

THE CHRONICLE OF HIGHER EDUCATION



The Strange, Secret History of Tenure

Academe's most important and embattled idea comes from the judiciary.

JON KRAUSE FOR THE CHRONICLE

By *Adam Sitze*

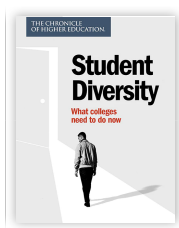
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Academic tenure is again the object of public criticism — but this time feels different.

Conservatives have long claimed that tenure allows professors to become lazy, politically intolerant elitists who are unaccountable to the public. Recently they've prosecuted this case with renewed vigor: In the last several years, governors, state legislatures, and university boards across the Midwest and South have debated or successfully passed new restrictions on tenure.

These developments, already cause for concern, are more worrisome still because of the growing momentum of a set of specifically progressive objections. These newer critics argue that tenure inhibits racial diversity and gender equity, authorizes an ugly sense of privilege and hierarchy, and wrongly protects professors accused of misconduct — all while also failing to protect the job security of the great majority of those who today are actually responsible for teaching and research in the academy.

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Tenure may or may not survive this moment intact. But we shouldn't abandon or diminish tenure without first considering all of the reasons for retaining and even expanding it. Opponents and proponents of tenure alike have left understudied one of its earliest and strangest justifications, which emerges when it's understood by

analogy with the lifetime tenure of federal judges.

This “judicial analogy,” as I’ll call it, has many surprising twists and turns, not all of them pleasant for those who care about academic freedom. But it also provides some of the strongest arguments in support of tenure, especially during a period of political polarization and democratic decline. It deserves a hearing.

Readers of *The Chronicle* will be familiar with the idea that academic tenure is necessary as a means to two ends: 1. It establishes independence in teaching, research, and extramural activities; 2. it provides enough economic security to make the academic profession attractive to talented individuals. Beginning in at least 1940, when these claims were codified in the American Association of University Professors’ [Statement of Principles of Academic Freedom and Tenure](#), academic tenure has been justified with reference to this double purpose: academic freedom on the one hand, economic security on the other.

The problem with this justification, as stated, is that it obscures its own nonacademic origin, and thus dilutes its account of tenure’s relation to politics, morality, and history.

[Consider](#) the AAUP’s 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, which is widely considered the founding document of academic freedom in America. In what is perhaps its central paragraph, the *Declaration* explains academic freedom by likening it to judicial independence:

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 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.

That lifetime tenure is implied in this argument should be plain. Writing [in *Federalist* #51](#), James Madison argued that permanent tenure of office would allow judges to free themselves from the control of the authority who appoints them.

This argument would be enshrined in [Article III, Section 1 of the U.S. Constitution](#), which established judicial independence by guaranteeing federal judges lifetime tenure of office on condition of good behavior.

Well before lifetime tenure was justified as a means to ensure academic freedom, in other words, it had already been used to establish the independence of the federal judiciary.

The same goes for academic tenure's second main justification. According to not only the *1940 Statement* but also to the AAUP's 1915 *Declaration*, one of academic tenure's most basic purposes is "to render the profession more attractive to men of high ability and strong personality." Because the "pecuniary emoluments" of the academic profession 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."

No reader of The Federalist Papers will fail to recognize the source of this claim. In *Federalist* #78, Alexander Hamilton argued that judicial tenure was necessary because in its absence talented individuals would have no reason to quit their

lucrative law practices to become judges. Here as before, therefore, there's at least a *prima facie* case that the two strongest justifications for academic tenure are borrowed from earlier justifications for judicial tenure.

The case becomes stronger once we turn from text to history. In his book on the AAUP's founding, Hans-Joerg Tiede notes that the judicial analogy was inserted into the 1915 *Declaration* by the controversial Harvard Law School professor Roscoe Pound — one of 15 committee members responsible for drafting the *Declaration* between 1913 and 1915. Pound came by it, in turn, by revising a text first penned by John Henry Wigmore, an influential scholar of comparative law who was then dean of Northwestern Law School and who, in 1916, succeeded John Dewey as the AAUP's second president.

