The Lawyer's Role in a Contemporary Democracy, Promoting Social Change and Political Values, Natural Legal Guardians of Judicial Independence and Academic Freedom

Robin D. Barnes

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol77/iss4/12
NATURAL LEGAL GUARDIANS OF JUDICIAL INDEPENDENCE AND ACADEMIC FREEDOM

Robin D. Barnes*

INTRODUCTION

If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our Founders is alive in our time, who still questions the power of our democracy, tonight is your answer.

It's the answer told by lines that stretched around schools and churches in numbers this nation has never seen, by people who waited three hours and four hours, many for the first time in their lives, because they believed that this time must be different, that their voices could be that difference.

It's the answer spoken by young and old, rich and poor, Democrat and Republican, black, white, Hispanic, Asian, Native American, gay, straight, disabled and not disabled—Americans who sent a message to the world that we have never been just a collection of individuals or a collection of red states and blue states; we are and always will be the United States of America.

...[T]o all those watching tonight from beyond our shores, from parliaments and palaces to those who are huddled around radios in the forgotten corners of the world, our stories are singular, but our destiny is shared, and a new dawn of American leadership is at hand. To those... who would tear the world down: we will defeat you. To those who seek peace and security: we support you. And to all those who have wondered if America's beacon still burns as bright: tonight we proved once more that the true strength of our nation comes not from the might of our arms or the scale of our wealth, but from the enduring power of our ideals—democracy, liberty, opportunity and unyielding hope.1

* Robin D. Barnes, Visiting Professor of Law, University of San Diego School of Law; LL.M., University of Wisconsin School of Law. Thanks to the Symposium participants and Lucinda Jacobs.
President Barack Obama spoke of enduring ideals and the hope of a nation that must reunite in the common cause of restoring peace, prosperity, and integrity in governance. He called for rejection of cynicism, fear, the myth of voter apathy, and lingering doubts about the future viability of the nation. Former law professor, and now President, Obama gave a victory speech that acknowledged the crisis of confidence that plagues our nation. Interestingly enough, he made this point by highlighting that worldwide fears associated with the loss of the American ideal evince collective anxiety about the future of democracy as a system of governance.

The domineering tendencies of the Bush administration manifested in bold steps away from consensus building, strident use of unilateral decision making, and preemptive actions more reminiscent of an autocratic government. The net result was a series of events that significantly raised the fears of the American public during the last seven years of his presidency. Public insecurity around the actual, as well as potential for, government corruption was the highest in recent memory. Partisan hyperbole aside, even those who once supported former President George W. Bush have been known to agree with his most vocal critics on certain issues. The precise basis for the significant loathing of Bush’s critics is summarized below:

2. Id.
3. Id.
6. See Posting of Eugen Solf to World Association of International Studies, Stanford University, CA-PAX et LUX, http://cgi.stanford.edu/group/wais/cgi-bin/index.php?p=5441 (Sept. 17, 2006, 4:25 PM) ("Gen. Colin Powell for the first time openly criticizes the Bush Administration over plans by the President to legitimize the torture of terror suspects for the fight against terrorism."); see also SCOTT MCCLELLAN, WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON’S CULTURE OF DECEPTION (2008) (George W. Bush’s former press secretary reveals mass corruption); Neil A. Lewis, Former Aide Testifies About C.I.A. Leak, N.Y. TIMES, June 21, 2008, at A18; Dana Milbank, From Some Bush Supporters, Anger Over Budget, WASH. POST, Feb. 14, 2005, at A15 ("[T]hose who are currently advocating these draconian cuts would not be in office today if it weren’t for rural America. These cuts disproportionately target essential programs in rural communities while turning a blind eye to the wasteful spending that is rampant in many big cities across the country.”) (quoting long-time conservative ally, Republican Pennsylvania House Representative, John E. Peterson); Peggy Noonan, Too Bad: President Bush Has Torn the Conservative Coalition Asunder, WALL ST. J., June 1, 2007, http://www.opinionjournal.com/columnists/pnoonan/?id=110010148 (“For almost three years, arguably longer, conservative Bush supporters have felt like sufferers of battered wife syndrome. You don’t like endless gushing spending, the kind that assumes a high and unstoppable affluence will always exist, and the tax receipts will always flow in? Too bad! You don’t like expanding governmental
Under the corrupt and inept leadership of Bush and Cheney, America has suffered from corporate extortion in the California energy crisis, the worst terrorist attack in America’s history on 9/11, unsolved anthrax attacks, an abandoned war in Afghanistan, a failed war in Iraq, a lost American city in New Orleans, the fastest and largest growth in the Federal government ever, a precipitous decline in national reputation, stagnant middle class wages, rising unemployment rolls, and the most divisive political culture since the 1860s. The Bush administration will go down in history as the most corrupt, least legitimate, most disgraceful administration in American history.7

The indictment of England’s King George III in our Declaration of Independence pales in comparison. The most politically charged and stanchest criticism surrounded what many regard as an intersection of post-9/11 fear mongering and encroachment upon American civil liberties.8 These phenomena are reflected in various studies on their long-term authority and power? Too bad. You think the war was wrong or is wrong? Too bad."); Fox News Sunday: Interview by Chris Wallace with Newt Gingrich, Former Speaker of the House (FOX television broadcast June 3, 2007), available at http://www.foxnews.com/story /0,2933,277454,00.html (“Not since Watergate has the Republican Party been in such desperate shape. Let me be clear: 28 percent approval of the president, losing every closely contested Senate seat except one, every one that involved an incumbent—that’s a collapse.”); Ann Coulter, A Green Card in Every Pot, ANNCOUTLER.COM, May 30, 2007, http://www.anncoulter.com/cgi-local/article.cgi?article=185 (“Americans—at least really stupid Americans like George Bush—believe the natural state of the world is to have individual self-determination, human rights, the rule of law and a robust democratic economy. On this view, most of the existing world and almost all of world history is a freakish aberration.”); Limbaugh Excoriates Bush on Global Warming, WORLDNETDAILY, June 3, 2002, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27828 (“Rush Limbaugh, the nation’s leading talk-show host and normally a strong supporter of President Bush and the Republican agenda, today ridiculed the administration’s apparent flip-flop on global warming, wondering aloud before millions of listeners whether things would have been much different had political nemesis Al Gore won the presidency.”); Mark Murray, Ex-Generals Criticize Bush and the War, FIRST READ, May 9, 2007, http://firstread.msnbc.msn.com/archive/2007/05/09/186287.aspx; Pat Robertson Criticizes Bush, Praises Obama, Dec. 24, 2008, CNN POLITICAL TICKER, http://politicalticker.blogs.cnn.com/2008/12/24/pat-robertson-criticizes-bush-praises-obama (“Pat Robertson is ‘remarkably pleased’ with President-elect Barack Obama, the conservative leader told CNN’s Suzanne Malveaux—and believes President Bush’s administration has not dealt with the nation’s economic crisis in a ‘professional manner.’”)

