

# The University in the Mirror of Justices

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*In its 1915 Declaration of Principles on Academic Freedom and Tenure, the American Association of University Professors (AAUP) set forth a limited analogy between the professoriate and the judiciary. The purpose of this article is to explore this analogy's genesis, basis, implications, and limits. Its claim is that the judicial analogy deserves renewed attention and consideration in the contemporary debate over the future of academic freedom.*

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### INTRODUCTION

If there's any doctrine in American law more elastic, contested, and misunderstood than the First Amendment, it surely is academic freedom. A practice largely without any corresponding theory, academic freedom is shot through with tensions, paradoxes, and ambiguities that allow it to authorize claims so very different from one another that, at times, they are diametrically opposed.<sup>1</sup> These difficulties are not resolved but aggravated by the fact that, over the second half of the twentieth century, academic freedom acquired what constitutional status it has largely by virtue of its inclusion under the protections of the First Amendment.<sup>2</sup> Even at its most coherent, this inclusion has been uneven and unsteady. Because the First Amendment only protects speech against the interference of public authorities, its legal guarantees generally are limited to public institutions of higher learning: at most private institutions, it can be invoked only as a value, norm, or principle.<sup>3</sup> Even more fundamentally, academic speech generally pursues the true to the exclusion of the false, whereas the First Amendment doesn't permit public authorities to criminalize otherwise harmless speech on the basis of falsity alone.<sup>4</sup> Falsity, however, is not just

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1. JOAN SCOTT, *Academic Freedom as an Ethical Practice*, in KNOWLEDGE, POWER, AND ACADEMIC FREEDOM 15, 15-37 (2019).

2. William Kaplin and Barbara Lee identify two phases to this jurisprudence. In the 1950s and 1960s, courts heard cases pitting institutions of higher education against governmental authorities. In the 1970s-1980s, meanwhile, courts tended to hear cases of individuals against institutions. See WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* 287 (5th ed. 2014).

Because First Amendment jurisprudence generally tends to favor the rights of institutions as against the rights of individuals, the American Association of University Professors (AAUP) has come to frame academic freedom under the protections of contract law. *Cf. id.* at 287 (clarifying that the legal boundaries of academic freedom depend primarily on the extent to which AAUP policies are incorporated into faculty contracts); HENRY REICHMAN, *THE FUTURE OF ACADEMIC FREEDOM* 45 (2019) (noting that most cases brought by faculty on First Amendment grounds are unsuccessful, and explaining that the AAUP's longstanding position that its policies are best observed by means of collective bargaining agreements or institutional employment contracts).

3. KAPLIN & LEE, *supra* note 2, at 275-76. *But cf.* Leonard Law, CAL. EDUC. CODE § 94367, [https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=EDC&sectionNum=94367](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC&sectionNum=94367) (applying the First Amendment to private postsecondary institutions incorporated in the State of California).

4. *See* United States v. Alvarez, 567 U.S. 709 (2012). *See generally* MATTHEW FINKIN & ROBERT POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 38-39, 42-43 (2011).

one among many problems for academic discourse: where one no longer can distinguish false from true, it's no longer possible to speak of the pursuit of truth in any meaningful or serious sense. Latent in the First Amendment, therefore, is a neutralization or nullification of what would seem to be academia's single most decisive criterion. To justify academic freedom on the basis of the First Amendment is then to justify it on grounds that are at best incomplete and uncertain, and that at worst introduce into it a subtle but decisive powerlessness—an inability to decide between true and false—that, taken to its logical conclusion, obscures and undoes the academe's innermost sense and purpose.

The claim of this article is that the assimilation of academic freedom to the First Amendment forecloses upon a very different justification of academic freedom—the one that opens up when the scholar is analogized to the judge.<sup>5</sup> The most prominent example of this analogy in the American tradition of academic freedom appears in Section Two of the AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure, which is titled, “The Nature of the Academic Calling.”

So far as the university teacher's independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees

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(arguing that if the First Amendment recognizes no such thing as a false idea, then it cannot support the disciplinary practices that allow experts to make truth claims on the basis of their academic training); STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 63-108 (2019) (distinguishing between free inquiry and free speech, and arguing that free speech is not an academic value); ULRICH BAER, *WHAT SNOWFLAKES GET RIGHT: FREE SPEECH, TRUTH, AND EQUALITY ON CAMPUS* 11-24 (2019) (arguing that the regulation of false speech is the very essence of the university's business).

5. This analogy is conspicuously absent from the leading histories of American academic freedom. See, e.g., RICHARD HOFSTADTER & WALTER METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 383-412 (1955). *But cf. id.* at 396-407 (discussing the way in which America adapted the German tradition of academic freedom, modified by American traditions of free speech, public interest and public trust, and professorial neutrality and impartiality). The exception to this rule is Steve Fuller, who argues persuasively that the German concept of *Urteil* (judgment) is so central to modern academic freedom that “[t]he fates of the two concepts have basically risen and fallen together.” See Steve Fuller, *The Genealogy of Judgement: Towards a Deep History of Academic Freedom*, 57 *BRIT. J. EDUC. STUD.* 164, 164 (2009). Even Fuller, however, follows the dominant historiography of academic freedom by locating its origins in early nineteenth-century German thought. The merit of this historiography is that it provides theoretical groundings for two of the four basic dimensions of academic freedom: the freedom to teach and the freedom to learn (or *Lehrfreiheit* and *Lernfreiheit*). Its problem is that it provides no theoretical ground for the concept of “tenure of office,” which emerges from the English judiciary and, before that, medieval thought more generally. Walter Metzger himself later would partially rectify this oversight, but his subsequent contributions have been less than fully integrated into the jurisprudence of academic freedom. See Walter Metzger, *Academic Tenure in America: A Historical Essay*, in *FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION* 126 (1973).

are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of all the legal reasonings of the courts.<sup>6</sup>

This “judicial analogy,” as I shall call it, is much more than a striking figure of speech. In what follows, I will argue that it extends to include, implicitly, a counter-intuitive political justification for academic tenure itself. In its earliest formulations, judicial tenure’s unique temporal form, permanency, was defined as a check against the possibility or indeed inevitability of the problem of *faction*, which in turn has traditionally been understood as that set of political divisions, popular opinions, and tyrannical passions that seize or bind the public in a specifically temporary, fleeting, or transient way.<sup>7</sup> Because elected offices tend to reflect more than deflect the whims and caprices of faction’s momentary fevers, so the argument goes, any lasting democratic republic will need to be supplemented by offices that will enable it to withstand, outlast, and survive the illness of faction. Judicial tenure of office, which judges hold for a lifetime on condition of good behavior, is a supplement of exactly this sort: it allows for the existence of a temporal form, continuity, that’s otherwise lacking in the institutions and practices of democratic politics.

Implicit in the judiciary’s famous counter-majoritarianism is thus a claim about the relation of justice to time: if judicial office needs to be interminable, it’s because the pursuit of justice is itself interminable. But much of what holds for justice also seems to hold for truth: not only is the pursuit of truth just as interminable as the pursuit of justice, but faction has also been understood as an illness of truth, for it develops under conditions where the whims and caprices of public opinion come to reign without any reference to considerations of true and false.<sup>8</sup> As such, the justifications that require judicial tenure of office double as justifications for academic tenure of office as well: not only can the academe allow for forms of continuity and permanency that are otherwise absent from democratic politics, but it also, for this same reason, can provide an enduring supplement capable of holding in check the passing whims, caprices, and passions that generate faction. With this, the judicial analogy is conceived—and conceived,

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6. AM. ASS’N OF UNIV. PROFESSORS, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in POLICY DOCUMENTS AND REPORTS 6 (Johns Hopkins Univ. Press 11th ed. 2015).

7. See PLATO, REPUBLIC 351d-352a, 439d6-430e8, 556a-79e, 606d1-7 (Allan Bloom trans., 1991).

8. The freedom to say whatever one likes (or, in Greek, *parrhēsia*) is traditionally understood as one of the most basic hallmarks of democracy. According to Plato’s Socrates, however, *parrhēsia* is also the condition for democracy’s collapse into tyranny, understood as the rule of whim and caprice, for under conditions of unlimited *parrhēsia* desire comes to rule *logos* (instead of the other way around). From this perspective, *parrhēsia* is not only the very hallmark of democracy, but also a mortal threat to democracy itself, the most basic origin of its metamorphosis into tyranny. *Id.* at 557a-b. See also MICHEL FOUCAULT, “DISCOURSE AND TRUTH” AND “PARRĒSIA” 131 (Henri-Paul Fruchaud & Daniele Lorenzini eds., Univ. of Chi. Press 2019).

moreover, on expressly political terms. To the extent that faction is the central problem of politics,<sup>9</sup> the academe, no less than the judiciary, is a necessary condition for any lasting democratic republic.

None of this, of course, should suggest that the judicial analogy is entirely coherent, stable, unequivocal, or even desirable. In some ways, in fact, the judicial analogy provides a justification for academic freedom that is even more volatile and ambivalent than the First Amendment itself. To begin, I argue, the 1915 Declaration integrated the judicial analogy within itself in a perplexing way, creating the conditions for that analogy's negation—and with it, I suggest, the negation of the mode of thought that justified tenure in the first place. What's more, I continue, the judicial analogy opens up one of the more ambiguous problems in the tradition of American academic freedom—the question of what it means to say that a professor's continued enjoyment of academic freedom can or should be made conditional on that professor's "good behavior." Finally, I contend, the judicial analogy sets into motion a turbulent dialectic around the vexed question of extramural utterances, authorizing a set of antitheses, reversals, and syntheses that remain in play in the contemporary academe. I conclude by considering the unexpected way the judicial analogy figures into the justification of academic freedom set forth by the medieval historian Ernst Kantorowicz in his 1950 pamphlet *The Fundamental Issue*. Today, I conclude, the time is ripe not only to rethink Kantorowicz's surprising place and function in the tradition of American academic freedom, but also to contemplate anew his unrecognized contributions to the American tradition of academic freedom jurisprudence.

## I. TENURE OF OFFICE

### *A. Tenure as Independence*

Is the professor an employee who works *for* and *in* the university or an appointee who in some constitutive sense *is* the university itself? The American tradition of academic freedom is defined by an ongoing dispute over this question.<sup>10</sup> The judicial analogy, as it happens, is indispensable for both standpoints. To the former, which is presupposed by today's faculty and graduate student unions, it provides an unacknowledged precursor for the critique of the precarious, short-term contracts that increasingly structure contingent faculty hiring in the contemporary academe. To the latter, it gives not only the term "appointee" itself, but also the model of an institution whose essence is immanent in its members: if in ordinary language we don't say that Supreme Court Justices work *for* and *in* the

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9. See GIORGIO AGAMBEN, *STASIS: CIVIL WAR AS A POLITICAL PARADIGM* 22-23 (Nicholas Heron trans., 2015).

10. REICHMAN, *supra* note 2, at 223-42.

Court, it's because we instead suppose that the Justices *are* the Court itself. Above all, it provides a manifestly political logic in support of the claim—today, unfortunately, more felt or intuited than understood, respected, or crisply argued—that faculty appointments should imply lifetime tenure. But to follow any of this, we first need to take a step back.

Before “tenure of office” appeared in the 1915 Declaration’s defense of academic freedom, it had a clear place and function in revolutionary eighteenth-century American politics. Judicial tenure of office was at issue not only in The Declaration of Independence, which objected to King George III’s 1772 plan to provide royal salaries to Massachusetts judges,<sup>11</sup> but also, more extensively, in the passages of *The Federalist Papers* that argue in support of judicial independence and, by extension, Article III, Section 1 of the U.S. Constitution.

Consider, to begin, James Madison’s Federalist No. 51, which outlines the doctrine of the separation of powers. There, writing under the pseudonym Publius, Madison argues that a proper partition of powers between the executive, legislature, and judiciary only can be achieved if each branch has as little power as possible over the formal appointment of the members of the other branches, and only if each branch should depend as little as possible on the others for the emoluments attached to their offices (for otherwise, Madison observes, independence would be merely nominal).<sup>12</sup> In the concrete, this means that each person who holds office in each branch of federal government must have not only the constitutional means but also the personal motive to resist encroachment of the others.<sup>13</sup>

In the case of the judiciary, this principle points to a very specific conclusion. Because it’s the case that “peculiar qualifications” are necessary in order to serve as a member of the judiciary, judges must be chosen in a way that ensures that the most qualified individuals will hold judgeships, and for this purpose direct elections will not suffice. Judges, therefore, must be appointed instead. But in order to ensure that judges will not remain dependent on the authority appointing them, Madison argues, it’s necessary for those judges to have “permanent tenure,” which in Madison’s view will have a very clear and distinct effect: it “must soon destroy all sense of dependence on the authority conferring” their appointments.<sup>14</sup> In *Federalist* No. 51, therefore, permanent tenure and judicial independence are part of the same logic: permanent tenure is the means by which judges accomplish the end of freeing themselves from the same executive branch responsible for their appointment.

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11. THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 86-87 (Jack Rakove ed., 2009) (arguing that King George III “has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”).

12. THE FEDERALIST NO. 51, at 263 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009).

13. *Id.* at 264.

14. *Id.*

In Federalist No. 71, which is dedicated to the topic of the duration in office of the executive, Alexander Hamilton deepens this logic. Also writing as Publius, he sets forth an account of property ownership into which duration, and thus too tenure, figures centrally.

It is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one, than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust, than to any article of ordinary property. The inference from it is, that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity, from the independent exertion of his powers, or from encountering the ill-humors, however transient, which may happen to prevail, either in a considerable part of the society itself, or even in a predominant faction in the legislative body.<sup>15</sup>

Conversely, Hamilton will go on to say, the longer one holds office, the more likely it is that one will be able to summon the “courage and magnanimity” that will be necessary under conditions where serving the public good means opposing public opinion, thereby incurring the “displeasure” of a majority.<sup>16</sup> If, for Madison, permanent tenure is the mechanism by which the judiciary establishes independence from the executive, for Hamilton, by contrast, the duration of tenure will correlate to the degree to which public office allows for a certain independence from the public itself. This independence is especially crucial under conditions where the public dissolves into factions and begins to oppose its own “permanent and aggregate interests.”<sup>17</sup> The longer the tenure of office, the greater one’s attachment to office, the more the officeholder will be capable of opposing temporary delusions with “cool and sedate reflection,” and the more likely it is that officeholders will equip the public to survive the otherwise lethal consequences of its own temporary delusions, transient impulses, ill-humors, and sudden breezes of passion.<sup>18</sup> Far from being a category of merely empty and homogenous time, permanency here assumes a directly and manifestly political dimension: it’s a quality or characteristic

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15. THE FEDERALIST NO. 71, at 361 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009); *cf. id.* at 363 (restating the principle that men take an only slim interest in “short-lived advantages,” and that such short-lived endeavors moreover offer men little inducement to expose themselves to considerable inconveniences or hazards).

16. *Id.* at 362.

