

## The Official Ideology of American Law Schools

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### The AALS's Dominance of Legal Education

The Association of American Law Schools (AALS) is not your typical fraternity of scholars. To begin with, its members are not individual law professors but 171 law schools. A law school is not legally required to join the AALS, but only a few obscure schools eschew membership. In its own words: “The AALS is legal education’s principal representative to the federal government and to other national higher education organizations and learned societies.”<sup>1</sup>

Technically, the AALS does not accredit law schools; it examines schools only for purposes of its own membership. The American Bar Association (ABA) makes national accreditation decisions. However, the AALS and ABA send combined teams that cooperate in evaluating law schools for their ostensibly separate purposes, and it is rare for a school that is not an AALS member to achieve national accreditation. It is hazardous for a school seeking to get or retain national accreditation to disregard AALS dictates.

Although its members are schools, not scholars, the AALS also serves (in its own words) “as the academic society for law teachers.”<sup>2</sup> It has ninety subject matter sections that run programs at annual and mid-year meetings and at individual workshops and conferences. Faculty at AALS member schools are

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<sup>1</sup>“What Is the AALS?” The Association of American Law Schools, <http://www.aals.org/about.php>.

<sup>2</sup>Ibid.

automatically eligible to participate in these sections. There is no other umbrella society of law professors comparable to, for example, either the American Association of University Professors or the Modern Language Association, and the AALS aggressively discourages any rivalry.<sup>3</sup>

### The AALS's Meaning of Diversity

None of this might be cause for concern if the AALS were apolitical. It is not; it openly promotes a left-wing agenda. Its most obvious partisan position is its support for racial preferences. By-Law 6-1(b)(ii) states that the AALS “expects its member schools to value...diversity of viewpoints.” This commitment does not mean what one might expect. By-Law 6-3(c) states: “A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex.”<sup>4</sup>

In the AALS's Statements of Good Practices, diversity is discussed only in the Statement on Diversity, Equal Opportunity and Affirmative Action. This statement mentions the importance of “different perspectives.” However, this comes in the context of the commitment to diversity “with respect to race, color, and sex.” The statement elaborates: “Although there has been great progress in recent decades in respect to the number of women and members of minority groups in American law schools, legal education still has a long road to travel to produce a truly diverse profession prepared to meet the needs of American society.”<sup>5</sup> That this is the sole discussion of “diversity of viewpoints” indicates that this value is to be pursued solely through diversity of “race, color, and sex.”

This is the meaning of diversity pressed by the AALS in practice. To be approved, every scholarly program offered under the aegis of the AALS must state how the composition of its panel satisfies the requirement of diversity. More significant yet is the content of AALS programs. In July 2010, Peter Wood, the president of the National Association of Scholars and editor of this

<sup>3</sup>The AALS demands a commitment from the official hotels for its annual meeting not to host events of any other legal organization. Other groups that want to hold events during the AALS meeting (and AALS attendees who want to participate in these events) must convene elsewhere.

<sup>4</sup>“AALS Handbook/Bylaws,” Association of American Law Schools, [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php).

<sup>5</sup>“Statement on Diversity, Equal Opportunity and Affirmative Action,” Association of American Law Schools, [http://www.aals.org/about\\_handbook\\_sgp\\_div.php/](http://www.aals.org/about_handbook_sgp_div.php/).

journal, wrote about an AALS workshop entitled “‘Post-Racial’ Civil Rights Law, Politics and Legal Education: New and Old Color Lines in the Age of Obama,”<sup>6</sup> noting that the official announcement of the conference made its politics clear. It says, *inter alia*, that the success of “conservative” explanations of racial disparities “makes it all the more important for proponents of the [liberal or progressive] ‘social structures’ approach to articulate how such structures work....It is the project of this plenary to demonstrate some of the distinctive mechanisms through which law reproduces racial inequality.”<sup>7</sup>

All the speakers at the workshop supported this project. Such blatant ideological partisanship is par for the course. It is common for programs on racial issues to comprise only liberals and progressives who favor racial preferences. Apparently, this is the AALS’s meaning of “diversity of viewpoints.”

Do not suppose that this ideological tilt is limited to programs on civil rights. There certainly are many programs hosted by the AALS that do not push any political agenda. However, the unification of the demands for “different perspectives” and for diversity “with respect to race [and] color” clearly requires that minority scholars be annexed to programs in areas other than civil rights precisely because of their ability to uncover issues of race everywhere. Thus programs alleging problems of racial discrimination are common in tax, torts, international law—virtually all fields.

