates that the Judge Burroughs thought that *Brown*,<sup>77</sup> which ended formal segregation, also championed diversity, even though it does not include so much as a syllable about either diversity or affirmative action, which only comes before the Supreme Court a generation later in *United Steelworkers of America v. Weber*.<sup>78</sup> *Weber* in turn offers a comprehensive defense of affirmative action, but contains not a single word about either diversity or inclusion, either separately or in tandem. It is an ill harbinger for an opinion to write as if an attack on institutional segregation necessarily clinches the case for modern versions of diversity and inclusion.

However recent its origins, it is clear that diversity has become the rallying cry for the modern civil rights movement. Thus, the "them" announced in *Students for Fair Admissions (SSFA)* resonates with the dominant institutional take on the same questions:

The diversity of the people of California has been the source of innovative ideas and creative accomplishments throughout the state's history into the

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75. 397 F. Supp. 3d 126 (D. Mass. 2019).

76. *Id.* at 133.

77. 347 U.S. 483 (1954).

78. 443 U.S. 193 (1979).

present. Diversity—a defining feature of California’s past, present, and future—refers to the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance. Such differences include race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, and geographic region, and more.<sup>79</sup>

Exactly how diversity achieves all of these goals is left unstated both in the *SFFA* decision and the California pronouncement, but the one form of diversity that is neither mentioned nor prized is that of diversity of intellectual perspectives on campus, which is essential to create an environment where all ideas are always at risk to rigorous counterargument. To make sure that its explicit preferences for race and gender considerations pass constitutional muster, the California statement, like *SFFA*, counts diversity as a “compelling state interest,” which thereby renders it largely immune from attack from those who continue to advocate for a color- and sex-blind position in referring to the protections offered to “any individual,” without regard to their personal characteristics.<sup>80</sup> The California statement then shows how it is possible to have it all: “Diversity should also be integral to the University’s achievement of excellence. Diversity can enhance the ability of the University to accomplish its academic mission.”<sup>81</sup>

These assertions of a compelling state interest have nothing in common with the traditional test which holds that any effort to overcome an explicit constitutional or statutory guarantee requires that the state show that there is an important ultimate goal that must be implemented by narrowly tailored or least restrictive means.<sup>82</sup> If the basic prohibition is one against government discrimination, the service of discrimination cannot be the desired end. It has to be some educational form of excellence, which is better achieved without the diversity screen than with it, so that the constant iteration of the same theme should in this context prohibit the finding of a compelling state interest.

It is the mark of the starkly incomplete analysis in both the District Court opinion and the California statement to see a total endorsement of a given position on any issue when there is no attempt to examine either the objections to or limitations on the application and extent of the principle. Yet that is exactly what has happened here. No trade-offs are recognized under either the *SFFA* or the University of California regime. It is stated that any effort to advance diversity, as defined, is posited to advance the academic excellence of the institution. At this point then, why the fuss, if the traditional principles of selection will lead a university to the same position of academic excellence? But the short answer is

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79. *Policies & Guidelines*, U. CAL. DIVERSITY, <https://diversity.universityofcalifornia.edu/policies-guidelines/> [<https://perma.cc/WYSS-6LPT>] (last visited Aug. 11, 2020).

80. 42 U.S.C. § 2000e-2 (2018):

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or . . .

81. *Policies & Guidelines*, *supra* note 79.

82. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

that it will not. We know that in dealing with the admissions of students into universities, the differences are huge by ethnic group. Consider this table:

TABLE 1: COMBINED SAT SCORE, AND CHANGES SINCE 2006, BY RACE/ETHNICITY<sup>83</sup>

Group	Combined Score 2015	Change Since 2006
American Indian	1423	-27
Asian-American	1654	+54
Black	1277	-14
Mexican-American	1343	-28
Puerto Rican	1347	-16
Other Hispanic	1345	-26
White	1576	-6

These numbers state that Black scores are 299 points below White scores and 377 points below Asian American scores. No matter how this raw data is sliced, the gaps are enormous and they speak to major differences in the level of preparation for academic work in any and all areas. There is no question that the use of these scores plays a strong role in deciding admissions for students within any given category, so that whether one deals with White, Asian American or Black applicants, the within-group rankings are critical. Those gaps are typically much smaller than the inter-group differences that are observed, and yet the tools that are used in the within-race group classification are largely, if not wholly, ignored in the across-group rankings. It is of course defensible to say as a matter of first principle that each private institution is entitled to pick whomever it wants for whatever reason it wants. But that argument does not survive in a world in which Title VI imposes an explicit prohibition against discrimination based on race.<sup>84</sup> But for these purposes, the hard question is how can anyone argue that there is no compromise in academic quality in the face of vast differences in pre-university performance? And that difference is, of course, reflected in graduation rates, as the following table from Inside Higher ED indicates:<sup>85</sup>