17. THE FEDERALIST NO. 10, *supra* note 15, at 48 (James Madison).

18. THE FEDERALIST NO. 71, *supra* note 15, at 362 (Alexander Hamilton).

of office that can and should help cure “the mischiefs of faction.”<sup>19</sup>

This holds true, above all, for the office of the judiciary. In Federalist No. 78, Hamilton sets forth what he calls “a strong argument for the permanent tenure of judicial offices,”<sup>20</sup> and suggests that “nothing will contribute so much” as permanent tenure of judicial office to that “independent spirit” that judges need in order to be able to carry out their duties.<sup>21</sup> Hamilton then tasks the independent judiciary with the duty to resist not only the public’s momentary inclinations and delusions but also, relatedly, its oppression of minority parties in the community.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>22</sup>

For Hamilton, therefore, the “permanent tenure” of the judiciary is more than just the mechanism through which the judiciary achieves independence from the executive branch. It’s also the mechanism that gives the judiciary the power to prevent what Alexis de Tocqueville soon would call the “tyranny of the majority.”<sup>23</sup> In Federalist No. 10, Madison argues that the “great object” of the inquiries in *The Federalist Papers* is to secure “the public good and private rights” against the danger of a faction formed by the majority, while also and at the same time preserving the spirit and form of popular government.<sup>24</sup> On these terms, it’s no exaggeration to say that the permanent tenure of the judiciary is central not only to the “science of politics” announced by the *Federalist Papers*, but also to the democratic republic whose founding it proposes to enable.<sup>25</sup>

### *B. Tenure as Relation*

The arguments set forth in *The Federalist Papers* would have been intimately familiar to Roscoe Pound, the influential Harvard Law School professor who was one of fifteen committee members who contributed to the creation of the AAUP’s 1915 Declaration in the years between 1913 and 1915, and who was responsible for inserting the judicial analogy into its

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19. THE FEDERALIST NO. 10, *supra* note 15, at 48 (James Madison)

20. THE FEDERALIST NO. 78, *supra* note 15, at 395 (Alexander Hamilton).

21. *Id.*

22. *Id.*

23. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 239-42, (Harvey C. Mansfield ed., Univ. of Chicago Press 2000).

24. THE FEDERALIST NO. 10, *supra* note 15, at 50 (James Madison).

25. THE FEDERALIST NO. 9, *supra* note 15, at 43 (Alexander Hamilton).

Second Section.<sup>26</sup>

It's therefore highly significant that Pound's earliest claim to fame was a 1906 speech to the American Bar Association that, among other things, criticized the practice of electing judges to office. In the words of John Wigmore—who was in the audience in 1906 when Pound gave his speech and who, in 1916, became the second president of the AAUP—Pound's ABA address struck a spark that, in turn, kindled the flame of legal progressivism.<sup>27</sup> In the years after 1906, Pound continued to write about the problem of tenure of office. In 1914, a year after Arthur Lovejoy would invite Pound to serve on the organizational committee that was responsible for drafting the AAUP's 1915 Declaration, Pound published multiple articles that took up the problem of tenure of judicial office. To be sure, the central focus of these articles was elsewhere: Pound's main concern during these years was to explore the conflict of theology and jurisprudence, the jealousy shown by the clerisy toward lawyers, and the differences between Roman law and American common law. But in the course of these arguments, Pound also repeatedly criticized what he called a "false idea of democracy," namely, the view that any difference in training is a class distinction that is, in turn, inimical to the idea of American popular government. This false idea, Pound argued, was at the heart of the "change in the tenure of judicial office that swept over the country about 1850."<sup>28</sup> In one of the longest footnotes he would write in any article that year, Pound suggested that the crisis of the judiciary was due in large part to "illiberal decisions" made by popularly-elected judges with short tenures of office.<sup>29</sup> The institution of an "elective judiciary, holding for short terms," Pound would add in an article published several months later, was not adequate to the task of the development of common law under conditions of rapid industrialization, intensifying urbanization, increasing economic complexity, and radical social transformation. Judges, he concluded, need more than just "popularity, honest mediocrity, or ignorant zeal for the public weal."<sup>30</sup>

Pound's concern here differed from that of Publius over a century earlier: the object of his criticism was less the public's temporary delusions, transient impulses, and momentary ill-humors than the consequences of overcrowded court calendars, which introduced haste into court procedures,

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26. See, on this point, HANS-JOERG TIEDE, *UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* 118 (2015).

27. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC'Y 176 (1937).

28. Roscoe Pound, *The Lay Tradition as to the Lawyer*, 12 MICH. L. REV. 627, 631 (1914).

29. *Id.* at 631 n.11. This footnote reappears in Pound's 1921 *The Spirit of the Common Law*, only now in the body of the text. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 7-8 (1921).

30. Roscoe Pound, *A Feudal Principle in Modern Law*, 25 INT'L J. ETHICS 1, 6 (1914). Pound later revised this into the first chapter of *The Spirit of the Common Law*, which he titled "The Feudal Element."

decreased the amount of time that judges and lawyers alike allotted to cases, and in general dissolved the conditions for judicial deliberation.<sup>31</sup> Nevertheless, this criticism clearly indicates that Pound shared with his predecessors an understanding of temporality as a problem for jurisprudence: for Pound no less than for Madison and Hamilton, judicial impermanence undermined the judiciary's independence from the same public whose interests it ultimately serves. Like Publius, therefore, albeit for different reasons, Pound held that only prolonged tenure of office could allow the judiciary to check the anti-democratic energies that emerge whenever the world becomes giddy with speed.

And yet, as Pound realized, the task of justifying permanent tenure for judges entailed considerable difficulties. To begin, permanent tenure cuts against the grain of the pseudo-democratic logic that reduces democracy to elections, and allows unelected appointees to be scorned as an undemocratic elite. One critic cited by Pound, for example, argued that "life tenure by appointment was un-American."<sup>32</sup> In addition, as Pound's Harvard colleague Charles Howard McIlwain pointed out in a 1913 article, the tenure of English judges derived from precedents in feudal law. Because the American judiciary was modeled on the English judiciary, what held for the latter held for the former as well: according to McIlwain, Madison's argument in Federalist No. 51—namely, that "a great judicial office is just the same as its emoluments"—is itself "an interesting survival of feudalism[.]"<sup>33</sup> In his 1914 inquiries into judicial tenure, importantly, Pound also turned his attention to feudal law, arguing that feudal law had given American common law what he called a "fundamental mode of thought."<sup>34</sup> In contrast to the other historical origins of American law, which in Pound's telling all assumed the isolated individual as law's paradigmatic subject, Pound claimed that feudalism alone allowed American law to grant standing to groups and classes, and to posit "the idea of relation" as law's primary concern.<sup>35</sup>

By "idea of relation," Pound had in mind something very specific: the entire set of reciprocal powers, rights, duties, and liabilities between tenants and lords that grew out of land tenure arrangements. In his view, tenure was the paradigmatic feudal relation: it gave rise to an entire "mode of thought" that, in turn, authorized an approach to legal situations and legal problems fundamentally different than the individualism of Roman law, Puritanism, natural law, and colonial law.

Here the question was not what a man had undertaken or what he had

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31. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 9 (1921).

32. Pound, *supra* note 28, at 631 n.11.

33. C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 221 (1913).

34. Pound, *supra* note 30, at 12.

35. POUND, *supra* note 31, at 22.

done, but what he was. The lord had rights against the tenant and the tenant had rights against the lord. The tenant owed duties of service and homage or fealty to the lord, and the lord owed duties of defense and warranty to the tenant. And these rights existed and these duties were owing simply because the one was lord and the other was tenant. The rights and duties belonged to that relation. Whenever the existence of that relation put one in the class of lord or the class of tenant, the rights and duties existed as a legal consequence. The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as incidents of a relation.<sup>36</sup>

The “analogy of the incidents of feudal tenure,” Pound concluded, was not only a “legal institution of capital importance for the law of the future,” but also was “a means of making of our received legal tradition a living force for justice in the society of today and of tomorrow, as it was in the society of yesterday.”<sup>37</sup>

Some readers might find it odd that Pound, that great torchbearer of legal progressivism, should rest his hopes for the twentieth-century American judiciary so fully on medieval jurisprudence, a body of law hardly known for its commitment to equality or social justice. But upon reflection some of this strangeness disappears. The word “tenure” derives from the Latin verb *tenēre* (“to hold”), which in turn gives rise to a constellation of terms that even today connect “holding” with duration. In contemporary parlance, for example, we say that a tenant holds land by a lease of some set time, that a tenet is a doctrine or principle one tends to hold firmly, and that tenacity is the ability to hold on despite everything. Under feudalism, similarly, a tenure designated a “holding” that was retained for a time by a series of vassals and lords in a ladder of tenures leading from the tenant ultimately to the feudal lord.<sup>38</sup> Feudalism itself, indeed, was nothing other than an elaborate system of tenures or holdings in which very few absolute, exclusive, and undivided property rights existed, which is why Pound suggests that the tenure relation is the very paradigm or exemplar of feudalism as such.

Far from being obsolete, this understanding of tenure remained active in early modern jurisprudence, where it was joined to the concept of office. For the French political philosopher Jean Bodin (1530-1596), whose works were read not only by King James I but also by Sir Edward Coke, an office

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36. *Id.* at 20.

37. *Id.* at 24.

38. HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 312 (1983).

could be loaned to a person for a certain period of time, even for an entire lifetime, but it never could be owned by that person.<sup>39</sup> Far from being possessable as a form of private property, Bodin argued, office is a “thing borrowed,” and the person who holds it (the “officer”) is properly its custodian or guardian.<sup>40</sup> From the fact that office is thus legally akin to a trust or mortgage, however, it doesn’t at all follow that officers lack rights: unlike commissioners, whose grants of authority are extra-legal and who serve at the sovereign’s pleasure, officers’ rights and responsibilities are legally binding on, reciprocally related to, and actionable even against the sovereign who appoints them.<sup>41</sup> Above all, because office is ultimately lent to the officer by the sovereign, office implies permanency: unlike commissions, which are precarious, occasional, and transient, office is, like medieval sovereignty itself, perpetual, so that office without tenure is something of a contradiction in terms.<sup>42</sup>

One can then understand why Pound would argue that the “relation” of tenure cannot be understood on the basis of the Roman law categories of person, thing, and contract (the last of which Pound, citing Maitland, called “the greediest of all legal categories”<sup>43</sup>). Whereas Roman law reduces juridical problems and situations to the will of the individual person as manifest in his legal transactions, feudal law reveals an altogether different mode of thought, which Pound described as “a tendency to affix duties and liabilities independently of those bound, to look to relations rather than to legal transactions as the basis of legal consequences, and to impose both liabilities and disabilities upon those standing in certain relations as members of a class rather than upon individuals.”<sup>44</sup> Under conditions where American jurists lose this mode of thought, the fate of American law would be settled: the isolated individual would be left as “the center of its most significant doctrines.”<sup>45</sup>

### C. Tenure as Property

Pound’s writings on judicial tenure of office aren’t usually considered a part of the tradition of American academic freedom. Nevertheless, they reveal how the judicial analogy may have informed the way at least one of

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39. Daniel Lee, “Office is a Thing Borrowed”: Jean Bodin on Offices and Seigneurial Government, 41 POL. THEORY 409, 420 (2013); Janet McLean, *Between Sovereign and Subject: The Constitutional Position of the Official*, 70 UNIV. TORONTO L.J. 167, 174 n.41 (Supp. 2, 2020).

40. Lee, *supra* note 39, at 424.

41. Lee, *supra* note 39, at 421-23. See also CARL SCHMITT, *DICTATORSHIP: FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE* 26-30, (Michael Hoelzl & Graham Ward trans., Polity Press 2014) (1921) (clarifying Bodin’s distinction between officer and commissar).

42. Lee, *supra* note 39, at 422-23; SCHMITT, *supra* note 41, at 26-27.

43. POUND, *supra* note 31, at 28.

44. *Id.* at 14.

45. *Id.*

the founders of that tradition understood academic “tenure of office.”<sup>46</sup> Speaking in 1906, Pound declared that the central problem of the American judiciary was that it was “archaic” and “behind the times.”<sup>47</sup> By 1914, however, he seems to have discovered a complementary dimension to this problem: the idea of the independent judiciary (and, by extension, the balance of powers itself) may have been a modern invention, but it derived the very foundation of its independence from a concept, tenure of office, that was not modern, and whose originary rationale was both antithetical to and untranslatable on the modern terms of private property, individual rights, and freedom of contract.<sup>48</sup>

To be sure, traces of this tension were already apparent in Hamilton’s argument about the tenure of judicial office in Federalist No. 78. There, Hamilton augmented his claims in Federalist No. 71 by providing three additional reasons why “permanency of judicial office” is necessary. First, he suggested, “long and laborious study” is necessary to acquire a competent knowledge of common law.<sup>49</sup> Second, he added, only a few of those who acquire competent knowledge of common law also have the requisite integrity to adjudicate it with utility and dignity.<sup>50</sup> Third, and most importantly, a merely “temporary duration in office . . . would naturally discourage such [men of high character] from quitting a lucrative line of practice to accept a seat on the bench.”<sup>51</sup> Taken together, these arguments seem to have allowed Hamilton to provide new premises for an otherwise outdated term. If Hamilton could successfully translate tenure into his revolutionary present, it was primarily because he first accepted the premise, familiar to readers of Benjamin Franklin, that time was translatable into money.<sup>52</sup> On these terms, permanent tenure is essential to judicial office neither because office is a trust borrowed from an intrinsically perpetual sovereign, nor because it’s an essential safeguard against executive or factional tyranny, but above all because those who dedicate their lives to long and laborious study apparently also regard permanency itself as a kind of compensation. Thought by Hamilton in direct connection with salary, in other words, permanency of office in Federalist No. 78 here begins to

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46. It’s worth underlining that the AAUP’s 1915 Declaration does not attach academic tenure to a person (the university teacher) or to a position (assistant or associate) but rather to an office. See AM. ASS’N OF UNIV. PROFESSORS, *supra* note 6, at 12.

47. See Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the Am. Bar Ass’n (Aug. 29, 1906), in 29 A.B.A. REPORTS 395 (1906), reprinted as *Roscoe Pound Kindles the Spark of Reform*, 57 A.B.A. J. 348, 351 (1971).

48. Cf. McLean, *supra* note 39, at 179-80 (arguing that office became a denuded and residual category under the conditions of radical social, political, and legal transformation that defined nineteenth century Britain).

49. THE FEDERALIST NO. 78, *supra* note 15, at 397 (Alexander Hamilton).

50. *Id.*

51. *Id.*

52. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 13-38 (Talcott Parsons trans., Routledge 2001) (1930).

become intelligible as, and equivalent to, a form of measurable or quantifiable payment. With this, however, Hamilton lends his signature to a conceptual transformation already apparent in Bodin, who modeled his doctrine of public law on concepts taken from private law.<sup>53</sup> That transformation takes tenure of office, this otherwise obscure feudal concept, and transplants it to a new soil, contract law, in which all things feudal generally wither away. In the process, the concept of time that underwrites tenure of office, in which permanency itself assumes a manifestly political dimension, is displaced by a very different concept of time, one that renders time fungible with money, quantifies it into empty and homogenous units, and turns it into exchange value. The condition on which the concept of tenure survived the transition from feudalism into modernity, it would seem, is its uprooting from the mode of thought that construed law in terms of relations of reciprocal rights and obligations and as such, at least in Pound's view, amounted to "a living force for justice."

