Drafting the Priests of Our Democracy to Serve the Diplomatic, Informational, Military & Economic Dimensions of Power

Robin Barnes
University of San Diego School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bpilj

Part of the Education Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/bpilj/vol27/iss1/5
I. INTRODUCTION
A. Defining a Typical Law Professor's Vision of America
B. Converting College Campuses to Hotbeds of Radical Activism

II. PROPOSED POST-9/11 GRAND [ACADEMIC] STRATEGY
A. Pseudo-Scientific Research
B. Calls for Weeding Out Disloyal Oppositionists

III. EXPLORING THE RHETORIC & REALITY
A. Constitutionally Prescribed Liberty of Conscience for Professors
B. Idealism Aside: We Remain Ahead of Our Times

IV. CONCLUSION
A. Lessons From the Stop-Loss Policy

I. INTRODUCTION

To regard teachers—in our entire education system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens . . . .

Federal Court rulings upon the limits of speech rights for public employees have begun to question whether there is a constitutionally viable basis for distinguishing university...
professors from traditional public employees as it pertains to those rights. The central inquiry has revolved around the meaning and application of Academic Freedom. Some scholars view it as a constitutionally mandated right, while others would label it a policy, and still others might claim that it operates as a ruse. Termination of a public employee is forbidden under the First Amendment when based upon their adoption of an unpopular position while speaking as a private citizen on matters of public concern. Thus, justifications offered by employers in cases of retaliatory termination have been closely scrutinized by the Court under fair labor and employment standards. The firing or punishment of university professors that originate in partisan political posturing outside the university is a special concern of the

See, e.g., Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of the Treasury, 545 F.3d 4 (D.C. Cir. 2008) (finding a challenge by an association of academics to regulations that made it considerably more difficult for U.S. universities to offer 3-week study abroad courses in Cuba failed because the regulations did not impermissibly infringe on Academic Freedom absent restrictions on the content of academic lectures); Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008) (granting summary judgment to the University of Wisconsin-Milwaukee for a 42 U.S.C. § 1983 claim brought by Professor Renken asserting that University officials had retaliated against him for exercising his First Amendment rights when he complained about the University's use of grant funds); Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (upholding a challenge to a Virginia law by a university professor by stating that Academic Freedom was an institutional rather than individual right); Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007) (denying retired Professor Hong's allegations that he was unfairly denied a merit raise because of some personnel comments he made in faculty meetings offended his superiors); Gorum v. Sessions (denying Delaware State University professor's claim that he was protected for speech related to a presidential search, student advising, and a campus event he helped organize).

ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY (Evan Gerstmann & David M. Streb eds., 2006).


Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846 (2009) (holding that Title VII's opposition clause extends to those who speak of discrimination during an employer's internal investigation of a complaint lodged by other employees).
First Amendment, because of the unique role that professors fill in 
constitutional democracies. Proper resolution this issue is vital 
because the absence of settled doctrine and clear guidance as to the 
nature and scope of Academic Freedom will force undue reliance 
upon Supreme Court public-employment rulings outside of the 
university context. This reliance might inadvertently encourage 
public colleges to “penalize faculty members for statements made 
in connection with shared governance, personnel decisions,” and 
job related activities that traditionally fall within their natural 
domain.

A. Defining a Typical Law Professor’s Vision of 
America

There are 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, 
uncomfortable with diversity, hostile to science, unfriendly 
to reason, contemptuous of personal autonomy. It sees 
America as a religious nation. It views patriotism as 
allegiance to God. It secretly adores coercion and 
conformity. Despite our [C]onstitution, 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

---

7 Peter Schmidt, Professors' Freedoms Under Assault in the Courts, CHRONICLE 
OF HIGHER EDUC. (Feb. 27, 2009), available at 
8 Id.
patriotism as love of country and of the people who make it strong. It defends all citizens against all unjust coercion and irrational conformity.\textsuperscript{9} 

- Rabbi Sherwin T. Wine

The purpose of this article is to highlight the connection between the recent debate over the goals of Academic Freedom and the neo-conservative agenda for conformity and domination. Efforts to weaken protections for university professors\textsuperscript{10} have become more concentrated in scope and directed at legal academicians, as core constituents of the latter vision of American society described by Rabbi Wine.

A detailed explanation of the so-called need for a strategic plan to insure de-radicalization of the entire field of higher education appears in a widely circulated piece by Thomas O’Connor entitled Academic Freedom, Intellectual Dissent, and Protest.\textsuperscript{11} O’Connor’s thesis is straightforward. He asserts that American faculties are overrun by extremist professors producing conditions that would return us to the campus unrest of the 1970s.\textsuperscript{12} O’Connor’s evidence of extreme liberalism in higher education, consists of polls showing that “a third of Americans suspect [that the Bush Administration] ‘assisted in the 9/11 attacks to go to war in the Middle East’ and 16% believe that the twin towers collapsed not because fully-fueled passenger jets smashed into them but because agents . . . rigged them to explode.”\textsuperscript{13}


\textsuperscript{10} See infra p. 136.

\textsuperscript{11} Thomas O’Connor, Academic Freedom, Intellectual Dissent, and Protest, AUSTIN PEAY ST. UNIV., Dec. 4, 2008, http://www.apsu.edu/oconnort/3030/3030lect06b.htm (noting in great detail the basis for and legal obstacles encountered in taking tenure away from professors on a case-by-case basis and suggesting that the easiest thing to do is to abolish tenure altogether).