8. John W. Whitehead & Steven H. Aden, Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA PATRIOT ACT and the Justice Department’s Anti-terrorism Initiatives, 51 AM. U. L. REV. 1081, 1085 (2002) (“Whatever the outcome of the undeclared ‘War on Terrorism,’ Americans should not labor under the misconception that freedoms forsaken today might somehow be regained tomorrow. Unlike previous wars, this time, enemies may not reach a truce which would signal the return of civil liberties. With or without sunset clauses, there is no horizon for recapturing any freedoms relinquished today. The U.S. Constitution, if compromised now, may never again be the same. In today’s world, once civil liberties are fenced, they may never be freed, becoming captive to the warden of national security.”). See generally Timothy Vercelloti, Stars and Stripes Forever? Long-Term Linkages Between American Patriotism, Terror, and Civil Liberties (Jan. 6, 2005) (unpublished manuscript), available at http://www.allacademic.com/meta/p67075_index.html.
impact. The legal profession’s response to these developments, as noted by comparative law scholars in other countries, stands in contrast to average citizens. According to Günter Frankenberg, professor of public law, legal philosophy, and comparative law,

Comparatively speaking, the American legal discourse, motivated and accelerated by the politics of counterterrorism, covers a wider spectrum of argument which is united, though, by the rhetoric of necessity. September 11, the war on terror, an imperial president who arguably authorized torture, and “rescue torture,” practiced notably in Guantánamo and Abu Ghrabl, shook up the legal profession and became the focal points of critical and apologetic juridical interventions in the wake of the Military Commissions Acts of October 2006 and the earlier Patriot Act.

Polls from nonpartisan and neutral organizations such as World Public Opinion and Zogby International reflect the magnitude of the public mistrust of the Bush administration. A Zogby poll found that a statistically significant number of Americans believe that officials in the Bush administration had prior knowledge of an imminent attack in 2001 and that the 9/11 Commission may have covered up relevant facts. A World Public Opinion poll found that citizens from eight countries (ranging from friendly nations to hostile ones) believe that an entity other than Al Qaeda is responsible for the 9/11 attack. Republican Congressman Curt Weldon is quoted as saying

[t]here’s something very sinister going on here that really troubles me . . . . What's the Sept. 11 commission got to hide? . . . The commission is trying to spin this because they're embarrassed about what’s coming out. In two weeks with two staffers, I've uncovered more in this regard than they did with 80 staffers and $15 million of taxpayer money.

The Program on International Policy Attitudes at the University of Maryland sponsored a public opinion poll of 16,063 people in 17 nations outside of the United States during the summer of 2008:

9. See Roberts, supra note 5; Thomas, supra note 5.
Even in European countries, the majorities that say al Qaeda was behind 9/11 are not overwhelming. Fifty-seven percent of Britons, 56 percent of Italians, 63 percent of French and 64 percent of Germans cite al Qaeda. However, significant portions of Britons (26%), French (23%), and Italians (21%) say they do not know who was behind 9/11. Remarkably, 23 percent of Germans cite the US government, as do 15 percent of Italians.14

Even the New York Times reported that two of the 9/11 hijackers were known associates of Osama bin Laden and were sought in the U.S. by the FBI before the attack. Both men, Khalid al-Mihdhar and Nawaf al-Hamzi, purchased airline tickets in their own names before boarding the American Airlines flight that left Dulles Airport.15 Confidence was shaken at home and abroad among key allied nations when a series of leaked memos and snippets of dialogue among international leaders suggested that our situation in Iraq is best characterized as the invasion in want of a pretext from the day that George W. Bush took office.16 How profoundly destabilizing was the possibility that the new tools of monitoring and surveillance created by the PATRIOT Act—sweeping legislation rammed through Congress in response to deaths by anthrax poisoning—might be used for spying on American citizens as much as for protection against the supposedly ubiquitous terror cells lurking behind every mosque?17 This left many to wonder whether it too might just be a pretext for amassing the information needed to punish or deter critics of former President George W. Bush and those in his administration.18 A crisis of confidence mushroomed

abroad with our invasion of Iraq; growing reports of extraordinary renditions and torture camps on distant shores nearly destroyed our credibility on the world stage.\textsuperscript{19}

At home, the determination of social conservatives to dominate the political landscape led to concerted attacks on public media, educational institutions, and members of the judiciary.\textsuperscript{20} The so-called liberal, agenda-driven media, radical professors, and activist judges (who legislate from the bench) became central villains in conservative talking points, as mainstream American news operations spent valuable resources tracking and reporting the intimate details of celebrities’ private lives.\textsuperscript{21} Thus, our recent historic election was spawned by a broad range of Obama supporters reasonably worried about the future of the nation, as well as the future of our commitment to a thriving democracy. Threats to judicial independence and academic freedom, if successful, have a more profound effect upon the democratic order because they undermine freedom of speech, critical inquiry, and the rule of law. Alexis de Tocqueville observed in Democracy in America that the authority that Americans have “[e]ntrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy.”\textsuperscript{22} The obvious corollary is that lawyers are often,

\begin{footnotes}
\item[22] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 348 (Francis Bowen, ed., Henry Reeve, trans., Late Sever, Francis & Co. 1882) (1835).
\end{footnotes}
as he described, possessed of certain habits of order, formality, and instinctive regard for continuity that naturally render them hostile to the revolutionary spirit and enable the bar and the bench in concert to exercise a substantial countervailing power when democracy is threatened.23

This essay highlights several factors that render American lawyers our most effective advocates for the maintenance and progress of democratic institutions.24 Defense of judicial independence and academic freedom, as a natural outgrowth of their legal training and sociohistorical development, are crucial for restoration of democratic processes. Such advocacy is significant to the conceptual and functional strength of these institutions, beyond the potential benefit to an identifiable group of sitting judges and/or university professors. On behalf of future generations of American citizens, sustained efforts to stabilize a democracy in peril will reinforce the structural integrity of mechanisms that ensure oversight, accountability, and fundamental fairness—matters completely ignored as we crossed the Rubicon, riding the waves of deregulation and national security, only to find ourselves in a sea of crisis.