The discussion of academic tenure in the AAUP's 1915 Declaration bears witness to a similar tension. According to the 1915 Declaration, one of the three purposes of tenure is "to render the profession [of academia] more attractive to men of high ability and strong personality by insuring the dignity, the independence, and the reasonable security of tenure, of the professorial office."<sup>54</sup> Because the "pecuniary emoluments" of the professorial office are not equal to those of other professions, the 1915 Declaration suggests, it's all the more essential that "men of high gifts and character . . . be drawn into it by the assurance of an honorable and secure position."<sup>55</sup> In the 1915 Declaration as in Federalist No. 78, therefore, permanent tenure of office receives an equivocal justification. In both texts, to be sure, one detects traces of the notion of reciprocal relation of rights and obligations, most especially between the public and the offices to which tenure attaches. In each case, however, what remains of this relation is far from easy to discern: because the judiciary and the professoriate alike occasionally need the right to shield themselves from public opinion in order to discharge their obligation to serve the public interest, a certain latent wariness of the public—or, more exactly, a certain wariness of the public's vulnerability to faction—seems to subsist as the prior condition for and corollary of these offices' felicitous operation as public trusts. Alongside this intricate, paradoxical, and older form of relational reciprocity, however, a newer and simpler justification of tenure came into view, for both texts *also* partially justify tenure as nothing more than a form

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53. SCHMITT, *supra* note 41, at 29.

54. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 6, at 11.

55. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 6, at 6. "Emolument," the word that appears in the Declaration, is the same word that Madison uses in *Federalist* No. 51 to describe the means by which the judiciary will achieve its independence from the elective branches of government.

of compensation, which is to say, a value whose worth derives from the fluctuating forces of the competitive free market (and from the price of skilled labor in particular). Far from being guided by political questions pertaining to the relations between justice, tyranny, and faction, tenure now also becomes the name for a kind of private property interest, a kind of remuneration that just happens to assume a temporal form (permanency), and whose main function is to incentivize talented individuals to expend their energies in the otherwise unremunerative professions of the judiciary and the professoriate.

With this newer justification, we certainly do see a premodern concept get a new lease on life within the distinctly modern horizon of the free market and the price mechanism. But we also see how this same renewal prepares the conditions for the disappearance of the older idea of tenure—namely, that it's indexed to, and justified by, the political dangers of faction and tyranny and the medieval concept of reciprocal rights and obligations. In the document that governs academic freedom today, The 1940 Statement of Principles on Academic Freedom and Tenure, that disappearance is complete. Whereas the 1915 Declaration dedicates a paragraph to the judicial analogy, the 1940 Statement makes no explicit reference to it at all. Less a professional code of ethics than a “managerial code” addressed to the university as employer,<sup>56</sup> the 1940 Statement retains the language of tenure while also abandoning the unstable conceptual origin—the judicial analogy—that earlier situated that same language within a manifestly political horizon.

Today, meanwhile, the translation of tenure into contract law is largely complete. At present, tenure is defended, litigated, and justified almost exclusively on the basis of contract law.<sup>57</sup> Reinterpreted in these terms, tenure begins to refer to another index altogether: it amounts to little more than a claim to the possession of a property interest under the Fourteenth Amendment.<sup>58</sup> The intricate political temporality it once implied now appears only in mute and mutilated terms, as a set of property-based claims based upon arguments about longevity of service and reasonable expectation of continued employment.<sup>59</sup> Perhaps most significantly of all, even today's most ardent defenders of academic freedom no longer use the

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56. See Walter Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 L. & CONTEMP. PROBS. 3, 10-11 (1990). In general, as Metzger notes, “most of the philosophy of the 1915 Declaration was parked outside the 1925 and 1940 Statements, as were all the images and turns of phrase for which the [later] draftsmen could find no succinct equivalents.” *Id.* at 30. This includes, above all, the reference to the judiciary.

57. KAPLIN & LEE, *supra* note 2, at 287; REICHMAN, *supra* note 2, at 100.

58. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (holding that professors at public institutions are only entitled to procedural due process if they can demonstrate a liberty or property interest under the Fourteenth Amendment).

59. Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 281-84, 301-02 (1977).

phrase “tenure of office.” Instead we speak of tenure only as something one “gets” or “has,” never as something one “holds,” as if the concept of “office,” which since Cicero has designated an intricate problem of duty and obligation, were somehow inessential for our theories of tenure and academic freedom. The sharpest sign of this erasure is the symptomatic split that holds sway today: those we call “university officials” are not professors (only administrators) and those who “get” and “have” tenure are not “university officials” (only professors).

Once fully privatized into a form of property, tenure’s protections perversely begin to operate in reverse, undercutting the justifications once incompletely opened up by the judicial analogy. Particularly under conditions where faculty increasingly teach and research on the basis of precarious, impermanent, and unpredictable contracts, tenure’s economic security becomes intelligible as little more than a scarce commodity that, in turn, becomes the object of bitterly ugly competition (the “job market”). In this iteration, needless to say, tenure no longer provides reasons for independence of judgment, fearless speech, and opposition to executive or factional tyranny. Nor does it derive its necessity from the reciprocal obligations and duties of an office that is essentially a public trust, an intrinsically perpetual thing borrowed from an intrinsically perpetual sovereign public. Under conditions where time becomes a form of money, accumulations of time become a form of wealth, and tenure’s unusual political temporality gives way to apolitical calculations of the great value of lifetime employment, on which terms it generates reasons to keep one’s head down, fall in line, obey hierarchies, steer clear of controversy, acquire what one doesn’t have, and protect what one does have. Reduced to a form of economic security, in other words, tenure itself begins to stifle and inhibit the very academic freedom it was designed to enable.<sup>60</sup>

One can then understand why faculty and graduate student unions have expanded in recent decades; one also can understand the growing need for a coherent legal theory of *de facto* tenure.<sup>61</sup> These practices and theories not only provide protections against precarity and penury; they also provide the professoriate with its best chance to retain and renew the older forms of perpetuity that for centuries have allowed the university to remain what it is. Nevertheless, their increasing necessity should not prevent us from

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60. See FRANK DONOGHUE, *THE LAST PROFESSORS* 76-78 (2008); cf. DERRICK BELL, *The Law Student as Slave*, in *THE DERRICK BELL READER* 280-81 (Richard Delgado & Jean Stefancic eds., 2005) (criticizing tenure). It’s noteworthy that after Bell left Harvard for New York University, he gave up tenure and began to work in contract system, under which conditions he generated a highly original, significant, and controversial body of work—critical race theory—in the absence of tenure’s academic freedom protections.

61. See Colleen Flaherty, *Academic Employee Unions Grow*, *INSIDE HIGHER ED* (Nov. 17, 2020), <https://www.insidehighered.com/quicktakes/2020/11/17/academic-employee-unions-grow>; Donna Euben, *De Facto Tenure*, *AM. ASS’N OF UNIV. PROFESSORS* (July 2005), <https://www.aaup.org/issues/tenure//de-facto-tenure-2005> (last visited July 15, 2021).

reflecting upon the epistemic constraints under which they currently emerge: where our best justifications of academic tenure become arguments about compensation, property, and contract, we've already lost the older political justifications of academic tenure, as obscure as they were sound, once made available by the judicial analogy.

## II. THE NORMS OF TENURE

### A. Good Behavior

Tenure is today widely recognized as the primary defense of academic freedom.<sup>62</sup> As we see, however, its origins in the judicial analogy point to a troubling conclusion. Tenure of office is less a single, coherent concept than a disjunctive synthesis, a term that combines within itself a set of justifications that are at best historically disparate and at worst mutually incompatible. Several of the judicial analogy's other relations to tenure, meanwhile, show up elsewhere in the doctrine of academic freedom. In particular, at the same time that the judicial analogy gave rise to a set of equivocal justifications for tenure, it also provided an ambiguous lexicon for defining the norms of conduct which tenured professors were expected to observe.

The origins of that lexicon lead us first to the seventeenth century, during the period when absolute monarchy in England was replaced with parliamentary rule and the first English Bill of Rights. Prior to the Long Parliament of 1640-1660, English judges were regarded as the king's counsellors, and generally served at the pleasure of the king (*durante bene placito*), from which it followed that they also could be dismissed for any displeasure they might cause the king.<sup>63</sup> This changed with the 1701 Act of Settlement, which granted judges permanent tenure of office "on condition of good behavior" (*quamdiu bene se gesserint*).<sup>64</sup> This Act allowed judges the security to arrive at the conclusions required by them of common law,

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62. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBLEMS 325, 328-29 (1990).

63. This occurred, most famously, with James I's 1616 dismissal of Edward Coke as Chief Justice of the King's Bench. See POUND, *supra* note 31, at 60-61.

64. Although McIlwain traces the roots of *quamdiu bene se gesserint* in modern English legal history to the reign of Henry VI, who was the first to appoint barons of the exchequer on these terms, Raoul Berger dates it much earlier, to the reign of Edward III. See *Impeachment of Judges and 'Good Behavior' Tenure*, 79 YALE L.J. 1475, 1478 (1970). Its earliest application to the independent judiciary appears to date to a committee that was appointed during the Long Parliament 1640-1, and charged with the responsibility to consider the tenure of judges. This resulted in a petition to King Charles I, who on June 5, 1641 promised that "the judges, hereafter, shall hold their places, *quamdiu bene se gesserint*." Nevertheless, this principle would not be firmly established in English law until 1701. See McIlwain, *supra* note 33, at 220-24. To this, however, it's important to add that the Act of Settlement did not *also* establish the principle of judicial independence: it would be more accurate to say that it merely switched the locus of the sovereign power to whom judges were beholden, from King to Parliament. See Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 616-22 (1977).

without fear or favor toward those to whom they owed their position. This crucial change had the effect of decreasing judges' dependence on the authority appointing them. Writing in the first volume of his definitive *Commentaries on the Laws of England* (1765-1769), William Blackstone therefore could say that commissioning of judges on condition of good behavior was one of the very cornerstones of the "dignity and independence of the judges in the superior courts."<sup>65</sup>

It's intriguing that in the very same year that good behavior was established as a principle of the English judiciary, it also would be established as a basic principle of the colonial American university. The first charter of Yale University, which also was written in 1701, would cite the formula *quamdiu bene se gesserint* to describe the terms on which its rectors, masters, ushers, and other officers would continue in office.<sup>66</sup> Yale was no outlier: a century later, following a revolutionary period in which figures like John Adams would use the formula in his 1773 defense of judicial tenure of office,<sup>67</sup> Thomas Jefferson would use it to explain the sort of permanent professorships he imagined at the University of Virginia.<sup>68</sup> Even prior to the period that some call "the American founding," therefore, the limits to tenure would be enshrined in the originary documents of two very different institutions on the basis of one and the same principle. For those who drafted the earliest blueprints of the American judiciary and university, it was self-evident that not only the judge but also the professor would continue to hold office so long as they satisfied the ambiguous criterion they called "good behavior."

### *B. Grave Moral Delinquency*

The AAUP's 1915 Declaration not only inherited this ambiguity; it also compounded it. At several points, the 1915 Declaration makes claims about how university teachers should behave if their profession is to retain the trust of the public, which academics serve yet which has no direct voice in

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65. 1 WILLIAM BLACKSTONE, COMMENTARIES \*258.

66. DOCUMENTARY HISTORY OF YALE UNIVERSITY, UNDER THE ORIGINAL CHARTER OF THE COLLEGIATE SCHOOL OF CONNECTICUT, 1701-1745, at 28-29 (Franklin Bowditch Dexter ed., 1916). See also Walter Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 126 (1973) (commenting on the more general use of the formula *quamdiu bene se gesserint* in early American universities). In the colonies, where the 1701 Act of Settlement did not apply, the principle of judicial tenure under conditions of "good behavior" was under discussion beginning at least in 1682, when William Penn drafted a second Frame of Government for the government of Pennsylvania. See Scott D. Gerber, *William Penn and the Origins of Judicial Tenure during Good Behavior*, 136 PA. MAG. HIST. & BIOGRAPHY 233, 241 (2012).

67. DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787, at 24-28, 30-31 (2011).

68. Letter from Thomas Jefferson to Thomas Cooper (Sept. 1, 1817), in 12 THE PAPERS OF THOMAS JEFFERSON 3-5 (J. Jefferson Looney ed., 2014), <https://founders.archives.gov/documents/Jefferson/03-12-02-0001>.

their appointment. We read, therefore, that the scholar is to set forth his conclusions with “dignity, courtesy, and temperateness of language.”<sup>69</sup> Insofar as he is fit for his position, we are told, he should be “a person of fair and judicial mind.”<sup>70</sup> When he is instructing young and immature students, we learn, he should not indoctrinate the student with his own opinions, but instead should habituate his students to look patiently and methodically on both sides of controverted issues before adopting any conclusions.<sup>71</sup> After proposing that in every academic institution the tenure of certain educators should be presumptively permanent, the 1915 Declaration then allows for the possibility that even a tenured professor could be dismissed (or refused reappointment) for what the Declaration called “grave moral delinquency.”<sup>72</sup> It does not, however, define “grave moral delinquency” at all, leaving the limits of this crucial category altogether unclear. Once interpreted in light of the Declaration’s explicit analogy to the federal judiciary, though, some of the phrase’s ambiguity begins to disappear, and a slightly clearer norm begins to emerge: academic tenure of office, like judicial tenure of office, should be held *quamdiu bene se gesserint*.

But this in turn involves a paradox. To the extent that professors live up to the standards of their profession, it would seem that professors need to live up to the standards of professions other than their own. Well-behaved professors, by this logic, would seem to be professors who model their behavior in the classroom on the conduct of the judge in the courtroom. There are, to be sure, good reasons why the professoriate’s self-identity tends to become non-identical with itself. The natural, human, and social sciences depend for their intelligibility upon a range of juridical forms and techniques of legal interpretation (such as the provision of proof, evidence, and facts; procedures of trial and error; and practices of historical, ethical, logical, and aesthetic judgment).<sup>73</sup> As such, the history of truth is, in large part, also the history of law.<sup>74</sup> However fascinating, this deep genealogy doesn’t clarify what inferences about academic professional standards, if any, one might draw from the jurisprudence of judicial misconduct. *The Federalist Papers* at first seem helpful, for it argues that judges are to hold

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69. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 6, at 9.

70. *Id.*

71. *Id.* at 10.

72. *Id.* at 11.

73. See HANS-GEORG GADAMER, TRUTH AND METHOD 320-35 (Joel Weinsheimer & Donald Marshall trans., Continuum 2d rev. ed. 2004); MICHEL FOUCAULT, *Truth and Juridical Forms*, in 3 POWER: THE ESSENTIAL WORKS OF MICHEL FOUCAULT, 1954-1984, at 4 (James D. Faubion ed., Robert Hurley et al. trans., The New Press 2000).