The most important activity of the AALS in support of racial preferences, however, is its use of accreditation reviews (which are required of each school every seven years) to push quotas for law school faculties. Like other areas of academia, law schools face a pool problem with some racial minorities—there simply are not enough candidates who have, or even come close to, the usual academic credentials for an academic appointment.

Although the AALS never uses the word “quota,” it insists that each faculty have a sufficient number of minority members. Strenuous efforts to find qualified minorities do not excuse failure to reach what the AALS considers the right numbers. No law school has ever lost its accreditation over this issue, but the ABA/AALS review teams frequently declare a

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<sup>6</sup>Peter Wood, “Conferring Privilege: DOJ, Law Schools, and the New Politics of Race,” National Association of Scholars, July 9, 2010, [http://www.nas.org/poldoc.cfm?doc\\_id=1429](http://www.nas.org/poldoc.cfm?doc_id=1429).

<sup>7</sup>Quoted in *Ibid*.

school's numbers unacceptable and delay re-accreditation until the school makes improvements. This fortifies those in the school who are pushing for increased minority hiring. It is also a headache and an annoyance for the school, which typically lowers its hiring standards until it can finally achieve the mandated numbers.

Of course, the effects don't end with hiring. People hired with substantially lower credentials than a school's norm often fail later to meet the usual tenure standards. Since firing minority faculty members is almost impossible, tenure standards for them must also be watered down. In promotion and tenure reviews the minority candidate's supporters frequently admit that the candidate's scholarship does not meet the school's usual standards but insist that the faculty should nevertheless act favorably because failure to do so would incur bad publicity from a lawsuit (even if the school eventually prevails), trigger protests from minority students, and invite trouble from the AALS. Moreover, it is always argued that because of the thin pool of minority scholars, the school couldn't find anyone more qualified than the candidate under review.

### **Other Ideological Commitments**

The AALS's commitment to racial preferences—and to the exclusion of any contrary views—is the most obvious plank in its ideological platform, but it is hardly the only one. Two others are its positions on sex and sexual orientation. Hiring and tenure are not major issues in these political causes because there are now plenty of women and gays and lesbians who meet the usual standards—at least when teaching needs and scholarship are defined to favor feminism and postmodern views on sexual orientation.

Once again, bias is evident in the speaker lists and content of AALS programs. Among the sessions at the January 2011 annual meeting were “Sex’ in the Classroom: Teaching Gender as a Core Value” (all seven participants were female); “Women’s Choices, Women’s Voices: Legal Regimes and Women’s Health” (all six participants were female); and “New Voices in Gender Studies” (five of six participants were female). Since it would be cruel to make the faithful wait a full year between rallies, the AALS has also scheduled a separate conference for June 2011 on “Women Rethinking Equality.” If you're wondering whether there are programs dedicated to men's issues or sessions on gender dominated by male panelists, be my guest and look for them. You won't find any.

The annual meeting session of the Section on Sexual Orientation and Gender Identity Issues (SOGII) was devoted to “queering the curriculum.” I attended and, because I teach “business associations” I listened with some interest to a talk about weaving sexual orientation issues into that course. The speaker mentioned things like the great variety of business organizations available in our law, but I could not figure out what I am supposed to say in class about that with respect to sexuality.

The annual meeting also included an all-day Workshop on Changing Society, Changing Laws: Conflicts Over Sexuality and the Evolving American Family. This is certainly a worthy topic of discussion, and the workshop’s title does not betray any ideological bias. However, not one of the twenty-three participants on any of the panels held during the workshop was an advocate of the traditional family.

The politicization does not end with scholarly programs. At the AALS annual meeting the SOGII also co-sponsored its third annual reception for Lambda Legal, a partisan organization that promotes the lesbian and gay agenda. Not even the pretense of scholarly non-partisanship here.

Several years ago the AALS filed a brief supporting those who had sued the federal government, charging that the federal Solomon Amendments were unconstitutional. U.S. military recruiters had been barred from many law schools because they declined to hire homosexuals who publicized their sexuality. The Solomon Amendments withdrew federal funding from universities that barred military recruiters. The AALS argued in its brief that the Solomon Amendments infringed schools’ First Amendment right of free speech. The Supreme Court unanimously rejected that argument and upheld the Solomon Amendments. “Legal education’s principal representative” has displayed no embarrassment over having completely misunderstood the Constitution.