\textsuperscript{12} Id.

\textsuperscript{13} Id.
Therefore, O’Connor calls for stricter sedition laws and penalties for providing aid and comfort to the enemy.14

**B. Converting College Campuses into Hotbeds of Radical Activism**

O’Connor believes that Academic Freedom is not a “species of free speech” entitled to constitutional protection.15 Therefore, he argues: “it makes perfect sense to discuss where, during wartime, the line between dissent and loyalty actually exists,” and to draw that line in relation to a post-9/11 grand strategy.16 He concludes that “terrorist professors” and bloggers waging “electronic jihad” have produced the current higher education “crisis” by elevating the very conditions that convert universities into “hotbeds of radical activism.”17 His solution is to take away the privilege of tenure, which he declares to be the most effective means of dealing with dissenters.18 He advocates the firing of tenured professors as necessary to prevent dissent from taking on “wave-like forms of epidemiology,”19 where platforms for expression are given to “radical” or “extremist” professors.20 O’Connor’s extremist professors are characterized as those with criminal backgrounds, who advocate and support terrorism, who are anti-war or revolutionary, who deny the Jewish Holocaust, and have an anti-Israeli or anti-U.S. bias.21 Efforts to expose these professors – those giving aid and comfort to the enemy – have been undertaken by FrontPage Magazine, Campus Watch and David Horowitz, who claims to have compiled a list of the “100 Most Dangerous Professors” in the U.S.22 According to O’Connor, it is

---

14 Id.
15 Id. (citation omitted).
16 See id.
17 See id. (citations omitted).
18 See id.
19 Id. (citation omitted).
20 See id.
21 Id.
22 Id.
time to marshal the “resources of the academic infrastructure to help fight the war on terrorism.”

II. PROPOSED POST-9/11 GRAND [ACADEMIC] STRATEGY

O’Connor’s polemic comfortably dovetails with the recent push for structural changes in the academy. David Horowitz, with assistance from conservative strategist Karl Rove and former House majority whip Tom DeLay, presented Republican members of Congress with an “Academic Bill of Rights.” Republicans also received Horowitz’s political primer The Art of Political Warfare: How Republicans Can Fight to Win, which Rove described as the “perfect pocket guide to winning on the political battlefield.” According to the group Students For Academic Freedom, the primary goal of the academic bill of rights is to insure protection of students from the imposition of “orthodoxy of

---

23 Id. (stating that grand strategy “might be the ticket to somehow shepherd academic resources in a productive way in the war on terrorism as a kind of psychopolitical force or information power in the ‘war of ideas’”).
a political, religious or ideological nature." Seizing upon the language of the American Association of University Professor's ("AAUP") 1915 General Report, the academic bill of rights is expected to serve as a basis for terminating faculty who take "unfair advantage of the student's immaturity by indoctrination . . . before the student has had an opportunity fairly to examine other opinions . . . [and gained] sufficient knowledge and ripeness of judgment . . . to form a definitive opinion." It goes on to offer every student the freedom "to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion."

These demands coincided with a notable reduction in tenured positions over the last decade. Many attribute the decrease to the convergence of several phenomena, such as downturns in the national economy, casualization of labor as part of the global norm, and increased calls for accountability linked to strategic planning first seen in prevailing corporate models. These events certainly paved the way, but fail to explain why attacks on Academic Freedom and the privileges of tenure should continue to

---

28 Id.
29 Id.
31 Id.; see also ROBERT C. DICKESON, FREQUENTLY ASKED QUESTIONS ABOUT COLLEGE COSTS 2-3, http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/dickeson2.pdf (last visited Mar. 24, 2009) (describing tenure, in the sixth of a series of Issue Papers released at the request of the Secretary of Education’s Commission on the Future of Higher Education, as a power that (1) gives professors authority over all curricular decisions and over-involves them in other campus policy making, resulting in a “slow-moving pace of change;” (2) puts too much power in the hands of department chairs “neither trained in nor committed to management;” and (3) emphasizes “research over instruction as the key to the internal reward systems,” among other problems).
The lengthiest Circuit Court of Appeals opinion on Academic Freedom to date was issued in 1999 by the Fourth Circuit in *Urofsky v. Gilmore*, which rejected arguments that individual faculty members in public colleges and universities have a constitutional right to Academic Freedom. The subsequent denial of certiorari by the U.S. Supreme Court, leave lower federal court without requisite clarity as to the scope of Academic Freedom around matters of teaching and scholarship, even as it denigrates key elements of faculty governance. Historically, American universities reached new heights through the investment of tenured and tenure-track faculty, who took the “lead in terms of advising the president and the provost and the board [of trustees].”

