



- 09 Jan 2012 at 5:48 PM
- 8TH CIRCUIT, IOWA LAW, LAW PROFESSORS, LAW SCHOOLS

## Conservative Law Profs: Just Say You Need ‘Affirmative Action’ for Intellectual Diversity and We’ll End Hiring Discrimination Against You

By ELIE MYSTAL

Is that a black rhino or a conservative law prof?

Conservative law professors need help. They don’t want to admit it because conservative orthodoxy holds that the only people who can ask for help in this country are small businessmen and the institution of marriage, but make no mistake, conservatives who want to get a tenure-track job in legal academia need a leg up. That’s because they’ve been discriminated against, both currently and historically. Law school faculties are thought to be a bastion of liberalism, and the problem has gotten so bad that conservative law profs probably need a “plus-factor” in order to overcome this ingrained systemic bias.

*Diversity* is important in law schools, and if we’re going to have an intellectually diverse faculty, we need to find a way to integrate more conservatives into teaching positions, even if that means a qualified, liberal law professor loses his or her “spot” on the tenure track for a colleague that leans a little harder to the right.

I’d be all for that. But conservatives can’t admit that they made need a diversity program to combat generations of systemic selection bias. So instead, they’re just going to bitch about the fundamental unfairness. Or fire off employment discrimination lawsuits....

Today seems to be the day that we’re all catching up on Teresa Wagner’s lawsuit against the University of Iowa. The law professor argues that Iowa discriminated against her because of her conservative views. The Eighth Circuit reinstated Wagner’s lawsuit between Christmas and New Year’s so you **might have missed it** (but we didn’t, it was featured in our **Morning Docket** back in December).

Adam Liptak has a report on it today in the **New York Times**:

Ms. Wagner’s lawyer, Stephen T. Fieweger, said the decision was a victory for an important sort of academic freedom.

“It’s gotten to the point where the law school’s diversity efforts are to eliminate everyone from the mainstream,” he said. “They espouse cultural diversity but won’t consider the conservative viewpoint.”

According to Ms. Wagner's lawsuit, the law faculty at Iowa in 2007 included a single registered Republican among its 50 or so members. The Republican professor was appointed in 1984. In 2009, The Des Moines Register found that there were two registered Republicans on the faculty.

Ms. Wagner would have added some balance, her lawyer said.

"My client is an ideologue," Mr. Fieweger said. "She does believe in conservative values." Ms. Wagner has worked for the National Right to Life Committee, which opposes abortion and euthanasia, and the Family Research Council, which takes conservative positions on social issues.

I'm not sure how many law professors have their lawyers call them "ideologues," but Iowa wouldn't be in the position of having to deal with a far right firebrand if more reasonable conservatives were a more visible part of their faculty. Or the faculty of any law school. Lat and I have **debated this point before**: I contend that if "regular" conservatives would take their party back from the crazy, right-wing fringe, things would be better for conservative law profs.

But it's incontrovertible that law schools favor liberal nut jobs over conservative extremists. And that law faculties are much more blue than red. What should be done about that? Are lawsuits the answer?

Walter Olson has written extensively about the partisan imbalance among tenured law professors. Today, **he notes with irony** that if the kind of hiring policies favored by liberals were applied to state-run law schools, they'd be forced to hire more conservative faculties. But Olson chooses to be intellectually consistent, and maintains his belief that lawsuits are not the way to right this wrong:

I have severe doubts that lawsuits by disappointed job applicants will really do much to improve fairness in the workplace and counteract arbitrariness in hiring decisions. Such lawsuits seem equally likely to provide a legal weapon to contentious applicants whether or not their talents are clearly superior, invite outside arbiters to apply subjective standards of their own, and take a great toll in collegiality, time, expense and emotional wear and tear, all while encouraging defensive employment practices that help no one.

I'm going to be intellectually consistent as well. I think conservative profs should sue, and they should demand that the same kind of diversity we see applied to women or minorities when it comes to academic hiring decisions be extended to conservatives, too. Conservatives writ large aren't a protected class, but the conservative law professor is damn near an endangered species. They need help, not because they are genetically predisposed to be crappy law professors, but because years of discrimination against them tell conservative legal minds to find something else to do besides become a law professor. There are lots of places where conservative principles are welcome, but legal academia isn't one of them.

To combat that, they should get a plus factor. Just like with racial affirmative action, you can't have a quota system. You can't say "at least 20% of your tenured faculty must vote for Rick Santorum." But if a school wants to give a plus factor to people who think you can't say "fire" in a crowded theater, but you have a constitutional right to carry and conceal your firearm in one, I say fine. Students should have the opportunity

to hear all sides. I used to love taking classes from right-leaning people: I don't particularly like hearing what I already think read back to me when I'm trying to learn.

Granted, I think conservatives should have to ask for the help, but that's just because I think making them beg for it would give them a little bit of an insight into how horrible it is to be in need of public assistance in this country, yet have to listen to freaking former hedge fund managers condescend about their work ethic, but that's just me.

Whether or not they grovel for it, something needs to be done to help the American conservative law professor. Because the way things are going, I'm taking screen caps of the [Volokh Conspiracy](#) and sending them to be archived in the Museum of Natural History.