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On Academic Tenure and Democracy: The Politics of Knowledge, 53 UIC J. MARSHALL L. REV. 937 (2019)

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ON ACADEMIC TENURE AND DEMOCRACY: THE POLITICS OF KNOWLEDGE

SARA DILLON*

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Abstract

Academic freedom in the form of tenure is vital to every democracy. It is important that, in light of the current rise in authoritarianism globally, we stop treating academic tenure as a matter of university governance or even employment law. Rather, it must be seen in political terms, and defended as a central aspect of democracy itself.

One hallmark of authoritarian regimes is that they make attacks on independent intellectuals an early priority. Traditionally, the university has been the site of independent intellectual inquiry, and so each act aimed at weakening academic tenure is also an attack on democratic values. Despite this crucial link, academic tenure in the United States continues to decline precipitously. At the same time, American academics have largely failed to stand up for tenure as a principle and have failed to act collectively in its defense. This article puts forward the argument that we should not accept the demise of tenure as a *fait accompli*, but must see our individual battles against administrative and

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political encroachment as part of the larger struggle to maintain healthy democratic structures.

If there is something worth fighting for in academic tenure, then we as academics and professionals have to stop moving forward on cruise control. Each professor in each university should stand up firmly for tenure rights and cease acting as if the status of tenure exists in a kind of legal confusion and uncertainty. The legal ambiguity exists in part because we have allowed it to persist.

Many writers have ably gone over the history of the rise and fall of tenure in the United States, and the effects of this decline on American higher education. The burning question now is whether we are living through an inevitable process of deterioration, or whether we can reverse the losses. The fact that we have a two-tiered, or even three-tiered system of academic status in place now makes the situation more difficult, as there is an inevitable conflict inherent in the points of view of these disparate groups of academic personnel.

In one sense, the answer to the question posed above is relatively simple: if we do not stand up collectively for tenure, rejecting a merely individual/contractual approach, tenure will be lost and will likely not return. Most arguments against academic tenure are being made in bad faith, and adversely affected academics seem unable to respond effectively. This article sets out the limits of a case-by-case legal approach to the issue of tenure, and encourages collective, preemptive action. Rather than waiting about for new administrators to come up with creative ways to weaken tenure, faculty must identify potential danger zones and insist on university documents and agreements (including university faculty handbooks) that will make certain forms of attacks on tenure far less likely. Faculties across the U.S. must also assist one another in holding the line as university boards attempt to impose new handbooks or other instruments designed to “review” tenure out of existence.

I. INTRODUCTION: THE MULTI-FACETED WAR ON TENURE

A. A “National” Faculty as an Autonomous Force

*The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.*¹

1. 1915 Declaration of Principles on Academic Freedom and Academic Tenure, AM. ASS'N U. PROFESSORS (1915) [hereinafter: 1915 Declaration].

University professors are being actively persecuted for expressing their views in Russia, Turkey, and Hungary, among other countries.² These nations, as is well documented, have turned the clock back on political freedom and are descending into autocracy. In such states, all academic speech that cannot be placed under political control is suspect, and even fledgling autocratic regimes lose little time in seeking out dissident professors, making sure they are silenced, fired or even jailed for daring to depart from the party line.³ In the United States, attacks on academic tenure have not yet taken this crude form, but as American democracy comes under unprecedented pressure, the value of tenure also takes on new significance.⁴

This article makes the argument that tenure and academic freedom need to be seen as deeply political matters, not merely matters of individual employment or contractual rights. Especially in these troubling times, the fate of academic tenure is an issue that the American professoriate needs to approach from a collective point of view, rather than a personal one.⁵ The demise of the tenured professor in the United States has been accompanied by the consolidation of corporate power over the public sphere,⁶ and has everything to do with the more general weakening of democratic institutions.⁷

2. Mary Ellen Flannery, *Wisconsin Faculty Fighting the Destruction of Public Higher Education*, NEATODAY (June 15, 2016), neatoday.org/2016/06/15/university-of-wisconsin-scott-walker/.

3. See Florin Zubascu, *Government Continues Crackdown on Academic Freedom in Hungary*, SCL/BUS. (Jan. 22, 2019), sciencebusiness.net/news/government-continues-crackdown-academic-freedom-hungary (describing attempts by the Hungarian government “to put the research institutes of the Academy of Sciences under direct political control.”); see also John K. Wilson, *Turkey’s Ongoing Attack on Academic Freedom*, ACADEME BLOG (Jan. 24, 2019), academeblog.org/2019/01/24/turkeys-ongoing-attack-on-academic-freedom/ (noting that on the date of his blog post, a Turkish court sentenced academic Yonca Demir to three years in prison for the crime of signing a petition critical of the government).

4. Kevin Mattson, *Book Reviews: In Defense of Tenure*, DEMOCRACY: J. IDEAS (2011), www.democracyjournal.org/magazine/20/in-defense-of-tenure/.

5. Ernst Benjamin, *The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education*, 1 J. ACAD. FREEDOM 1, 18 (2010).

6. Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARV. EDU. R. 425, 428 (2002); see also Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS L. J. 51, 53 (2000) (asserting that corporate interests have a larger stake in academia than any other era).

7. Giroux, *supra* note 6, at 428; see also Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. L. & PUB. POL’Y 263, 268 (2007) (complicating the institution further is being unable to define the faculty identity).

Much has been written about academic tenure, including its history and the current state of play in the courts where tenure rights in particular situations are in question.⁸ However, this fundamental reality, that tenure is a political issue, has been largely obscured in the U.S.⁹ Academic tenure is in fact one of the pillars of democracy, even if it is not generally described or understood in that way.¹⁰ While the situation of professors and academic staff in Europe is far from perfect, European nations have thought more deeply, and for a longer period of time, about academic freedom and tenure as human rights and as core elements of a functioning democracy.¹¹ If tenure disappears altogether, this will be another symptom of the banishment of independent voices capable of defending a democratic order that, seen from the vantage point of 2019, appears increasingly under threat.

In the U.S., hostility to tenure has been presented to the public in terms of whether young students can “afford” to provide professors with “jobs for life”—but this formulation overlooks the central importance of tenure.¹² Indeed, such arguments and rationales are disingenuous distortions put forward by those pursuing other agendas.¹³ Both defenders and opponents of

8. See Caitlin Rosenthal, *Fundamental Freedom or Fringe Benefit? Rice University and the Administrative History of Tenure, 1935-1963*, 2 AAUP J. ACAD. FREEDOM 11 (2011) (indicating that tenure as we know it has had a short existence regardless of historical precedence); see also Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 73 (2006) (discussing the early twentieth century initiatives to codify academic and employment rights for educators).

9. Denise Cummins, *Think Tenure Protects You? With Wealthy Donors and Less Public Funding, Think Again*, PBS NEWS HOUR (Oct. 1, 2014), www.pbs.org/newshour/nation/think-tenure-protects-wealthy-donors-less-public-funding-think; see also Jeff Charis-Carlson & William Petroski, *Iowa Lawmaker Looking to End Tenure at Public Universities*, DES MOINES REG. (Jan. 12, 2017), www.desmoinesregister.com/story/news/education/2017/01/12/iowa-lawmaker-looking-end-tenure-public-universities/96460626/ (presenting the idea of state representative arguing that universities should have freedom to hire and fire whenever fit).

10. Mattson, *supra* note 4.

11. See Defence of Academic Freedom in the EU's External Action, EUR. PARL. DOC. P8_TA0483 (2018), [www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/11-29/0483/P8_TA\(2018\)0483_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2018/11-29/0483/P8_TA(2018)0483_EN.pdf) (showing EU leaders signaling the recognition of academic freedom being tied to the promotion of democracy abroad); see also Terence Karran, *Academic Freedom in Europe: Reviewing UNESCO's Recommendation*, 57 BRITISH J. EDUC. STUD. 191 (June 2009) (setting out the history of academic freedom in Europe from the Middle Ages to the present, and providing information on the state of play in various European states regarding both academic freedom and tenure).

12. Rebecca Schuman, *The Tenure Apocalypse: “Jobs for Life” Are Rare and Mostly Fictitious. Attacks on Them Obscure the Real Problems of Higher Ed.*, SLATE (June 17, 2015), slate.com/human-interest/2015/06/scott-walker-and-the-post-tenure-university-an-apocalyptic-scenario.html.