74. See, e.g., JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 42 (2019); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979, at 34-35 (Michel Senellart ed., Graham Burchell trans., Palgrave 2008); Michel Serres, *Science, Law, in THE NATURAL CONTRACT* (Elizabeth MacArthur & William Paulson trans., Univ. of Mich. Press 1995); cf. LEPORE, *supra*, at xvii.

office only on condition of “good behavior,” and at one point even asserts that permanent tenure is justifiable because it’s an inducement to “good behavior.”<sup>75</sup> But once the reader places these easily misread passages in the wider context of *The Federalist Papers*’ mentions of insanity, senility, and high crimes and misdemeanors, it’s very difficult to conclude that Publius’s words about “good behavior” provide any kind of standard for impeachment.<sup>76</sup> Subsequent U.S. Constitutional Law has hardly clarified this matter either: although there’s scholarly consensus that no judge should be impeached for manifestly political reasons,<sup>77</sup> there’s little scholarly consensus on the relation between Article III’s good behavior clause and Article II’s description of impeachment standards procedures.<sup>78</sup> Tenure of office may be related to “good behavior,” but “good behavior” itself therefore remains a wide-open question. Or, more exactly: it implies a set of moral philosophical questions that cannot be answered, much less posed in the first place, on the terms of the judicial analogy.

### C. Enjoy It Like Gentlemen

The principle *horror vacui*, however, applies as much in jurisprudence as it does in physics: where explicit norms are absent, implicit norms rush in to fill the void. In the case of the “good behavior” of the tenured professor, there is one such norm in particular that requires our attention: the idea that good behavior ought to be modeled on the conduct of the gentleman.<sup>79</sup>

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75. See, e.g., THE FEDERALIST NO. 9, *supra* note 15, at 43 (Alexander Hamilton); THE FEDERALIST NO. 72, *supra* note 15, at 366 (Alexander Hamilton); THE FEDERALIST NO. 78, *supra* note 15, at 392, 397 (Alexander Hamilton); THE FEDERALIST NO. 79, *supra* note 15, at 399 (Alexander Hamilton); cf. THE FEDERALIST NO. 39, *supra* note 15, at 193-94 (James Madison).

76. Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 119 (2006).

77. Cf. Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 799-800 (1998); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 37-40 (1998); Prakash & Smith, *supra* note 76, at 124-25.

78. Cf. Michael Gerhardt, *Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 66, 69 (1989) (arguing that misbehavior is not an independent reason for removing judges, and that it’s the Article II standard that applies); Sherry, *supra* note 77, at 798 (arguing that the good behavior clause must be understood in relation to the Article II standard for impeachment); Prakash & Smith, *supra* note 76, at 109 (arguing that the good behavior clause and impeachment were entirely unconnected and give rise to separate processes). For the purposes of bringing impeachment jurisprudence to bear on academic freedom, the 1804 impeachment trial of Samuel Chase is exemplary. Among other things, Chase’s “intemperate” statements from the bench raised the question of whether judges should be held to a higher standard than others when speaking in their official capacity. As we’ll see in Section 3.1 *infra*, this presents a clear analogy to the problem of “extramural utterances” in the tradition of academic freedom. See Adam Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725 (2010).

79. This question was central to the case of Dr. Scott Nearing, an assistant professor of economics who was voted down for reappointment by the Trustees of the University of Pennsylvania during the 1915-1916 academic year. Nearing’s critics accused him of intemperate and vulgar speech that damaged the dignity that ought to attach to the University. Nearing’s case was one of the first taken up by the nascent AAUP. An almost identical accusation was made in 1960 against Leo Koch, an untenured biology professor at the University of Illinois who wrote a letter to a local newspaper that seemed to

This norm has deep roots in the history of the university and of liberal education in particular. Consider, for example, Cardinal John Henry Newman's 1854 book *The Idea of a University*, one of the most influential treatises on the topic of the university ever written in English. There the reader finds the claim that an "academical system" should "result in nothing better or higher than in the production of that antiquated variety of human nature and remnant of feudalism . . . called 'a gentleman.'"<sup>80</sup> The gentleman, Newman will say in his fifth lecture, has "a cultivated intellect, a delicate taste, a candid, equitable, dispassionate mind, a noble and courteous bearing in the conduct of life."<sup>81</sup> Above all, Newman argued, the gentleman's knowledge was a synonym for humane or liberal knowledge.<sup>82</sup> Liberal education—the gentleman's education—is education in which the enjoyment of knowledge as an end unto itself forms a habit of mind that "lasts through life"—it's an "acquired illumination," a "personal possession," an "inward endowment" whose attributes are "freedom, equitableness, calmness, moderation, and wisdom," or, in short, "a philosophical habit."<sup>83</sup>

Because Newman elsewhere characterized the idea of gentlemanly behavior as a remnant of feudalism, we may assume that he did not use the word "habit" here in a casual or unthinking way. The premise of Newman's metaphor is that the practice of bearing oneself or conducting oneself as a gentleman is comparable to the cloak that signified one's vow to devote oneself to the monastic way of life.<sup>84</sup> To the extent it's a "habit," the practice of conducting oneself as a gentleman would then be tantamount to a set of rules for living that, precisely like the monk's habit, become indistinct from life itself, and imply a work of the self upon itself (or, put differently, a moral discipline).

In Newman's thinking, the aim of this work was clear: it was directed at the achievement of a quality that he called *humanitas* and that, in classical Latin, designates everything that distinguishes humans from animals.<sup>85</sup> Newman is also clear about what it means for the self to work upon itself in service to *humanitas*: in order to achieve *humanitas*, one first must cultivate a "self-hatred"—his term<sup>86</sup>—of the presence within oneself of *inhumanitas*,

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endorse premarital sex. Here too the question was the extent to which the dignity of the gentleman scientist ought to serve as a moral guide for faculty or whether it was an enforceable job requirement. For discussions of these cases, see SCOTT, *supra* note 1, at 56; and REICHMAN, *supra* note 2, at 56.

80. JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY*, 3-4 (Frank Turner ed., 1996) (1852).

81. *Id.* at 89.

82. *Id.* at 83.

83. *Id.* at 77, 85.

84. See, on this point, GIORGIO AGAMBEN, *THE HIGHEST POVERTY: MONASTIC RULES AND FORM-OF-LIFE* 13-16 (Adam Kotsko trans., 2013).

85. See, on this point, Marc Crépon & Marc de Launay, *Menschheit, Humanität*, in *DICTIONARY OF UNTRANSLATABLES: A PHILOSOPHICAL LEXICON*, 650 (Barbara Cassin et al. eds., 2014).

86. NEWMAN, *supra* note 80, at 132.

*barbaritas, crudelitas, arrogantia, superbia, durities, acerbitas, and severitas* (the raw materials, one might say, of “grave moral delinquency”). This self-hatred is not optional; it’s the duty of all humane people, and in particular all gentlemen, and study is the way one acquires the ability to perform it.

Writing in 1914, Columbia University President Nicholas Murray Butler would bring the full weight of the history of this self-hatred to bear on the doctrine of academic freedom that was then crystallizing. The norm that Newman once posited as the university’s ultimate purpose would now, in Butler’s hands, extend to include the then-novel concept of academic freedom. Addressing the question of the limits of academic tenure, Butler turned to the figure of the gentleman to explicate the unstated norms governing the “good behavior” of the scholar:

In Columbia University there is but one rule of order for the government of teachers and students alike. That rule is that each member of the University is presumed to be a gentleman and is expected to conduct himself as such. With a simple, easily comprehended principle such as this, no elaborate code of regulations for the control of teachers or for the government of students is necessary. The observance of this simple rule would cause the quick disappearance of almost every charge that academic freedom is in danger. A gentleman measures his public utterance and bears himself with tolerance and kindness toward those who are otherwise minded. A gentleman understands that it is neither necessary nor expedient to teach to the young everything which the experience and reflection of an older man may have taught him to believe. A gentleman has some appreciation of historic values and a sense of proportion. He knows how to use the rich gift of freedom without divesting himself of a high sense of responsibility for that use. The universities of the world, and, in particular, the leading universities of the United States, offer abundant illustrations of scholars who hold views on fundamental questions that are quite at variance with those in authority about them and who are yet as secure and as contented in their tenure of academic office as it is possible for men to be. They enjoy academic freedom, *but they enjoy it like gentlemen*. This is the crux of the whole matter.<sup>87</sup>

This argument is significant not only because it grafts the new and controversial doctrine of academic freedom onto older concepts of the university, but also because it resumes the arguments about enjoyment Hamilton introduced in Federalist No. 71. There Hamilton claimed that the enjoyment of tenure is similar to the enjoyment of property. The firmer the tenure of our holding, Hamilton maintained, the more we find ourselves

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87. Nicholas Murray Butler, *Academic Freedom*, in *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION: A COLLECTION OF ESSAYS AND REPORTS* 291, 293-94 (Walter Metzger ed., 1977) (emphasis added).

attached to and interested in that which we hold, so that permanent tenure of office is less some kind of supplemental income (a job perk, as we would say today) than the very precondition for any institution whose essence is immanent in its members (and whose offices, or duties, therefore by definition should be consubstantial with, and indistinct from, their lifetimes). Butler, like Hamilton, here poses for himself the question of what it means to enjoy tenure. But his recourse to the figure of the gentleman allows him to answer that question very differently than does Hamilton. Implicit in Butler's understanding of the enjoyment of tenure—particularly his use of the conjunction “but” in the phrase I've emphasized above—is that it's possible to enjoy the tenure of academic office *too much*.

For Butler, then, academic governance amounts to the contrast between *excessively* enjoying academic freedom, on the one hand, and enjoying academic freedom *like a gentleman*, on the other. “Gentleman” in his formulation would then appear to be a name for some sort of internal restraint or regulatory ideal that scholars must impose upon themselves as a condition for holding office. It's a name for a principle of academic self-governance that sets limits on an enjoyment of academic freedom that otherwise, taken on its own terms, might flare up into some kind of pathological excess. Everything proceeds here as if, at root, Butler understood that the new doctrine of academic freedom risked freeing up a certain ungovernable *jouissance*—as if *curiositas*, which earlier religious authorities once condemned as the very mark of original sin, were damnable still.

The reader hardly needs reminding that Butler, the president of an all-male university, was widely regarded as one of the most authoritarian university leaders of his time. A figure Thorstein Veblen had in mind when he coined the scornful term “captains of erudition,”<sup>88</sup> Butler centralized control of Columbia University, ended the practice of the faculty choosing its own deans, dismissed professors who criticized him, and threatened to fire anyone who dissented from the American war effort in 1917. It's hard, in short, to imagine any figure more antithetical to the American tradition of academic freedom.

It's thus instructive that no less a figure than John Dewey himself, writing in 1902, would share Butler's premise that a certain form of masculinity provided the implicit schema for the specific kind of “good behavior” that academic freedom enabled.<sup>89</sup> Dewey certainly disagreed with Butler about the style and manner of that masculinity—for Dewey, it seems, the exemplary form of good scholarly conduct was not gentlemanliness, but a certain virile *conatus*, a kind of manly, sleeves-up grappling with the

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88. THORSTEIN VEBLÉN, *THE HIGHER LEARNING: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 98 (Richard F. Teichgraber III ed., Johns Hopkins Univ. Press 2015).

89. See Scott, *supra* note 1, at 21-22.

hardest problems of the day. But this difference aside, Dewey seemed to subscribe to the same basic tenet Butler held: to understand how scholarly men must conduct themselves, one must first understand how non-scholarly men must conduct themselves. “Good behavior” may then be a central criterion for the continued appointment of those professors who proposed to lay claim to the protections of tenure, but such bitterly opposed men as Dewey and Butler seemed to agree that the innermost norm of good academic conduct depended for its intelligibility on norms that extended beyond academia, that were entirely non-academic in character.

Even as the judicial analogy opened up a series of moral philosophical questions, in other words, it also closed those questions down with the supposedly common-sense answers of sex and gender. To rethink that analogy, therefore, we need to set aside those same answers and re-open the questions they suspend. And while it’s outside the scope of this article to give full expression to the abiding dilemmas from which they indirectly issue, we can at least underline two before moving on. The first, which we already have encountered, has been an inescapable part of American public life over the last several years: what fixed standards, if any, ought to define impeachable conduct? The second, which today only a very few scholars are probing, points to a deeper and more enigmatic problem still: what exactly is office, and what forms of moral conduct—or “good behavior”—does it assume or even entail?<sup>90</sup>

### III: THE PROFESSORiate AND THE PUBLIC

#### *A. A Partial Sacrifice*

Traced to its premodern origins, as we can see, the judicial analogy reveals a set of equivocal logics, related to tenure, the residues and remnants of which persist in the modern doctrine of academic freedom. Taken on its own terms, meanwhile, this same analogy sheds new and different light on one of academic freedom’s most vexed questions: the matter of extramural utterances, which is to say, as the AAUP put it in 1964, “the right of faculty members to speak or write as citizens, free from institutional censorship or

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90. In the strict sense, *officium* is less a term of administrative law or bureaucracy than a problem for moral philosophy. Beginning with Cicero’s *De Officiis*, which argues that the search for truth is the highest and most primary of all *officia*, the concept of “office” designates a paradoxical form of duty that at times comes into conflict with legal and even moral obligations. See, on this point, GIORGIO AGAMBEN, *OPUS DEI: AN ARCHAEOLOGY OF DUTY* (Adam Kotsko trans., Stanford Univ. Press 2013). For an insightful analysis of the place and function of office in early modern law, see Janet McLean, *Between Sovereign and Subject: The Constitutional Position of the Official*, 70 U. TORONTO L.J. (SUPPLEMENT 2) 167 (2020). On office more generally, see Shaun McVeigh, *Afterword: Office and the Conduct of the Minor Jurisprudent*, 5 U. CAL. IRVINE L. REV. 499 (2015); Shaun McVeigh, *Office and Persona of Critical Jurist: Peripheral Legal Thought (Australia)*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 386-405 (J. Desautels-Stein & C. Tomlins eds., 2017).

discipline.”<sup>91</sup>

As we shall see, the judicial analogy poses this question in an exemplary and even originary form, while also answering it in an acutely ambivalent way. On the one hand, the judicial analogy authorizes the formulation of an unambiguous norm: professors, like judges, should enjoy sweeping protections to speak in their official capacity about matters that might offend or upset some members of the public. This same norm, however, also allows for the formulation of an unusual obligation, one more professional than legal, more unstated than stated: professors, like judges, should moderate or temper their public speech and should refrain from direct involvement in the hurly-burly of partisan politics. In this way, the judicial analogy justifies academic freedom on terms that also impose a quotient of political unfreedom, as if professors could not be protected against institutional censorship without first partially self-censoring themselves as citizens. If today it’s important to recall the extent to which the judicial analogy frames the implicit question to which the doctrine of extramural utterances is the explicit answer, it’s because our forgetting of that framing helps explain why the debate over extramural utterances has unfolded in such a contorted way. Here, as before, what intrigues in the judicial analogy is less the clarity it provides than the perplexities it bequeaths.