I. THE VALUE OF JUDICIAL INDEPENDENCE AND ACADEMIC FREEDOM TO DEMOCRATIC GOVERNANCE

Legal experts routinely acknowledge the need to protect the rights of the minority against the will of popular majorities, rendering judicial independence the most essential characteristic of a free society.25 As Judge Shirley Abramson stated, “Judicial independence is a means to an end—the end is due process, a fair trial according to law. Judicial independence thus protects the litigants in court and all the people of the nation.”26

Judges and scholars have also emphasized the importance of academic freedom. Justice Felix Frankfurter declared that it was the “special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens.”27 Justice William Brennan echoed the importance of academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First

23. Id. at 349.
24. 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 697 (Little, Brown & Co. 1927) (1868) (citing D. Bethune Duffield, The Lawyer’s Oath, An Address Delivered Before the Class of 1867, University of Michigan 6 (Mar. 27, 1867) (“Every high-minded and cultivated community, too, will demand a high-minded and cultivated Bar; regarding it as the as the very surest bulwark of defense to their liberties.”)).
Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.\textsuperscript{28}

A report on Policy for Government by the People for the 21st Century reminds us that democracy is not immutable—without due diligence, antidemocratic forces tend to creep forward, making small but significant adjustments in key structural components of democratic institutions.\textsuperscript{29} As a result, efficacy and normative functional values are quickly undermined by duplicity and neglect.\textsuperscript{30}

\textbf{II. CONCERTED ATTACKS ON JUDICIAL INDEPENDENCE AND ACADEMIC FREEDOM}

\textbf{A. Strong-Arming the Judiciary}

National Public Radio represented one of the few media outlets that reported the remarks of former U.S. Supreme Court Justice Sandra Day O’Connor when she condemned attacks on judges by conservative leaders as attempts to strong-arm the judiciary and key steps along the road to dictatorship.\textsuperscript{31} Her statements referred to former House Speaker Tom DeLay’s attack on pro-choice rulings, those striking mandatory prayer in public schools, and decisions upholding familial decisions to remove the artificial life support of those in persistive vegetative states.\textsuperscript{32} Similarly, U.S. Senator John Cornyn stated that he was also distressed by decisions of activist judges that may well account for recent episodes of courthouse violence—the cause and effect of unpopular rulings by unaccountable judges.\textsuperscript{33}

In a speech to members of the South African Parliament, Justice Ruth Bader Ginsburg confirmed that she and Justice O’Connor received death threats because they acknowledged international law in their written opinions.\textsuperscript{34} She views the introduction of legislation that prohibits citation to foreign laws or rulings in interpreting the U.S. Constitution as fueling the irrational fringe.\textsuperscript{35} In response, one bill’s sponsor, Congressman Tom Feeney (Republican of Florida), took aim by insinuating that the Justices

\textsuperscript{28} Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
\textsuperscript{30} Id.
\textsuperscript{32} Id.
\textsuperscript{35} Id.
needed a reality check insofar as judicial independence has never been a shield from criticism.\textsuperscript{36}

During a dialogue at Stanford Law School, Justice Stephen Breyer described legislative attempts to limit the topics on which judges can rule, noting former President George W. Bush's proposed constitutional amendment to bypass activist judges.\textsuperscript{37} Article III jurisdiction\textsuperscript{38} has been targeted through efforts to limit the Court's jurisdiction involving public displays of the Ten Commandments, the constitutionality of the words "under God" in the Pledge of Allegiance, and bans on same-sex marriage.\textsuperscript{39}

Stanford Law School Dean Larry Kramer acknowledged that, beyond the inevitable tension between co-constituent branches, we entered a new era.\textsuperscript{40} Justice O'Connor rates the Supreme Court's relationship with right-wing members of Congress as the worst she has seen: "while scorn for certain judges is not an altogether new phenomenon, the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."\textsuperscript{41} A group called JAIL 4 Judges (Judicial Accountability Initiative Law) campaigns for state constitutional amendments to repeal judicial immunity by impaneling grand juries to censure judges based upon their decisions.\textsuperscript{42} The group's leaders brag that their efforts have created an "intimidation factor [that now flows] through the judicial system."\textsuperscript{43}

\begin{flushright}


And President Bush, who complains that judges are trying to shape state and federal laws through court rulings (so-called "judicial activism"), is pressing for a constitutional amendment banning same-sex marriage.

\textit{Id.}

38. U.S. CONST. art. III (The judicial power of the United States extends to cases arising under the Constitution, federal laws or treaties, cases involving ambassadors, ministers and consuls, cases of maritime jurisdiction, cases in which the United States is a party, cases between two or more states, cases between citizens of different states, cases between citizens of the same state claiming land under the grants of different states, and cases between a state or citizens of a state and a foreign state or citizens of a foreign state.).

39. Erickson, \textit{supra} note 37.

40. \textit{Id.}


42. \textit{Id.}

43. \textit{Id.}
Threatening communications toward federal judges have increased fourfold in recent years, forcing Congress to allocate funds for installation of home security systems.\textsuperscript{44} Calls for impeachment, efforts to eliminate judicial immunity, and the push for legislation that would limit federal court jurisdiction on select topics were capped by proposals for an inspector general to investigate and monitor the federal bench.\textsuperscript{45} At the next level of governance, state court justices aligned with the ideological agenda carry the mantle from one state to the next. Alabama Supreme Court Justice Tom Parker attacked his colleagues for their faithful application of precedent in \textit{Roper v. Simmons}, which prohibits imposition of the death penalty for minors.\textsuperscript{46} Boldly reinterpreting the Supremacy Clause, Justice Parker advised state judges to ignore "the liberals on the U.S. Supreme Court . . . [who] look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state."\textsuperscript{47} As H. Thomas Wells assumed the presidency of the American Bar Association, regional leaders of the Bar nationwide expressed grave concerns about "potential threats to judicial independence, and to fair and impartial courts at the state level."\textsuperscript{48} The obvious threat was taken into consideration by the Framers of the Constitution.\textsuperscript{49}

Threats of budget cuts that might hamper traditional judicial functioning loom large. U.S. Court of Appeals for the Ninth Circuit Judge Pamela Rymer warns that, with legislative control over state and federal judicial budgets, judges must remember that "without money for probation officers, civil juries and an adequate number of judges, the power of the judicial branch is diluted."\textsuperscript{50} If the threat to deny necessary increases or trim

\begin{footnotes}
\item[44.] Id.
\item[45.] Id.
\item[46.] Id.
\item[47.] Id. (alterations in original) (internal quotation marks omitted).
\item[49.] We have Alexander Hamilton's assurances, from Federalist 78, that the judiciary is "the least dangerous" branch of government. Having "neither Force nor Will, but merely judgment," it "has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." \textit{THE FEDERALIST} No. 78 (Alexander Hamilton).
\item[50.] News Release, Mandy Erickson, Stanford News Serv., 'Judicial Activism' Depends on Point of View, Judges Say (Oct. 26, 2004), available at http://news-service.stanford.edu/pr/2004/judicial-1027.html. Canadians care about judicial independence, because a strong independent judiciary can be a bulwark against tyranny; an aspiring dictator attempts to neutralize the independence and effectiveness of the judiciary through harassment or corruption. \textit{Id.} The Supreme Court found that judicial independence was a constitutionally protected right and required the government to set up arms-length commissions to remove politics from the remuneration process. Many issues continue in public debate, and while governments represent the will of the Canadian majority, judges guarantee the rights of all. Where judges are vulnerable to the influence, manipulation, or
funding has a measurable chilling effect, it pales in comparison to the experience of Chief Justice Carol Hunstein of the Georgia Supreme Court. Chief Justice Hunstein was swift-boated in retaliation for her commitment to fair and impartial decision making by the number of corporations who tossed large sums of money into 527 groups backing her opponent.\(^{51}\)