The American Law Deans Association (“ALDA”) supports revision of the law school accreditation process to eliminate the demand for adherence to specific employment terms and conditions. At an open forum held by the American Bar Association Accreditation Policy Task Force, David Van Zandt, the President of the ALDA Board of Directors, stated that “requiring tenure or tenure-like job security for faculty and other employees certainly might improve the program of legal education of a particular law school;” but cautioned that those benefits may be achieved by other means. On March 2009, the Kentucky

---


38 Van Zandt, *supra* note 24, at 13. However, the same day, the general membership of ALDA rejected the position of its board. See id.
Community and Technical College System’s Board of Regents voted to eliminate tenure for all new faculty hires.\textsuperscript{39} In 2008, 40 percent of the thirty junior faculty members at Baylor University were denied tenure, contrasted with 14 percent in 2007 and 11 percent in 2006.\textsuperscript{40}

The push for reliance upon ranking surveys intensified competition for faculty researchers\textsuperscript{41} as budget cuts increased the use of adjunct instructors thereby fortifying the pink ghetto.\textsuperscript{42} Faculty who teach legal writing often earn salaries that are roughly half of tenure track faculty and lower than the median starting junior associates salary at a law firm. “Members of the female dominated legal writing profession (70 percent of all writing instructors) refer to their domain as the ‘pink ghetto’ of law schools.”\textsuperscript{43}

Ongoing debates about what constitutes “good” legal scholarship,\textsuperscript{44} and a vocal conservative student presence on law


\textsuperscript{41} Michael E. Solimine, \textit{Status Seeking and the Allure and Limits of Law School Rankings}, 81 IND. L.J. 299, 305 (2006) (noting that “An applicant can now find data on, among other things, student/faculty ratios, employment rates after graduation, and bar passage rates, in addition to the notorious reputation scores”).


\textsuperscript{44} See Kathryn Abrams, \textit{How to Have a Culture War}, 65 U. CHI. L. REV. 1091, 1117 n.48 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND
campuses helps fuel allegations around the lack of intellectual diversity.\textsuperscript{45} The presumed liberal bias is blamed for the so-called downturn in the quality of education. Errors in the underlying assumptions have been overlooked in favor of examining what people suspect about college educators before receipt of scientifically credible evidence.\textsuperscript{46}

A seventy-six page study, \textit{The Social and Political Views of American Professors}, undertaken for purposes of moving “analysis of the political views of faculty members out of the culture wars and back to social science,”\textsuperscript{47} found that in every type of institution except liberal arts colleges and elite PhD granting schools, more faculty members identify as moderates than liberals.\textsuperscript{48} However, the substandard and misleading nature of the research used to support conclusions of a liberal bias in higher education has not diminished the attention that it has received in the pre-law literature directed at students.\textsuperscript{49} The same funding sources

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} David Horowitz has spearheaded a campaign for an “Academic Bill of Rights” utilizing conservative students organized as “Students For Academic Freedom.” See J. Peter Byrne, \textit{Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University}, 77 U. COLO. L. REV. 929, 941 (2006). In Colorado, the Presidents of its public universities have committed themselves to reviewing grievance procedures toward the view of protecting “political diversity.” \textit{Id.} at 942.
\item \textsuperscript{46} \textit{Contra} Stanley Rothman & S. Robert Lichter, \textit{The Vanishing Conservative – Is there a Glass Ceiling?} 17-18 (Nov. 14, 2007) (unpublished working paper, \textit{available at} http://www.aei.org/docLib/20071114_20071114RothmanandLichter.pdf) (claiming to have performed a multiple regression analysis of data to test the effect of ideology on professional status in academy and found that conservatives taught at lower quality schools than liberals).
\item \textsuperscript{48} \textit{Id.} at 29.
\item \textsuperscript{49} \textit{See, e.g.,} \textit{David Horowitz, Indoctrination U.: The Left's War Against Academic Freedom} (2007).
\end{itemize}
\end{footnotesize}
responsible for the creation of Horowitz’s organization sustain a large and integrated network of ideologically defined think tanks.\(^5\)

The late conservative philanthropist Michael S. Joyce was a key

[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.

In case the student has any doubt that the far left wing of the legal professoriate is indeed pretty far to the left, he should check Robert Clark’s address entitled “In Critical Legal Studies, the West Is the Adversary.” Clark should know: he is now the dean of the Harvard Law School, which houses a significant number of “Crits.” For a strong critique of the leftist drift in American culture since the 1960s, see Robert Bork’s *Slouching Towards Gomorrah*.


Admission to law school is not going to be affected much by astronomical grade point averages which look like a noninterference pact existed between teachers and student. Law schools are more impressed by signs of a struggle, overcoming adversity (sometimes even having a criminal background) or difficult, demanding coursework involving critical analysis, problem-solving, and extensive reading and writing requirements.


[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, Ameri[C]orps, 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 RAMPTON & STAUBER, supra note 26, at 5.
player in the ideological attacks on the academy. Early calls by groups adopting the mission of insuring “Accuracy in the Media” and “Accuracy in Academia” represent the beginning of a strategic plan sponsored by endowments from the Olin Foundation to organize support for the launching of the Federalist Society, which is directly linked to current efforts by neoconservatives to restructure American higher education.

The Federalist Society, with Joyce’s ongoing support, not only fostered the development of ultra-conservative legal scholars and politicians such as Antonin Scalia, Clarence Thomas, Robert Bork, Samuel Alito, John Ashcroft, Alberto Gonzales, and Kenneth Starr (all of whom are members of the society) but also organized some of these individuals into a powerful force for reshaping American legal institutions in support of a larger neoconservative agenda.

Professor Beshara Doumani demonstrates the difference between today’s attacks on Academic Freedom and the crackdowns related to the political activism of the 1960s. Doumani, editor of Academic Freedom After September 11, noted that “escalating tensions are a product of..." well-funded special interest groups intimately tied to the coalition of forces currently walking the corridors of power in

---

51 See Jones, supra note 25. According to former American Bar Association President, Jerome Shestack, the Federalist Society is increasingly being used as a platform from which to launch ideological attacks on the mainstream legal community. See Jerome Shestack, The Federalist Society and the Challenge to a Democratic Jurisprudence (Jan. 2001), http://www.institutefordemocracy.org/pub3.html. Through the device of the Federalist Society publication, ABA Watch, the society has launched a vicious attack on the ABA. Id.