13. *Id.*

academic tenure have generally failed to address the question of where tenure fits within a democratic political order, a matter that is at the heart of the argument presented here.¹⁴

With that in mind, this article seeks to rebut the idea that tenure is an outdated concept, and that the future of American universities must or should be one of a tenure-less faculty, working under conditions that more closely resemble the corporate model so favored by many academic administrators.¹⁵ The belief has grown that there is inevitability in the erosion of tenure, and that the vast majority of instructors will not enjoy these protections in the future.¹⁶ The supposed inevitability of this process has never been fully explained, except to pin it somewhat vaguely on supposed defects of the professoriate.¹⁷ American society has been led to believe that in some natural or fatalistic way, universities have found themselves no longer able to shoulder the cost of tenured professorships.¹⁸ Oddly, the same universities have proven that they are able to afford extremely well-paid administrators, whose number has expanded rapidly over the past twenty years.¹⁹

Notably, the very persons making the argument about the unaffordability of tenured professors are the highly paid administrators whose own worth is seldom if ever questioned. These same administrators, for the most part, also hold the repetitive and duplicative view that costs must be cut, mainly through the removal of tenure rights, for the alleged purpose of “helping the students.”²⁰ For overburdened families, in shock at the staggering price of higher education in America today, they are often all too ready to

14. *Id.*

15. Giroux, *supra* note 6, at 440.

16. Schuman, *supra* note 12; *see also* Humeyra Pamuk & Ece Toksabay, *Purge of Academics Leaves Future of Turkish Universities in Doubt*, REUTERS (Mar. 1, 2017), www.reuters.com/article/us-turkey-security-academics/purge-of-academics-leaves-future-of-turkish-universities-in-doubt-idUSKBN1684DE (indicating that Turkish academics fired in the wake of the coup in Turkey fear the implications for Turkish democracy).

17. Schuman, *supra* note 12.

18. Mark Strasser, *Tenure, Financial Exigency, and the Future of American Law Schools*, 59 WAYNE L. REV. 269, 278 (2013).

19. *See* Colleen Flaherty, *What Remains of Tenure*, INSIDE HIGHER ED. (Dec. 7, 2016), www.insidehighered.com/news/2016/12/07/faculty-members-university-wisconsin-oppose-proposed-change-new-post-tenure-review (discussing the growing power of administrators at the University of Wisconsin as they may have the power to decide whether to tenure professors); *see also* Sol Gittleman, *Tenure Is Disappearing. But It's What Made American Universities the Best in the World*, WASH. POST (Oct. 29, 2015), www.washingtonpost.com/news/grade-point/wp/2015/10/29/tenure-is-disappearing-but-its-what-made-american-universities-the-best-in-the-world/ (providing the idea that American universities saw their golden age when faculty were protected from arbitrary firings).

20. Jonathan R. Cole, *The Pillaging of America's State Universities*, ATLANTIC (Apr. 10, 2016), www.theatlantic.com/education/archive/2016/04/the-pillaging-of-americas-state-universities/477594/.

believe that it is the cost of tenure that is driving the inflation, and therefore agree with the view that tenure must somehow be contained.²¹ For the affected professoriate, such spurious arguments put them in the difficult position of defending what has been framed as an undue burden on students.

This article also argues that there is no valid basis for accepting the idea, one that has slowly gained credence, that professors are not in the best position to devise curricula and run a university. In decades past, it was assumed that as experts in the teaching of young people, tenured professors were also best positioned to administer the institutions in which the learning occurred.²² As the corporate model has gained in influence, so too has the notion that professors themselves have to be “managed,” and that of course entails the creation of a separate and specialized group of bureaucrats whose main career path lies in educational administration rather than academic life.²³ Again, this notion that the task of professors is separate from the role of administrators is pernicious and unjustified; yet it has grown in influence and general acceptance.

The decline in tenure is neither economically necessary, nor some inevitable outgrowth of the evolution of educational models. Its decline reflects the convenience of the administrator class and the wishes (or suspicions) of often corporate-minded boards of trustees.²⁴ In the case of public universities located in red states, it reflects the annoyance of conservative state legislators with the outspoken social and political views of tenured faculty, and a wish to bring such persons into line as at-will employees.²⁵ These legislators often decry the fact that too many professors are “liberal,” but it seems that this charge is code for professors being independent-minded and well informed. In addition to these factors, there is also the reality of expanding corporate influence, through the use of targeted donations in support of research into topics such as free markets and libertarian values.²⁶

21. *Id.*; see also Dan Kaufman, *The Destruction of Progressive Wisconsin*, N.Y. TIMES (Jan. 16, 2016), www.nytimes.com/2016/01/17/opinion/campaign-stops/the-destruction-of-progressive-wisconsin.html (presenting thoughts on corporate donation allowances and the removal of tenure signals corporate control in Wisconsin).

22. Gittleman, *supra* note 19.

23. Giroux, *supra* note 6, at 440.

24. See *id.* (highlighting the existing gaps that emerge from corporate, rather than academic, leadership in universities).

25. *Protecting an Independent Faculty Voice*, *infra* note 49.

26. See Mark LeVine, *Killing Tenure Is Academia's Point of No Return*, AL JAZEERA AM. (June 5, 2015), america.aljazeera.com/opinions/2015/6/killing-tenure-is-academias-point-of-no-return.html (arguing that the abandonment of tenure opens the door to corporate interest and not actual learning); see also Maya Nadkarni, *Warning from the Future? Central European University and the Fate of Europe*, SOC'Y FOR CULTURAL ANTHROPOLOGY (Apr. 25, 2018), culanth.org/fieldsights/warnings-from-the-future-central-european-university-

Thus, over the past twenty years or so, academic tenure and all it stands for has been under attack from a variety of sources.²⁷ As mentioned, politically conservative politicians have even convinced segments of the general public that it is in the public's interest to destroy tenure, based on such arguments as its cost, its supposed reward for poor performance, and its allegedly unjustified shielding of "leftists" and other "unworthies."²⁸ Until quite recently, it was taken for granted that academic tenure was essential to maintaining the reputation of American colleges and universities as the best in the world.²⁹ After a lengthy period of study and pre-tenure apprenticeship, American professors were largely given free rein to determine the direction of the academic enterprise.³⁰ At some point, this logic was turned on its head and tenure was forced to go on the defensive. The "product" of the academic enterprise was measured in articles written and students made happy, as seen through the lens of the student evaluation.³¹

Faculties at individual institutions have done their best to defend tenure rights, though not always successfully.³² Significantly, strategic moves by faculty members, whose tenure is placed under threat, are not coordinated nationally or internationally. In addition, many seem confused as to both the legal and conceptual basis for defending tenure. On the one hand, many are justifiably unsure as to whether tenure-based legal

and-the-fate-of-europe (explaining that without protections for academics, government oppression can take root early among students being fed propaganda).

27. Schuman, *supra* note 12; see also John Shattuck, Opinion, *Hungary's Attack on Academic Freedom*, BOS. GLOBE (Apr. 3, 2017), www.bostonglobe.com/opinion/2017/04/03/hungary-attack-academic-freedom/sSYNAizjeoevfcqzV176K/story.html (showing that attacks on academic integrity and tenure is not an American only issue).

28. *Intellectual Freedom the Target of Illiberal Regimes*, UNIV. WORLD NEWS (Dec. 16, 2017), www.universityworldnews.com/post.php?story=20171215145815416 [hereinafter *Intellectual Freedom*]; see also Matthew J. Flynn, Opinion, *Gov. Scott Walker is Vandalizing UW System*, MILWAUKEE J. SENTINEL (Mar. 22, 2016), www.jsonline.com/story/opinion/contributors/2016/03/22/matthew-j-flynn-gov-scott-walker-is-vandalizing-uw-system/84929166/ (explaining that no tenure protections prevent a stable professorate from working at universities).

29. Gittleman, *supra* note 19.

30. See also Flynn, *supra* note 28 (describing the advantages of tenure and the attacks it has recently endured).

31. Donna R. Euben, *Post-Tenure Review: Some Case Law (2005)*, AM. ASS'N U. PROFESSORS (Aug. 2005), www.aaup.org/issues/post-tenure-review/some-case-law.

32. Audrey Williams June, *Frustrated Faculty Struggle to Defend Tenure Before It's Too Late*, CHRON. HIGHER ED. (June 17, 2018), www.chronicle.com/article/Frustrated-Faculty-Struggle-to/243675/; Audrey Williams June, *Court Rejects Law Professor's Assertion That "Tenure" Means Continuous Employment*, CHRON. OF HIGHER ED. (Aug. 7, 2012), www.chronicle.com/article/Court-Rejects-Assertion-That/133403 [hereinafter *Court Rejects*].

arguments would ultimately hold up in litigation.³³ On the other hand, academics have done a poor job in directly addressing the public as to the value of tenure to society and to democracy itself. While tenure has always found its legal basis in the nature of the academic contract, its power was drawn from the traditional assumption of tenure being educationally and socially desirable.³⁴

Overall, the war on tenure does appear to be significantly weakening the practice, if not completely destroying it. It is clear that the proportion of teaching faculty with tenure or on the tenure track is far smaller than was the case a decade or two ago.³⁵ It has been widely pointed out that no more than thirty percent of the total number of third-level teaching faculty now enjoy the protections of tenure, a staggering drop of nearly a half over the past three decades.³⁶ This erosion in tenure protection is somewhat analogous to the loss of union protection in the workforce and results from decades of conservative and pro-business hostility to a system of legal protection for workers of all kinds.³⁷ As a class of workers who had not been subject to the whims of “the boss,” tenured professors undoubtedly enjoyed a unique status. As “appointees” of the university rather than mere “employees,” they were simultaneously directors and laborers in the enterprise of higher learning.³⁸ University administrators have managed to erode tenure protections, in part, by describing certain “horror stories” of tenured professors who failed to live up to basic professional standards, thus providing cover for weakening tenure rights for all.³⁹

In the academia of recent times, those with tenure must always wonder if a stealth attack by hostile administrators or trustees might be around the corner.⁴⁰ A slightly more nuanced way of interpreting the evolving fate of tenure is that it will be reserved for professors in the top layer of private universities. By contrast, less prestigious colleges and universities, as well as public universities, will likely offer a separate range of academic employment options, from tenure-lite (or “fake tenure” as some have called it), to renewable contracts, down to purely at-will arrangements.⁴¹

33. See *Court Rejects*, *supra* note 32 (providing examples of the manner in which tenure and employment contracts have been handled in litigation).