B. Academic Freedom in the Recycle Bin

As the judges are forced to deal with what many concede to be a hostile climate for members of the bench, the academic community witnessed development of strategic efforts to change the face of academia. Most notably, the efforts are sustained by *FrontPage Magazine*,\(^{52}\) *Campus Watch*,\(^{53}\) and the now infamous David Horowitz, who claims to list America’s 101 most dangerous professors.\(^{54}\) Warnings about a deluge of radical and extremist professors, who are antiwar, revolutionary, and harboring anti-Israeli or anti-U.S. bias, hit academic circles like a Texas twister. With assistance from conservative political strategist Karl Rove, and former House majority whip, Tom DeLay, Horowitz presented Republican members of Congress with his “Academic Bill of Rights” and his political primer, *The Art of Political War: How Republicans Can Fight to Win*, which Rove described as the “perfect pocket guide to winning on the political battlefield.”\(^{55}\) Their efforts are supported by the same ideologically networked think tanks that sponsor studies purporting to control of government, this balance is thrown off-kilter and democracy inevitably falters. See id.


53. See, e.g., Stanley Kurtz, *Taking Sides on Title VI: Middle East Studies Reform Goes Partisan*, *CAMPUS WATCH*, Dec. 12, 2007, http://www.campus-watch.org/article/id/4606 (“Although the Senate has already passed a very reasonable bipartisan compromise on Title VI (crafted by Senators Kennedy and Enzi), the House appears to have buckled to pressure from the higher education lobby, and gutted nearly every previously proposed reform of this troubled federal program. The radical professors who control MESA (the Middle East Studies Association) have been pressing to gut Title VI reform, and the House Democrats have clearly listened.”); see also Nicole Gerring, *Blacklisted Politics Professor Speaks Out*, *ITHACAN* (N.Y.), Nov. 14, 2002, http://www.ithaca.edu/ithacan/articles/0211/14/news/2blacklisted_.htm (noting that a student accused Professor Robert Ostergard, assistant professor of politics, of being anti-Semitic after a discussion in his State University of New York (SUNY) Binghamton class and reported him to Campus Watch).


demonstrate the effects of liberal bias among college professors. This research is among the least reliable in demonstrating the major premise or primary allegation: that a strong liberal bias has led to systematic exclusion of conservative ideas, limited promotion opportunities for conservative faculty, and indoctrination of liberal perspectives that has damaged student learning.\textsuperscript{56}

C. Heterodoxy in Action

At the extreme, there is the proposal for a grand strategy to change the face of academia that calls for a two-prong attack. First, weed disloyal oppositionists from academic ranks. Afterward, lobby legislatures for an Academic Bill of Rights to aid in marshalling academic resources for the conservative cause. The decisive objective, according to its proponents, is to force academics to use their talents, skills, and resources to fight the so-called fourth-wave terrorism.\textsuperscript{57} They must become active agents in "dismantling the intellectual foundations of terrorist support."\textsuperscript{58} According to one proponent, it makes perfect sense to discuss during wartime where the line between dissent and loyalty actually exists.\textsuperscript{59} "Terrorist professors"\textsuperscript{60} and bloggers waging "electronic jihad"\textsuperscript{61} have produced the current higher education crisis by elevating conditions that convert universities into "hotbeds of radical activism."\textsuperscript{62} Taking away the privilege of tenure is touted as the most effective means of dealing with dissenter.\textsuperscript{63}

At the other end of the spectrum, a less visible strategist recommends quietly tackling academia's "multiple defensive rings": academic freedom, tenure, and endowment, one by one. Reforming the politically correct university, according to Stephen Balch, requires a new push for "academic pluralism."\textsuperscript{64} Gutting liberal ideology is best achieved through programs that integrate studies of Western civilization, including the history of constitutionalism, market economics, and a variety of philosophical arrangements.\textsuperscript{65} The ultimate goal is to bring together a cohort of believers to launch an information revolution that makes "all education . . . a much

\begin{itemize}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} (noting that this grand strategy might be the ticket to somehow shepherding academic resources in a productive way in the war on terrorism as a kind of psychopolitical force of information power in the "war of ideas").
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{64} \textit{STEPHEN BALCH, WHERE WE'VE COME AND WHERE WE SHOULD GO: THE ROUTE TO ACADEMIC PLURALISM} 1 (2007), \textit{available at} http://www.aei.org/docLib/20071114_20071411Balch.pdf.
\item \textsuperscript{65} \textit{Id.} at 15–16.
\end{itemize}
more capital intensive and much less labor intensive business than it currently is."  

III. DEMOCRACY, FREEDOM AND AMERICAN LAWYERS

Attorneys in the United States are especially qualified to advocate on behalf of democratic institutions. Their instincts toward rulemaking, rule bending and strategic argumentation are carefully honed throughout their legal education. Upon acquisition of the license to practice law, they wield a power unmatched by all other professional classes precisely because they dominate traditional branches of government at the local, state, and federal level. In addition to governmental posts, they hold key positions of power and authority as trustees and directors at all levels of private sector service and industry. The majority of American lawyers share a vision of our nation that includes faith in the great democratic experiment. Their undergraduate backgrounds and legal training predispose them to appreciate the nuances in President Obama's call for a new spirit of patriotism, responsibility, and equality. Their constitutional law studies, in particular, provide a key illustration of President Obama's assertion that over time "we rise or fall as one nation, as one people."  

According to Rabbi Sherwin Wine there are really only two visions of America,

One precedes our founding fathers and finds its roots in the harshness of our puritan past. It is very suspicious of freedom, [and] uncomfortable with diversity[,] hostile to science, unfriendly to reason, contemptuous of

66. Id. at 16.
67. Brooks Holland, Holistic Advocacy: An Important but Limited Institutional Role, 30 N.Y.U. REV. L. & SOC. CHANGE 637, 639 (2006) (emphasizing the qualities of holistic advocacy where lawyers operate as part of team, which may include other lawyers, social workers, investigators, law students, interns, and high school students); Kathryn M. Stanchi, Moving Beyond Instinct: Persuasion in the Era of Professional Legal Writing, 9 LEWIS & CLARK L. REV. 935, 937 (2005) (reviewing Michael R. Smith, ADVANCED LEGAL WRITING (2002)) ("For each category of device, the book explains the function served by the device, and evaluates its persuasive power from the perspectives of different disciplines, including classical rhetoric and cognitive psychology. The goal is to help students and lawyers discover 'the hidden world of forces' underlying effective advocacy, and to demonstrate that certain tools of advocacy are effective for concrete, demonstrable reasons. Advanced Legal Writing's realization of this goal makes the book stand out among advocacy texts.").
68. As predicted and encouraged by Alexis de Tocqueville, "the authority [Americans] have [e]ntrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy." TOCQUEVILLE, supra note 22, at 348. Yet, the situs of the training ground is changing. See, e.g., Marc Galanter, Tournament of Jokes: Generational Tension in Large Law Firms, 84 N.C. L. REV. 1437, 1448 (2006) ("[S]enior lawyers wield power that can devastate, as well as facilitate, the careers of juniors. Younger lawyers in their collective ambition to rise represent a threat to the security of seniors, as well as the source of their affluence. While the old are anxious about losing their power, the young are anxious about their using it. The jokes point precisely to this covert and undiscussable conflict at the heart of the large firm. As that conflict intensifies, we can expect more jokes about the tensions and rivalries that conflict engenders.").
69. See Obama, supra note 1.
personal autonomy. It sees America as a religious nation. It views patriotism as allegiance to God. It secretly adores coercion and conformity. Despite our Constitution, despite the legacy of the Enlightenment, it appeals to millions of Americans and threatens our freedom.