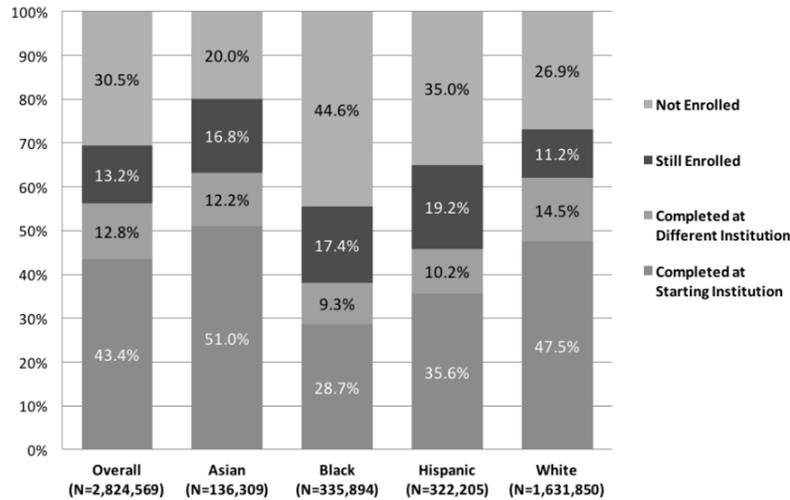
83. Scott Jaschik, *The Numbers and the Arguments on Asian Admissions*, INSIDE HIGHER ED. (Aug. 7, 2017), <https://www.insidehighered.com/admissions/article/2017/08/07/look-data-and-arguments-about-asian-americans-and-admissions-elite> [https://perma.cc/Y5GF-AJKQ].

84. 42 U.S.C. § 2000d (2018). Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

85. Emily Tate, *Graduation Rates and Race*, INSIDE HIGHER ED. (Apr. 26, 2017), <https://www.insidehighered.com/news/2017/04/26/college-completion-rates-vary-race-and-ethnicity-report-finds> [https://perma.cc/CGP2-95TT].

TABLE 2

Figure 6. Six-Year Outcomes by Race and Ethnicity (N=2,824,569)\*



The differences are also evident in the percentage of students that go into STEM (Science, Technology, Engineering, Math). Those percentages are 30% for Asian, 10% for Black, 12% for Hispanic, and 14% for White.<sup>86</sup>

The clear question that arises from these data is why have any confidence in an admissions policy that produces these disappointing results? In the conventional articulation of the compelling state interest test, the state must show a strong objective that is reached by the narrowest possible means. It is hard to see how academic excellence is advanced by any program that produces lower graduation rates and leads to smaller participation in the sciences. And it is equally hard to see why these tactics are necessary when other less draconian means can be used to improve awareness of some of the evident disparities in performance. There is just nothing in these data that supports the contention that the use of racial preferences improves any traditional measure of academic excellence.

What is critical for this purpose is the way in which the weaker cohort of minority graduates ties into the selection of students for graduate education. It should be evident, especially in the STEM subjects, that it will take very steep technical discounts to hire minority workers in substantially higher numbers. And differences at the entry level, as is the case with firms, will become only more exaggerated once promotions kick in. At this point, the call for diversity no longer involves claims of superior patterns of social interaction. It becomes a narrative in which the source of the current disparities is said to be rooted, as

86. Peter L. Hinrichs. *Racial and Ethnic Differences in College Major Choice*, FED. RES. BANK CLEV. (Mar. 31, 2015), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-trends/2015-economic-trends/et-20150331-racial-and-ethnic-differences-in-college-major-choice.aspx> [<https://perma.cc/HTA8-HWNQ>].

noted earlier, in an institutionalized racism that requires strong action to correct—whether or not it advances academic excellence.