34. Gittleman, *supra* note 19.

35. Benjamin, *supra* note 5, at 4-6.

36. *Id.*; see generally John M. Badagliacca, *The Decline of Tenure: The Sixth Circuit's Interpretation of Academic Tenure's Substantive Protections*, 44 SETON HALL L. REV. 905, 916 (2014) (showing how the decision by the courts will throw the tenure system used by universities into free-fall).

37. *But see* Giroux, *supra* note 6, at 430 (demonstrating how corporate minded restructuring of faculty is at odds with any potential for university unionization).

38. Gittleman, *supra* note 19.

39. *Id.*

40. *Id.*; Flaherty, *supra* note 19.

41. See Katy Savage, *Vermont Law School Revokes Tenure for 75 Percent of Faculty*, VT. DIGGER (July 15, 2018), vtdigger.org/2018/07/15/vermont-law-

Professors will not be consulted on these new arrangements; they will not be allowed to veto the weakening or even elimination of tenure.⁴² In rare circumstances, they may choose to fight back with votes of no confidence or other public statements of disapproval. These techniques may or may not succeed in particular instances.⁴³

As with regimes that attack genuine democracy without eliminating sham elections, it is likely that many tenured positions will be seriously weakened through means other than overt elimination.⁴⁴ Indeed, this has already happened in many educational institutions. The playbook for this is often the introduction of administrative opportunities to reorganize university programs, often by rewriting the “strategic plan” of the institution.⁴⁵ University administrators are adept at framing the dilution of tenure as part of a strategic vision, in the context of which tenured faculty do not have a central role to play, and have in fact become a hindrance.⁴⁶ Once upon a time in America, most politicians would not have considered attacking tenure as an institution. In keeping with the aggressive, zero-sum game approach to partisan politics in our time, however, tenure is one more enemy on the to-do list for defeat.

The implications of this situation go well beyond a threat to the contractual rights of individuals, since the decline of tenure as an institution also has important implications for the relationship of intellectuals to the larger society.⁴⁷ While hostility to tenure is often

school-revokes-tenure-75-percent-faculty/ (providing the statistic that Vermont Law School fired 75 percent of faculty in response to consistent budget deficit); see also Adams, *supra* note 8, at 69 (explaining that the trajectory of tenure is a constant battle between job security and financial limitations); see also Flynn, *supra* note 28 (referencing “fake tenure” in the context of the University of Wisconsin and cuts by Governor Walker); Colleen Flaherty, *‘Fake’ Tenure*, INSIDE HIGHER ED. (Mar. 11, 2016), www.insidehighered.com/news/2016/03/11/u-wisconsin-board-regents-approves-new-tenure-policies-despite-faculty-concerns.

42. Flaherty, *supra* note 19.

43. Flannery, *supra* note 2.

44. *Hungary Passes Bill Targeting Central European University*, BBC NEWS (Apr. 4, 2017), www.bbc.com/news/world-europe-39493758 [hereinafter *Hungary Passes Bill*]; Laura Mowat, *Orban under Fire as George Soros Refuses to Close his Budapest University*, EXPRESS (June 26, 2018), www.express.co.uk/news/world/980048/George-Soros-CEU-Orban-Hungary-central-european-university-Budapest; Pablo Gorondi, *Hungary’s leader: EU and Soros Seek to “Muslimize” Europe*, SEATTLE TIMES (July 22, 2017), www.seattletimes.com/nation-world/hungarys-leader-eu-and-soros-seek-to-muslimize-europe/; Suzy Hansen, *Inside Turkey’s Purge*, N.Y. TIMES MAG. (Apr. 13, 2017), www.nytimes.com/2017/04/13/magazine/inside-turkeys-purge.html.

45. See Colleen Flaherty, *‘A Different Kind of University’*, INSIDE HIGHER ED. (Mar. 13, 2018), www.insidehighered.com/news/2018/03/13/faculty-members-wisconsin-stevens-point-react-plan-cut-13-majors (showing that the removal of majors for more “job oriented” ones disrupts the purpose of academia).

46. *Id.*

47. Mark Lowen, *Turkey Brain Drain: Crackdown Pushes Intellectuals Out*,

couched in terms of enhancing efficiency and professional performance, most attacks on tenure are political to some degree. In recent months, there have been rumblings concerning the creation of a “watch list” of faculty members in American universities with supposedly dangerous left-wing biases, an obvious throwback to McCarthyism, and an uncomfortable harbinger of possible things to come under a fiercely reactionary administration.⁴⁸ The alleged transgressions of these faculty members include expressions of support for what are considered to be “liberal causes,” such as Black Lives Matter, Palestinian rights, immigrant rights or LGBT rights.⁴⁹ Yet the stakes in this anti-faculty crusade go much beyond these matters, as the war on tenure strikes a blow at the heart of academic freedom itself, perhaps a prelude to the death of autonomous academic life as this idea has been understood in the United States for over at least the last hundred years.⁵⁰ As with the right to vote, the right to think, speak and write freely is what allows the academic class to respond in real time to political and social events, without fear of retaliation.⁵¹ Properly understood, academic tenure is a concept with *two* indispensable components: academic freedom *and* employment security.⁵² For tenure to have real meaning, both of these elements are necessary.

At this moment in American history, it is important to consider what difference all this makes. Does tenure at large make a measurable contribution to our collective political and social debates? Indeed, in the age of fake news, does an article written by

BBC NEWS (Dec. 28, 2017), www.bbc.com/news/world-europe-42433668/; Philip L. Merkel, *Scholar or Practitioner? Rethinking Qualifications for Entry-Level Tenure-Track Professors at Fourth-Tier Law Schools*, 44 CAP. U. L. REV. 507, 543 (2016); *Intellectual Freedom*, *supra* note 28.

48. *Intellectual Freedom*, *supra* note 28.

49. See *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, AM. ASS'N U. PROFESSORS 67, 77 (July 21, 2016), www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos [hereinafter *Protecting an Independent Faculty Voice*] (outlining the evolution and implications of faculty speech rights and education consequences).

50. Zamudio-Suaréz, *infra* note 119.

51. See David L. Hudson, Jr., *No Free Speech for You*, SLATE (Aug. 4, 2017) slate.com/news-and-politics/2017/08/anthony-kennedy-has-the-chance-to-undo-his-worst-first-amendment-decision.html (citing *Garcetti v. Ceballos* as one of the worst decision from the Supreme Court, there still exists little to no protections for workers to exercise free speech in the workplace without being at risk for retaliation or termination from their position).

52. See Adams, *supra* note 8, at 67 (introducing the idea that tenure has evolved with the idea that security promotes stronger faculty achievements); see also BENJAMIN GINSBURG, THE FALL OF THE FACULTY: THE RISE OF THE ALL ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 132 (2011) (asserting not only that Academics play an important role in creating new ideas for society, but that society is dependent upon the freedom academics must have to “inquire, study, and evaluate.”).

a professor (especially in a non-science field), understood by relatively few experts, make any significant contribution to the common good? The argument in favor of tenure rests on the belief that ideas and facts are important, and more significantly, that the writing and speaking of academics are vital components in the production of human knowledge.⁵³ But given that the very existence of “facts” is currently being disputed, with unwelcome news increasingly denounced as “fake news,” and with false information influencing the election cycles of the entire Western world, it is important to be realistic concerning how much of a contribution academic discourse can actually make.⁵⁴ Even within the academic world, few are highlighting the contribution to be made by autonomous tenured faculty in holding the line against political coercion, in the many places where democracy and civil liberties are under threat. This article argues that the very presence of tenured professors, un beholden to internal or external leadership, is nevertheless politically vital.

The essence of university tenure is that it conceives of academic personnel as autonomous and self-directed appointees of the university, in a category quite distinct from other kinds of employees.⁵⁵ In a tenure regime, decisions on what to teach, what to write about and how to arrange university affairs should be led—in collaboration with the other university stakeholders—by the faculties, without being put through the permission-granting filter of “the boss,” namely university provosts, presidents, boards of trustees, corporate donors or outside political figures. Each unit of the university, under a classical view of tenure, should stand at arm’s length from every other, each representing a pillar of university concern, with none capable of over-running the other. Traditionally, however, as the front-line members of the academic profession, tenured professors enjoyed the greatest deference, and tenure was considered to be a reflection of that unique status.⁵⁶

In addition, it is faculty as a collective body who have been relied upon as capable of lighting the way in the social or political darkness when need be. In the multi-polar university, the faculty had been seen until recently as particularly essential to the

53. Hudson, *supra* note 51.

54. Todd Gitlin, *Promoting Knowledge in an Age of Unreason*, CHRON. HIGHER ED. (Mar. 9, 2017), www.chronicle.com/article/Promoting-Knowledge-in-an-Age/239434.