Significantly, these two scholars had also worked together to challenge the system of the elective judiciary that had come to dominate state courts since the mid-19th century, when a wave of Jacksonian democracy abolished state judges' lifetime tenure of office. In contrast to other legal progressives, whose outrage over the Supreme Court's *Lochner*-era jurisprudence focused on the court's composition, Pound and Wigmore favored structural reforms designed to improve public trust and confidence in the judiciary more generally.

Before tenure was justified as a means to ensure academic freedom, it had been used to establish the independence of the judiciary.

Not coincidentally, judicial tenure was a consistent theme in Pound's scholarship during these years. In 1914, one year after the philosopher Arthur Lovejoy invited Pound to help draft the 1915 *Declaration*, Pound published an article criticizing what he called a "false idea of democracy" — the view that any difference in training is a class distinction inimical to the spirit 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.” Pound furthermore argued that the crisis of the judiciary was due in large part to “illiberal decisions” made by popularly elected judges with short tenures of office. The institution of an “elective judiciary, holding for short terms,” Pound said, 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.” Before real social progress could be possible, it would first be necessary to repair a judiciary that had been stripped of the protections of lifetime tenure.

The influence of Pound and Wigmore certainly helps explain why the 1915 *Declaration* justified academic tenure by analogy to judicial tenure, not least because that analogy is missing from that era’s many other statements on academic freedom. But it also helps explain the curious way the *Declaration* takes up one of academic freedom’s most vexed questions — the problem of “extramural utterances.”

The ugliest disputes over tenure tend to begin when professors make controversial public statements about topics that fall outside of the four walls of their academic training. In recent years the rise of social media has intensified this problem, offering the professoriate’s fiercest critics a reliable source of perpetual outrage. But well before the problem of extramural utterances became the [chronic crisis](#) it is today, it was first a response to a set of questions generated by the judicial analogy.

The judicial analogy’s link to these questions is apparent in Wigmore’s December 1916 essay in *The Nation* called “Academic Freedom of Utterance: An Analogy Drawn from Judicial Immunity.” A version of the text he earlier circulated to Pound, Wigmore’s essay argued that academic freedom should be modeled squarely on

judicial immunity. Judges, Wigmore argued, are protected against civil action from individuals claiming to have been wrongfully treated by judges acting in their official capacity as judges. In just the same way, he continued, professors whose utterances remain within the jurisdiction of their expertise should be able to expect absolute protection against anyone who might feel wronged by those utterances.

From this, Wigmore drew several conclusions. The first was a claim that persists today in the debate over extramural utterances. Just as judicial immunity protects judges from civil action only in their official capacity, and not in all domains of their life, so too “academic immunity” (as Wigmore called it) should protect professors only when they speak to matters related to the fields to which they’re appointed, and not in everything they say. For this reason, Wigmore suggested, professors should act like judges in another way as well: They should refrain from the most extreme forms of direct involvement in partisan politics (such as giving stump speeches or interviews in general newspapers). Because professors enjoy speech protections that ordinary citizens lack, in other words, it’s not unreasonable to expect professors to relinquish certain other rights in exchange.

A week later Lovejoy published a critical response to Wigmore. He pointed out, among other things, that federal judges are exempt from presidential control not only in their decisions but also in their purely personal expressions and their off-bench activities. As such, Lovejoy reasoned, the judicial analogy’s true corollary is that academic freedom should imply no restraints whatsoever on professors as citizens.

This exchange between two of the AAUP’s leading lights (Tiede calls Lovejoy the AAUP’s “primary founder”) helps clarify why the 1915 *Declaration* ultimately endorsed the judicial analogy only in limited fashion. It also helps explain the *Declaration*’s various equivocal remarks about extramural utterances. On the one hand, the *Declaration* stated, academic teachers should have minds untrammelled

by party loyalties, enthusiasms, antagonisms, and personal political ambitions — a position that seemed to vindicate Wigmore. But the *Declaration* also repeated the claim that “it is neither possible nor desirable to deprive a college professor of the political rights vouchsafed to every citizen.” This, basically, had been Lovejoy’s point.