The other vision finds its roots in the spirit of our founding revolution and in the leaders of this nation who embraced the age of reason. It loves freedom, encourages diversity, embraces science and affirms the dignity and rights of every individual. It sees America as a moral nation, neither completely religious nor completely secular. It defines patriotism as love of country and of the people who make it strong. It defends all citizens against all unjust coercion and irrational conformity.70

As lawyers and law professors, this second vision is our vision.

A. Lawyers in Action

The manifest goal of judicial independence is to enable fair and impartial adjudication. Fears surrounding the reach of ideologues, the influence of public opinion, and coercion from legislative or executive branches, private citizens, and interest groups highlight the relationship between democracy and justice. Former Supreme Court Justice Sandra Day O'Connor declared that the natural constituency for judicial independence is a "vibrant, responsible lawyer class."71

One journalist sums up Justice Breyer's thoughts on where we now stand:

Breyer said that while the judicial branch is currently in the hot seat, the country has seen significant progress since President Jackson ignored a Supreme Court ruling to grant northern Georgia to the Cherokee and President Eisenhower had to call in troops to enroll black children in a white school. After Bush v. Gore, Breyer said, "Despite those strong disagreements, nobody ever thought of troops, nobody ever thought that decision wouldn't be obeyed. That is... a treasure that has taken 200 years, a civil war, 80 years of segregation and a lot else besides. The challenge is to pass just that along to the next generation."72

A background article from the American Bar Association on the independence of the judiciary notes that judicial independence is of such grave concern to the legal, business, and academic communities "because

---


71. Mauro, supra note 33.

without independent courts, we might not be able to restrain a President who has gone too far in a political campaign, void a state law requiring the segregation of schools, or hold a police officer accountable."

The constitutional basis for academic freedom has been hotly contested in recent years. In bygone years, it was contested mostly by those who wished to deny its relevance. Academic freedom has received formal recognition and the official endorsement of the Supreme Court since the McCarthy era. That Supreme Court Justices over time have disagreed as to the nature and scope of academic freedom in terms of practical application should hardly create cause for alarm. Academic freedom, like every other vital liberty, is often greeted with a healthy skepticism that inspires a second sober look and routine charges of heresy within academic circles. These circumstances suggest that academic freedom has assumed its rightful place among hundreds of other constitutional principles with similar fates. If plurality opinions, 5-4 decisions, and the fact that all citizens enjoy freedom of political speech, association, and other First Amendment protections are academic freedom's only conceptual

75. On October 12, 1985, the late Justice William J. Brennan, Jr., said the following about constitutional interpretation:

[T]he amended Constitution of the United States . . . entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text.

76. See e.g., Bruce Ackerman, Robert Bork's Grand Inquisition, 99 YALE L.J. 1419, 1419 (1990) (reviewing Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)) ("This book is a call to battle—against the enemy within. The rhetoric is martial. We are in the midst of 'a long-running war for control of our legal culture, which, in turn, [is] part of a larger war for control of our general culture.' It is also religious—the struggle is against 'heresy' on behalf of an embattled 'orthodoxy.' The enemy? Subjectivists who turn their backs on history; relativists who seek to impose their moral prejudices on the American people by reading them into the Constitution. These heretics have entrenched themselves in America's law schools, where they seek to bedazzle and intimidate the judiciary by their fancy theories and false erudition—and thereby lead the next generation of lawyers astray." (quoting BORK, supra, at 6, 271)).
challenges, then I can leave for vacation. What is beyond debate, though maligned in public discourse, is that academic freedom is a constitutionally significant means to a constitutionally desired end. Its principal value to individual professors, the colleges and universities effectively run by them, and the nation as a whole is as vital as judicial independence and freedom of the press, which might explain why all three are under strategic attack by conservative political operatives. Under the Constitution that we are expounding, protection for the free exercise of political rights in the United States has always mandated meaningful distinctions between permissible regulation of individuals and entities in nearly all fields and politically motivated campaigns of intimidation and coercion.

B. Academic Freedom as a Constitutional Mandate

Principles of academic freedom are constitutionally ordained, along with the priests of our democracy, by the mandates of the First and Fourteenth Amendments and are designed to serve as a necessary check against political excesses from the fringe Right and Left on behalf of individuals and institutions. Edmund Burke has earned a place in history for declaring that the press in free societies operates as the Fourth Estate—a necessary means of providing checks and balances in relation to the three traditional branches of government. I nominate Chief Justice Earl Warren as a champion of democracy for articulating the importance of the Fifth Estate. No one, according to Warren, “should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”

Academic freedom is widely guaranteed at both public and private universities as a necessary component of higher education because of its relationship to democracy. The foundation of originalism, the holy grail

77. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”). But see Chen, supra note 74, at 960 (the extant law can best be described as a set of context-specific legal standard loosely connected by some common principles).


79. Sweezy, 354 U.S. at 250; Rachel E. Fugate, Choppy Waters Are Forecast for Academic Free Speech, 26 FLA. ST. U. L. REV. 187, 213 (1998) (“‘Discoveries are made, at least in part, because inquiring minds have an opportunity to challenge one another, to debate their methods and their conclusions, and to question their findings.’ Therefore, academic freedom, both in and out of the classroom, not only benefits the professor, but also benefits society.” (citing Burton M. Leiser, Threats to Academic Freedom and Tenure, 15 PACE L. REV. 15, 60 (1994))).