55. *But see* Nico Savidge, *Changes to Tenure, Budget and Regents Show Extent of Scott Walker’s Impact on UW*, WIS. ST. J. (Mar. 27, 2016), madison.com/wsj/news/local/education/university/changes-to-tenure-budget-and-regents-show-extent-of-scott/article_90954155-df31-5fdb-bb93-dd93a0f81225.html (explaining how governmental attempts to remove autonomy from universities show a misunderstanding of how universities survive).

56. Gittleman, *supra* note 19.

academic enterprise.⁵⁷ Systems of “ranking” and evaluating faculty have been avoided, as such treatment implies that faculty members are interchangeable or replaceable, depending on their measured value to their institutions, and—in the parlance of administrators—“to the students.”⁵⁸ The very idea of granting tenure is implicitly a recognition that the person receiving tenure is qualified to act in this capacity over the long-term, not merely by providing the services of teaching, committee chairing and producing works of attention-getting scholarship, but rather by molding young minds, preserving fundamental knowledge and exerting broad intellectual influence.⁵⁹ In this regard, there is something quasi-mystical at the heart of the classical tenure idea, in a way decidedly at odds with our modern educational instrumentalism.⁶⁰

Indeed, the aspect of modern faculty life that has apparently provoked the greatest conservative ire is this very autonomy of faculty, as protected by the tenure system. This autonomy has frequently been mischaracterized as a lack of “accountability,” an alleged defect university administrators believe themselves capable of fixing through the imposition of such structures as “post-tenure review.”⁶¹ Without question, tenure as a symbol of that autonomy has been systematically whittled away by various hostile forces in recent years, and the drive to make faculty more compliant, relative to the central administration of the university and/or corporate values, is apparent.⁶² To compare the lives and freedoms of university faculties thirty years ago and today is to realize the extent of the destruction.⁶³ There have been many forces arrayed against the autonomy of faculty members, but the unity of purpose of tenure’s opponents is striking. Faculty must be reined in; faculty

57. See Scott Jaschik, *Big Union Win*, INSIDE HIGHER ED. (May 15, 2018), www.insidehighered.com/news/2015/01/02/nlrb-ruling-shifts-legal-ground-faculty-unions-private-colleges (establishing that the National Labor Relations Board classified full time, non-tenured track employees under a standard for managerial positions).

58. Barbara A. Lee & Mark R. Davies, *No More “Business as Usual” in Higher Education: Implications for U.S. and U.K. Faculty*, 40 J. C. & U. L. 499, 500 (2014).

59. See generally Merkel, *supra* note 47, at 523 (providing the context of history of the American Bar Association and the education and research models in law school education).

60. Schuman, *supra* note 12; see also J. Royce Fichtner & Lou Ann Simpson, *Trimming the Deadwood: Removing Tenured Faculty for Cause*, 41 J. C. & U. L. 25, 31 (2015) (providing counterpoints to the myth that tenure encourages laziness among faculty).

61. Euben, *supra* note 31.

62. Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J. C. & U. L. 115, 154 (2014).

63. Rebecca Schuman, *The End of Research in Wisconsin*, SLATE (Mar. 21, 2016), slate.com/human-interest/2016/03/university-of-wisconsin-and-the-after-math-of-destroying-professor-tenure.html.

must be controlled in their self-expression and academic performance. Faculty must be evaluated according to criteria of efficiency and productivity; to not do so would “harm the students.” Not only is the concept of the self-directed faculty member at odds with the American preference for “at will” employer-employee relationships, it is also increasingly at variance with a polarized and right-leaning political atmosphere.⁶⁴

B. *The False Lure of Professorial Accountability*

Cast in terms of accountability, university administrations have sought to discredit tenured, and thus independent, faculty members as irresponsible and out of step with today’s modern, more efficient and corporate-minded age.⁶⁵ In arguments about the value of tenure, one often hears representatives of university administrations give examples of particular tenured faculty who have come to be underperforming over time—perhaps less popular or effective as teachers.⁶⁶ Despite the fact that it is well established that anonymous student evaluations are rife with prejudices, these evaluations are frequently used against tenured professors as a way to reduce their self-confidence and put them on a remedial track under the supposed guidance of the administration.⁶⁷ While even the most avid advocate of tenure rights would not say that gross incompetence should be overlooked, many administrators would like to have the power to dismiss tenured professors for not being as high performing as they could be, or as someone else might be.⁶⁸ However, random examples of defects in individual faculty performance are not germane to the larger question of where tenure fits systemically within the political landscape, nationally or globally. As this larger battle plays out, skirmishes often take place around the question of the scope of “just cause” as grounds for the firing of a professor, an issue to be discussed below.⁶⁹

Although the legal analyses governing the state of play for tenure rights in public versus private institutions differ somewhat, the role and importance of tenure in these contexts are actually very

64. See also Matthew Jay Hertzog, *The Misapplication of Garcetti in Higher Education*, 2015 B.Y.U. EDUC. & L. J. 203, 205 (2015) (showing that the lack of funding leaves universities open to political skewing in lieu of donations).

65. Giroux, *supra* note 6; see also Flaherty, *supra* note 19 (arguing that administrative power over faculty reviews further erodes tenure).

66. Flaherty, *supra* note 19.

67. Euben, *supra* note 61.

68. Flaherty, *supra* note 19; David Rabban, *The Regrettable Underenforcement of Incompetence as Cause to Dismiss Tenured Faculty*, 91 IND. L. J. 39, 43 (2015).

69. Adams, *supra* note 8, at 71-72, 93. Just cause is the traditional basis for the termination of a tenured professor; it implies egregious failure to live up to the professional expectations of the job, or some other form of significant malfeasance. *Id.*

similar.⁷⁰ When seen from the perspective of a democratic society, it matters little whether a faculty member is employed at a private or public institution. As in Wisconsin and other states, most recently Arkansas, conservative legislators have engaged in elaborate legal attacks on the institution of tenure at public universities in recent years.⁷¹ At private institutions, administrators have adopted the rhetoric of corporate efficiency in order to achieve the same results.⁷² But for the purpose of going beyond piecemeal attempts to save tenure rights for individual faculty members, it is important to acknowledge the negative implications for society, generally, of a national faculty working without a tenure system that preserves their autonomy from either corporate or political influences.

Wherever one falls on the tenure issue, the percentage of faculty at colleges and universities who enjoy the protection of tenure has already been greatly reduced over time, and the proportion of non-tenured teaching staff in higher education is likely to increase.⁷³ It is astonishing that such a large percentage of tenured professors have been replaced by adjunct faculty who work under genuinely terrible teaching conditions, often being paid a pittance for individual courses.⁷⁴ It is difficult to reconcile the traditionally high status of the professoriate with the indifferent treatment received by this new army of semi-employed academics. After all, such adjunct faculty have also undergone years of study and academic attainment, to find themselves being treated with what can only be said to be professional contempt. While this stark devaluation in the status of university teachers might be attributable to a drastic need for cost-saving, no such treatment of administrators has been noted. There are few, if any, higher

70. *Id.*

71. *Id.*

72. Schuman, *supra* note 63; Cathy Sandeen, *Wisconsin Controversy: with Fewer Tenured Positions, Who Benefits from Academic Freedom?*, CONVERSATION (June 25, 2015), theconversation.com/wisconsin-controversy-with-fewer-tenured-positions-who-benefits-from-academic-freedom-43167; Savidge, *supra* note 55; Valerie Strauss, *A University of Wisconsin Campus Pushes Plan to Drop 13 Majors – including English, History and Philosophy*, WASH. POST (Mar. 21, 2018), www.washingtonpost.com/news/answer-sheet/wp/2018/03/21/university-of-wisconsin-campus-pushes-plan-to-drop-13-majors-including-english-history-and-philosophy/; Opinion, *Weaker tenure at the University of Wisconsin Weakens Academic Freedom*, MILWAUKEE J. SENTINEL (June 12, 2015), archive.jsonline.com/news/opinion/weaker-tenure-at-the-university-of-wisconsin-weakens-academic-freedom-b99518100z1-307129221.html/; Monica Davey & Tamar Lewin, *Unions Subdued, Scott Walker Turns to Tenure at Wisconsin Colleges*, N.Y. TIMES (June 4, 2015), nyti.ms/1Qv6Xk3; Flaherty, *supra* note 19; Flynn, *supra* note 28; Colleen Flaherty, *Wisconsin in Wyoming?*, INSIDER HIGHER ED. (May 15, 2018), www.insidehighered.com/news/2018/05/15/proposed-changes-shared-governance-university-wyoming-recall-those-passed-wisconsin; Kaufman, *supra* note 21.

