

INTELLECTUAL DIVERSITY IN THE LEGAL ACADEMY

NICHOLAS QUINN ROSENKRANZ*

Elite law faculties are overwhelmingly liberal. Jim Lindgren has proven the point empirically.¹ I will just add my impressions from Georgetown Law School to reinforce the point. We are a faculty of 120,² and, to my knowledge, the number of professors who are openly conservative, or libertarian, or Republican or, in any sense, to the right of the American center, is three—three out of 120. There are more conservatives on the nine-member United States Supreme Court than there are on this 120-member faculty. Moreover, the ideological median of the other 117 seems to lie not just left of center, but closer to the left edge of the Democratic Party.³ Many are further left than that.

But at least there are three. And the good news is that this number has tripled in the last decade. The bad news, though, is that, at Georgetown, the consensus seems to be that three is plenty—and perhaps even one or two too many.

* Professor of Law, Georgetown University; Senior Fellow in Constitutional Studies, Cato Institute. Yale University, B.A. 1992, J.D. 1999. Thanks to Nita A. Farahany. And thanks, also, to Stephanie Freudenberg for first-rate research assistance.

This essay was adapted from panel remarks given at the Harvard Federalist Society's conference on "Intellectual Diversity and the Legal Academy" held on April 5, 2013, at the Harvard Law School in Cambridge, Massachusetts. For an audio and video recording of the complete conference, please visit the Harvard Federalist Society's website. *Intellectual Diversity Conference*, HARVARD FEDERALIST SOCIETY, <http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/> (last visited Nov. 26, 2013).

1. James Lindgren, Professor of Law, Nw. Univ. Law Sch., Remarks on Panel I: Problem: is there a lack of intellectual diversity in law school faculties? at the Harvard Federalist Society's Intellectual Diversity Conference (Apr. 5, 2013), *available at* <http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/>.

2. This list includes 106 full or associate professors, twelve professors of legal research and writing, and two graduate programs faculty. Georgetown Law Faculty List (Apr. 2013) (on file with Georgetown Law Dean's Office).

3. Cf. Lindgren, *supra* note 1.

These numbers are stark, but they are not unusual; this ratio actually seems fairly typical of most elite law schools. This lopsidedness would be a shame in any academic department.⁴ But it is a particularly ironic sort of shame at a law school. After all, it is a fundamental axiom of American law that the best way to get to truth is through the clash of zealous advocates on both sides. All of these law professors have, in theory, dedicated their lives to the study of this axiomatically *adversarial* system. And yet, at most of these schools, on most of the important issues of the day, one side of the debate is dramatically underrepresented, or not represented at all.

One result, unfortunately, is a certain lack of rigor. To be blunt, a kind of intellectual laziness can set in when everyone agrees. Faculty workshops fail to challenge basic premises. Scholarship becomes unreflective and imprecise.

Worse yet, this intellectual homogeneity impairs analysis of law in progress—law as it unfolds out in the world. Analyzing and predicting actual American law would seem to be an important aspect of the job. After all, the country would like to be able to turn to these elite faculties for wisdom and insight about contemporary legal controversies. But because elite American faculties are so far to the left of the American judiciary, these faculties can be startlingly poor at analyzing the actual practice of American law.

Three recent examples illustrate this point. First, consider *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*⁵ At the time the case was filed, many universities were restricting military recruiters' access to campus, to protest the military's policy on homosexuality.⁶ Congress responded with the Solomon

4. These lopsided ratios exist, by the way, throughout elite universities; it is not just a law school problem. In 2008, the number of Yale professors who gave money to the John McCain campaign was five. That is, five from the entire university—all of Yale. From Yale Law School, it was one (and that person no longer teaches at Yale Law School). Margy Slattery, *Eli profs show Obama support in dollars*, YALE DAILY NEWS, Nov. 4, 2008, <http://yaledailynews.com/blog/2008/11/04/eli-profs-show-obama-support-in-dollars/> (reporting that five Yale University professors gave money to the John McCain campaign, and that Professor Tom Merrill was the only professor from Yale Law School to give money to the John McCain campaign).

5. 547 U.S. 47 (2006).

6. See William J. Clinton, Remarks Announcing the New Policy on Gays and Lesbians in the Military (July 19, 1993), in 29 WEEKLY COMP. PRES. DOC. 1369, 1372.