The AALS supports other causes, like environmentalism, but its partisanship on these issues tends to be more muted. In general, the AALS lionizes liberal scholars, judges, and politicians, and ignores conservatives when it comes to choosing the speaker for the plenary luncheon at the annual meeting.

### **The AALS and Ideological Diversity**

As noted before, the AALS does encourage member schools to value a faculty with “different perspectives.” I have been suggesting that this principle of diversity extends only to perspectives that are well to the left

of center. Perhaps, however, I am simply wrong about the AALS's intentions—or perhaps the AALS's political bias has no effect on the composition of law school faculties.

Unfortunately, the evidence shows that law school faculties reflect the AALS's ideological tilt. A study by Northwestern University law professor John McGinnis and law student Matthew Schwartz found that campaign contributions by law professors overwhelmingly favored Democrats over Republicans.<sup>8</sup> “Ideological Diversity in Law School Hiring,” a study by Douglas Spencer and James Phillips, two doctoral fellows at Berkeley, looked for indicia of political orientation among newly hired law professors.<sup>9</sup> They found that of those with an identifiable orientation, liberals outnumbered conservatives by seven to one.<sup>10</sup> Moreover, in constitutional law and related fields with more pronounced ideological concerns than, say, commercial law or intellectual property, liberals outnumbered conservatives by eleven to one.

Note that the term “conservative” is much broader in academia than it is in our national politics. In general, academia is so far to the left of the rest of America that many who are labeled “conservative” in academia (including the present writer) would be considered moderate in most of the country. By “conservative” here I mean about two-thirds of the American ideological spectrum.

Despite these studies and the AALS's professed desire for “diversity of viewpoints,” the AALS has never expressed the least concern over the dearth of conservatives on law school faculties. The academic establishment wants faculties that “look like America,” but they resolutely oppose faculties that *think* like America. By diversity they mean the greatest variety of scholars who all think alike. Accordingly, I initiated an effort at least to bring the issue to the AALS's attention. The AALS invites proposals for so-called “Hot Topics” programs at its annual meetings. These are intended to permit discussion of new developments that might not be caught by the regular programs, which are scheduled months in advance.

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<sup>8</sup>John O. McGinnis and Matthew Schwartz, “Conservatives Need Not Apply,” *Wall Street Journal*, April 1, 2003, A14.

<sup>9</sup>The draft study by Phillips and Spencer was posted online. It drew so much fury from liberals that it was withdrawn from the Internet, and Spencer is no longer involved in the study. This is significant. Phillips indicates he has been told by numerous individuals within legal academia and the law community that this project will not be good for his career and a wiser course would be to wait until one has tenure to publish such scholarship.

<sup>10</sup>The study defined “conservative” to include libertarians. I will do likewise, despite the great differences between the two, because both are discriminated against in academia.

I proposed a session on “Ideological Diversity and Discrimination in American Law Schools.” Somewhat to my surprise, the proposal was approved. My joy was somewhat tempered, though, by the scheduling of our session for 8:30 in the morning on the first day of the meeting. Many conference attendees had not even arrived then, and many who had did not learn of the event until it was already over.

The panel included the aforementioned James Phillips and John McGinnis, Ilya Somin, a law professor at George Mason University, and Bill Nelson, a law professor at New York University. Prof. Nelson coauthored a study that showed that law clerks of liberal Supreme Court justices are much more likely to enter academia than clerks of conservative justices.<sup>11</sup> I moderated.

Professor Nelson argued that, at least in his field of legal history, the underrepresentation of conservatives may stem from disagreements over methodology. In general, though, neither the panelists nor audience members who spoke during the question and answer segment contested the assertion that conservatives suffer discrimination in the law school professorship as in other areas of academia.

Some liberals claim that the absence of conservatives on law school faculties results from self-selection. That might be a factor. Conservatives tend to be more interested than liberals are in business and economics. These interests fit well with the practice of law, which can be very lucrative. However, it is clear to me that conservatives who do try to enter academia encounter discrimination. The Federalist Society, which was founded in 1982 as an organization of lawyers unhappy with the increasing liberal politicization of the ABA, runs an annual boot camp for young law school grads interested in teaching. Part of the advice offered is that conservatives hide their political views while searching for a teaching job. A good way to do this is to write one’s first scholarly papers on apolitical issues or on the technical aspects of politically charged issues.