These dynamics are all on display in the December 1916 exchange in the pages of *The Nation* between two of the most prominent figures in the early history of American academic freedom: John Wigmore, a legal scholar who was the dean of Northwestern Law School and AAUP’s second president, and the philosopher Arthur Lovejoy, whom Hans-Joerg Tiede has called the AAUP’s “primary founder.”<sup>92</sup> The exchange opened with a short essay by Wigmore called “Academic Freedom of Utterance: An Analogy Drawn from Judicial Immunity.” Wigmore’s central claim was that the academic freedom of the professor can and should be modeled on the absolute immunity of the judge, and in particular against civil action from individuals claiming to have been wrongfully treated by that judge in his professional capacity as judge. In just the same way, Wigmore argued, “[t]he object of academic immunity is the protection of the competent thinker in that unhampered research and discussion which alone leads to the discovery of scientific truth.”<sup>93</sup> Insofar as a professor’s utterances remain within the jurisdiction of his expertise, Wigmore maintained, that professor should be able to expect absolute protection against anyone who might happen to take offense at his utterances—whether they be trustees, regents, editors,

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91. AM. ASS’N OF UNIV. PROFESSORS, *Committee A Statement on Extramural Utterances*, in POLICY DOCUMENTS AND REPORTS 31, 31 (Johns Hopkins Univ. Press 11th ed. 2014).

92. TIEDE, *supra* note 26, at 29.

93. John Wigmore, *Academic Freedom of Utterance: An Analogy Drawn from Judicial Immunity*, 103 THE NATION 538, 538 (1916).

ecclesiastics, parents, or the man on the street.<sup>94</sup> Although, Wigmore admitted, complete academic immunity may inadvertently protect a small number of professors who are incompetent, malicious, or corrupt, this nevertheless does not remove the necessity of its sweeping scope. Quite the opposite: in the absence of professional protections that apply to tactful and tactless academics alike, Wigmore contended, members of the public would come to believe that the public itself should have the right to draw the line between competent and incompetent, and would proceed to make accusations of malice and corruption against any and all academics who appear to give offense.<sup>95</sup> And because some members of the public are always likely to be offended by some academics, Wigmore reasoned, no single academic could be protected unless all academics are protected as a class. Just as absolute judicial immunity is necessary to protect judges who perform the often unpopular activity of judging, absolute academic immunity is thus necessary to protect academics who engage in the often unpopular activity of pursuing the truth.

From this iteration of the judicial analogy Wigmore then drew several conclusions. The first was the claim that, even today, persists as the core of the doctrine of extramural utterances: just as judicial immunity protects judges only insofar as they remain within their own jurisdiction, and not in every jurisdiction and in all domains of their life, so too academic immunity only protects professors when they speak to matters related to the fields to which they're appointed, and not in everything they say. If judges and professors enjoy exceptional protections, in other words, it's not because they are exceptional beings whose training somehow gives them the right to enjoy more personal freedom than every other member of the public. Instead, in Wigmore's view, those protections exist because Justice and Truth are exceptional pursuits that entail exceptional duties, which in turn cannot be performed except under conditions defined by exceptional protections.<sup>96</sup> Just as a judge should not be personally blamed for issuing upsetting judgments that are required by law, so too a professor should not be personally blamed for uttering upsetting conclusions that are required by his training.

To these claims, which are more or less uncontentious within the history and theory of academic freedom, Wigmore then added a highly contentious corollary: like judges, professors should refrain from the most extreme forms of direct involvement in partisan politics (such as, Wigmore says, giving stump speeches or interviews in general newspapers).<sup>97</sup> This partial surrender of political freedom Wigmore justified in two ways. First, because

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 539.

professors enjoy an exceptional form of protection that ordinary citizens lack, which Wigmore called “university immunity,” it’s not unfair to expect professors to relinquish something in exchange. In particular, Wigmore seems to imply, professors’ sense of equity ought to preclude them from laying claim not only to the exceptional freedoms of their profession, but also to the entire range of citizens’ normal freedoms as well. Second, professors’ enjoyment of university immunity requires that the trustees who have appointed them abdicate any expectation that professors will conform to their political opinions. This expectation, which employers frequently presume in relation to their employees, is equally inappropriate in the executive’s relation to the judiciary. But just as judges’ freedom from the executive implies the unstated responsibility to refrain from partisan politics, Wigmore concluded, so too professors’ freedom from trustees implies the unstated responsibility to refrain from speech that is unnecessarily controversial, extreme, or antagonistic.<sup>98</sup>

In the concrete, Wigmore acknowledged, this means that professors need to surrender some, though far from all, of the freedom of utterance and action ordinary citizens enjoy. Clearly aware that his conclusion would displease his professorial readers, Wigmore then defended it with a last analogy. As if judicial immunity alone were not sufficient to explain professors’ partial sacrifice of free speech, Wigmore now analogized university immunity not only to the judge but also to the medieval cleric.

The churchman dedicated himself to works of God; and, in so doing, he received an immunity from military service, from civil taxation, and from that liability to maintain himself by temporal violence which was the common lot of the burghers and the peasant in those days. As a man of God, he became immune. But, in return, he must abstain from temporal methods; he must put away weapons, and he must confine himself to the duties of the Church. This analogy is valuable only as illustrating that, in the conscience of mankind, it is not unnatural to find that one who dedicates himself to a career which carries great immunities must expect to pay a price, and to sacrifice something of that precarious liberty which otherwise he had. The moral is that the professor must frankly resign himself to forego some of the exceptional modes of civic utterance, if he is to insist on that absolute immunity which is granted to him for the sake of his research after Truth in his chosen field.<sup>99</sup>

We’ll return to this surprising triple analogy in the final section of this

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98. *Id.*

99. *Id.* Wigmore was hardly the only prominent law school dean to make this argument in the early twentieth century. See, even more prominently, Harlan Stone, *University Influence*, 20 COLUM. U. Q. 338 (1918) (arguing, on the topic of extramural utterances, that the university professor’s attitude “must never be that of the partisan, but rather that of the judicially minded” and that “the university professor, like the cleric and the judge, must give up some freedom of action because of his position”).

article, where we'll take up Ernst Kantorowicz's unusual 1950 claim that there are "three professions which are entitled to wear a gown: the judge, the priest, the scholar."<sup>100</sup> For now it will be enough to underline how Wigmore's iteration of the judicial analogy, far from being of merely antiquarian interest, is of abiding significance for the American tradition of academic freedom. According to Tiede, it was an early version of this essay that Pound then revised into the paragraph on the judicial analogy that ultimately appeared in Section Two of the 1915 Declaration.<sup>101</sup> This paragraph, however, is only the most explicit instance of the judicial analogy, and not its only or most powerful expression. From our review of Wigmore's essay, we learn that that analogy also extends to include the AAUP's famously indeterminate positions on extramural utterances. In its 1915 Declaration, the AAUP referred to professors' "peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."<sup>102</sup> In its 1940 Statement, meanwhile, the AAUP reduced this language to the even more opaque reminder that professors' "special position in the community imposes special obligations."<sup>103</sup> These claims, and the sizable literature that parses them, at first appear entirely unrelated to the judicial analogy. Once reread within the interpretive horizon established by Wigmore's essay, however, it becomes clear that, here as elsewhere, our grasp of the keywords of American academic freedom remains incomplete insofar as we fail to consider the judicial analogy's perplexities and vicissitudes.

Nothing here suggests, of course, that Wigmore's approach to the judicial analogy is necessarily precise, apposite, or desirable. In his concise response to Wigmore in *The Nation*, in fact, Arthur Lovejoy made a compelling case to the contrary, arguing that the judicial analogy, properly understood, actually leads to conclusions diametrically opposed to Wigmore's. To begin, Lovejoy asserted, judges do not in fact enjoy

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100. ERNST KANTOROWICZ, *THE FUNDAMENTAL ISSUE: DOCUMENTS AND MARGINAL NOTES ON THE UNIVERSITY OF CALIFORNIA LOYALTY OATH 6* (1950).

101. TIEDE, *supra* note 26, at 118-19.

102. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 6, at 10. In fact, much of what the Declaration has to say on the matter of extramural utterances seems either directly indebted to Wigmore or else engaged in a direct repudiation of Wigmore. For examples of the former, see the Declaration's claims that academic teachers should have minds untrammelled by party loyalties, party enthusiasms, party antagonisms, and personal political ambitions. For examples of the latter, see the Declaration's claim that "it is neither possible or desirable to deprive a college professor of the political rights vouchsafed to every citizen" (quoting a December 1914 Report of the Wisconsin State Board of Public Affairs). The point here is not then that Wigmore's essay is somehow singly responsible for the 1915 Declaration's position on extramural utterances, only that that position's internal intricacies are most illuminatingly understood with reference to the judicial analogy, of which Wigmore's essay is the most historically proximate example.

103. AM. ASS'N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in *POLICY DOCUMENTS AND REPORTS* 13, 14 (Johns Hopkins Univ. Press 11th ed. 2014).

sweeping legal immunity, for they can be impeached.<sup>104</sup> But even if they did, he suggested, it would be undesirable for professors to aspire to immunity of this sort anyway, for then the professoriate would have no way to dismiss incompetent colleagues, and hence no way to maintain its own internal professional standards.<sup>105</sup> If anything, Lovejoy observed, the fact that judges are not immune to impeachment provides a model, however imperfect, of what it might mean for the academic profession to regulate itself, and hence retain its autonomy.<sup>106</sup> Continuing, Lovejoy then took aim at Wigmore's argument about appointive powers. Federal judges, he pointed out, are exempt from the presidential control not only in their decisions but also in their purely personal expressions and their off-bench activities.<sup>107</sup> As such, he claimed, the judicial analogy's true corollary is that academic freedom should imply no restraints whatsoever on professors as citizens.<sup>108</sup> Wigmore's very different thesis, Lovejoy concluded, was unwise, for in the concrete it would mean abandoning any practical possibility of defending academic freedom against its many critics.<sup>109</sup>

Lovejoy's sharp criticisms of Wigmore's essay certainly help explain why the drafters of the 1915 Declaration limited their recourse to the judicial analogy, explicitly affirming it only in some regards and not in others. Nevertheless, even though Lovejoy at one point questioned the very idea of settling the problems of academic freedom with reference to the judicial analogy, his detailed objections to Wigmore's conclusions ultimately confirm more than deny Wigmore's premise. The open question, one gathers from Lovejoy, is not whether or not to consider the judicial analogy, but how to do so without also undoing the cause of academic freedom itself.

### *B. A Mere Umpire*

One of the most basic responses to this question involves reference to the figure of the even-handed judge, the judge whose decisions can be considered justified to the extent that they conform to abstract concepts of symmetry, balance, and equilibrium. In the formative years of the early twentieth century, when the AAUP was coming into being, this familiar figure of judgment was revitalized by Max Weber's arguments about the vocation of secular social science: for Weber, science could answer its calling only to the extent that it first freed itself from any and all value

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104. Arthur Lovejoy, *Academic Freedom*, 103 THE NATION 561, 561 (1916).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

judgments.<sup>110</sup> In more recent years, conservative critics of the academe have used a similar figure of the even-handed judge to condemn a professoriate that, in their view, has become politicized, partisan, biased, one-sided, and indoctrinating.<sup>111</sup> A third and related figure of the even-handed judge, meanwhile, is specifically ludic in character: in just the same way that umpires remain exterior to the games they referee, so too judges ought to remain impartial relative to the controversial matters they adjudicate, limiting themselves to the calling of balls and strikes. Extended to the professoriate, this element of the judicial analogy leads to a conclusion as clear as it is curious: academics too should remain internally exterior to the game of truth, refereeing it without also playing in it, as if the scholar's obligation were not to directly grapple with falsehood itself, but only to stand on the sidelines, ensuring that truth's encounter with falsehood remains as free and open as possible.

Writing in 1930, Arthur Lovejoy himself would draw a conclusion along exactly these lines. Taking up the question of "the social role of the scholar," Lovejoy suggested that

[H]is office . . . has some analogy to that of the judge. His opinions must be not only competent but also disinterested. No one indeed is constrained to accept them; but if specialized knowledge and methodical inquiry by trained minds are to have in the long run the part in the shaping of general opinion and social policy which it is desirable that they should have, it is important that those who are appointed to this function should be free from intimidation and subordination. They should, moreover, be beyond reasonable suspicion of subjection to such influences, especially from economic groups.<sup>112</sup>

For Lovejoy, it would seem, the scholar should be as exterior to social, political, and economic interests as possible: scholars, no less than judges, should stand outside the disputes they regulate.

A careful reader of Kant, Lovejoy no doubt understood that his argument had as its logical outcome the double-binds implicit in Kant's concept of university autonomy: where the pursuit of truth is completely modeled on the paradigm of the judge (and on judgment more generally), the university acquires a function so pure that it's at once *omnipotent* (responsible for reviewing the truth of all constative utterances made by all public authorities) and also *impotent* (proscribed by public authorities from any public performative utterances, and above all from any public

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110. Max Weber, *Science as a Vocation*, 87 DAEDALUS 111 (1958).

111. See, generally, AM. ASS'N OF UNIV. PROFESSORS, *Freedom in the Classroom*, in POLICY DOCUMENTS AND REPORTS 20 (Johns Hopkins Univ. Press 11th ed. 2014).

112. Arthur Lovejoy, *Academic Freedom*, in THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION 384, 384 (Walter P. Metzger ed. 1977). Notably, Hofstadter and Metzger suggest that claims of professorial neutrality are crucial for distinguishing the American concept of academic freedom from the German. See HOFSTADTER & METZGER, *supra* note 5, at 400.

commands).<sup>113</sup> What drops out in this figure of judgment, this repressive neutrality, is the question of time—or, more exactly, of duration or endurance. When we spatialize judgment into both-sidedness or even-handedness, we lose any sense of that strange temporality that allows for analogies between the judge and the scholar in the first place—this permanency or continuity that, while not itself directly political, is the nevertheless indispensable condition for any democratic republic capable of withstanding the mischiefs of faction or the whims of transient opinion.

It's therefore notable that Pound, another close reader of Kant, would present a very different figure of the judge in his famous 1906 ABA address. In Pound's view, one of the main problems with the American judiciary was the idea that the judge should comport himself as a "mere umpire" who "hold[s] counsel to the rules of the game," and "let[s] the parties . . . fight out their own game in their own way without judicial interference." This model of the judge, Pound argues, "leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, *not to search independently for truth and justice.*"<sup>114</sup>

I emphasize this last phrase not only because it clarifies that Pound regards the ludicization of the judiciary—its metaphorization as a sort of amoral sport or game<sup>115</sup>—as the most pitched antithesis of its independence, but also because it suggests that the very idea of an independent judiciary, at least in Pound's view, should be modeled in part on the judge's own independent "search for truth." The "quest for truth," however, is exactly what the AAUP would later say is the entire purpose of the professoriate.<sup>116</sup> Before the AAUP analogized the conduct of the professor in part on that of the judge, it would then seem, Pound already had analogized the conduct of the judge, at least in part, to that of the professor.<sup>117</sup>

With this we reach a reversal of the judicial analogy's most repressive expression. So far is it from being the case that professors should model their office on that of judges (who, in turn, should limit themselves to

113. It's often forgotten that Kant, who is frequently regarded as one of the forefathers of modern academic freedom, supported not only the faculty's right to censor university graduates (who he understood to work in government and business), but also, reciprocally, the government's right to sanction the teachings of the faculty (who have, after all, agreed to accept government offices). Immanuel Kant, *The Conflict of the Faculties*, in RELIGION AND RATIONAL THEOLOGY, 247-8 (Allen Wood & George di Giovanni trans. & eds., Cambridge Univ. Press 1996). Cf. 2 JACQUES DERRIDA, *Mochlos; or, The Conflict of the Faculties*, in EYES OF THE UNIVERSITY: RIGHT TO PHILOSOPHY 83 (Richard Rand & Amy Wygant trans., Stanford Univ. Press 2004).

114. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), 10 CRIME & DELINQ. 355, 362 (1964) (emphasis added).

115. *Id.* at 363.

116. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 6, at 6.

117. It's not then an accident that, toward the end of his career, Pound would speak approvingly of the judiciary's renewed interest in the philosophy of law and in the connection between law and morality. See ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 94 (1950).

calling balls and strikes), that it's judges who should model their office on that of professors (whose pursuit of the true is often also itself, per Cicero, a moral pursuit).<sup>118</sup> It's implied in what Pound writes, I believe, that this pursuit is interminable: for better or worse, what Pound calls "conscience" would seem to entail an image of judgment more incomplete than any decision, more open-ended than any holding, and more enduring than any opinion. Here as elsewhere, in other words, temporality is more than just one among many problems for academic freedom: it's the key for formulating a theory of the way the academe might participate in politics without also lending itself to the energies of *stasis* or faction or, as some might put it, "becoming politicized."

### C. *An Inviolable Refuge*

We find the rudiments for this theory in Hamilton's Federalist No. 78, which, following Montesquieu's discussion of the judiciary in *The Spirit of the Laws*, locates the strength of the judiciary precisely in its weakness. Lacking the sword (and force) of the executive, the judiciary also lacks the will (and purse) of the legislative. Its only power is to declare void all acts of the legislature that are contrary to "the manifest tenor of the Constitution[.]"<sup>119</sup> And yet, far from consigning it to impotence, the judiciary's lack of any power except the power to void coincides with an extraordinarily consequential political obligation. As we have seen, *The Federalist Papers* argues that it's the responsibility of the judiciary, more than the elective branches of government, to equip the public to withstand its own temporary delusions, to protect the public interest against the possibility of majority faction (or the "tyranny of the majority"), and, in so doing, to preserve the possibility of permanency in law and politics. One of the central reasons for permanent judicial tenure, clearly, is to create the conditions under which an independent judiciary may then discharge these manifestly political obligations. According to Section 3 of the 1915 Declaration, titled "The Function of the Academic Institution," the university can and should assume a similar responsibility.

[T]he most serious difficulty [of the problem of the university's relationship to politics is the set of] dangers connected with the existence in a democracy of an overwhelming and concentrated public opinion. The tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real

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118. Cf. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1986) (arguing that "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

119. Hamilton, *supra* note 20, at 392-93.

liberty of the individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to the tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion. An inviolable refuge from such tyranny should be found in the university.<sup>120</sup>

This last claim, which is most proximately indebted to Tocqueville's reflections on "The Power That the Majority in America Exercises over Thought,"<sup>121</sup> implies a paradox that deserves careful reflection. So far is it from being the case that, in a democracy, political freedom *diminishes* the tyranny of public opinion, that, to the contrary, political freedom *fans the flames* of that tyranny.<sup>122</sup> Implicit in this claim is that the university's unique responsibility—to provide an "inviolable refuge from such tyranny"—cannot be met by satisfying the conditions of political freedom alone. Stated more strongly: the university can succeed in establishing conditions of political freedom—up to and including freedom of expression—and still fail in its responsibility to provide an inviolable refuge from the tyranny of public opinion. This is because the tenured offices that constitute the university, like those that constitute the judiciary, are vested with a manifestly political obligation: *to protect the permanency of the public interest against the transience of public whims.*

Although this obligation certainly can assume elitist forms, not all of its expressions are necessarily elitist, and to conclude as much is to succumb to the same pseudo-democratic logic Pound criticized in 1914.<sup>123</sup> It would be closer to the mark to discern at the root of this obligation a commitment to a certain strange temporality. Not only for the tradition we are considering here, but also for a thinker like Hannah Arendt, law and

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120. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 6, at 8-9; *cf.* FINKIN & POST, *supra* note 4, at 149-55. For a contemporaneous and more capacious argument about the university as refuge, see VEBLEN, *supra* note 88, at 71-72. It's important to remember that "public trust" and "public interest" are not only part of the vocabulary the judiciary shares with the university, but also the points of emphases that differentiate the American tradition of academic freedom from the German tradition. On the latter point, see HOFSTADTER & METZGER, *supra* note 5, at 399. Finally, it's important to recall that the definition of "tyranny" in *The Federalist Papers* is very specific: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009).

121. TOCQUEVILLE, *supra* note 23, at 243-46.

122. This is ultimately a Platonic argument, *supra* note 8.

123. Stanley Fish offers three criticisms of these passages of the 1915 Declaration. First, they are hubristically elitist; second, academia is not necessary for the flourishing of democracy; and third, that they reduce academia to a means to a non-academic end, namely the fashioning of character. See STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 47-48 (2014). The irony of Fish's criticisms is that his core arguments in support of academic freedom depend upon a reference to the very juridical analogy whose corollaries he here opposes: at the same time, he insists that academic freedom must be grounded in the distinctive features of the specifically academic task, he also defines that task—obsessively, as if under the sway of some repetition compulsion—as judgment.

education alike aspire to forms of worldly continuity between generations, and do so in ways that render them incomparable with any other modern, secular institution.<sup>124</sup> Just as the judicial analogy can serve as a reason to constrain the free speech of professors, so too then can it provide reasons for professors to feel obliged to respond to the excesses to which the very idea of free speech can lend itself. This seems essential to remember today, when we are faced not only by an array of teletechnical apparatuses (ranging from talk radio and cable news to social media and networked software applications) that allow very divided publics, more than ever before, “to think alike, to feel alike, and to speak alike,” but also, relatedly, by a “weaponiz[ation of] the First Amendment” whose relation to tyranny Plato would easily recognize.<sup>125</sup>

#### IV. THE JUDICIAL ANALOGY AND ITS DISCONTENTS

##### A. *The Analogy Today*

We return, therefore, to the present. For many years now, as numerous authors and studies have shown, we’re witnessing what can only be called the erosion of tenure and academic freedom in American higher education.<sup>126</sup> Most of the causes for this erosion can be attributed to forces outside of the professoriate (e.g., corporatization and administrative bloat) or even outside of the university itself (e.g., political factions hostile to higher education and neoliberal theories and practices). But if this article’s inquiry is not off the mark, then it’s also the case that a crucial few are internal—or, more exactly, so extremely intimate that they likely appear to us as though they were foreign, strange, and external.

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124. Compare HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 462-65 (1976); Hannah Arendt, *The Crisis in Education*, in BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT 185-93 (1961). These passages are striking when reread alongside Bill Readings’s call to rethink the way we understand and value the time of education. See, on this point, BILL READINGS, THE UNIVERSITY IN RUINS 127 (1996).

125. *Janus v. AFSCME*, 138 S. Ct. 2448, 2500 (2018) (Kagan, J., dissenting).

126. See, on this point, DONOGHUE, *supra* note 60, 55-82; REICHMAN, *supra* note 2, at 3-8. See also AM. ASS’N OF UNIV. PROFESSORS, *Data Snapshot: Contingent Faculty in US Higher Ed* (Oct. 11, 2018), <https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.YCAJ4C1h3UI>; AM. ASS’N OF UNIV. PROFESSORS, THE ANNUAL REPORT ON THE ECONOMIC STATUS OF THE PROFESSION, 2019-20, at 11-14 (2020). Most recently, state legislatures in Kentucky, Missouri, Tennessee, and Iowa have advanced bills that would reduce or eliminate tenure protections in public higher education. For a comprehensive analysis of the status of academic freedom today, see more generally THE CHRONICLE OF HIGHER EDUC., ACADEMIC FREEDOM NOW: WHY COLLEGES SHOULD BE WORRIED (2021). For a set of recent critiques and defenses of tenure, see Editorial Board, *Academic Tenure is in Desperate Need of Reform*, BOSTON GLOBE (May 9, 2021), <https://www.bostonglobe.com/2021/05/09/opinion/academic-tenure-is-desperate-need-reform/>; Molly Worthen, *The Fight Over Tenure is Not Really About Tenure*, N.Y. TIMES (September 20, 2021), <https://www.nytimes.com/2021/09/20/opinion/tenure-college-university.html>; and Steven Mintz, *Academic Tenure: In Desperate Need of Reform or of Defenders?*, INSIDEHIGHERED (September 23, 2021), <https://www.insidehighered.com/blogs/higher-ed-gamma/academic-tenure-desperate-need-reform-or-defenders>.

As we've seen, the concept of tenure we defend today (set forth in the AAUP's 1940 Statement) elides the judicial analogy that, in turn, provides the fullest non-economic justification for tenure of office itself. From this perspective, the erosion of tenure we're witnessing today has been a long time coming and can't be attributed simply to economic corporatization and politicized reactionaries. In addition to being the effect of these exterior causes, it's also the belated sequelae—the long materialization, the gradual institutionalization—of an interior epistemic erosion that first occurred much earlier, much more quietly, and much less painfully.

The effects of this erosion, meanwhile, are not limited to tenure, but manifest themselves in other, more counterintuitive ways as well. Today, perhaps more than ever before, American universities are taking seriously the question of their responsibility for, or even participation in, slavery and colonialism. These unmastered pasts cry out for judgment—or, in what amounts to the same thing, critique.<sup>127</sup> And yet it's far from clear exactly what sort of judgment or critique is adequate to this task, for each of these crimes is in its own way aporetic: like other crimes against humanity, such as genocide and apartheid, slavery and colonialism are wrongs that cannot be either fully punished or forgiven.<sup>128</sup>

From this impasse there follows a need for new and different forms of judgment and indeed self-judgment, for new and different theories of critique and self-critique—for the creation of new “reflective judgments” that respond convincingly to the crises of our present. Where these new forms of judgment remain lacking, we can expect the university to default to older and more familiar paradigms of judgments, and, given the religious origins of many American institutions of higher learning, to one paradigm in particular: the monotheistic narrative of human history as the history of inherited original sin.

Today, the use of this paradigm of judgment sometimes gives the appearance of radical political critique, in particular when it takes as its object what Walter Benjamin once called “law-founding violence.”<sup>129</sup> But to the extent that this model of judgment borrows its basic concepts from religion, its consequences are likely to become apolitical as well. In effect if not in intent, the critical discourse that construes slavery or colonialism as secular forms of original sin will tend to remove judgment from the scene of the self-legislating public sphere, which in principle allows the public to use reason to determine its own historical destiny, and to situate it instead in the domain of private faith, ineffable belief, inner conscience, and

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127. I here set aside the question of the extent to which the tradition of “critical” academic freedom is also, and above all, indebted to a certain figure of the judge (or, in Greek, *kritēs*).

128. ARENDT, *supra* note 124, at 459.

129. WALTER BENJAMIN, *TOWARD THE CRITIQUE OF VIOLENCE: A CRITICAL EDITION* (Peter Fenves & Julia Ng eds., 2021).

ahistorical, timeless, or indeed “structural” truth (for, to the extent that original sin is the *origin* of history, it’s also precisely *outside* of human history). Theologized in this way, slavery and colonialism are no longer aporias that call for new forms of thought and action, new practices of judgment and repair, and new uses of public reason; they become archaic and unchanging forms of guilt which at best can only be addressed through prophetic truth-telling and redressed with the performance of various types of ritualized confession, contrition, and penitence.

Apolitical to the extent that it theologizes the political, this paradigm of judgment also paradoxically tends to be über-political as well. The powerful forms of censure it authorizes condense the performative utterances of not two but three eminent professions, combining the truth of the scholar’s criticism not only with the authority of the judge’s verdict but also with the infallibility of the priest’s condemnation. The fantastical amalgamation that results is the very portrait of everything academia’s fiercest opponents today most love to hate—it fits perfectly with the stereotype of the self-appointed elitist cultural savior, the pious and self-righteous moralist, the nagging super-egoic censor, a set of phantasmagorias that indeed would be quite at home in any given Jon McNaughton painting. And yet, far from working through the forms of judgment that together precipitate this caricature, too many members of the contemporary academe depend upon these forms as if they were obvious and self-evident, thus all but ensuring that they will act out, repeat, and indeed unthinkingly embody the melancholic pasts those forms imply.<sup>130</sup>

Where we fail to thematize the need to create new forms of judgment, in other words, it’s not as though the dynamics and practices of judgment also disappear. To the contrary, wherever the university’s default paradigms of judgment remain in force, the outcome cannot but be forms of judgment that are deeply symptomatic. A symptom, to use the language of Freudian psychoanalysis, is a compromise formation between otherwise opposed forces, and the symptom that governs the university’s current paradigm of judgment assumes a structure of exactly this sort. Under conditions where some enjoy the pleasures of morally righteous judgment, and others enjoy the pleasures of claiming the morally righteous position of the victimized and persecuted, we witness the emergence of a silent pact or underlying agreement, one that certainly does seem to be mutually satisfying, for very different reasons, to otherwise bitterly opposed factions of the polarized American public, but one that also cannot be sustained without eventually undoing the university’s ability to continue with its most basic aims.

The emergence of this symptomatic pact is especially unfortunate at a historical moment when there’s a growing need for the American university

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130. For this argument, see Adam Sitze, *The Loss in Academic Freedom, L., CULTURE, & HUMAN.* 7 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/17438721211030140>.

to rethink its relation to the American public (on which the entire legal edifice of the academe is predicated) and where, relatedly, judicial deference toward universities is clearly waning.<sup>131</sup> Today the most salient and distinctive feature of the judicial analogy is that the federal judiciary has become as conservative as the professoriate has long leaned liberal or even left. In this as in other ways that seem, for the most part, to have escaped scholarly attention, these two cousins institutions seem to be growing increasingly divided from one another, generating very divergent kinds of futures (precedents that in principle will need to be followed, on the one hand, students who later will be leaders, on the other).<sup>132</sup> Perhaps the most fascinating sign of this division is the fact that otherwise bitterly opposed factions of the American public currently seem united in their opposition to the lifetime tenure of office that structures these two institutions: whereas liberals increasingly seem inclined to argue in support of term-limits for Supreme Court justices, conservatives have for many years now elected governors who have sought to limit or abolish tenure in their states' public universities. Even and especially today, in other words, these two institutions—which, as we've seen, are conjoined to one another not only by a set of homologous justifications, but also by a set of submerged historical roots—seem to share a curiously common fate.

This striking coincidence of opposites provides yet another reason why advocates for academic freedom need to rethink the judicial analogy in a new and even radical way. Reopening this line of inquiry not only might give us a chance to reconsider, and perhaps revive, the relational concept of the public that the analogy once implied (which, per Pound, is constituted by reciprocal duties and obligations); it might also provide us with a new lexicon and a new horizon for comprehending and responding to the conscientious calls that define our present (which oblige academics to imagine unprecedented forms of judgment).

It should be plain enough, in any case, that the struggle of contemporary academics to justify tenure to an increasingly distrustful public isn't due simply to economic and political forces that are hostile to academic freedom and that have managed to overpower those of us who are inclined to defend it. It's also due to the fact that we have for a long time now neglected tenure's fullest and also most perplexing justification, shying away from the difficult philosophical questions it raises: how, if at all, might academics form a judgment about the various ways the judicial analogy silently governs the self-definition of the academic profession? Is a judgment of this sort even possible, given the circularity it implies? And if not—if it should

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131. See, on these points, Amy Gajda, *Academic Duty and Academic Freedom*, 9 *IND. L.J.* 17, 23-31 (2015).