As for the problem of extramural utterances itself, the *Declaration* referred only to professors’ “peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.” At no point, however, did it connect the problem of extramural utterances to the contentious analogy that appears to have generated the need to speak of a “peculiar obligation” in the first place. By remaining silent on the obligation’s origins, the *Declaration* refrained from sharing the reasoning that led to its position on extramural utterances, thus limiting that position to mere exhortation.

But words that can’t be fully understood can’t give rise to fully effective norms either. If today the polemics over extramural utterances have become so painful, confused, and repetitive — turning the knot between free speech and academic freedom into a tangle — it’s in part because we’ve forgotten that the problem of academics’ “peculiar obligation” is anything but peculiar to academe.

The juridical analogy can help resolve some of this obscurity. Beginning at least with the 1804 impeachment trial of Samuel Chase — the only Supreme Court justice to have been tried for impeachment — federal judges have faced the question of what laws and norms ought to regulate their official conduct as judges, and how, if at all, those laws and norms ought to impinge upon their unofficial speech and conduct as citizens.

The Constitution offers two different answers to this question. On the one hand, [Article II, Section 4](#) allows for the impeachment and removal of federal judges who

are convicted of “Treason, Bribery, or other high Crimes and Misdemeanors.” On the other hand, [Article III, Section 1](#) holds that federal judges “shall hold their Offices during good Behavior.” Between these two standards there exists a vast gray area, for there are countless ways for tenured judges to fall short of “good Behavior” without also committing high crimes and misdemeanors. For these sorts of bad behavior, judicial tenure seems to preclude the possibility of removal from office.

Here, as elsewhere, what holds for judicial tenure holds for academic tenure as well. The language in Article III, Section 1 of the U.S. Constitution is derived from England’s 1701 Act of Settlement, which declared that judges should hold permanent tenure of office “on condition of good behavior” (*quamdiu se bene gesserint*). Significantly, the first charter of Yale University, which was also written in 1701, used the same Latin formula to describe the terms on which its rectors, masters, ushers, and other officers could expect to continue to hold office. Yale was no outlier. Over a century later, Thomas Jefferson would use the good-behavior formula to describe the sort of permanent professorships he envisioned at the University of Virginia.

These origins offer a stark contrast to the usual history of academic freedom. The conventional wisdom is that American academic freedom derives mainly from late-18th and early-19th century Germany, which gave us *Lehrfreiheit* and *Lernfreiheit*, the interlinked freedoms of teaching and learning. But to justify academic tenure, and to work through the tensions and ambiguities of extramural utterances, the founders of the AAUP didn’t turn to Kant, Fichte, and Humboldt. They looked to the norms of judicial tenure in the American judiciary. If today we seem to lack persuasive justifications for tenure, perhaps that’s because we’ve been looking for them in the wrong places.

The Act of Settlement’s legal Latin, in any event, didn’t make its way into the AAUP’s 1915 *Declaration*. What did is the related assumption that the well-behaved

professor should behave like a well-behaved judge. Insofar as a professor is “fit for his position,” the *Declaration* states, he should be “a person of fair and judicial mind.” When he’s instructing young and immature students, it continues, he shouldn’t indoctrinate them with his own opinions but should instead habituate them to look patiently and methodically on both sides of an issue. Or, as Lovejoy himself would put it in 1930, the office of the scholar “has some analogy to that of the judge. His opinions must be not only competent but also disinterested.”

Professors should be impartial and even-handed. If this normative claim about professorial fitness seems to work, it’s because it works by analogy. It transposes a familiar legal maxim — *audi alteram partem*, “listen to the other side” — into a nonlegal domain, academie, where it quickly begins to malfunction and misfire. Are there really two sides to the idea that Jews are not lice but humans? That the Earth is not flat but round? That evolution and anthropogenic climate change are scientific facts? That there are no microchips in the Covid-19 vaccine?