73. Benjamin, *supra* note 5, at 18.

74. *Id.*

education administrators who are forced to work at several different campuses, receiving small compensation for each job.⁷⁵ As has been pointed out, as many administrators make very similar points in different institutions, “administrative sharing” could be a better and fairer way to save on salary expenditure than treating adjunct professors in the disparaging way that has become all too common.⁷⁶

Institutional attacks on tenure should no longer surprise us, although affected faculties almost always appear to be caught off guard. While individual colleges and universities still engage in the tenure battle as if each time were the first, the larger war has already taken its toll. The value of a professor to the institution has been effectively recast in terms of student service and effectiveness rankings.⁷⁷ Except for the most elite institutions, the prestige of scholarship as a professional aspiration has been successfully downplayed, on the grounds that so much of what passes for scholarship is of little “practical” use.⁷⁸ Even scholarship itself is no longer allowed to stand on the strength of its own ideas. Rather, each academic article is evaluated by schools and departments in terms of its “impact” ranking—and thus, also in terms of the prestige benefits captured by the institution as a result of the publication.⁷⁹ Ideas have been presented as a luxury neither the university nor the nation can afford, and more importantly, an add-on that students cannot afford. Political and historical inquiry that favors democracy and freedom have been presented as “biased” and “liberal” and thus out of the mainstream. Both hostile state legislatures and suspicious central university administrations have managed to convince much of the public that they—rather than faculty members—know better what should be taught to students, and how.⁸⁰

One question before us is what exactly is left of tenure, and the relative viability of the struggle to preserve it. In order to understand particular examples of attacks on tenure, it is important to consider tenure’s social value in addition to its legal standing. When we say that tenure must be defended, or that tenure rights have been eroded, what exactly do we mean? What is the state of play for tenure rights in the United States, and abroad? If the battle is essentially over, and if tenure for the academic rank and file has been vanquished, should faculties accept their fate and

75. Audrey Williams June, *Can Faculty Workload Be Captured in a Database?*, CHRON. HIGHER ED. (July 15, 2018), www.chronicle.com/article/Can-Faculty-Workload-Be/243890.

76. *Id.*

77. See generally Alexis M. Jordan & Shaheen M. Christie, *The Graduate Student Experience in the Neoliberal Academy*, 6 ANUAC 69, 69-70 (2017) (arguing academic fulfillment is secondary to what a university can produce via graduate students).

78. *Id.*

79. *Id.*

80. Lieberwitz, *supra* note 7, at 285-86.

move on—or continue to stand and fight? Or, more likely, have faculties failed miserably to fight as a group, unwilling to take on the defense of tenure as a national effort? As conditional tenure becomes more common, will business-minded trustees, wealthy donors and politicians achieve their aims without a direct or explicit philosophical confrontation with tenure? In other words, should we accept that we are years into a war of attrition, and that acts of resistance will not avail much at this stage?

The problems besetting the institution of tenure are similar across the United States, despite differences in descriptive and geographical contexts. Tenure is by no means a concept unique to the U.S., of course, and indeed began within the medieval European university system.⁸¹ In European countries where public universities predominate, many professors enjoy the considerable protections of the civil service, and thus do not have to agonize over tenure as much as in the U.S. Most European countries recognize that third-level teachers should be protected under a human rights rationale, by reference to the nature of academic freedom.⁸² International comparisons are obviously useful and important as the U.S. watches the erosion of tenure take place in real time. If academic tenure is still capable of supporting democratic institutions, it is obviously worth the effort to protect tenure rights, and to affirm higher education's traditional reliance on the free and unrestrained professor. Thus, exactly how weak or strong "tenure" is as a legal and social pillar of democracy serves as a vital indicator of the strength of democracy itself.

The rise of illiberal regimes in various parts of the world have seen corresponding attacks on academic freedom. Academics in Russia have been punished for failing to support the Russian annexation of Crimea in the recent conflict in Ukraine, and repressive regimes in both Turkey and Hungary have targeted liberal academic institutions as enemies of the state, as part of a bid for increased autocratic power.⁸³ Any rigorous analysis of the

81. Adams, *supra* note 8, at 67.

82. *But see* David Matthews, *Academic Freedom at Risk in Italy*, INSIDER HIGHER ED. (May 30, 2019), www.insiderhighered.com/news/2019/05/30/scholars-fear-future-academic-freedom-italy (explaining that political actors are beginning to make the argument that universities have a "duty of loyalty to the state" throwing into question the parameters in which academics are allowed to operate in as educators. Italy, in recent years, has seen attacks from the far-right "The League" party and the deputy Prime Minister Matteo Salvini calling the "professoroni" a leftist bastion that allegedly oppose his policies. There is a further disconnect between politicians and university members with government leaders believing that the university system is not producing anything of merit to the country).

83. *See* Neil MacFarquhar, *To Many in Crimea, Corruption Seems No Less at Home Under Russian Rule*, N.Y. TIMES (Aug. 13, 2015), www.nytimes.com/2015/08/14/world/europe/in-crimea-a-disputed-beach-is-a-symbol-of-corruption.html (showing that Russian annexation and speech repression has diminished university capabilities on an international scale); Anna

current value and meaning of tenure must assume that unexpected political repression could appear at any time, including in the United States.⁸⁴ In such a worst case scenario, would our political life be diminished without the contribution of tenured faculty, able to exercise full academic freedom? The correct answer seems to be yes, without question. As the United States enters a period in which attacks on freedom of the press may become routine, appeals to efficiency and individual accountability are inadequate reasons for dismantling what had been an independent social institution. Merely because not all tenured professors “speak truth to power” does not mean that tenure as a system fails to provide important protection for those who do.⁸⁵

C. *Who Wants to Litigate?*

There are two principal means by which tenure may be undermined by a hostile university administration: the first is through a broad, systematic attack on the tenure rights of the entire faculty, and the second is through the selective “weeding out” of disfavored faculty, thus daring individuals to fight back. Indeed, it is not uncommon, as in the recent egregious example at Vermont Law School, to see an administration simultaneously moving against the *system* of tenure as well as individuals and their particular tenure rights.⁸⁶ Where individual tenure rights are under threat, affected professors first wish to know what their chances are of obtaining relief against the university.⁸⁷ That is, how strong a legal defense against termination does tenure provide; how reliable is a contract that contains tenure language? As an initial matter, any such litigation is unpleasant, expensive and frightening to the affected individual. It is far more likely that the university will offer a “buy-out” of some kind and that the professor will choose to walk away without engaging in protracted litigation.⁸⁸ It is also likely that no affected professor will relish the uncertain prospect of litigating the meaning of tenure as it relates to his or her particular

Borschevskaya, *Professor Who Failed to Support Putin Line on Crimea Fired*, EUR. FOUND. FOR DEMOCRACY (Mar. 26, 2014), europeandemocracy.eu/2014/03/professor-who-failed-to-support-putin-line-on-crimea-fired/; Hansen, *supra* note 44; Lowen, *supra* note 47; Shattuck, *supra* note 27.

84. See generally MacFarquhar, *supra* note 83 (describing the political oppression that is present in other countries, including Russia and Crimea).

85. Adams, *supra* note 8, at 88-89.

86. Mark A. Cohen, *When the Numbers Don't Add Up: Vermont Law School's Tenured Faculty Purge and What It Portends*, FORBES (July 18, 2018), www.forbes.com/sites/markcohen1/2018/07/18/when-the-numbers-dont-add-up-vermont-law-schools-tenured-faculty-purge-and-what-it-portends/; Savage, *supra* note 41.

87. *Id.*; see also Kevin Mattson, *supra* note 10 (arguing speech is not simply personal but impacts the ability to work as an academic).

88. *Id.*; Jordan & Christie, *supra* note 77, at 72-73.

situation.

The recent case of terminated law professor Lynn Branham provides the perfect example of what makes litigation in this area so unappealing.⁸⁹ In that case, both the federal District Court and Court of Appeals in Michigan reduced tenure to only one-half of its essential meaning by focusing on academic freedom only, without any regard for the job security aspects of tenure as traditionally understood.⁹⁰ As to the particular facts, Professor Branham had been a law professor for 23 years.⁹¹ As is common practice, she received a letter of renewal each year, which indicated her salary for the coming year and referred to her as a *tenured* professor.⁹² As is also common practice, the letter provided no explicit definition of “tenure” for this purpose, though her contract did contain a “Policy 201” that referred to the concept of tenure without explicitly indicating that tenure includes a right to permanent employment.⁹³ Unlike other universities, there was no source indicating with sufficient clarity the university’s view or understanding of tenure.⁹⁴ Judges in both courts concluded, rather absurdly, that the renewal of Branham’s contract with tenure was no more than a year-by-year commitment on the university’s part, with a promise of academic freedom *within the year specified in the renewal letter*.⁹⁵

The argument has been made that the courts could easily have looked to the American tradition of tenure, as found in the AAUP (American Association of University Professors) definitions,⁹⁶ as well as to the usage and practice in other universities, but this was not the approach taken by these courts. Instead, as mentioned, the courts adopted a somewhat illogical legal position, to the effect that the length of Professor Branham’s contract was only the year referenced in her renewal letter, and not the much longer period of time embedded in the *concept* of tenure itself.⁹⁷ It seems an obvious point that academic freedom without job security does not amount to very much, and certainly does not attain the goals found in the original concept of tenure. If the judges of the Branham courts are correct, all the university needs to do is wait until the end of a particular academic year, and terminate the offending professor—hardly a recipe for ensuring the intellectual autonomy of an independent scholar.⁹⁸ For tenure to be tenure, it must consist of two equal dimensions: that of freedom to research, speak and write,

89. Branham v. Thomas M. Cooley L. Sch., 689 F.3d 558 (6th Cir. 2012).

90. *Id.* at 562.