132. For a limited exception, see RICHARD POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

turn out that a certain circularity is inescapable—what then? Shouldn't we then conclude that we need to find ways to begin saying that silent part out loud?

None of this, to be clear, implies that the judicial analogy can or should be revived intact in the present. Nor, to repeat, does it suppose that this analogy was ever coherent or viable in the first place. It's simply to say that we need to understand as completely as possible the judicial analogy's full sweep and thrust in order to understand the vicissitudes it sets into motion—its remnants and survivals, its lacks and excesses, its dialectics and equivocalities—and in order to retrieve, for possible new uses, the logics that govern those vicissitudes. If the judicial analogy deserves our renewed attention and consideration today, at a moment when faculty are attempting to mount new defenses of academic freedom,<sup>133</sup> it's because it generates enthymemes that are as indefensible in the contemporary world as they are indispensable for the future of academic freedom and tenure.

*B. The Three Professions Entitled to Wear a Gown*

To offer a final word in support of this argument, I conclude with a comment on Ernst Kantorowicz's *The Fundamental Issue*, the jagged defense of academic freedom that the medieval historian self-published in 1950. At its core was a claim about the interrelations between three eminent professions:

There are three professions which are entitled to wear a gown: the judge, the priest, the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and to his God. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and to yield to pressure.<sup>134</sup>

Kantorowicz's claim here is far more intricate than it at first appears. It not only brings three sovereign professions into contact with one another; it also puts their most superficial exteriority (their gowns) into contact with their deepest interiority (their professional consciences). In support of this unusual insight, Kantorowicz then proceeded to offer an equally unusual series of remarks (or, in his words, "marginal notes"). To criticize contract law and the excesses of the modern public university, he turned to the

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133. See Carolyn Betensky, Seth Kahn, Maria Maisto, and Talia Schaffer, *Common Good, Not Common Despair*, PROFESSION (2018), <https://profession.mla.org/common-good-not-common-despair>. See also, more generally, Irene Mulvey, *Bold Action for Higher Education*, ACADEME, Spring 2021, at 1, 10-12 (on the need for full-time faculty and fairness for contingent faculty). On the enthymeme as a form of syllogism and as the essence of persuasion, see 2 ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE 2152-53 (Jonathan Barnes ed., 1985).

134. KANTOROWICZ, *supra* note 100, at 6.

outdated terminology of medieval canon law.<sup>135</sup> To affirm how central professors are for the university, he underlined how unnecessary janitors and gardeners are within the university.<sup>136</sup> To explain the dignity of the academic profession, he contrasted its regalia with the nudity of the oldest profession.<sup>137</sup> Perhaps most controversially of all for contemporary readers, for whom the university's corporatization is tantamount to its irreversible corruption, Kantorowicz argued emphatically in favor of the idea that the university is and must remain a specific kind of "body corporate."<sup>138</sup>

All of this, needless to say, places Kantorowicz far outside of the American tradition of academic freedom, which in his day was defined by the principles of philosophic pragmatism and by the figures of John Dewey and Sidney Hook. But if Kantorowicz was outside that tradition in conceptual terms, he was outside it in another way as well. During the Red Scare of the late 1940s and 1950s, the AAUP's leading lights either capitulated to the forces of McCarthyism or else, worse, assumed leading roles in its purges and investigations.<sup>139</sup> Kantorowicz, by contrast, was one of the very few scholars of his day to make a fierce, public, and principled stand against it. The occasion for his self-publication of *The Fundamental Issue*, after all, was the attempt by the Regents of The University of California, Berkeley to require all members of the Berkeley faculty to swear a loyalty oath declaring their opposition to the Communist Party. Imposed by the Regents in reaction to the Soviet Union's first nuclear bomb test and the Chinese Revolution of 1949, the oath was a mandatory condition for professors' continued appointment at Berkeley after June 1950.<sup>140</sup>

Only a minority of faculty at Berkeley ultimately resisted taking the oath, and few opposed it more outspokenly than Kantorowicz.<sup>141</sup> He led the

135. *Id.* at 9, 30-31.

136. *Id.* at 15-17, 19-22.

137. *Id.* at 21, 23.

138. See ERNST KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 302-313, 383-401 (1957).

139. To be clear, the AAUP's own position, first articulated in 1947, was that communist professors should only be dismissed under very specific conditions, and not because of their communism as such. This position, however, was widely ignored and ineffective; in general, the AAUP failed utterly to protect academic freedom during these years. See, Ellen Schrecker, *Academic Freedom and the Cold War*, 38 *ANTIOCH REV.* 313, 318, 326 (1980); Stephen Aby, *Discretion over Valor: The AAUP during the McCarthy Years*, 36 *AM. EDUC. HIST. J.* 121, 121-32 (2009). See generally ELLEN SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986) (describing how university administrators implemented McCarthyism, and criticizing the AAUP for failing to mount an effective defense). See also ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY* 48-56 (2010). This goes above all for Sidney Hook. See Julian Nemeth, *The Case for Cleaning House: Sidney Hook and the Ethics of Academic Freedom during the McCarthy Era*, 57 *HIST. EDUC. Q.* 399, 399-426 (2017).

140. See, on this point, BOB BLAUNER, *RESISTING MCCARTHYISM: TO SIGN OR NOT TO SIGN CALIFORNIA'S LOYALTY OATH* 72 (2009).

141. *Id.* at 74-76 (arguing that Kantorowicz's June 14, 1949 speech in the Faculty Senate was a "turning point in the discourse over the oath" because it framed the loyalty oath in terms of "universal questions of human freedom").

struggle against it, advocated for the most extreme form of opposition to it (mass resignation), and ultimately was forced to leave Berkeley because of it.<sup>142</sup> However neglected the loyalty oath controversy is by academic freedom scholarship today—it's at best understudied and at worst forgotten—it nevertheless marks a decisive moment in the history of American higher education. Not only did it prepare the conditions for the more famous Free Speech Movement (FSM) that emerged at Berkeley in the 1960s, it also foreshadowed a series of Supreme Court decisions that would end up protecting academic freedom under the First Amendment.<sup>143</sup>

Kantorowicz's stalwart opposition to the loyalty oath is thus of more than merely local interest. Despite his exteriority to the American tradition of academic freedom—or, perhaps, precisely because of it—Kantorowicz rose to the occasion of defending academic freedom at a time when that tradition's official representatives, self-appointed champions, and public spokesmen failed definitively at that same task.

### C. *The Priests of our Democracy*

Why was that? What was it in this medieval historian's strange approach that allowed, or perhaps obliged him, to fight for academic freedom under conditions where the formal guardians of American academic freedom instead joined forces with the danger itself? What if Kantorowicz's many untimely logics are actually in some way indispensable for the purpose of clarifying and understanding the concept of tenure itself? If untimeliness is essential for understanding tenure, might it also in some way be essential to the defense of academic freedom more generally? If so, what should we conclude from the fact that Kantorowicz's work has been so completely disregarded by the American tradition of academic freedom, even and especially today?<sup>144</sup> Of what conceptual limit might this tradition's continuing silence on Kantorowicz be the sign or symptom?

These questions matter more than the reader might suppose. Even though Kantorowicz has been almost entirely excluded from the American tradition of academic freedom, the same does not appear to be true of American academic freedom jurisprudence. To date, Kantorowicz's *Fundamental Issue* has been interpreted without reference to his friendship with Supreme Court Justice Felix Frankfurter.<sup>145</sup> This is a consequential oversight.

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142. See, on these points, ROBERT LERNER, ERNST KANTOROWICZ: A LIFE 313-31 (2018).

143. BLAUNER, *supra* note 140, at 233-42.

144. To take just one among many examples: there is no mention of Kantorowicz in WHO'S AFRAID OF ACADEMIC FREEDOM (Akeel Bilgrami & Jonathan Cole eds., 2015), an authoritative collection that contains contributions from (among others) Stanley Fish, Judith Butler, Noam Chomsky, John Mearsheimer, Robert Post, and Jon Elster. The only scholar to have taken up Kantorowicz's *Fundamental Question* as a basis to theorize academic freedom in the present is Joshua Barkan. See JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013).

145. See, on this point, LERNER, *supra* note 142, at 220.

Frankfurter's opinions on academic freedom in *Wieman v. Updegraff* (1950) and *Sweezy v. New Hampshire* (1957) prepared the way for Justice Brennan's majority opinion in *Keyishian v. Board of Regents* (1967), which declared academic freedom "a special concern of the First Amendment."<sup>146</sup>

It's significant, therefore, that Frankfurter corresponded with Kantorowicz about *The Fundamental Issue* during the very years when Frankfurter wrote those opinions. In October 1950, for example, Frankfurter wrote to Kantorowicz to say that he was "looking forward to the pamphlets which you are sending me."<sup>147</sup> After Kantorowicz sent Frankfurter a copy of *The Fundamental Issue*, Frankfurter replied to Kantorowicz expressing his "warm thanks" for writing it, pressing him for the sources of several quotations (two pertaining to the problem of oath), and asking for six additional copies (presumably for all members of the Court except his nemeses, Justices Black and Douglas).<sup>148</sup> After this exchange, Frankfurter continued to correspond with Kantorowicz about the loyalty oath controversy, first offering support and encouragement, and then, once the Regents dismissed Kantorowicz, reassurance.<sup>149</sup> These exchanges leave little doubt that Frankfurter not only read Kantorowicz but also took his ideas very seriously, and did so in the years just prior to his contributions to the foundations of American academic freedom jurisprudence.

Did the judge's regard for the scholar make its way into his later judicial opinions? There are reasons to believe as much. Consider *Wieman v. Updegraff* (1952), a key academic freedom case in which the Supreme Court struck down a loyalty oath imposed by the Oklahoma state legislature upon employees of the Oklahoma Agricultural and Mechanical College. The most famous phrase from Frankfurter's concurrence to that landmark case is his declaration that teachers are the "priests of our democracy."<sup>150</sup>

146. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (Brennan, J.). See, more generally, William Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in *FREEDOM AND TENURE IN THE ACADEMY* 79, 105-112 (William Alstyne ed., 1993); Richard Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 *HAMLIN L. REV.* 1 (2007).

147. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (Oct. 26, 1950) (on file with the Ernst Kantorowicz Collection, 1908-1962, Leo Baeck Institute, New York, Reel 1, Folder 13, Document 0313), <https://archive.org/details/ernstkantorowicz00reel01/page/n311/mode/2up>.

148. See Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (Nov. 3, 1950) (on file with Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43).

149. See Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (May 24, 1950) (on file with the Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43); Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (Nov. 15, 1950) (on file with the Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43); Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (Nov. 21, 1950) (on file with the Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43).

150. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1950) (Frankfurter, J., concurring) ("To regard

The attentive reader will note that Frankfurter's formulation depends for its intelligibility upon an unstated premise: if it's possible for the priest to stand in as a figure for the teacher, such that the former's attributes can be transferred to latter, it's because there is in some sense a prior likeness or similarity between the teacher's profession and the priest's. In the pamphlet he sent to Frankfurter in 1950, as we've seen, Kantorowicz asserted precisely this premise: scholars, priests, and judges, he argued there, are in some way analogical or homological professions. Kantorowicz furthermore developed this premise into a series of claims about why loyalty oaths violate academic freedom. Frankfurter's opinion shares both sets of claims. Although Frankfurter does not cite Kantorowicz by name in *Wieman*, it's not hard to see the outline of *The Fundamental Issue* in the most memorable metaphor he offers there.

An even more important academic freedom case—*Sweezy v. New Hampshire*—was argued before the Supreme Court on March 5, 1957, and decided on June 17, 1957. In his concurring opinion to *Sweezy*, Frankfurter famously affirmed the “four essential freedoms of a university”—the freedom 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.<sup>151</sup> Mainly exhortative in their initial formulation, Frankfurter's four freedoms have gradually become a central part of American academic freedom jurisprudence; they endure, in particular, as one of the principal sources of the doctrine of “university autonomy” that, among other things, permits American universities to implement policies of race-conscious admissions.<sup>152</sup>

This outcome might surprise readers who are familiar with Frankfurter's chief contribution to American jurisprudence: few things could be more inconsistent with his theory of judicial restraint, which holds that judges should leave lawmaking to legislatures and stick to *stare decisis*, than the judicial creation of a set of freedoms that were not only unprecedented in their time but also manifestly limit the power of legislatures.<sup>153</sup>

The puzzle is only deepened by the fact that Frankfurter himself did not author these four freedoms, and derived them neither from the U.S.

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teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.”). This phrase is far from marginal to the contemporary American tradition of academic freedom. See, for example, ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 87 (2012).

151. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). On the “foundational” status of *Sweezy* for academic freedom jurisprudence, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 290-91 (2014).

152. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”). See also *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (on the “educational autonomy” of universities); *Fisher v. Univ. of Texas*, 570 U.S. 297, 307 (2013).

153. I thank Jakob Littell for this observation.

Constitution nor even from the AAUP. He found them instead in a 1957 South African publication called *The Open Universities in South Africa*, which was published the same year *Sweezy* was decided, and which summarizes the proceedings of a conference convened by two South African universities.<sup>154</sup> The occasion for this conference was provided in March 1957, when the Nationalist Party—the South African political party responsible for the imposition of apartheid in South Africa in 1948—introduced into Parliament a bill that aimed to extend the policy of apartheid to the two South African universities that at that time admitted African students. *The Open Universities* was not only a declaration of opposition to this proposal, it was also the first articulation of academic freedom in the history of higher education in South Africa.<sup>155</sup> Readers who review *The Open Universities*, meanwhile, will find that it derived its account of university autonomy in turn from the history, theory, and practice of the medieval *universitas*. In Bologna and Paris as at Oxford and Cambridge, the text argued, the principle of the *studium generale*—“a place where students from all parts are received”<sup>156</sup>—meant that any *universitas* worthy of the name must remain constitutively open to talented students from many “nations.”<sup>157</sup> In just the same way, it continued, the modern university must remain open to talented students from diverse races.<sup>158</sup>

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154. See THE OPEN UNIVERSITIES IN SOUTH AFRICA: PUBLISHED ON BEHALF OF THE CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG, HELD IN CAPE TOWN ON 9,10 AND 11 JANUARY 1957, at 10-16 (1957) [hereinafter OPEN UNIVERSITIES]. This was sent to Frankfurter by his friend Albert van der Sandt Centlivres, who at the time was Chief Justice of South Africa’s Supreme Court and also Chancellor of the University of Cape Town.

155. In a 1975 review of the recent history of academic freedom in South Africa, G.R. Bozzoli situated *Open Universities* at the origin of that history. See G.R. Bozzoli, *Academic Freedom in South Africa: The Open Universities in South Africa and Academic Freedom 1957-1974*, 13 MINERVA: REV. SCI., LEARNING & POL’Y 428, 430 (1975).

156. OPEN UNIVERSITIES, *supra* note 154, at 14-15 (arguing that “[o]ne of the characteristics of universities from the twelfth century onwards has been that they have drawn their members from a diversity of backgrounds,” that “the great medieval universities were cosmopolitan,” and that “[n]owadays it is almost axiomatic that a university should be more diverse in its membership than is the community in which it exists”).