80. The president of Harvard University issued a statement on the PATRIOT Act and academic freedom in April 2003 declaring that the university will uphold and defend the rights of academic freedom and free speech. “We do these things because academic freedom is central to what the University is all about. It is central to our ability to disseminate knowledge, and to create knowledge.” Office of the President of Harvard University,
of the Right, lends support for Justice Breyer’s assessment of the imperatives around constitutional interpretation.81 His book Active Liberty notes what President John Adams argued in defense of the Constitution more than 200 years ago—that reason rarely prevails: “Scarcely any two writers, much less nations, agree in using words in the same sense.”82 Ultimately, despite the endless debate about the origins of academic freedom, it acts as a Fifth Estate because it sustains the essential workings of our democracy. Breyer, supported by originalist thought, and with the hindsight of four centuries of experience with colleges and universities, sums it up perfectly:

[Our Constitution creates] a coherent framework for a certain kind of government. Described generally, that government is democratic; it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of law itself.83

---


In 1940, the American Association of University Professors (AAUP) and the Association of American Colleges released a joint statement addressing the nature of the “special responsibilities” of the teacher. The paragraph reads as follows:

As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Am. Ass’n of Univ. Professors & Ass’n of Am. Colls., 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretative Comments, available at http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf; see also ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY: HOW TERRORISM, GOVERNMENTS, AND CULTURE WARS IMPACT FREE SPEECH (Evan Gerstmann & Matthew J. Streb eds., 2006). In a study of academic freedom around the world, Streb notes that “Academic Freedom in the United States, while not perfect, is light years ahead of where it is in many countries”: Academics have been attacked in Brazil, Ecuador, Haiti, and Venezuela, imprisoned in Egypt, Ethiopia, and Zimbabwe, and hundreds of college professors and students have been killed over a 40-year period in Colombia. Id. at 144.

81. Originalists claim that “in constitutional adjudication we necessarily face the interpretive choice between the intentions of the Framers and the personal views of unelected federal judges.” DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 2 (2005); see also John Harrison, On the Hypotheses That Lie at the Foundations of Originalism, 31 HARV. J.L. & PUB. POL’Y 473, 474 (2008) (“Originalism is often understood as giving special place to the views of people at the point of origin in time of a legal text. Originalism means following the views of those people. If that is what originalism means, and if originalism is constraining, then people who had to be originalists because of their location in time . . . would have been more constrained than subsequent interpreters.”).


The constitutionally desired end of academic freedom is support for the unique responsibility of higher education institutions: to train students in the formation of grounded judgments about the relative value of competing perspectives, for the advancement of knowledge, and for the maintenance of a free, diverse, and democratic society.\textsuperscript{84}

Professor Ron Standler remains unconvinced of the validity of academic freedom. He suggests that an egalitarian democracy would never embrace a higher level of civil liberties for one group—in this case university professors—in violation of fundamental principles of equality.\textsuperscript{85} According to Rachel Fugate, Supreme Court precedent acknowledging academic freedom "allow[s] for the presence and tolerance of dissent, even when it goes against the deeply held convictions of most members of the university community," as a way of acknowledging that dissent gave birth to this nation and to the Bill of Rights that Americans revere.\textsuperscript{86} Even if we restricted this discussion to the principles embodied in the First Amendment, focusing solely upon doctrines related to and protective of free speech, press, religion, association, assembly, petition, and academic freedom, the cases roundly defeat Standler's position. The rabbi, journalist, police officer, stripper, navy seal, lobbyist, professor, and judge all have varying abilities to exercise that cluster of rights and still retain their employment. Standler concludes that "protection against termination of a professor's employment in retaliation for a controversial remark on a political topic can be accomplished in the employment contract between the professor and university."\textsuperscript{87}

In three recent examples, this statement appears true, but then the academic freedom of the professors is not clearly challenged in all instances. First, the University of California at Irvine requires all supervisory employees to undergo sexual harassment training as a matter of state law.\textsuperscript{88} One professor, Alexander McPherson, has steadfastly refused it as a violation of his principles: "I am offended that the university comes to me and says you need to take sexual harassment training. There is no more reason that I need to take sex harassment training than I need to take training on avoiding grand theft auto or murder or any other crime. The state is imposing this based on politics and that can't be allowed."\textsuperscript{89} He operates on the theory that requiring all professors to take harassment


\textsuperscript{86} Fugate, supra note 79, at 214 (quoting David Rosenberg, Note, Racist Speech, the First Amendment, and Public Universities: Taking a Stand on Neutrality, 76 CORNELL L. REV. 549, 563 (1991)).

\textsuperscript{87} Standler, supra note 85.


\textsuperscript{89} Id.
training suggests responsibility for, if not direct involvement in, harassment, when the mandate should only involve specific departments or individuals with a history of infraction. If he is dismissed by the university, academic freedom would not be implicated regardless of tenure because he would presumably be fired for failure to comply with a reasonable job requirement, rather than for expression of a politically unpopular point of view. Had he completed the training before undertaking a mass campaign to publicize the absurdity of the requirement and the political machinations that led to it, calling for student boycotts and so forth, then we would enter into an entirely different realm of constitutional concerns.

Another example, presented by law professor Stanley Fish in a New York Times editorial is quite different. A lecturer at the University of Wisconsin at Madison publicized his strong conviction in a radio interview that the destruction of the World Trade Center on 9/11 was an inside job perpetrated by the American government, leading many to demand that he be fired. Professor Kevin Barrett is untenured, not subject to a long-term employment contract and a member of Scholars for 9/11 Truth. The university’s provost, Patrick Farrell, renewed Barrett’s contract on the grounds that the university must not “allow political pressure from critics of unpopular ideas to inhibit the free exchange of ideas.”

Academic freedom is implicated in two circumstances. The first occurs when classroom instruction or matters related to course content or design, such as restrictions or additions, are mandated solely by political considerations where no clear rule or lawful policy is implicated. The second involves opposition to promotion, retention, and tenure that originate from political pressures.

In a third example, the Dean of the University of California at Berkeley’s School of Law, Christopher Edley, defended Professor John Yoo with those concerns in mind. A group called American Freedom Campaign reported the following on its website and took action against Yoo:

In 2003, the U.S. Department of Justice’s Office of Legal Counsel issued a memo advising the Pentagon that laws and treaties forbidding torture and other forms of abuse did not apply to U.S. interrogators because of the president’s wartime power.

The man who wrote that memo—John Yoo—is now happily ensconced as a tenured law professor at the UC Berkeley School of Law.

91. Id.
92. Id.
94. The e-mail campaign calling for John Yoo’s dismissal is from a group called the American Freedom Campaign. See Am. Freedom Campaign, Tell the Dean of UC Berkeley School of Law to Fire John Yoo, http://salsa.democracyinaction.org/o/2165/v/1027/campaign.jsp?campaign_KEY=24188 (last visited Feb. 24, 2009).
While an unknown number of people suffer the aftereffects of illegal torture he encouraged, Professor Yoo is teaching, writing, and generally enjoying life in California.

This is flat out wrong. John Yoo should not only be disqualified from ever serving in government again, but he should also be prohibited from spreading his distorted view of the law and the role of lawyers to young law students.

He must be fired. And the man to do it is Christopher Edley, Jr[.], Dean of the UC Berkeley School of Law.95

Yoo is concededly the infamous author of the Bush administration’s “torture memos.” The memos have spawned vociferous attacks upon Yoo’s character as a consummate international war criminal and all-around poster child for the worst possible example for lawyers-in-training. Edley said this in response to calls for his dismissal:

[H]e enjoys not only security of employment and academic freedom, but also First Amendment and Due Process rights . . . .