It is therefore no surprise that the next stage in this process is to put diversity and inclusion at the center of the hiring process, whereby in the academic setting it is now required that every applicant must give their own account of how they will work in their own career to advance the goals of diversity and inclusion. One consequence of this standard is that any consideration of academic merit is put on the back burner until these concerns are satisfied, which in practice means a heavy concentration of left-of-center faculty members, which is wholly skewed in favor of Democratic and liberal professors who are white and Jewish or nonreligious, and a corresponding reduction in Republican and conservative professors.<sup>87</sup> The skew is enormous: “A study of various university faculties showed that at Cornell the ratio of liberal to conservative faculty members was 166 to 6, at Stanford it was 151 to 17, at UCLA it was 141 to 9, and at the University of Colorado it was 116 to 5.”<sup>88</sup> Professor Stephen Bainbridge, a conservative member of the UCLA faculty, quotes all these materials in a blog-post<sup>89</sup> that makes his application for a merit raise on the grounds that he will add intellectual diversity to the faculty. Professor Bainbridge shouldn’t hold his breath waiting for his raise. Intellectual diversity is the first casualty from the requirements of loyalty oaths to diversity. Thus, the operation of hiring for life sciences at UC Berkeley now starts with a screen that deals solely with diversity and inclusion issues, and only those that pass this test are considered at the next stage of the hiring process. The question here is not one of subtle inference, but of explicit administrative command: “The LSI [Life Science Initiative] Committee conducted a first review and evaluated candidates based solely on contributions to diversity, equity and inclusion. Only candidates that met a high standard in this area were advanced for further review, narrowing the pool down to 214 for serious consideration.”<sup>90</sup> The ranking system has very explicit categories.<sup>91</sup> The basic scale moves from 1 to 5 and makes clear that a low 1–2 ranking is necessarily awarded to people who have had little exposure to diversity, or only

87. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 93, 99 (2016).

88. Patrick M. Garry, *The Next Step in Diversity: Extending the Logic of Grutter v. Bollinger to Faculty Tenure*, 82 DENV. U. L. REV. 1, 23–24 n.140 (2004).

89. Stephen Bainbridge, *I Submit Herewith My “Diversity, Equity, and Inclusion” Statement for my Merit Raise at UCLA*, PROFESSORBAINBRIDGE.COM (Dec. 23, 2019), [https://www.professorbainbridge.com/professorbainbridge.com/2019/12/i-submit-herewith-my-diversity-equity-and-inclusion-statement-for-my-merit-raise-at-uclaw.html?mod=article\\_inline](https://www.professorbainbridge.com/professorbainbridge.com/2019/12/i-submit-herewith-my-diversity-equity-and-inclusion-statement-for-my-merit-raise-at-uclaw.html?mod=article_inline) [<https://perma.cc/U3QD-NJTM>].

90. REBECCA HEALD & MARY WILDERMUTH, INITIATIVE TO ADVANCE FACULTY DIVERSITY, EQUITY AND INCLUSION IN THE LIFE SCIENCE AT UC BERKELEY, YEAR END SUMMARY REPORT: 2018-2019, U. CAL. BERKELEY OFF. FOR FAC. EQUITY & WELFARE, [https://ofew.berkeley.edu/sites/default/files/life\\_sciences\\_initiative\\_year\\_end\\_report\\_summary.pdf](https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf) [<https://perma.cc/YXZ5-8DRT>].

91. RUBRIC TO ASSESS CANDIDATE CONTRIBUTIONS TO DIVERSITY, EQUITY, AND INCLUSION, U. CAL. BERKELEY, [https://ofew.berkeley.edu/sites/default/files/rubric\\_to\\_assess\\_candidate\\_contributions\\_to\\_diversity\\_equity\\_and\\_inclusion.pdf](https://ofew.berkeley.edu/sites/default/files/rubric_to_assess_candidate_contributions_to_diversity_equity_and_inclusion.pdf) [<https://perma.cc/B8XV-KLZX>]. For criticism of the position, see Jerry Coyne, *Life Science Jobs at Berkeley Give Precedence to Candidates’ Diversity and Inclusion Statements*, WHY EVOLUTION IS TRUE (Dec. 31, 2019), <https://whyevolutionistrue.wordpress.com/2019/12/31/life-science-jobs-at-berkeley-with-hiring-giving-precedence-to-diversity-and-inclusion-statements/> [<https://perma.cc/W8Q7-FBCF>].