At its strongest, the point of saying that professors should act like judges is simply to suggest (as AAUP co-founder Edwin Seligman did in 1930) that professors shouldn’t act like lawyers (hired guns whose expertise serves the interests of their paying clients). But pressed beyond a certain threshold, the image of the even-handed judge doesn’t clarify the question of what good professorial behavior is. It distorts it. It handcuffs professors to a sterile, formulaic epistemology (“substantive neutrality”) that stifles intellectual judgment before it even begins.

Those who criticize tenure today, of course, don’t limit themselves to claims about partisanship. They also say that lifetime tenure of office is an elitist, antidemocratic concept. In academe it therefore should be eliminated or reduced (and public accountability increased) by means of posttenure performance reviews, term limits, or outright abolition. And in the Supreme Court, it should be diminished (and, again, public accountability

increased) by means of mandatory retirement, rotating court membership, or (again) term limits.

In both cases, we witness today a revival of the criticism Pound called pseudodemocratic over a century ago. Its claim is that lifetime tenure arrogates excessive power to out-of-touch elites who then, by virtue of tenure's protections, become unaccountable to the very public on whose trust and taxes they rely. And in both cases, contemporary life has provided us with so many egregious examples of unaccountable judges and badly behaved academics that today nothing seems more reasonable than loss of confidence in these two ostensibly antidemocratic institutions of tenure.

But take a step back, and this lost confidence appears in a new light. Our present is characterized by worldwide democratic decline. The symptoms are everywhere: open disregard for the rule of law, marked decreases in competitive elections, rejection of ethnic pluralism and tolerance, growing civil conflict, deadlocked legislatures, and brutal assaults against the postwar international order. Under these conditions, readers should wonder whether our collective loss of confidence in lifetime tenure is really as reasonable as we suppose. Perhaps our new impatience with this old practice might be better interpreted as one among many worrisome signs of our worrisome times — which, not coincidentally, are defined by socio-economic acceleration, time-space compression, ever-shorter attention spans, and general pessimism about the future. Perhaps, indeed, what we need more than yet another attack on tenure is a chance to rethink the concept of public accountability that, at least in principle, is already immanent within it. And for this we need to turn from history to theory.

In the modern democratic tradition, where the place of the sovereign is occupied by the idea of the people, the danger of tyranny doesn't disappear. It changes shape. It begins when a majority decides to rule in its own exclusive interest, without

consideration for what Madison called the community's "permanent and aggregate interests." The authors of *The Federalist Papers* proposed to guard against this danger by designing offices whose counter-majoritarianism hinged on their specifically durable or lasting character. And they did so because considerations of time were central to the way they understood the problem they called "faction."

Conceived as a kind of illness in which the public became internally divided against itself, attacking itself as if it were an external enemy, faction was also understood to afflict the public's capacity for continuity over time. The danger of faction is that it permanently reduces politics to the pursuit of a series of opinions, whims, fits, caprices, and passions that are not only fleeting but also, for that reason, internally disconnected from one another. And where democracy's ideas are short-lived, democracy itself is not long for this world either.

To help prevent this illness, the authors of *The Federalist Papers* proposed offices whose tenures were longer rather than shorter. Because short-term elective offices are exposed to faction's vagaries and vicissitudes, any enduring democratic republic needs to be supplemented by long-term unelected offices.

Too many offices of this sort obviously mean death for democracy. But taken in the right dose, this same poison provides the cure for the disease, tyranny of the majority, to which democracies are uniquely susceptible. Long-term appointive offices, which may at first seem antithetical to democracy, thus have a very specific place and function with them: they immunize democratic communities against the form of self-destruction to which they're constitutively vulnerable.

Judicial tenure of office, at least as Hamilton imagined it, is immunitary in exactly this way. The judiciary's famous countermajoritarianism — which is better understood as an inoculation against the disease of faction — is conditional upon its undemocratic duration. Lifetime tenure of office may be the very antithesis of

elective office, but it isn't then the antithesis of democracy itself.