157. The medieval university, to be clear, was structured on the basis of two very different principles. On the one hand, it was arranged around the four faculties of theology, law, medicine, and the liberal arts. On the other hand, and in the case of the liberal arts in particular, students and teachers were organized according their various nationalities, which is to say, their ethnic and linguistic affinities. See, on these points, ÉMILE DURKHEIM, THE EVOLUTION OF EDUCATIONAL THOUGHT: LECTURES ON THE FORMATION AND DEVELOPMENT OF SECONDARY EDUCATION IN FRANCE, 97 (Peter Collins trans., Routledge & Kegan Paul 1977). In the medieval university corporation, Jacques le Goff clarifies, “[m]asters and students were grouped according to a distribution corresponding quite loosely to their place of birth. Paris had four nations: France, Picardy, Normandy, and England.” At Bologna, meanwhile, “[t]he nations were grouped into two federations, the Cismontanes and the Ultramontanes. Each contained a variable number of nations—as many as sixteen for the Ultramontanes[.]” See JACQUES LE GOFF, INTELLECTUALS IN THE MIDDLE AGES, 73-75 (Teresa Lavender Fagan trans., Blackwell 1994). It’s this history that OPEN UNIVERSITIES has in mind when it argues that “diversity is essential to our ideal of a university.” OPEN UNIVERSITIES, *supra* note 154, at 21.

158. OPEN UNIVERSITIES, *supra* note 154, at 15 (“A closed university in South Africa throws away . . . the very advantage which it is afforded by its position in a content of diverse cultures and languages.”).

Contemporary scholars of academic freedom more often than not attribute the American doctrine of university autonomy to Frankfurter and “his” four freedoms. But to the extent that it originates in Frankfurter’s concurrence, that doctrine was South African before it was American, and medieval before it was South African.<sup>159</sup>

#### *D. In the Mirror of Justices*

Far from trivial, this provenance casts the correspondence between Kantorowicz and Frankfurter in a new and different light. The two continued to write to one another during the months when *Sweezy* was before the Supreme Court. At some point after April 1957, for example, Frankfurter sent Kantorowicz an offprint of his March 20, 1957, lecture entitled “The Supreme Court in the Mirror of Justices.” The title of Frankfurter’s talk alluded to (or, in his words, “plagiar[ized]”<sup>160</sup>) the medieval text *Speculum Justitiariorum*, a late thirteenth-century work of jurisprudence. At the top of the offprint Frankfurter left a handwritten note: “My dear Eka: This shall make claim upon your ecumenical interest only *In nomine Legis*. Yours, FF.”<sup>161</sup>

Frankfurter’s Latin suggests that he was referring to Kantorowicz’s 1955 paper “*Invocatio nominis imperatoris*,” which elsewhere Kantorowicz reported having sent to Frankfurter.<sup>162</sup> In this paper, Kantorowicz presented a close analysis of an unusual thirteenth-century legal remedy called “the Sicilian *defensa*.” Championed by Frederick the Second, about whom Kantorowicz had written in 1927, this defense allowed anyone suffering

159. See, on this point, Matthew Finkin, *On ‘Institutional’ Academic Freedom*, 61 TEX. L. REV. 817, 846 (1983); cf. FINKIN & POST, *supra* note 4, at 20. See also, more recently, Nicholas Lemann, *Can Affirmative Action Survive?*, THE NEW YORKER, Aug. 2, 2021, <https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive>.

160. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 782 (1957).

161. Felix Frankfurter, *The Supreme Court in the Mirror of Justices 1* (unpublished offprint) (on file at The Historical Studies-Social Science Library, The Institute for Advanced Study, Princeton University).

162. See, for example, the May 20, 1958 letter Kantorowicz addressed to one “Mr. Lynch,” who is likely Charles Arthur Lynch, a Professor of Classics at Brown University, and translator of Thomas More’s Latin poems and epigrams. In this letter, Kantorowicz provided Lynch with the source of the canonistic theory that “an unjust excommunication binds,” and pointed him to his discussion of this theory in his 1955 paper “*Invocatio nominis imperatoris*,” which contained a lengthy analysis of the Sicilian poet Cielo d’Alcamo. Kantorowicz next drew a connection between this theory and the modern writ of mandamus, arguing that both are based on the same principle: *ob reverentiam judicis*. He then added the following: “I am glad the Supreme Court did not think of this analogy, though Felix Frankfurter might have thought of it, since he knew my paper—or, at least, had it.” It’s unclear to what court case Kantorowicz is here alluding; *Deen v. Hickman*, a case in which the Supreme Court held that it had the authority to issue a writ of mandamus, was not decided until October 1958. What is clear is that Kantorowicz’s reference to mandamus is also a reference to the very limits of federal judicial review, for *Marbury v. Madison* (1803) turned on the question of whether it was constitutional for the Supreme Court to issue a writ of mandamus. Letter from Ernst Kantorowicz to Mr. Lynch (May 20, 1958) (on file at The Historical Studies-Social Science Library, The Institute for Advanced Study, Princeton University).

aggression to protect themselves by invoking the name of the emperor using a special formula. Once the victim exclaimed the words in this formula, any attack was immediately considered to be a vicarious attack against the emperor himself, and the victim could bring their case before the *Magna Curia* (or any of the emperor's other law courts). Because the emperor's power was understood to be omnipotent, pervasive, and ubiquitous, and because his name could be invoked anywhere in his realm, Frederick II's promotion of the Sicilian defense had a very specific effect: it strengthened and extended his sovereign jurisdiction over and against local powers and courts.<sup>163</sup> Given Frankfurter's abiding concern with the question of the limits of federal jurisdiction, one imagines that he read Kantorowicz's text with great attention.

In 1957 as in 1950, then, the exchanges between the two émigrés included substantive discussions about law. It's likely more than a mere coincidence, therefore, that Frankfurter invited Kantorowicz to dine with him in late April 1957, during the very months that he would have been writing his famous concurrence to *Sweezy*.<sup>164</sup> In the fall of that same year, of course, Princeton University Press would publish *The King's Two Bodies*, which contained Kantorowicz's lengthy analysis of the medieval *universitas*—precisely the topic, as we've seen, Frankfurter would've encountered in his review of *The Open Universities*.<sup>165</sup> If Frankfurter had wanted to consult an authority on the question of medieval university autonomy before finishing his concurrence to *Sweezy*, Kantorowicz therefore would have been a good choice. Kantorowicz, meanwhile, couldn't have been ignorant of the fact that *Sweezy* was before the Court. Not only did Paul Sweezy's pugnacious resistance to McCarthyism in some ways resemble Kantorowicz's own, but Sweezy's highly controversial case had been well publicized since his initial conviction in 1953.<sup>166</sup> Although it's certainly possible that Frankfurter and Kantorowicz completely refrained from any and all discussion of *Sweezy* in April 1957, the entire momentum of their archived correspondence suggests

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163. Ernst Kantorowicz, *Invocatio nominis imperatoris (On vv. 21-25 of Cielo D'Alcamo's Contrasto)*, 3 BOLLETTINO DEL CENTRO DI STUDI FILOLOGICI E LINGUISTICI SICILIANI 35, 37, 45 (1955).

164. See Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Ernst Kantorowicz (Apr. 25, 1957) (on file with Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43).

165. KANTOROWICZ, *supra* note 138, at 291-313; *Open Universities*, *supra* note 154, at 12-14, 25-29. The difference between the two is that Kantorowicz emphasized the idea that the *universitas* is comprised of a plurality of persons collected in one body *over time*, whereas *The Open Universities* emphasized the idea that the *studium generale* must be comprised by a diversity of students *across space* ("from all parts").

166. In 1953-1954, Paul Sweezy was convicted and jailed for, among other things, refusing to turn over to the New Hampshire attorney general the lecture notes he used in his courses at The University of New Hampshire. At the very least, Kantorowicz would have read about oral arguments in *Sweezy* in *The New York Times* (or New York "Timeaus," as he nicknamed it in a 1959 letter to Frankfurter, Kantorowicz, note 167 below), which were reported, among other places, in *United States Supreme Court*, N.Y. TIMES, Mar. 6, 1957, at 61.

otherwise.<sup>167</sup> From the fact that Kantorowicz's name is absent from American academic freedom jurisprudence, it doesn't then follow that his thought is absent from it as well.

### *E. Aevum*

Kantorowicz's correspondence with Frankfurter may or may not explain why a judge so famous for judicial restraint should instead set in motion the creation of such a novel set of rights. But it does provide an unexpected way to rethink one of the most pressing problems of academic freedom jurisprudence today—the relation between the freedom of individual professors and the university's corporate autonomy.

The AAUP's 1915 Declaration, which remains silent on the question of the university's medieval origins, is silent on the question of this relation as well.<sup>168</sup> In *The Fundamental Issue*, by contrast, Kantorowicz speaks to both matters at one and the same time. It's Kantorowicz's contention that the university derives its essence from an unusual type of juristic fiction: it's a corporate body whose central purpose, as legal creation, is to ensure the continuity, over time, of successive generations of teachers and scholars.<sup>169</sup> At its core is therefore a paradox: it's an "immortal body," a body whose various mortal members may die but which itself is designed and administered to perpetually withstand death. It therefore implies a peculiar experience of time, one that's deeply foreign to the historicist habits of modern thought. It arranges itself according to a temporality that's neither timeless nor provisional, but instead is "immanently immortal" or "finitely infinite." This strange temporality, to which Kantorowicz will give the name *Aevum*, is what links the medieval university to the juristic fiction of the King's Second Body. In just the same way that "time runneth not against the king," and the king's *dignitas* doesn't die whenever a single monarch happens to die, the university is a body that has no existence except through the mortal scholars who embody or personify its essence, yet nevertheless doesn't die when they die.<sup>170</sup> This paradox—that the university's

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167. On April 15, 1959, for example, Kantorowicz sent a letter to Frankfurter asking him to have drinks on May 1. Kantorowicz closed his letter by expressing his desire "to ask you why you deviated from Henry II's sound principle 'Ne bis in idem,' when he refused a person to be tried in two courts, royal and Christian, for the same crime; whereas you seem to take the State Court as a quasi-Court Christian and allow, as the papacy demanded, a double trial for a poor culprit. Love all the same. Eka" This almost certainly is a reference to *Bartkus v. Illinois*, 359 U.S. 121 (1959), which held that it was not unconstitutional for a defendant to be acquitted of a federal crime yet also, on the basis of the same evidence, to be convicted of a state crime. The majority opinion in this 5-4 case was written by Frankfurter. See Letter from Ernst Kantorowicz to Felix Frankfurter, Assoc. Justice, U.S. Supreme Court (Apr. 15, 1950) (on file with Felix Frankfurter Papers, Library of Congress, Manuscript Division, Library of Congress, Reel 43).

168. See, on this point, Walter Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1277 (1988).

169. Cf. KANTOROWICZ, *supra* note 100, at 18-19; KANTOROWICZ, *supra* note 138, at 302-13.

170. Cf. KANTOROWICZ, *supra* note 100, at 6 (arguing that the "fundamental issue" at stake in the

continuous and imperishable corporate body exists only in and through its continually perishing members—was the beating heart of Kantorowicz's 1950 fierce defense of academic freedom. It's because of this paradox—the problem, as it were, of the professor's two bodies—that Kantorowicz could regard an attack on the tenure of any single professor *also* as an attack on the essence of the university itself.

The traces of this defense are certainly apparent in *Sweezy*, where not only Frankfurter's concurrence but also Chief Justice Warren's plurality opinion joined institutional autonomy and individual professorial freedom hand in glove.<sup>171</sup> But *Sweezy* also established the conditions for the negation of that same defense, for Frankfurter's concurrence all but finalized the inclusion of academic freedom under the First Amendment.<sup>172</sup> After Justice Brennan's majority opinion in *Keyishian* defined academic freedom as “a special concern of the First Amendment,”<sup>173</sup> Frankfurter's concurrence subsequently would be cited as if it led to this conclusion and this conclusion alone. And this, in turn, has led to a subtle but decisive historical twist: it authorized claims about the university's corporate autonomy that are directly opposed to those that inspired Kantorowicz and that arguably informed Frankfurter's concurrence as well.

Consider *University of Michigan v. Ewing* (1985), in which the Supreme Court cited Frankfurter's concurrence in support of the argument that colleges and universities have a First Amendment right to educational autonomy and that courts should restrain themselves from reviewing the substance of academic decisions.<sup>174</sup> Judicial deference of this sort has no doubt helped to cement into place a certain claim to academic freedom that's indispensable today, at a time when state and federal lawmakers have proposed bills that weaken or eliminate academic tenure, criminalized certain forms of free expression (such as the right to boycott), and even prohibited the teaching of certain curricular contents (such as ethnic studies and critical race theory). But it has also crystallized a premise that has cut against academic freedom in yet another way, for the doctrine of institutional autonomy, once uprooted from its medieval soil and reinterpreted on the terms of First Amendment, has permitted universities to claim the protections of the First Amendment as their justification for placing limits on individual professors' speech.<sup>175</sup> In *Sweezy*, we see

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Berkeley loyalty oath controversy is “professional and human dignity”); KANTOROWICZ, *supra* note 138, at 307-313, 383-409, esp. 397 (explaining how medieval jurists solved the problem of the university's continuity over time by arguing that it was an intellectual person which could not die, and by furthermore grounding its immortal essence in the concept of *dignitas*).

171. Metzger, *supra* note 168, at 1313.

172. Alstynne, *supra* note 146, at 107-08.

173. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (Brennan, J.).

174. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985).

175. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (concluding that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights

Frankfurter weld the university's corporate autonomy indissociably to individual professorial freedom, forging an outward-facing shield that protects the *universitas* against attacks by the state. In *Urofsky v. Gilmore*, by contrast, we see this same shield sheared apart and redeployed now as an inward-facing sword: for the same reason that the doctrine of institutional autonomy gives universities First Amendment protections against courts and legislatures, it also allows those same universities to violate the academic freedom of individual professors.<sup>176</sup>

#### CONCLUSION

Today, in other words, even as First Amendment jurisprudence has moved Frankfurter's concurrence in *Sweezy* from the margin of academic freedom to its center, that same movement has marginalized the claim, so central to Kantorowicz's defense of academic freedom, that the university is a corporation whose essence is immanent in its members' existence. From this perspective, Frankfurter's friendship with Kantorowicz is more than just a biographical curiosity. It guides us towards a forgotten concept of time—the *Aevum*—that, once retrieved, gives us a new and different way to think about the predicaments of academic freedom in the present. The medieval jurisprudence admired by both the scholar and the judge may be even more foreign to contemporary American law than the doctrine of academic freedom itself, but it's not for that reason irrelevant or inconsequential. Quite the opposite: for those who are willing to look, it's a mirror that shows us what academic freedom has become today, and presents us with an image of what it still could become tomorrow.

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to which every citizen is entitled, the right inheres in the University, not in individual professors . . .").

176. *Urofsky*, 216 F.3d at 413 (arguing that "at no point in his concurrence does Justice Frankfurter indicate that individual academic freedom rights had been infringed; in his view, the constitutional harm fell entirely on the university as an institution.").