91. *Id.* at 561.

92. *Id.* at 561.

93. *Id.* at 562.

94. *Id.*

95. *Id.* at 562-63.

96. *See also* Euben, *supra* note 61 (setting forth the synthesis of the legality and implications of how post-tenure review is carried out and by whom).

97. Branham, 689 F.3d at 562-63.

98. *Id.* at 562.

and that of job security that continues unless and until there is a finding of just cause to terminate the professor's employment.⁹⁹ Branham sought a hearing on the meaning of just cause, something the courts refused to grant her.¹⁰⁰ Just cause has traditionally been understood as an *egregious* professional failure, not a relatively trivial failure to please the boss, or delight the students.¹⁰¹

The best approach for tenured faculty who have not yet experienced attacks on tenure would be to make sure that their faculty handbook or other document spells out the terms of tenure, and to not assume that the university administration is on board with the nature of the tenure rights the faculty assumes are in place.¹⁰² Where terms and conditions are left unspecified, litigation in defense of individual contractual rights is a very uncertain undertaking. Invoking the professor's own understanding of his or her tenure rights will not provide adequate protection, and it is folly to expect that one's colleagues will step up in one's defense. In such a case, it is likely that personal defects and failures will be magnified, and the resulting successful termination will have the effect of weakening everyone's tenure rights in the long term.

Universities are increasingly aware of the importance of the documents underlying the institution of tenure as it relates to particular educational establishments. In that regard, new administrators (presidents, provosts, etc.) often come onto the scene with the intention to reorder the relationship between faculty and central administration, generally by diminishing the value and reliability of tenure, and often by focusing on faculty handbooks and program or personnel review procedures.¹⁰³ In Wisconsin and other "red" states, governors and legislatures have instituted programs that reduce the power of faculties in state colleges and universities.¹⁰⁴ Program review, program closure, post-tenure review and evaluation, have all been cleverly used as a way of reducing the value of tenure and the role of professors, yet without taking heat for eliminating tenure completely.¹⁰⁵ Such innovations have the effect of pitting professors against each other in a competitive way, and tend to make faculties more dependent on, and more eager to please, top administrators.

The very recent example of Vermont Law School is particularly

99. *Id.*; Adams, *supra* note 8, at 67.

100. *Branham*, 689 F.3d at 562-64.

101. *Branham*, 689 F.3d at 558.

102. See *Faculty Handbook Guide*, AMERICAN ASS'N U. PROFESSORS, www.aaup.org/our-programs/legal-program/faculty-handbooks-guide (last visited Dec. 3, 2019) (explaining that well-written faculty handbooks can provide a great deal of assistance to a faculty member defending tenure rights).

103. Flynn, *supra* note 28.

104. *Id.*

105. Flaherty, *supra* note 19; see also Gittleman, *supra* note 19 (explaining that the safety provided by tenure allows for intellectual enlightenment to flourish, rather than stagnate).

shocking in the audacity of its hostility to tenure.¹⁰⁶ As will be discussed below, in that case, a new president essentially called in individual faculty amounting to seventy-five percent of the total tenured faculty, told them he was eliminating their tenure, and asked them to either agree to this change, or be fired on the spot.¹⁰⁷ If they agreed to the change, presumably out of fear and confusion, he then required them to sign a non-disclosure agreement (NDA).¹⁰⁸ The propriety of using NDAs to cover up administrative behavior in non-profit institutions is very questionable and deserves an entire academic inquiry of its own.¹⁰⁹

A third and less obvious means of weakening tenure is of course to hire new academic personnel without tenure, otherwise known as the “separate faculty tracks” approach.¹¹⁰ This requires the college or university to invent new job titles that imply less than fully integrated academic roles for persons who are visitors, instructors, scholars in residence, etc.¹¹¹ While the position of “adjunct” is proper for a person with another outside career and a willingness to share knowledge on a course-by-course basis, it is utterly inappropriate, and corrosive to the academic enterprise, to take on large numbers of adjuncts as poorly paid, low-status employees who carry out the functions fully tenured and integrated professors ought to be carrying out.¹¹²

II. WHAT’S SO GREAT ABOUT TENURE?

A. *The Faculty at the Heart of the University: Companion Concepts*

Notwithstanding the claims of critics, tenure has always been about far more than job security, let alone the protection of those who seek to coast by with poor performance.¹¹³ Wide reading in the history and development of academic tenure reveals that legal and political struggles between scholars and authorities go back centuries, and that the idea of academic tenure—even if not its settled practice—is far from new.¹¹⁴ Despite frequent and recurring

106. Savage, *supra* note 41.

107. *Id.*

108. *Id.*

109. *Id.*

110. See Cummins, *supra* note 9 (showing how a professor was fired for tweets criticizing Israel’s war in Gaza before being able to start position).

111. See generally Benjamin, *supra* note 5, at 15.

112. See Jordan & Christie, *supra* note 77, at 70-72 (explaining that a funding scarcity leaves adjunct faculty vulnerable to dismissal and forces a cycle of limited work options).

113. See Adams, *supra* note 8, at 67 (showing that security is only a portion of what tenure does, while the reputation of a university relies on it as well); Schuman, *supra* note 12.

114. See Adams, *supra* note 8, at 71-72 (explaining that the very root of

skirmishes with established religious and political authorities, the notion that scholars must be free from outside interference would have been familiar to thinkers many years before the actual “system” of tenure was put into place.¹¹⁵ In other words, academic freedom predates contemporary understandings of “tenure” as a recognizable institution. In modern times, we must go one step further to argue that no society can be fully free and democratic without both academic freedom and tenure; professorial independence is that important.¹¹⁶

In its roots, the design of academic tenure is inextricably linked to the idea of the university—a place apart, where deeply reasoned conclusions rule and informed debate is the primary activity.¹¹⁷ Tenure has a profound connection with the concept of the unfettered gathering of specialized knowledge, and thus of human enlightenment.¹¹⁸ Whereas ordinary business is unavoidably aligned with self-interest and tainted alliances, academic life ideally exists for the sake of a larger social purpose—to speak truth to power, guided by values that exist apart from those that hold sway in the world of business.¹¹⁹ Just as the university existed to support creative action through the fostering of ideas, the faculty were meant to be the leaders in that process, unconfined by the need to gratify those in power. In that sense, the story of religious repression of academic freedom in the Middle Ages is scarcely

tenure’s origin is about protection, which has endured over centuries).

115. *Id.*

116. Joshua Silverstein & Robert Steinbuch, *Professors Fight to Save Free Speech on Campus and Academic Freedom in Arkansas*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (July 12, 2019), www.jamesgmartin.center/2019/07/professors-fight-to-save-free-speech-on-campus-and-academic-freedom-in-arkansas/. The importance of free speech among academics, the professorate and their students is the bedrock to an effective and rigorous academic program. *Id.* The curtailing of free speech in academia limits that potential for students to learn and grow and removes protections from professors that may not share the same beliefs of their deans or board members. *Id.* Tenure protects those faculty members who are facilitating more comprehensive learning through the exercise of free speech. *Id.*; see also George Leef, *A Lawsuit to Protect Academic Freedom in a Surprising State*, NAT’L REV. (July 12, 2019), www.nationalreview.com/corner/a-lawsuit-to-protect-academic-freedom-in-a-surprising-state/ (showing how the lack of protections for faculty prompted a lawsuit to protect tenure and the professorate).

117. *But see* Merkel, *supra* note 47, at 509 (presenting the idea that the enduring argument of function in academia affects how tenure is embraced).

118. See Jordan & Christie, *supra* note 77, at 70 (explaining that the ultimate purpose of tenure is thrown into question when economic value may not match with “enlightenment”); see also Shattuck, *supra* note 27 (considering in the context of Hungary, academic freedom is inherently tied to liberal democracy).