These protections, while not absolute, are nearly so because they are essential to the excellence of American universities and the progress of ideas. Indeed, in Berkeley’s classrooms and courtyards our community argues about the legal and moral issues with the intensity and discipline these crucial issues deserve. Those who prefer to avoid these arguments—be they left or right or lazy—will not find Berkeley or any other truly great law school a wholly congenial place to study. For that we make no apology.96

Critics who press for an evaluation of whether academic freedom is relevant outside of general First Amendment rights are decidedly unconcerned about the harassment, threats, and manipulation of college administrators. They view the undue provocation of nasty debates about what constitutes “good” legal scholarship, encouragement of a vocal conservative student presence to fuel allegations of an acute lack of intellectual diversity, and manipulation of prelaw literature to reflect these views as a mere exercise of free speech or as somehow related to important measures of accountability.97 The large and integrated network of ideologically defined think tanks that produce misleading publications are

95. Id.
96. Edley, supra note 93.
97. See DAVID HOROWITZ, INDOCTRINATION U.: THE LEFT’S WAR AGAINST ACADEMIC FREEDOM (2007); The Federalist Society, Conservative & Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others, http://www.fed-soc.org/resources/id.65/default.asp (last visited Feb. 24, 2009) ("[T]he student may be interested in how the constrained and unconstrained visions manifest themselves among law teachers. He should take a look at two short articles: Michael McConnell’s 'Four Faces of Conservative Legal Thought' and Mary Becker’s 'Four Faces of Liberal Legal Thought.' These two pieces serve as a sort of field guide to law professors’ ideologies.").
seen as fair game in the so-called culture wars. If the sponsors of the new studies of faculty politics, which are known to ignore the basic measures of validity in social science research, were critiqued as long and hard as the Supreme Court's articulation of the basis for academic freedom, the relationship between academic freedom's goal of truth seeking and democratic governance would be self-evident.

Instead, we are faced with a dilution of minority rights as advocated in conservative public policy journals that spend an inordinate amount of time and resources on issues of criminal justice, affirmative action, constitutional history, and religious liberties. Key speakers on their conference circuits openly mock the "sentimental notion among the general public that education is the engine of mobility between socio-economic classes." They lament the fact they have found a way to deal with donors so as to insure influence over the direction of research—by defining the questions—but not enough influence over the findings themselves. They encourage adherents to return to their respective universities with the intention of seizing upon every scandal involving liberal professors. They have determined that if they can prod even one trustee to press against the perimeters, while staying closely connected to administrators who have many more leverage points than do trustees in isolation, they can infiltrate the universities they claim to be hostile to their cause. They advocate telling trustees that self-governing faculties are not suited to manage the academic enterprise and that a concentration of power has corrupted the process. One need not be a mathematician, conspiracy theorist or elite strategist to see the connection between these events and the political primer Art of Political Warfare: How Republicans Can Fight to Win. Likewise, there is no mystery as to who bears responsibility for making sure that criticism does not cross over into manipulation and intimidation.

98. Alan Jones, Connecting the Dots, INSIDE HIGHER ED, June 16, 2006, http://www.insidehighered.com/views/2006/06/16/jones. The conservative coalition advocates abolishing taxes, especially estate taxes and capital-gains taxes. Regulations they want abolished include minimum-wage laws, affirmative action, health and safety regulations for workers, environmental laws, and gun controls. They also support cutting or eliminating a variety of government programs including student loans, state pension funds, welfare, AmeriCorps, the National Endowment for the Arts, farm subsidies, and research and policy initiatives on global warming. Even well-entrenched and popular programs such as Medicare, Social Security, and public education are targeted for rollbacks, beginning with privatization. See generally RAMPTON & STAUBER, supra note 55.

99. See generally Robin Barnes, Drafting the Priests of Our Democracy to Serve the Diplomatic, Informational, Military & Economic Dimensions of Power, 27 BUFF. PUB. INT. L.J. (forthcoming 2009) (noting that eight recent studies of faculty politics that alleged disruptive liberal bias were reviewed by experts according to five basic measures of validity in social science research in order to determine whether they were science or propaganda and that all eight came up short in adhering to appropriate research standards).
IV. ADVOCACY FOR THE PRESERVATION OF ACADEMIC FREEDOM AND JUDICIAL INDEPENDENCE

The task of preserving academic freedom and judicial independence is properly undertaken by those deemed guardians of the public interest. Professor Russell Pearce has painstakingly laid out the history and justification for the role of lawyers as part of the governing class.\textsuperscript{105} It is simply time to get to work. Our goals necessarily include developing greater public and student understanding of judicial independence and academic freedom. This is effectively achieved by demonstrating how manipulations of these concepts become touchstones for debate during election years and in times of crisis.\textsuperscript{106} Free and accessible forums for discussing critical attacks on individual judges or the judiciary and individual professors or universities create a vital opportunity to train members of the public in appropriate and reasoned analysis.\textsuperscript{107} Efforts undertaken through our bar associations and public legal education programs, such as Street Law, help to disseminate information about the appropriate procedures for handling complaints against judicial officers and university officials.\textsuperscript{108} Providing university-based support for professors

\textsuperscript{105} Russell G. Pearce, Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role, 8 U. CHI. L. SCH. ROUNDTABLE 381, 384-400 (2001).

\textsuperscript{106} Balch, supra note 64, at 9.

\textsuperscript{107} The AAUP statement on professional ethics describes the “special responsibilities” of the teacher. See Am. Ass’n of Univ. Professors & Ass’n of Am. Colls., supra note 80. These include rights and obligations of citizenship measured against their responsibilities to their subject, students, profession, and their institution. “As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.” Id.

\textsuperscript{108} See, e.g., City-Wide Task Force on Housing Court, How To Make an Effective Complaint About a Judge, http://www.tenant.net/Court/Howcourt/complain.html (last visited Feb. 24, 2009). The United Kingdom has an Office for Judicial Complaints that clearly establishes their procedures and encourages litigants to lodge their complaints: “Your complaint should be made as soon as possible and in any event, no later than 12 months after the incident that you wish to complain about. If your case or your appeal is ongoing, we will not be able to consider your complaint until the case is closed; but you should still let us know about your complaint as soon as you can.” Office for Judicial Complaints, Complaints About Judges, Members of Small Tribunals or Coroners, http://www.judicialcomplaints.gov.uk/complaints/complaints_judge.htm (last visited Feb. 24, 2009). In the United States, complaints against federal judges are filed under the Judicial Conduct and Disability Act of 1980, as amended. Under the Act, any person may file a written complaint alleging that a judge has engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all duties of office by reason of mental or physical disability.” Complaints are filed with the chief judge of the court of appeals in the circuit in which the judge sits, through the clerk of the court. The chief judge may also “identify a complaint” in a written order stating reasons. After reviewing a complaint (and perhaps engaging in a limited inquiry), the chief judge either: dismisses the complaint, concludes the proceeding if corrective action has been taken, or appoints a special committee.
who become targets of student-led attacks, especially those facilitated by national or regional ideologically based groups, is an important first step in building cohesion, furthering expression, and developing enthusiasm around the mission of the university. Greater involvement in university leadership of fair and civic-minded leaders who understand the importance of protecting academic freedom through neutral processes is an important step toward reaching our constitutionally protected objectives. In that sense, curtailing outside influence of faculty hiring on political grounds is as important as preventing politically motivated firings.