52 “Accuracy In Media is a non-profit, grassroots citizens watchdog of the news media that critiques botched and bungled news stories and sets the record straight on important issues that have received slanted coverage.” Accuracy in Media, Mission Statement, http://www.aim.org/about/mission-statement/ (last visited Apr. 24, 2009).


54 Jones, supra note 25.

55 Id.
Washington." Contrasted against the McCarthy era, Doumani observed that “private groups, not the government, are playing the lead role in the campaigns to quarantine dissent, to dominate the framing of public discourse, and to re-channel the flows of knowledge production.”

A. Pseudo-Scientific Research

Studies purporting to demonstrate the effects of liberal bias among college professors in general, but especially those released during the last few years, are among the least reliable sources given the gravity of the allegations. Over reliance upon the compilation of data that includes party affiliation, superficial viewpoint surveys completed by university professors, and scouring syllabi content are all highly suspect and illogical. Indiana University Professor Robert Ivie, points to some of the measures undertaken by Horowitz to sustain allegations of liberal bias. “These tactics include (1) a skewed sample, (2) shoddy data collection, (3) slanted statistics, and (4) presumptive attributions of cause as if the hypothetical effect (i.e., radical liberal hegemony) exists.”

---


57 Id.


59 See id. (“Some of the studies were prompted by specific events, such as the American Council of Trustees and Alumni’s ‘How Many Ward Churchills?,’ which analyzed class materials online at top institutions . . . .”).


After using a skewed sample and shoddy data collection methods to falsely document radical liberal bias in U.S. universities, Horowitz and his co-investigators concocted slanted and misleading statistics, the basic finding of which was that the overall ratio of Democrats to
In a report that examines the claims of faculty bias, John Lee, who specializes in postsecondary education policy research and analysis, reviewed eight recent studies of faculty politics according to five basic measures of validity in social science research to determine whether the recent studies were science or propaganda. The authors of the flawed studies claim that liberal dominance results in: systematic exclusion of conservative ideas, limited promotion opportunities for conservative faculty, and expression of liberal perspectives that damage student learning. All eight studies came up short in adhering to appropriate research standards. Lee concluded that the authors of the studies “have a clear agenda” of charging professors with unprofessional conduct.

Republicans among university faculty in six departments in the humanities and social sciences at elite institutions is 10 to 1, but as bad as 30-1 at Brown and 17-0 at MIT. This alleged ratio of registered Democrats to registered Republicans later becomes the basis of Horowitz’s claim that “on any given university faculty in America, professors to the left of the political center outnumber professors to the right of the political center by a factor of 10-1 or more.”

Even if one were to accept the obviously confused argument that registered Democrats are leftists, the raw data on which the claim of imbalance is based simply do not support the conclusion that there is a 10-1 ratio, which itself implies that the percentage of Democrats among the faculty is 90% or higher: that is, that 90% of the faculty is Democrat/leftist.

*Id.*


1. Can another researcher with a different perspective replicate the results using the information provided by the author?
2. Are the definitions used in the studies clear enough?
3. Does the research eliminate alternative explanations for the results?
4. Do the conclusions follow logically from the evidence?
5. Has the author guarded against assumptions that could introduce systematic bias into the study?

*Id.* at 7.

62 See *id.* at 8.

63 See *id.*

64 *Id.* at 10.
yet lack the evidence to make their case. Not a single study, Lee says, shows political bias in the classroom or in hiring decisions. Basic methodological flaws warn against crediting the conclusions found in these studies. For example, the authors have been known to lack data on applicant pools for faculty positions. According to Lee, the authors also appear to be uninterested in comparing causal relationships. For example, the authors might compare the disparities in the political inclinations of professors to the political inclination of those on Wall Street, and research whether the Republican “tilt” results from a bias in business schools that creates a hostile climate for Democratic investors. Similarly, two of the study authors allege that “Groupthink” is the obstacle to the tenure and retention of conservative faculty. The premise of these authors is fraught with serious ethical and methodological flaws in that they fail to analyze any particular data and merely describe the lowering of self or outward esteem that arises when elite faculty members in their infinite flashes of arrogance, summarily announce that an idea has no merit whatsoever. The problem Lee describes appears more closely connected to elitism than discrimination, since every idea is subject to evaluation on the merits. Who in academia today is unable to distinguish a political argument from a moral argument or an intellectual premise from some form of serial-ideology? The studies’ authors virtually ignore those mechanisms in the tenure process that routinely protect both academicians and universities from vindictive professors as well as teaching candidates with clearly politicized agendas.