Amendment, which withheld certain federal funds from colleges and universities that did so.⁷ In *Rumsfeld*, many top law schools and law faculties argued that the Solomon Amendment was unconstitutional.⁸ When Georgetown's faculty decided to join them,⁹ I was new at the law school and hesitant to pick a fight. Still, I did ask to meet with one of the champions of this project at Georgetown. Over coffee, I told her that I thought we were making a mistake.

She quickly assured me that she understood completely: Obviously, I must have very strong and religiously motivated objections to homosexuality. I said no, actually, I do not; and in fact I am in favor of gays in the military as a matter of policy. I explained to her that what I object to is an *incoherent legal argument*. The argument against the Solomon Amendment made no sense, I said, and it was embarrassing for the Georgetown faculty to endorse it.

She had not heard that before; apparently, no one at Georgetown had raised any doubts about the legal merits of the position. Indeed, the notion that our policy preference might be inconsistent with constitutional law seemed unfathomable to her. And so, she must have found it equally unfathomable when the Supreme Court rejected the academy's challenge and upheld the Solomon Amendment—eight to zero.¹⁰ All of these great minds of Stanford and Georgetown and New York University and so forth¹¹ garnered not a single vote—not

7. See 10 U.S.C. § 983 (Supp. IV 2001–05) (version considered by the Court in *Rumsfeld*).

8. 547 U.S. at 52, 70 (Forum for Academic and Institutional Rights (FAIR) “is an association of law schools and law faculties”). See Brief for Respondents, *Rumsfeld*, 547 U.S. 47 (No. 04-1152); Caitlin Daniel-McCarter, *Homophobia Through the First Amendment: A Critique of FAIR v. Rumsfeld*, 10 N.Y. CITY L. REV. 199, 244 n.66 (2006) (listing law schools and faculties that were public members of FAIR). See also *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (separate case in which Yale Law School faculty challenged Solomon Amendment); Brief for Columbia University et al. as Amici Curiae Supporting Respondents at 20–24, *Rumsfeld*, 547 U.S. 47 (No. 04-1152) (amici are Columbia University, Cornell University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University).

9. See generally Brief for Respondents, *supra* note 8.

10. See generally *Rumsfeld*, 547 U.S. 47.

11. Daniel-McCarter, *supra* note 8, at 244 n.66 (noting that the Stanford Law School, Georgetown University Law Center, and New York University School of Law faculties were members of FAIR).

Stevens, not Souter, not Ginsburg, nobody. What seemed a winning argument to the legal academy could not persuade even a single Justice at the Supreme Court.

Second, consider *National Federation of Independent Business v. Sebelius*: the Affordable Care Act case.¹² When my colleague Professor Randy Barnett first crafted the Commerce Clause argument against the individual mandate,¹³ the Georgetown faculty was skeptical at best. Indeed, the typical response, at Georgetown and throughout the elite academy, was closer to ridicule.¹⁴ But the Supreme Court did not find Professor Barnett's argument to be ridiculous; it found his argument to be correct. The Supreme Court held that Congress cannot require individuals to buy insurance under the Commerce Clause.¹⁵ In the academy, there was utter, dumbfounded consternation. A question that probably would have been decided 117-3 at Georgetown was decided 5-4 the other way at the U.S. Supreme Court. As so often happens, an argument that the academy considered frivolous turned out to win the day.

Third, consider the debate over Congress's power to legislate pursuant to treaty. In 1920, the Supreme Court held that if a

12. 132 S. Ct. 2566 (2012).

13. Randy E. Barnett et al., *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUND. (Dec. 9, 2009), <http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional>; see also, e.g., *Constitutionality of the 'Individual Mandate': Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 27-40 (2011) (statement of Randy E. Barnett); *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Randy E. Barnett); Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional*, 62 MERCER L. REV. 608 (2011); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

14. See Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html> ("many of [Barnett's] colleagues . . . dismissed the idea as ridiculous . . ."). See also Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013); David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits against PPACA?*, 2013 U. ILL. L. REV. (forthcoming 2013).