Improper influence on political grounds is an age-old battle, raging more intensely than ever, now that a select group of major corporations control virtually all media formats. Despite this dominance, it is increasingly

---


109. According to Robert Quinn, the director of the Scholars At Risk Network, an organization he co-founded in 1999, 

[A] range of global forces in the past half-century had put academia under unprecedented pressure. We need to reintroduce people to the fundamental principles of these values; the academy needs to explain its role and work to people. We are at an important historic moment: the tide has swept higher education forward without waiting for its values to catch up.


110. See, Jennifer Elrod, Critical Inquiry: A Tool for Protecting the Dissident Professor’s Academic Freedom, 96 CAL. L. REV. 1669, 1670–71 (2008) (“The actions taken by [the University of Colorado]’s highest officials raise the issue of whether any tenured professor at a public university risks incurring an investigation of all her endeavors—academic and otherwise—when she expresses dissident political opinions. After incidents like Churchill’s firing, all faculty members might fear that they are susceptible to the same intense scrutiny and—ultimately—the same harsh economic sanction. As a result, professors will likely err on the side of caution, refraining from speaking or writing publicly about their political perspectives.”); Terry Smith, Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace, 57 AM. U. L. REV. 523, 553–54 (2007) (“[U]ndeterred by appearances of pretext, the university brought charges of ‘research misconduct’ against Churchill on the heels of the public controversy over his 9/11 remarks.”); Julie H. Margetta, Note, Taking Academic Freedom Back to the Future: Refining the “Special Concern of the First Amendment,” 7 LOY. J. PUB. INT. L. 1, 23–25 (2005) (“The expansion of the Churchill investigation from inappropriate speech to academic fraud is not far off from the potential spiraling of offensive speaker to suspected terrorist. Under the PATRIOT Act, a professor like Churchill could become a suspect as the result of authoring a controversial publication. This, in turn, could lead to a government search of his research, publications, and personal and financial records, all without his knowledge.”).

111. Christa Corrine McIntock, The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 570–571 (2004) (“Imagine [that] ABC criticizes a Disney employment practice, NBC reports General Electric is involved in a political cover-up, Fox critiques Rupert Murdoch’s News Corporation’s involvement with campaign finance violations or CBS denounces Westinghouse for its involvement with building weapons of mass destruction. These hypothetical situations are not reality because at present, approximately six large media corporations control nearly ninety percent of all major media outlets. With such large corporations in close relations and with their interests in cable, radio, publishing and television ownership continuing to expand, the public may wonder whether media critic A. J. Liebling was correct to assert, freedom of the press is guaranteed
important to stem the tide of political influence in faculty hiring and in the maintenance and selection of quality candidates for the bench.\textsuperscript{112}

Actively engaging debates about rules that allow judicial acceptance of campaign contributions from lawyers and others who regularly appear before them as part of the larger dialogue about issues related to campaign finance reform are useful as we compare and contrast the unique implication of judicial bias in favor of campaign donors.\textsuperscript{113} Working to eliminate the circumstances where hundreds of federal judges take trips each year to fancy resorts for legal seminars paid for by corporations and foundations that have an interest in federal litigation is an effective means of raising public awareness around issues of fairness in the political process as a whole.\textsuperscript{114}

Answering the widespread misconceptions featured in philosophical debates over regulatory efforts in the interests of social justice has become so labor-intensive that they hardly seem worth the time. However, the question of whether there is a moral imperative in the notion of government for and by the people, in general, and within constitutional democracies, in particular, has been advanced in Sweden in an effort to "increase the citizens' participation, influence and involvement in the development of society in the 21st Century."\textsuperscript{115} Principles of equality, diversity, and interdependence ring especially loud in the great collective symphony of "we the people," emphasizing the duty to resolve conflicts peacefully with some degree of consensus and respect for others.


\textsuperscript{113} See, e.g., Michael Scherer, State Judges for Sale, NATION, Sept. 2/9, 2002, at 20 ("Supreme Court justices [have] been meeting under the auspices of the National Center for State Courts to explore other possible reforms. The judges have discussed extending term limits, eliminating partisan elections and establishing independent review boards. The latter plan has recently been adopted by the Louisiana Supreme Court, which set up a board to monitor judicial campaign activity. As an officially sanctioned watchdog, the group is empowered to speak out against unscrupulous campaign tactics, battling free speech with more speech.").


\textsuperscript{115} GOV'T COMM'N ON SWEDISH DEMOCRACY, supra note 29, at 1.
CONCLUSION: A LESSON FROM THE LAWYERS OF PAKISTAN

In May 2008, the University of Exeter held a symposium on the value of a Hippocratic Oath for Lawyers.\footnote{116} Associate Dean for Cornwall Anthony Pinching questioned whether there was a need for some unique process through which one “becomes a member of a profession and ceases to be an ordinary person.”\footnote{117} The swearing of an oath, in his view, is ultimately about changing the meaning of the future.\footnote{118} A lawyer’s oath, when viewed as a rite of passage, mythical or otherwise, has that transforming tendency.\footnote{119} A lawyer’s first discussion about the nature and scope of our professional values usually begins and perhaps ends in law school. Many scholars have noted that value devaluation as a norm has transformed dialogue about justice into a free-for-all on moral relativism that leaves precious little “time, space, energy or inclination for deep reflections on the concept [of] justice.”\footnote{120} According to former Head of Exeter Law School, Kim Economides, this neglects or ignores a key aspect of “lawyers’ professional lives and character: namely courage and integrity.”\footnote{121} Economides continues:

Last November I tuned into the news on Radio 4 and heard a report on lawyers and judges in Pakistan being beaten up and imprisoned for taking a stand in defense of democracy and the rule of law. I was incredibly moved and impressed by the way in which these lawyers naturally assumed, and despite considerable cost to their personal security, their duty was to uphold democracy and legal values.\footnote{122}

In the age of Obama, where all Americans are being called to reunite in the common cause of restoration of peace, prosperity, and integrity in governance, with all hands on deck, no less, I echo Rabbi Wine.\footnote{123} Lawyers are uniquely qualified to carry the collective torch for love of country and of the people who make it strong by defending those managing the institutions of democracy against unjust coercion and irrational conformity.

\footnote{117}{Id. at 42.}
\footnote{118}{Id. at 43.}
\footnote{119}{Id.}
\footnote{120}{Id. 46.}
\footnote{121}{Id.}
\footnote{122}{Id.}
\footnote{123}{See supra note 70 and accompanying text.}