Quite the opposite, in fact. Its explicit goal is to allow judges to dedicate their lives to no other interest except the pursuit of justice, freeing them up to decide cases exclusively on no other basis except their professional conscience. And this goal implies a duration that, in turn, correlates to an obligation — call it a duty to continuity — that's otherwise lacking in the elective institutions and practices of democratic politics.

Understood in this way, it's a mistake to assume that lifetime tenure is necessarily elitist. Tenure's wager is much simpler and also much more intricate than that. Its claim is that any public office that allows its holder to dedicate their life to “long and laborious study,” as Hamilton put it in *Federalist* #78, is also, at least in theory, an office that allows the public to immunize itself against faction's fleeting fevers. Calling that antidemocratic is like saying a vaccine is the disease itself.

Is there a similar obligation implicit in lifetime tenure of *academic* office? According to Section 3 of the AAUP's 1915 *Declaration*, titled “The Function of the Academic Institution,” the answer is yes.

[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 liberty of the individual. [An earlier draft indicated that the menace was to “the real liberty of democracy.”] 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.

Fewer passages provide more prescient guidance for those who today worry about the tension between academic freedom and free speech. Because public opinion in democracies is double-sided — at once a promise and a threat — the academy's relation to public opinion must also be twofold. Universities that propose to affirm free speech in its most libertarian form — turning the academy into a pure marketplace of ideas — consequently suffer a double failure. They not only lose any ability to distinguish a university campus from an internet chatroom; they also lose any ability to protect democracy against the tyranny of public opinion. Clearly, then, universities that think of freedom in terms of free speech *alone* thus risk neglecting academic and political obligations alike. But universities that turn away from the First Amendment *altogether* run another risk: They leave themselves without a good account of the academy's relation to the public and to the Constitution.

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The dilemma is resolved somewhat by the *Declaration's* judicial analogy. It suggests that the university, no less than the judiciary, is necessary to the American democratic experiment. It furthermore suggests that lifetime tenure is the indispensable condition for the university's performance of its countermajoritarian obligations. In just the same way that judicial tenure is the means by which the independent judiciary protects democracy's ongoing capacity for justice, so too

academic tenure is the means by which the autonomous university protects democracy's ongoing capacity for truth. This is what it means for academic and judicial tenure to share not only a set of *constitutional justifications* but also a set of *public obligations*. The purpose of lifetime tenure, in academy and judiciary alike, would seem to be to protect the public's permanent and aggregate interests under conditions where public opinion becomes so factious that it destroys its own fidelity to those interests.

But with this, the judicial analogy also hits a decisive limit. When judges speak in their official capacity as judges, their speech is protected by Article III, Section I of the U.S. Constitution. No similar constitutional basis exists to protect academics when they speak in their official capacity as academics. Instead, professors must rely upon Supreme Court holdings that imperfectly assimilate academic freedom to the norms of the First Amendment, and on trustees and administrators who don't always seem convinced of the idea that, by preserving tenure, they're serving the public interest in its highest and best form. The 1915 *Declaration* suggests that healthy democracies need their universities to be just as countermajoritarian as their courts. But when professors attempt countermajoritarian speech without also enjoying the immunities that protect judges, how salutary can we really expect that countermajoritarian speech to be?

This question is especially relevant today, when free-speech jurisprudence has become increasingly incoherent, and when too many university leaders believe that fiduciary responsibility means that academic appointments should assume the form of precarious, short-term contracts. Here the verdict of the judicial analogy is clear. Whatever their intentions may be, university leaders who abandon or diminish tenure aren't at all living up to their responsibilities. They're failing utterly to bequeath intact to the next generation of Americans an institution that, for all of its many flaws, nevertheless has an indispensable place and function in American democracy. And if the *Declaration* is right, the erosion of academic tenure that's

happened on their watch won't at all remain merely academic.