---

65 Id. at 28.
66 See id.
67 See id.
68 See Guess, supra note 24; Jaschik, supra note 58. Lee also compares the military, where “recent polls have found a Republican tilt in opinions, but no evidence that soldiers’ service to their country is affected by whether they are seeking to protect members of one party or another.” Id.
In 2007, Stephen Balch of the National Association of Scholars delivered a paper at a conference titled, *Reforming the Politically Correct University*, which also calls for a tighter strategy.\textsuperscript{70} He assures that:

[F]ortunately, a massive overhaul may not be required to achieve important intellectual results . . . [A] significant cohort of dissenters . . . should have effects far beyond what their numbers might suggest[,] . . . [creating] the real possibility of . . . destabilization once serious internal debate gets underway . . . . Dislodging [liberals] will not only require dogged application of organizational pressure, but an ability to reimagine the sum and substance of academic life.\textsuperscript{71}

Further, Balch asserts that the task of questioning academic quality and content may not reliably be left to legislatures, trustees, or even moneyed interests.\textsuperscript{72} Grantors, he notes, have influence over the direction of research – by defining the questions – but not enough influence over the findings, and only a relatively small influence beyond the natural sciences.\textsuperscript{73} Unsurprisingly, this is the one area where Balch believes the current governance model actually works.\textsuperscript{74} Balch claims that the governance of academe, “if not quite hermetically sealed,” is surrounded by multiple defensive rings: Academic Freedom, tenure, and endowment.\textsuperscript{75} He then offers tactics for undermining each.\textsuperscript{76}

\textsuperscript{70} Stephen Balch, Where We’ve Come and Where We Should Go: The Route to Academic Pluralism (Nov. 14, 2007), http://www.aei.org/docLib/20071114_20071411Balch.pdf.
\textsuperscript{71} Id. at 3.
\textsuperscript{72} Id. at 4.
\textsuperscript{73} Id. (emphasis omitted).
\textsuperscript{74} See id. at 4-8, 13.
\textsuperscript{75} Id. at 9-10.
\textsuperscript{76} Id.
Academic Freedom, according to Balch, may be “buffeted by scandal or an especially galling ideological outrage.” Balch recommends finding a single trustee who can be convinced to press against the rules and call for the firing of faculty members caught out on the ideological battleground, remaining careful to avoid a circumstance where the rogue trustee’s public persona might become a touchstone of debate for the media. Balch asserts that “[t]o yield any profit this kind of an assault [on individual faculty members] will have to involve close collaboration with senior administration . . . given their control over budgets and staffs and quasi-academic status, they have access to many more leverage points than do trustees in isolation.”

Balch concludes that a “patient siege” on the “points of maximum vulnerability” will get the job done. Donors cannot be relied upon to protest liberal bias, according to Balch, because they are heavily courted and share that “sentimental notion with the general public” that education is the “engine of mobility between socio-economic classes.” He highlights the importance of “training” for the trustees, donors, and conservative academics so that they become aware of how to take advantage of the opportunities before them. Why not tell the trustees that academics are not suited to manage the enterprise and that a concentration of power has corrupted the process? The trustees would soon realize that they need their own “independent staff,” i.e., an academic advisory council, which will lead them to closer interaction with administrators. Balch endorses seizing upon scandals and public outrage because they would “serve[e] to

---

77 Id. at 9. See generally Terry Smith, Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace, 57 Am. U. L. Rev. 523, 550-58, (2008) (discussing the University of Colorado’s firing of Ward Churchill), for an example of how this is done.
78 Balch, supra note 70, at 9-10 (emphasis added).
79 See id.
80 See id. at 11 (“[F]inding ways to give against the grain requires a cleverness hard to come by without instruction . . . .”).
81 Id. at 12.
82 See id.
dissipate, even temporarily, a university’s endowment of psychological capital . . .”  

In sum, Balch’s call for “academic pluralism” envisions integrated studies of Western Civilization including the history of constitutionalism, market economics, and a variety of philosophical arrangements. These concepts, he assures, would bring like-minded individuals together, create a strong community among practitioners, and form the basis for launching programs that would, in the best of all worlds, create an “information revolution [that makes all education] a much more capital intensive and much less labor intensive business than it [currently] is.”

---

83 Id. at 13.
84 See id. at 15-16.
85 Id. at 16.
B. Calls for Weeding Out Disloyal Oppositionists

A right-wing alumni group at UCLA recently came up with a tactic that even Joe McCarthy and HUAC never tried: paying students to rat on their professors. The Bruin Alumni Association offered students up to $100 for tapes of lectures that show how “radicals” on the faculty are “actively proselytizing their extreme views in the classroom.” The group has posted a list of thirty professors—the Dirty Thirty—on its website as its first targets.\(^86\)

Law professor Gary Blasi suggests the Dirty Thirty ask the “Bruin group” for “specific guidance as to things we are forbidden to say in classrooms, or things that are mandatory to discuss that

---


But what is the Bruin Alumni Association? It appears to be a single person: Andrew Jones, a 2003 UCLA grad who headed the campus Bruin Republicans. He made news for running an affirmative action bake sale, in which he charged white male students more for cookies than minorities and women. Jones worked for Horowitz, but according to the *New York Times*, Horowitz says he fired him because Jones pressured students to “file false reports that they had been physically attacked by leftists.” (Neither Jones nor Horowitz replied to e-mailed questions.)

Jones’s website features lengthy reports on each of the thirty professors he’s targeted, but they contain virtually nothing about misconduct in the classroom. The charges against the faculty include supporting affirmative action (Ellen DuBois), organizing a memorial meeting for Edward Said (Sondra Hale), opposing the confirmation of John Roberts as Chief Justice (Christine Littleton), supporting gay rights (Eric Avila) and arguing that Bush stole the 2000 election in Florida (Doug Kellner). As Russell Jacoby noted in these pages [“The New PC: Crybaby Conservatives,” April 4, 2005], “Once an unreliable professor meant an anarchist or communist; now it includes Democrats.”