endorse its goals in general terms, without any detailed knowledge of the social problem and the wealth of information that is used to deal with it. At the opposite pole is a deep commitment to the entire process. Thus the LSI Committee demands: “Clear knowledge of, experience with, and interest in dimensions of diversity that result from different identities, such as ethnic, socioeconomic, racial, gender, sexual orientation, disability, and cultural differences.”<sup>92</sup> That, in turn, leads to a commitment to acquire information about the problem and to talk about it. The section then ends with a political loyalty test, requiring that applicants discuss “diversity, equity, and inclusion as core values that every faculty member should actively contribute to advancing.”<sup>93</sup> And so it was that Berkeley rejected 679 out of 893 applicants, or 76%, solely on diversity grounds.<sup>94</sup> But not only at Berkeley, the implementation of this program has had profound effects on the selection processes at UC Davis as well. Thus it has been reported by Brian Leiter that in “2018-2019 UC Davis ran eight open discipline searches using this methodology.”<sup>95</sup> With all the other searches conducted at UC Davis in 2018-2019 under 10% of the applicant pool were minorities, just about 5% of the finalists and 2.3% of hires. But in the pilot searches nearly a third of the applicants were minorities, over 80% of the finals, and a full 100% of those hired were minorities. The results for female hires was similarly sharp, with 87.5% of those hired through the pilot program being women, compared with 45.5% campus wide.<sup>96</sup> The message is stunningly clear. Either you are with the program or you are out of contention for appointments.

These statements are absolute pre-commitments for moving on in the hiring process, and any skepticism is a fatal disqualification, which means that with each successive appointment, the ideological iteration of the faculty becomes more politically homogenous, thus making it impossible for any skeptic of the system to survive. There is not the slightest willingness to debate these issues, which now have the status of self-anointed truth. Any problems that arise because weaker faculty members are hired, and weaker students are admitted, are glossed over as irrelevant considerations. Diversity and inclusion have become code words for excluding both by race and sex, followed by the complete silencing of any intellectual disagreement. It is a regrettable form of totalitarian behavior, which at no point needs to engage its critics in any form of debate. Make no mistake about it, we have a distinguished state institution eagerly engaging in a vigorous and systematic program that supports explicit viewpoint discrimination,

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92. U. CAL. BERKELEY, *supra* note 91, at 1.

93. *Id.*

94. Coyne, *supra* note 91.

95. *Advancing Faculty Diversity Grant, 2018-2019*, U. CAL. DAVIS ACAD. AFF., <https://academicaffairs.ucdavis.edu/advancing-faculty-diversity-pilot-project> [<https://perma.cc/G238-E96L>] (last updated Dec. 10, 2019) (“Participating schools or colleges include: The College of Agriculture and Environmental Sciences, The College of Biological Sciences, The College of Engineering, The Graduate School of Management, The School of Education, The School of Law, The School of Medicine, The School of Veterinary Medicine.”).

96. Brian Leiter, *Were you Rejected in One of the University of California Job Searches Utilizing the Unlawful “Diversity Statements”?*, LEITER REP. (Jan. 28, 2020, 5:22 PM), <https://leiterreports.typepad.com/blog/2020/01/were-you-rejected-in-one-of-the-university-of-california-job-searches-utilizing-the-unlawful-diversi.html> [<https://perma.cc/ZF4Y-U78H>].

which is then paired with race and gender discrimination, in the selection of its faculty members.

The precedents for these actions are ominous. During the 1950s and 1960s, one of the most contentious issues was the requirement that individuals sign loyalty oaths of the sort that affirmatively stated they are not and never were members of the Communist Party, which resulted in some cases of genuine tragedy, as in the case of George Anastaplo, who was denied admission to the bar when he refused, on principle, to sign a declaration that he was not a member of the Communist Party.<sup>97</sup> In an 8-1 decision, over an impassioned dissent from Justice Hugo Black, the much respected Justice John Marshall Harlan concluded that “in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment.”<sup>98</sup> At the very least it could be argued that some compelling state interest arose from the concern with national security. But those claims seem far-fetched in the extreme, which is why most civil libertarians of that earlier era, including David Baum, would have surely held that given the “uncontroverted evidence as to Anastaplo’s ‘good moral character’”<sup>99</sup> the burden should fall on the state to prove some reason to fear the Communist affiliation in light of his general record of excellence. The case made Anastaplo a genuine casualty of the excesses of the anti-Communist sentiments of the time.