119. See Fernanda Zamudio-Suaréz, *Missouri Lawmaker Who Wants to Eliminate Tenure Says It’s ‘Un-American,’* CHRON. HIGHER EDUC. (Jan. 12, 2017), www.chronicle.com/article/Missouri-Lawmaker-Who-Wants-to/238886 (introducing the argument from a lawmaker that tenure leaves people “immune” from accountability).

different from the political firings of professors in late nineteenth century America.¹²⁰ In contemporary times, in the U.S. and elsewhere, there has been an attempt to undermine and dethrone the idea of free scholarly endeavor as a sacred mission, and it could happen that over the next ten or twenty years, tenure becomes a rare and unusual honor, as opposed to a mainstream academic right.¹²¹

Indeed, properly understood, faculty were historically seen as the only stakeholders qualified to direct university governance. While in recent times, trustees and administrators have sought to project an image of the university as run by competent and skeptical bosses, with academic faculty taking their marching orders from above, this is a complete perversion of the original idea of the university.¹²² While any university requires some degree of oversight and organization, faculty are hired specifically *for their knowledge*, knowledge which is assumed to grow and evolve over time under the right conditions. As we have increasingly emphasized the role of students as the consumers of the taught “product” of the university, this unique capacity of the faculty has been lost when translated into the modern, corporate-minded world.¹²³ As universities have become increasingly tuition-dependent and as tuition has risen, faculty members have come to be seen as “earners” within the university.¹²⁴ If their power to attract students is great enough, and if students are sufficiently entertained and impressed, the professors have earned their keep.¹²⁵

In addition, as financially strapped universities have emphasized their dedication to practical and relevant forms of knowledge, they have simultaneously devalued the importance of ideas and insights that exist independently and apart from immediate relevance to career ambitions of students.¹²⁶ As

120. Karran, *supra* note 11.

121. See Badagliacca, *supra* note 36, at 910 (asserting that the initial purpose of having a faculty pursuing scholarship was enlightenment); see also Matthews, *supra* note 82 (explaining further the importance of peer review, rather than administrative oppression).

122. Adams, *supra* note 8, at 71-73.

123. Giroux, *supra* note 6, at 430; Lieberwitz, *supra* note 7, at 301; LeVine, *supra* note 26.

124. Giroux, *supra* note 6, at 447-48.

125. See *History of Tenure*, HIGHER ED PROFESSOR (Apr. 23, 2018), higherprofessor.com/2018/04/23/history-of-tenure/ (discussing the history of tenure arising in twelfth or thirteenth century European universities and developing into what was known prior to World War I as “the German Model” of research focused academia with secured positions for faculty. Slowly, that model has been replaced with a model of corporate profit making that conflicts with the so-called “German Model.”).

126. See Deirdre Fernandes, *Tufts Professors Sue Over New Fund-Raising Requirements*, BOS. GLOBE (Dec. 12, 2019), www.bostonglobe.com/metro/2019/12/12/tufts-professors-sue-over-new-fund-raising-requirements/hJauSJjRn9ug

university education in the United States has become more expensive, it is noteworthy that the departments being eliminated first are almost always humanities (including history and literature) and languages, areas of study that are arguably the most significant in today's world.¹²⁷ It may be that the restoration of tenure's prestige and importance will require the restoration of a collective belief in the importance of ideas, and the need to build the university around ideas.¹²⁸ It cannot be taken for granted that most people appreciate the value and enduring importance of ideas, and it is unclear where this rediscovery might come from.

B. *Tenure in America—Its Often-Remarked Rise and Fall*

Tenure was first established in the United States on a formal basis after a series of high-profile incidents involving the sacking of outspoken professors at private universities.¹²⁹ The system of tenure took root in both private and public institutions and was to some extent an indicator of the quality and seriousness of a college or university. For many decades in the United States, few institutions of higher learning would have considered a no-tenure policy for its faculty.

While no-tenure institutions of higher learning have proliferated in recent years, at most American colleges and universities, tenure has been considered to be a vital part of the academic landscape.¹³⁰ Not only were faculty set free from the demands of state legislatures in public universities, but also from the control of wealthy sponsors of private colleges.¹³¹ The notion that those powerful enough to set up a college or university were also in a position to restrict the academic and political output of the

ALoJ4zz1zL/story.html (discussing Tufts Medical School, where tenured professors are potentially being forced out as a result of new requirements that professors raise specific funding amounts).

127. See Nico Savidge, *Tenure Shouldn't Protect Faculty Who Are 'No Longer Needed,' UW System President Says*, WISC. ST. J. (May 10, 2016), madison.com/wsj/news/local/education/university/tenure-shouldn-t-protect-faculty-who-are-no-longer-needed/article_fcabf1c7-4a84-5ed8-870e-1fe0f73f69d7.html (showing that a university president sees tenure as protecting people who are not pursuing scholarship, or being redundant); James C. Wetherbe, *It's Time for Tenure to Lose Tenure*, HARV. BUS. REV. (Mar. 13, 2013), hbr.org/2013/03/its-time-for-tenure-to-lose-te; see also Strauss, *supra* note 72 (describing the trend of seeing certain majors as more valuable than others in the humanities).

128. *History of Tenure*, *supra* note 125.

129. *Id.*

130. See generally William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"*, AM. ASS'N UNI. PROFESSORS BULL. 328, 330 (1971) (looking objectively at what tenure is supposed to be, and what it is in present use).

131. See Cummins, *supra* note 9 (explaining that tenure is no longer as protective vis a vis corporate influences, compared with earlier times).

faculty was roundly rejected by American society as a whole.¹³² High level (and highly paid) university administrators who are currently making a name for themselves by weakening tenure should consider the strong possibility that they are also irrevocably harming the quality and international reputation of American higher education.

1. *On the founding of the AAUP—its goals and the AAUP “mindset”*

The American Association of University Professors (“AAUP”) was created to assist in the protection of the American professoriate, and its foundational documents spelled out in clear prose the principled bases for tenure and academic freedom.¹³³ For many decades, the AAUP standards were often incorporated by reference into university faculty handbooks and other instruments; the AAUP view of things was accepted as relatively uncontroversial and its publications were generally granted *de facto* legal authority by colleges and universities.¹³⁴ It was not until the recent emphasis on business-based models of university organization that administrators and trustees began to banish reference to AAUP standards, in favor of a new, less faculty-friendly, approach.¹³⁵

Looking back, it is extraordinary to consider what the AAUP managed to achieve, especially given the strong personalities of the founders of America’s early private universities.¹³⁶ In the current political climate, it is almost unthinkable that a body like the AAUP would be established, and in turn, exert the kind of influence that the AAUP did beginning one hundred years ago. Though the AAUP came into being in reaction to the late nineteenth century treatment of certain academic personnel at colleges and universities that had been established by rich and powerful patrons across the United States, it doggedly continues to offer legal help and expert commentary wherever tenure rights are under threat.¹³⁷ In many ways, it is the failure of the American professoriate to think collectively that guarantees the continuing relevance of the AAUP.¹³⁸

Tenure was not an explicit feature of the earliest American universities, which were staffed by young men with professional

132. *Id.*

133. See *Protecting an Independent Faculty Voice*, *supra* note 49 (putting the professorate on notice of how lower courts interpret the right to faculty free speech).

134. *Id.*

135. *Id.*

136. *History of Tenure*, *supra* note 125.

137. *Protecting an Independent Faculty Voice*, *supra* note 49.

138. *Id.* Note that whenever there is a “raid” on tenure by an ambitious administration, the AAUP is always ready to investigate and assist with advice and analysis. *Id.*

ambitions, often with plans to enter the clergy, and who taught third-level students as a temporary or part time job.¹³⁹ It was expected that these academic employees would adhere to the generally understood religious and political beliefs dominant at the time, and in line with the ethos of the particular university in which they taught.¹⁴⁰ They were usually taken on under yearly contracts, and as academia was not yet seen as a stable career, the issue of permanency seemed to not arise at the time.¹⁴¹ In order for tenure to become an established element in higher education in the United States, certain historical transitions had to occur. The first of these was the professionalization of academia as a career path, a necessary precondition to considering professors as deserving of special deference.¹⁴²

Throughout the nineteenth century, and in particular after the Civil War, the proliferation of colleges and universities, both public and private, gave rise to the college professor as a recognized and prestigious career path—in the same way doctors and engineers were seen as professionals enjoying a certain elevated status in society.¹⁴³ This process of professionalization also led to curricular specialization and the development of high levels of academic expertise in various disciplines.¹⁴⁴ No longer were college and university professors mere generalists, waiting for their chance to enter the Church or other professions; rather, the university was the site of this new profession and the special role of the professor came to be broadly recognized.¹⁴⁵

Several high-profile firings of professors for their views are often mentioned as the catalysts for the creation of the AAUP, and the establishment of the intellectual “aura” of the academic profession.¹⁴⁶ Perhaps the most famous is the tale of Professor Ross at Stanford University, who was fired by Stanford’s founder for his anti-business views.¹⁴⁷ Whether implicitly or explicitly, this set up a clear conflict between the university founders, with their particular beliefs, and the independence of newly professionalized academic personnel. The resulting publicity led directly to the

139. See Dr. Arthur Gross-Schaefer et al., *Being Honest About Tenure in the United States: The Need for Tenure System Reform Within Institutions of Higher Education*, 3 INT’L J. SOC. STUD. 25, 26-27 (2015) (demonstrating that tenure’s history shows an evolution of intent to preserve knowledge safely among academics); see also *History of Tenure*, supra note 125 (establishing the chronology of the AAUP’s founding and how tenure has evolved during its existence).