*Id.*
we may have overlooked.”  

Robert Brenner teaches a course on Karl Marx’s Capital but was not listed. He declared: “It’s humiliating . . . I didn’t even make the top thirty.” Russell Jacoby did make the Dirty Thirty but was disappointed to be second from last saying, “I’ve inquired discreetly . . . as to how one can move up on the list.” Their responses relate directly to conclusions found in a recent study at Penn State, which found that the real bias in the classroom does not come from professors: “Not only do students not change their views because of professors, but may even ‘push back’ and judge professors based on politics, not merit.” State legislative initiatives have also moved toward castigating university officials for defending Academic Freedom. An appropriations bill, designed to punish the University of North Carolina at Chapel Hill for assigning a book on the Koran to first year students, passed in 2002. Missouri passed a bill with a reporting requirement for public colleges as to how they promote intellectual diversity in teaching and program development with special emphasis on religious freedom and Biblical *inerrancy.*

### III. EXPLORING THE RHETORIC & REALITY

Amidst a great deal of controversy, universities have rejected a handful of teachers and administrators, against peer-recommendation, for what many perceive to be politically motivated reasons. The salient issue for legal scholars is where

---

87 *Id.*
88 *Id.* (emphasis omitted).
89 *Id.*
90 *Id.*
93 See, e.g., Smith, *supra* note 77, at 523-84 (discussing the firing of Ward Churchill from the University of Colorado after controversial remarks outside of class were widely publicized ); Spencer S. Hsu, *Former Fl. Professor to be*
firing, or the threat of firing, university professors intersects with the introduction of strategies for “marshalling academic resources” and “‘weeding’ . . . the professoriate” for purposes of fighting the so-called fourth-wave of terrorism.94 O’Connor states that this can only be achieved by “dismantling the intellectual foundations of terrorist support.”95 The allegation that there has been a diminution in the quality of legal institutions because of liberal bias appears to be little more than a ruse designed for purposes of drafting all minds to serve the diplomatic, informational, military, and economic dimensions of power.96 According to O’Connor, in an ideal world, the university system would serve as the informational power that compliments the other measures deemed necessary to counter terrorism.97 According to Doumani, the Global War on Terrorism brought unprecedented curtailment of civil liberties with the passage of the Patriot Act, “Take Back the Campus” campaigns, changes in the grant language of major foundations, and a level of political intervention by legislators that has structurally altered Academic Freedom.”98 He goes on to describe universities “as buffeted between the forces of anti-liberal coercion and neo-liberal privatization.”99


94 O’Connor, supra note 11.
95 Id. (emphasis added).
96 See id.
97 See id.
98 Jaschik, supra note 56.
99 Id.
A. Constitutionally Prescribed Liberty of Conscience for Professors

Several U.S. Supreme Court cases establish the doctrine of Academic Freedom and articulate its constitutional validity, answering the salient question of whether teachers have a special claim under Academic Freedom that is not subsumed under the general First Amendment doctrine.\textsuperscript{100} Linking Academic Freedom to discovery of truth leads down one analytical path, while embracing Academic Freedom as a means to a constitutional end suggests another.\textsuperscript{101} Justice Breyer notes the general consensus around the role of the Constitution as creating a coherent framework for democratic governance that avoids “concentration of too much power in too few hands;” “protects personal liberty;” “insists that the law respect each individual equally;” and “acts only upon the basis of law itself.”\textsuperscript{102} Skills needed to maintain that framework are best honed in university classrooms where professors replace opinion with knowledge.\textsuperscript{103} Through content and methodology, instructors inspire “a sense of what is known and how much remains to be discovered.”\textsuperscript{104} The very essence of civilized society is said to depend upon the freedom of open inquiry lest we “stagnate and die.”\textsuperscript{105} A virulent anti-intellectual analysis of the wars in Iraq and Afghanistan where “terrorists are represented as irrationally evil and freedom is said to be a God given right” accompanied by the warning “you are either with us or against us” asks “academics to give up what they hold most

\textsuperscript{100} See R. George Wright, \textit{The Emergence of First Amendment Academic Freedom}, 85 \textit{NEB. L. REV.} 793 (2007).
\textsuperscript{102} \textit{STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION} 8-9 (2005).
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \\Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).}
dear: the use of critical reasoning in the free pursuit of knowledge.” The AAUP first developed a working conception of Academic Freedom to guide university administration, as the primary responsibility of its faculty.

Academic Freedom falls under the principles of the First Amendment because freedom and autonomy of one’s speech, association, assembly and protest were implicated in all of the major cases, few, if any involved genuine issues of academic competence. Thus, Academic Freedom developed well beyond dicta or as a running commentary on matters pertaining to liberty of conscience in an academic setting. Neither teaching nor scholarship can flourish in an atmosphere of suspicion and distrust. Academic Freedom has been formally recognized by the U.S. Supreme Court since the McCarthy era as a