The hard question here is what possible state interest in diversity could rise to the level of the asserted claims of national security in the anti-Communist loyalty oath cases. Calling diversity a compelling state interest should be a clear loser, given the disappointing performance of diversity programs in generating the academic excellence that they purport to advance, and the ability to get a wide diversity of substantive views, articulated with greater passion and power from a stronger academic cohort. The entire program fails the compelling state interest test.<sup>100</sup>

It is therefore a matter of genuine personal sadness that Professor Abigail Thompson, a Vice President of the American Mathematics Society, took strong exception to the ever larger role that so-called diversity statements have in driving the hiring process.<sup>101</sup> Thus, on a scale of five, she notes that any candidate who states that he or she will treat all students the same “regardless of background” will get a low score (1 or 2 on a scale of 5), which only makes the political dimension of the process even greater. Needless to say, UC Davis offered

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97. *In re Anastaplo*, 366 U.S. 82 (1961).

98. *Id.* at 89.

99. *Id.* at 85.

100. *See Adarand Constructors*, 515 U.S. at 227.

101. Abigail Thompson, *A Word From*, 66 NOTICES AM. MATHEMATICAL SOC’Y 1778, 1779 (2019), <https://www.ams.org/journals/notices/201911/moti-p1778.pdf> [<https://perma.cc/X29Z-JYEP>]. Her column was a longer version of the op-ed that she wrote in the Wall Street Journal. Abigail Thompson, *The University’s New Loyalty Oath*, WALL ST. J. (Dec. 19, 2019, 6:55 PM), <https://www.wsj.com/articles/the-universitys-new-loyalty-oath-11576799749> [<https://perma.cc/R7GV-6NHK>].

its standard diversity justification for this litmus test.<sup>102</sup> The ostensible justification for this policy is that increasing the supply of African American Ph.Ds. in mathematics (less than 1% in all programs) is an important goal. But as Professor Thompson makes clear, she—and I dare say every member of her department—would do all that they could to help any student achieve their goals. A simple reminder by a department chair could handle this issue. Clearly, this front-end policy is a massive overkill that affects every aspect of graduate education, and is moreover all too emblematic of the current Civil Rights Juggernaut that allows no dissent from the orthodoxy propounded by the Harvards and the UCs of the world.

#### CONCLUSION

A brief summary of the argument is now in order. As a general matter of political theory, the use of state coercion should be regarded as presumptively bad until it is shown to be necessary. To a classical liberal like myself, that general maxim translates into a general position that government force should be confined to deal with problems of force, fraud and monopoly. Under those standards, aggressive government intervention to advance civil rights was fully justified in the earlier age of segregation when powerful forces suppressed large portions of the American population on the grounds of race. But with those battles won, their lessons have been forgotten by the current generation of civil rights advocates who have forgotten that their key role was to combat excessive state power. Now that these former outsiders have gained in both political and rhetorical dominance, controlling both the academic sphere and government halls, they have imitated some of the worst practices of their predecessors by finding all sorts of “compelling interests” that pay little or no attention to the position of the “discrete and insular minorities” of today.

Just look at the record. The discourse all too often starts with a contemptuous dismissal of capitalism that shows scant appreciation of the virtues of a decentralized market authority. The targets of the new civil rights movement include the bakers, photographers, florists, and designers who have religious objections to same-sex marriage. But I am not aware of a single state court that has upheld their claims.<sup>103</sup> It covers institutions like Gibson’s Bakery that are denounced as racist merely because it seeks to prevent the theft of its merchandise. It includes, not Google, but individual Google employees who are run out of the firm because they seek to explain the role of statistical analysis in handling complex data sets. It includes the wide range of conservative and straight, white males whose status requires some degree of subordination based on stereotypes that bear no relationship to the group under analysis. None of this is pretty, but all of it must be said. There is always a tendency for dominant groups to use the

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102. News and Media Relations, *Response to Faculty DEI Statements*, U. CAL. DAVIS (Nov. 22, 2019), <https://www.ucdavis.edu/news/response-questions-about-faculty-dei-statements/> [https://perma.cc/3VBN-6KCA].

103. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Klein v. Or. Bureau of Labor & Indus.*, 434 P.3d 25 (Or. 2018); *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

law to strengthen their position against their already weakened adversaries. That was all too true under Jim Crow. It is frightening to observe how the new dominant classes of today are using their power to regulate—decimating the status and dignity of any group or person who stands in their path. Perhaps Michelle Alexander was right after all. It is with great sadness we recognize that with the New Civil Rights Juggernaut, indeed, the more things change, the more they stay the same.