15. See *Nat'l Fed'n Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (holding that the Commerce Clause does not authorize the individual mandate requiring individuals to purchase health insurance); *id.* at 2644-50 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (same).

treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would otherwise lack such power.¹⁶ It held, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty. The Court offered no reasoning whatsoever for that proposition, but, decades later, eminent professor Louis Henkin presented the first powerful argument in its favor, based on constitutional drafting history. According to Professor Henkin, "The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties,' but it was stricken as superfluous."¹⁷

Henkin's argument held sway for a generation, and forestalled any serious debate about the question until 2005. That year, I took a look at the historical documents. What I found was that Henkin's historical claim was simply false; no draft of the Necessary and Proper Clause ever included the words "to enforce treaties."¹⁸

It is not shocking that a law professor could make this error; scholars make errors all the time. What is shocking, though, is that Professor Henkin's error managed to stand uncorrected for decades and to short-circuit debate for a generation. How was that possible? Had I parsed Madison's notes in some terribly subtle way that no one else ever could? Not at all. All I did was flip open the right volume and check Henkin's cite. So why was I the first to do it?

Here, I think, is another pernicious symptom of intellectual homogeneity. Not only does it cause errors, but it allows errors to persist. Professor Henkin's historical claim was very congenial to the academy because its implications—greater congressional power and greater scope for international law—jelled with the prevailing liberal orthodoxy. No one in the academy had a different intuition. And so, for a generation, no one in the academy thought to question Professor Henkin's premises and check his sources. I had the opposite intuition, and so it occurred to me to look.

16. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

17. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 408 n.105 (1st ed. 1972). This error persisted in the second edition. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 481 n.111 (2d ed. 1996).

18. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1912–18 (2005).

Even now, after my article debunked Henkin's historical argument, the vast majority of the liberal legal academy remains committed to his conclusion. Indeed, my argument to the contrary—like Professor Barnett's Affordable Care Act Commerce Clause argument—has been widely derided as farfetched.¹⁹ But the Supreme Court apparently does not find it so farfetched; it recently granted certiorari to reconsider this exact point.²⁰ Whatever the Court decides, the argument has already gotten far more traction than the academy expected. Again, the academy seems mystified about which arguments will actually work in court.

Now, some professors may say that that they are simply not interested in predicting what the current Supreme Court will do, because, from their perspective, this Court is dominated by right-wing ideologues. But this view would be unsatisfactory even if its premise were correct. Professors may profess not to care what these Justices think, but students do care. Students would like to learn how to craft arguments that are going to persuade real judges—not the judges that the liberal academy might wish for, but the actual judges on the bench today.

This brings me to my final point, the most important reason to care about intellectual diversity in law schools: Intellectual diversity matters to students. Without it, they are getting only half of a legal education. Again, at Georgetown, the ratio is three out of 120, and so most students will graduate without ever laying eyes on a Republican behind a lectern. In their three years in law school, they will simply never see what that looks like. How are

19. See generally, e.g., Brief for Professors David M. Golove, Martin S. Lederman, and John Mikhail as Amici Curiae Supporting Respondent, *Bond v. United States* No. 12-158 (argued Nov. 5, 2013); Carlos Manuel Vázquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939 (2008); Rick Pildes, *Does Congress have the Power to Enforce Treaties? Part I*, THE VOLOKH CONSPIRACY (Jan. 14, 2013, 6:58 AM), <http://www.volokh.com/2013/01/14/does-congress-have-the-power-to-enforce-treaties-part-i/>; Rick Pildes, *Does Congress Have the Power to Enforce Treaties? Part II*, THE VOLOKH CONSPIRACY (Jan. 16, 2013, 10:27 AM), <http://www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/>; Rick Pildes, *Does Congress Have the Power to Enforce Treaties? Part III*, THE VOLOKH CONSPIRACY (Jan. 16, 2013, 1:16 PM), <http://www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/>; Rick Pildes, *Does Congress Have the Power to Enforce Treaties? Part IV*, THE VOLOKH CONSPIRACY (Jan. 27, 2013, 4:15 PM), <http://www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/>.

20. *Bond v. United States*, 133 S. Ct. 978 (2013).

they to learn how to persuade Justices Scalia, Thomas, Alito, Roberts, and Kennedy, when they do not encounter a single professor with a similar perspective? Some say that liberal professors are careful to present both sides of the argument.²¹ But that does not suffice. Unsurprisingly, the liberal version of the conservative argument is generally a caricature of the *actual* conservative argument. To put this point most sharply, students are spending more than \$150,000 on their legal education, and they are being taught how to argue against *hypothetical* Republicans. For that kind of money, they should at least learn to argue against real ones.

21. Jack Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law Sch., Remarks on Panel I: Problem: is there a lack of intellectual diversity in law school faculties? at the Harvard Federalist Society's Intellectual Diversity Conference (Apr. 5, 2013), *available at* <http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/>.