106 Jaschik, supra note 56.
107 See N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 681 n.10 (1979) (“Professors are sometimes spoken of as working for the college. They are the college.” (quoting Kenneth Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 UCLA L. REV. 63, 70 n.16 (1973))). “[Faculty] authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated.” Id. at 686.
108 See, e.g., Adler v. Bd. of Educ., 342 U.S. 485, 490 (1952) (firing of Communist teachers); Wieman v. Updegraff, 344 U.S. 183, 184 (1952) (requiring state employee to take loyalty oaths); Sweezy v. New Hampshire, 354 U.S. 234, 244-45 (1957) (professor cited for contempt for failing to produced copies of his lectures to state officials investigating violations of the Subversive Activities Act); Keyishian v. Bd. of Regents, 385 U.S. 589, 592 (1967) (requiring loyalty oaths); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (allowing colleges and universities to use properly devised standards for consideration of race and ethnicity in pursuit of the constitutionally permissible goal of achieving a diverse student body and summarizing the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study); Grutter v. Bollinger, 539 U.S. 306, 322-23 (2003) (affirming portion of Bakke relating to a university’s mission and goals of diversity).
109 See Wieman, 344 U.S. at 196 (Frankfurter, J. & Douglas, J., concurring).
constitutionally significant means to a constitutionally desired end. Every noteworthy articulation of the goals of freedom and liberty warn of abuse of governmental power; Justice Douglas noted that one of the “earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities – family, school, business, press, church – completely subject to control by the State.” Academic Freedom’s protection of transcendent values is described as a “special concern of the First Amendment” and as the primary defense against laws that cast a pall of orthodoxy over the classroom. Teachers have the special task of fostering habits of open-mindedness and critical inquiry, which in turn produce responsible, civic-minded adults who engage in enlightened debate by precept, example, and meaningful exertion of influence. As stated in Sweezy, “[t]he essentiality of freedom in . . . American universities is almost self-evident.” Lofty statements of principle have likened universities to laboratories where free inquiry can only have a positive influence on the inculcation of democratic values, and professors to the scientists whose dedication to perfecting the research and increasing new knowledge bring forth that result.

---

110 But see Alan Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV 955, 959 (2006) (“Because the Supreme Court has never fully articulated a constitutional doctrine of Academic Freedom, the extant law can best be describe as a set of context-specific legal standard loosely connected by some common principles.”).  
112 Keyishian, 385 U.S. at 603 (emphasis omitted).  
113 Wieman, 344 U.S. at 196 (Frankfurter, J., concurring).  
B. Idealism Aside, We Remain Ahead of Our Times

While embracing all of our flawed humanity, Ronald Standler cuts to the chase with much needed realism when he declares that “[A]cademic [F]reedom is invoked to justify statements by faculty that offend politicians, religious leaders, corporate executives, parents of students, and citizens.”115 He describes the offense as inevitable because professors are intellectual risk-takers, ahead of their time, and loyal to Truth.116 Standler’s description comes closest to describing how the right is exercised. Justice Breyer notes that the means provided by constitutional interpretation are designed for the achievement of constitutionally desired ends.117 In short, Academic Freedom for the university and its professors is constitutionally protected for promotion of “new knowledge” and to enable professors to “model independent thought.” Tenure is extolled as a means to specific ends: insuring autonomy in relation to teaching, research, and extramural involvement, alongside economic incentives that enable universities to attract quality educators.118 This environment demands “protection from the forces and influences that would subvert newness and independence by either anointing or demonizing avenues of inquiry in advance.”119 In For the Common Good: Principles of American Academic Freedom, Matthew Finkin and Robert Post began with an interesting story about the battle waged against the University of North Carolina over its

116 Id.  
117 Barnes, supra note 101, at 1469.  
selection of a single book for the incoming class.\textsuperscript{120} Author Barbara Ehrenreich learned that following the University of North Carolina’s selection of her book, \textit{Nickel and Dimed}, as required reading for all incoming freshmen, that a conservative student group held a press conference, along with a handful of rightwing state legislators, to denounce the book as a “classic Marxist rant” and a work of “intellectual pornography with no redeeming characteristics.”\textsuperscript{121} Upon reading their full page advertisement, she noted that the controversy was less about the book than it was about her. She was called a Marxist, a socialist, atheist and a dedicated enemy of the American family, and asked by a North Carolina radio talk show host how it felt to be “the Anti-Christ in North Carolina.”\textsuperscript{122} Ehrenreich admitted that just as she was getting into her “new role as North Carolina’s premier amateur philosopher and religious studies scholar, and hoping for some in-depth discussion of [her] own ‘anti-Christian bigotry,’” she discovered that like everyone else she was being distracted and diverted.\textsuperscript{123} The real issue was that “[a]ccording to the North Carolina Justice and Economic Development Center, 60 percent of North Carolina families with children do not earn enough to meet basic, bare-bone, needs.”\textsuperscript{124}

Such demonization leads to calls for curtailment and termination of individual faculty members. Such calls are often greeted with rejoinders concerning security of employment, Academic Freedom, First Amendment and due process rights.\textsuperscript{125} Such was the case when UC Berkeley Dean Christopher Edley defended Law Professor John Yoo, whom many believe might

\textsuperscript{120} \textsc{Matthew W. Finkin and Robert C. Post, For the Common Good: Principles of American Academic Freedom} 2 (2009).
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
soon be indicted for international war crimes. When uncorrupted by political allegiance in the post-tenure phase, many productive legal scholars fulfill their Constitutional mandate by laying claim to a reality even closer to the invaluable contributions around which we have built meaningful consensus. We develop the uncanny ability to use mistakes as stepping stones. The majority in *Grutter* correctly affirmed the role of Academic Freedom in providing constitutional protection for teaching and scholarship from the excesses of political gamesmanship.