However, even if a conservative lands a spot on a law school faculty, the battle is not over. There is still the possibility of political discrimination in promotion and tenure. Most prestigious law reviews (which, unlike scholarly journals in other fields, are edited by students) not only favor liberal views

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<sup>11</sup>William E. Nelson, Harvey Rishikof, I. Scott Messinger, and Michael Jo, “The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?” *Vanderbilt Law Review* 62, no. 6 (November 2009), <http://www.vanderbiltlawreview.org/articles/2009/11/Nelson-et-al.-Supreme-Court-Clerkships-62-Vand.-L.-Rev.-1749-2009.pdf>.

but also prefer trendy ideas and topics, which further hampers conservative scholars. Moreover, top law schools rarely hire entry-level faculty—scholars write their way up the law school hierarchy, where they again face discrimination. It would be astonishing if many conservatives did not decline to risk their careers on overcoming this barrier, especially when the alternative of a lucrative career in practice beckons.

Less clear than the existence of discrimination is how it works. Most liberals deny that they deliberately indulge in political discrimination, and their denials are probably sincere. Most academics prefer to hire people they think are doing important work. Liberals tend to think that the work of liberals (for example, feminist, “queer,” and “critical race” theory) is more important than the work of conservative legal scholars (e.g., natural law theory and economic analyses of the law). As a result, most law schools offer a much higher percentage of courses in fields of interest to liberals than the percentage of lawyers who work in those fields, and correspondingly fewer courses in less politicized fields where most lawyers actually work. They get away with this because most employers care primarily about what law school job applicants attended and what grades they earned, not which courses they actually took.

Most academics also prefer to hire and promote people they think are right rather than people they think are wrong. Liberals think the work conservatives do is just plain wrong, or at best insignificant. This judgmental attitude may be even stronger with respect to conservative women, who are particularly underrepresented on law school faculties and who seem like traitors to liberals.

As in other fields of academia, the leftist domination of law schools has a long history, and the old Left has welcomed the New, even when the new leftists proceeded to vilify their seniors. However, the leftist tilt may have gone farther in law schools (and warrant greater public concern) because of the politicization of the Supreme Court that began with Chief Justice Warren and Justices Douglas, Brennan, and Marshall. The Left realized that a handful of judges could trump the entire democratic process, and liberal law professors could serve as a think tank for liberal judges. Law and legal scholarship gained an appeal to the Left that they had not previously had.

What to do about this state of affairs is a difficult question. “Preferences” for conservatives would be as disastrous as they are elsewhere. The goal is not just to get conservatives onto law school faculties, but to allow a proper



airing of conservative legal thought in the marketplace of ideas. Fortunately, preferences are also totally unnecessary. The key is to apply the same standards to all political persuasions. However, achieving fairness will require that the liberals who control law schools change their ways, which compels them essentially to recognize that in the past they have been unfair. They don't have to agree with conservatives, but they do have to acknowledge them as worthy opponents. That will not be easy.

I have no road map to a solution. I have talked with some other conservative academics, and we would like to ask the hierarchy of the AALS at least to acknowledge that a problem exists. That alone would probably go a long way toward easing discrimination against conservatives. The AALS could also work with conservatives to rectify the ideological tilt of the choice of speakers and the content of the programs it conducts.

Steve Balch, editor-in-chief of *Academic Questions*, NAS chairman, and for many years its president, realized long ago that liberal academics will never play fair. To establish a firm presence in academia conservatives have to build their own, parallel institutions. To this end the faculty and student divisions of the Federalist Society are invaluable, but more must be done. Conservative legal scholars need to follow the trail laid down by Robert George and the James Madison Program in American Ideals and Institutions at Princeton. We should create and obtain independent funding for programs (for example, a Center on Law in a Free Society) at individual schools. This will provide conservative scholars at least some of the funding that liberals get through official channels for research time and expenses, conferences, travel, fellowships, and such.

The Madison Program and its many analogs have shown that such centers help conservative scholars to flourish, making it much harder for liberals to dismiss them and their work. Thus independent centers do not relieve but rather increase the pressure on liberal establishment organizations, like the AALS, to play fair.

It is unrealistic to think that there will soon be any dramatic change in the political profile of law school faculties. However, it is important to put the problem of political discrimination in the public eye. Given the dominant role of the AALS in legal education, it is also important to put this issue on its radar screen. Even small improvements would be welcome, and there is always the outside possibility that once change begins it will snowball until real fairness is achieved.