This democratic theory of academic tenure is certainly compromised by the elitism tenure often entails. But notice how much the elitist concept of tenure depends on a prior elision in the way we today talk about tenure. In current parlance, tenure is either something an individual scholar “gets” or “has,” or else a set of long-term commitments an institution attaches to a “track” or “position.” The 1915 *Declaration*, by contrast, consistently speaks of tenure as an attribute *of office*. For the founders of the AAUP, at least, lifetime tenure seemed to be less a property interest or institutional commitment than the name for a certain kind of “duty” (the usual modern translation for the Latin *officium*).

Why is it that today not even the most ardent defender of academic freedom speaks of office? It's as if we believed that the perplexities of office — the vast set of philosophical questions pertaining to moral and juridical obligation — were somehow inessential for our defenses of tenure. Or worse: that we're unable to say what academic tenure is really *for* — what its deeper point or purpose is.

It's telling, in fact, that those we today call “university officials” aren't professors (only administrators) whereas those who (we say) “get” and “have” tenure aren't “university officials” (but rather professors). Professors, once understood as the university's permanent conscience, today no longer seem to speak about their office, whereas those in the university who *do* speak about their office don't *themselves* pursue the truth, only propose to manage those who do.

Once tenure is disconnected from questions of obligation, in any case, there's very little preventing it from being privatized into a special kind of property interest — job security — that a few academics possess and most lack. It only adds epistemic insult to economic injury that those who possess this job security sometimes also claim a corresponding liberty interest — the freedom to pass judgment on the

opinions of their colleagues and fellow citizens, most of whom also lack the job security they enjoy. If this is all there were to tenure, who would dare defend it?

But this isn't all there is to tenure. Taken to its logical conclusion, the judicial analogy discloses that lifetime tenure of office implies a fourfold theory of obligation. 1. Tenure isn't a possession; it's the prior condition for the performance of epistemic duties that are lifelong and indeed intergenerational. 2. It's never individually owned; it's only ever held in the name of the public interest. 3. It's justified because the pursuit of truth, like the pursuit of justice, is permanently in the public's interest. And 4. It sometimes obliges those who hold it to speak difficult truths to those on whose behalf it's held.

This is all no doubt easier said than done. In today's polarized world it seems delusional to speak of *the* public interest at all, for increasingly we experience only a set of open animosities, separate realities, and relations of mutual incomprehension. But the public the academy serves has always been factious to some degree. The 1915 *Declaration* itself was no mere scholastic exercise; it was occasioned by crisis, conflict, and chaos. It responded to a public riven by extraordinarily bitter divisions, fears, and hatreds (over monetary policy, Darwinian evolution, whiteness, and women's suffrage, to name a few).

Today's public may lack the shared epistemic horizons that allow for rational, civil debate. But it's illusory to suppose that the birth of academic freedom dovetailed with some prelapsarian public that faction somehow left unscathed. It'd be better to say that the public interest the academy serves has always been less an empirical fact than an ongoing desire, an exhausting and perpetually disappointing aspiration we cannot not have — one that we abandon only at the cost of embracing something worse.

These deadlocks are as old as faction itself. But today they seem to have reached an

unprecedented form. In the U.S., as in most countries, institutions of higher education have long been more secular and liberal than the communities around them. In the last several years, meanwhile, the federal judiciary has veered sharply right, handing down decisions that are less conservative than radical — and that seem destined to intensify the very forces of faction the judiciary is supposed to help calm.

Faction thus seems to have taken hold of the two institutions that, in principle, are most capable of remedying it. And because these two cousins each generate enduring forms of intergenerational continuity — the formation of enforceable precedents on the one hand, the education of young adults on the other — it seems unreasonable to hope that the fever will break anytime soon.

Today, indeed, it appears that the judicial analogy is less a figure of speech than a map for a collision course. Even in this newer and grimmer form, however, it remains instructive. If we don't want to go down the road it allows us to foresee, we need to have the humility to admit that today we lack the language we need to name a better destination. Invention, that long-forgotten part of the art of rhetoric, should once again be our art too. Where words fail, after all, force must decide.

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SCHOLARSHIP & RESEARCH

ACADEMIC FREEDOM

OPINION

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