O’Connor has presented alarming proposals for changing the academy that takes the gamesmanship to a new level. He labels those prone to dissent as having a four-point orientation, toward anti-militarism, anti-Semitism, anti-administration, and anti-capitalism, that presents a revolutionary threat that has no place in American Freedom.

---

126 American Freedom Campaign, Tell the Dean of UC Berkeley School of Law to Fire John Yoo, http://salsa.democracyinaction.org/o/2165/t/1027/campaign.jsp?campaign_KEY=24188 (last visited Dec. 26, 2008). The e-mail campaign calling for Yoo’s dismissal is from a group called the American Freedom Campaign. It says of 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. 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.

*Id.*


128 See Byrne, *supra* note 45.
He would convert the professoriate, with its "cosmopolitan tendencies," into a roving band of diplomats who travel the globe, reflexively inclined toward justifying peremptory strikes as dictated by the need to advance U.S. interests.

IV. CONCLUSION

A. Lessons From the Stop-Loss Policy

[A]ll of us who are concerned for peace and the triumph of reason and justice must today be keenly aware how small an influence reason and honest good-will exert upon events in the political field.\(^{130}\)

In a March 1961 letter calling for the abolition of the House Committee on Un-American Activities, Harvard University professors observed that the committee was "careless or unscrupulous in vilifying its critics," resulting in the understandable, though deplorable, circumstance where "many teachers, in the colleges and universities, as well as in the public schools, have grown timid about stating, even for classroom discussion, ideas which someone later might interpret as

\(^{129}\) O'Connor, supra note 11. Describing what he deems the four (4) causal factors:

- anti-militarism -- the primary goal of the protestors; their whole personality being opposed to all things military
- anti-Semitism -- a prejudice against all things suspected of being Jewish or under Jewish influence
- anti-administration -- a tendency to react oppositionally to college rules and regulations
- anti-capitalism -- disdain, dislike, or even hatred toward the U.S. economic system

Justice Hugo Black stated that the Committee abridged First Amendment freedoms through “exposure, obloquy and public scorn.” This is similar to today’s “aggressive incursion of partisan politics into university hiring and tenure practices.”

Over the last twenty years, military strategists and ultra-conservatives have aligned their interests to target American colleges and universities, through scorn, dogged pressures and grand strategies. The responsibility lies with the faculty to judge the quality of their peer’s research and teaching, as part of a regularly audited process. Thus, it is not merely a “question of academic autonomy, but of the future of a democratic society. This is a time in which we need more thoughtful reflection about the world, not less.”

Currently, our military involuntarily extends soldiers’ enlistment terms to prevent them from leaving prior to redeployment. “[L]awmakers and critics claim the Army has used ‘stop-loss’ as a back-door draft to make up for the shortage of soldiers for the wars in Iraq and Afghanistan.” As of January 2009, 13,217 soldiers had tours extended under the stop-loss policy. Military officials argue that the policy is necessary to ensure success, lest inadequately trained soldiers and unprepared

---

134 Id.
units be sent into combat. One soldier had just completed the eight years he promised to serve in the Oregon National Guard, when he was told by the Army that it would reactivate him under its stop-loss rule, and that under U.S. Army's orders he was being sent to Afghanistan. The military will soon phase out the contentious practice of holding troops beyond the end of their enlistments, for all but extraordinary situations.

Three Iraq and Afghanistan war veterans: a National Guard member who served longer than any other soldier deployed to Iraq, a Vietnam veteran who spent his fifty-fourth birthday in Baghdad, and a veteran who tattooed the names of eleven dead comrades on his right arm, are among the founding members of the Minnesota chapter of the Iraq Veterans Against the War. The Vietnam veteran believes the Iraq war was based on lies, and that the cost is born by servicemen and women, and their families, as more and more returning veterans suffer from undiagnosed or untreated physical and mental problems, while “the affluent in the political and corporate worlds who sacrifice nothing are profiting from the war.” Scholars who agree with this position are being silenced. The message to the rest of us is clear: concede the potential if contingent legitimacy of pre-emptive strike or face the music. This places untenured scholars at risk for being pressed against their will into service or silence. Criticism abounds for the outspoken among them, while less courageous fellow travelers “keep silent and move away” until the transgressor is returned to silence and displays “remorse for having spoken [up].” A simple coherent

---


141 Id.

142 ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY, supra note 3, at 159 (quoting Tocqueville on the methods of political tyranny).
statement of logic and view toward coherency is labeled treasonous and subject to ridicule rather than reasoned debate.

Preventive self-defence [sic] threatens to upset the international regime on the use of force. Should the doctrine form the basis of new state practice, there will be injurious consequences for world public order that would transform the existing system from its tenuous rule of law-based framework to a balance of power system. Once the door to pre-emptive strikes is open, it can hardly be closed again. . . . We cannot have one standard for the world’s sole superpower and a different one for everyone else. 143

Thus, when scholars begin to analyze the various distractions and diversions they conclude that those seeking to utilize the cultural capital of U.S. higher education institutions today have illicit motives. 144 Jonathon Cole, former Columbia University provost, warns that our nation “paid a heavy price when the leaders of its research universities failed in the 1950s to defend the leader of the Manhattan Project, J. Robert Oppenheimer, the double Nobel Prize chemist Linus Pauling, and the China expert Owen Lattimore.” 145 Unsurprisingly, he concludes that “a wave of repression in American universities today is apt to have even more dramatic consequences for the nation than the repression of the Cold War.” 146

145 Id.
146 Id.