140. Gross-Schaefer et al., supra note 139, at 26-27.

141. *Id.*

142. *Id.*

143. *History of Tenure*, supra note 125.

144. *Id.*

145. *Id.*

146. *Id.*

147. Hans-Joerg Tiede, “To Make Collective Action Possible”: *The Founding of the AAUP*, AAUP J. ACAD. FREEDOM 1, 9 (2014).

creation of the AAUP as an influential advocacy body.¹⁴⁸

In fact, the AAUP was created through the collaborative efforts of three professional bodies, the subject matter of which was prominent in higher education—the American Economic Association, the American Sociological Society, and the American Political Science Association.¹⁴⁹ These scholarly associations worked together to investigate the more notorious terminations of faculty, ostensibly because of their stated political views.¹⁵⁰ As the story is told, it makes perfect sense that this collaboration among professional bodies would lead to a new organization, one of whose functions was to look into allegations of unfair and politically motivated treatment of faculty.¹⁵¹

The first president of the AAUP was the famous scientist John Dewey, and from its very inception, the organization began to attract interest and members.¹⁵² This degree of early success is surely indicative of a pent-up demand for protection against capricious treatment by the founders of America's fast-proliferating colleges and universities. The academic idealism of the organization is reflected in its foundational documents, in particular the 1915 Declaration of Principles on Academic Freedom and Academic Tenure.¹⁵³ The 1915 Declaration addressed the need to maintain academic freedom not only by granting tenure to faculty, but also through systematic university support for the protection of academic freedom.¹⁵⁴ The further 1940 Statement by the AAUP was in part a re-affirmation of the 1915 statement supporting academic freedom and tenure, but also sought to promote public understanding of the value of these structures.¹⁵⁵ In the years since the original 1915 Declaration, American case law has approached the notion of academic freedom in terms of both free speech and academic integrity.¹⁵⁶

Conservatives hostile to a supposedly unaccountable professoriate have criticized tenure as providing a “job for life” whether deserved or not, but the AAUP standards did not, in fact, provide such broad protection.¹⁵⁷ Rather, the main contribution of the AAUP standards was the insistence that the tenured professor

148. *1915 Declaration*, *supra* note 1.

149. Tiede, *supra* note 147, at 9.

150. *Id.*

151. *Id.*

152. *Id.* at 16.

153. *1915 Declaration*, *supra* note 1.

154. *Id.*

155. *See also* Silverstein & Steinbuch, *supra* note 116 (fearing corporate influence and the potential removal of faculty).

156. *See* Lane v. Franks, 573 U.S. 228, 242 (2014) (asserting that faculty testimony during a trial is considered First Amendment speech); *see also* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (setting forth that speech made in relation to employment position is subject to managerial discipline).

157. Schuman, *supra* note 12.

should only be terminated *for just cause*, which was understood to include a *gross* failure to perform the basic duties of the tenured faculty member.¹⁵⁸ While insisting that the tenured professor should not be treated as an at-will employee, the AAUP was unequivocal in its view that tenured faculty nevertheless had to meet a certain standard of performance in order to enjoy the protection of tenure.¹⁵⁹

The AAUP standards certainly did not allow colleges and universities to terminate faculty for their political viewpoints, minor insubordination, or relatively insignificant failures to live up to performance standards. It would take something far more egregious to trigger the AAUP standard—which was unabashedly favorable towards the newly prestigious profession. Under the AAUP standards, faculty were seen as a cohort apart—not as corporate employees, employees at will, nor as employees on mere long-term contracts—but rather as appointees of the university, with special rights and status that recognized and honored the unique role of the academic personality and contribution within the wider society.¹⁶⁰

The aspect of the AAUP perspective that is perhaps most difficult for the public to grasp is that tenured faculty are assumed to want to carry out the university's mission. To that extent, faculty members have traditionally been treated as a separated self-policing or self-regulating group, subject mainly to their own sense of professional excellence and the spirit of academic inquiry.¹⁶¹ Within reasonable limits, exclusive of gross failures to live up to professional norms, the faculty were to be trusted as the keepers of the university's founding goals. Administrators who have made it their mission to weaken tenure have tried to create a counternarrative to this one, chipping away at the idea that professors could possibly be relied upon to behave faithfully to their own academic ideals, without the application of coercion from either the administration or the board of trustees.¹⁶²

A related problem was how the faculty would be treated in the event of institutional financial woes that might tempt the

158. *Id.*; see also Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL'Y REV. 387, 397 (1998) (describing how post-tenure review provides opportunities to protect and remove faculty for shortcomings).

159. See *Protecting an Independent Faculty Voice*, *supra* note 49 (explaining the AAUP examination of what position related speech means in the scope of job performance).

160. *Id.*; see Nadkarni, *supra* note 26 (arguing that free speech and academia is painted by government as dangerous to society).

161. See James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 167 (2000) (showing that the relationship tenured faculty have with administration is toxic and bleeds into student learning experiences).

162. *Id.*

administration and trustees to downsize in the name of fiscal management.¹⁶³ Here, too, the faculty enjoyed significant protection under the AAUP vision. While common sense dictated that universities would at times have to downsize or shift resources, the AAUP standards placed distinct procedural and reputational costs on the university for doing so and demanded that it not move to terminate faculty as an initial matter and without broad consultation and agreement.¹⁶⁴ Rather, the university was placed under an evidentiary burden and required to demonstrate that there was a genuine financial need, or “financial exigency” for proceeding with the faculty terminations.¹⁶⁵ That such a dire situation actually existed would have to be agreed to by representatives of the faculty.¹⁶⁶ It is obvious that no university administration is eager to have the world see the institution as under a financial cloud, and therefore, it would hesitate before actually declaring such a “financial exigency.” Central administrators have worked hard in recent years to change this earlier, pro-faculty equation, and to grant themselves wide latitude to make “business decisions” that could include the elimination of programs and, by extension, the elimination of faculty.¹⁶⁷ Allowing university employers to terminate professors in the name of efficiency was a kind of discretion decidedly not envisaged under the AAUP standards. Termination of faculty for financial reasons was not impossible, but another kind of “cost,” a reputational one, would be imposed on the institution.

It is likely that the widely-acknowledged quality of education in American colleges and universities has stemmed directly from the freedom of thought and expression enjoyed by professors.¹⁶⁸ Once undue burdens are placed on academic freedom, professional behavior turns in the direction of conforming to the restrictions, and the consequences are an intellectual outcome that has lost its unpredictability and its ultimate creativity.¹⁶⁹

163. Schuman, *supra* note 12.

164. *Id.*

165. See Lee Gardner, *Want to Kill Tenure? Be Careful What You Wish For*, CHRON. HIGHER ED. (June 18, 2018), www.chronicle.com/article/Want-to-Kill-Tenure-Be/243674 (arguing that the bulk of criticism of tenure is external, while tenure is already scarce in academia).

166. *Id.*

167. *Id.*

168. *But see* Merkel, *supra* note 47, at 521 (showing that the shift in hiring has emphasized practice-oriented teaching, rather than intellectualism).

169. *Id.*; see also Shattuck, *supra* note 27 (setting forth that academics in Hungary are no longer acting as intellectuals but as arms of the state for propaganda purposes); Hansen, *supra* note 44.

III. HOW THE ATTACK ON TENURE PROCEEDS: THE LOGIC OF AN UNRAVELING

A. *The Public University: A Case Study of the University of Wisconsin*

Over the past ten years, public universities in red states have engaged in anti-tenure warfare under the direction of Republican governors and legislatures. This phenomenon further bolsters the view that tenure is inherently political and, in the case of public universities, the impulse to weaken tenure is also political in nature. It should be asked why this is happening in red states particularly, and what exactly Republican state governments have in mind as they go after tenure rights. It is a long-standing complaint of right-wing politicians that professors are spoiled and excessively liberal as a group, and undeserving of the kind of “job for life” that most other people do not enjoy.¹⁷⁰ But is the problem that professors are “liberal,” or that they are deep thinkers, with access to facts and data that make them more inclined to be rational in their beliefs? As a nation becomes more inclined to rely on propaganda in its political debates, tolerance for reasoned discourse grows inevitably less.¹⁷¹

It is interesting to note that the anti-tenure negativity of red state politicians is rarely, if ever, aimed at groups such as police or fire unions.¹⁷² As with university tenure, public school teachers’ unions also experience this kind of negative attack.¹⁷³ Hostile politicians invoke the “job for life” meme as a way of enlisting opposition to tenure, by telling the public that they are paying for underworked professors in the form of inflated tuition costs.¹⁷⁴ The fact is that budget cuts targeting higher education are far more relevant to the out-of-pocket cost of tuition than is tenure.¹⁷⁵ In addition to public sector unions (including teachers’ unions), GOP-majority legislatures seem to believe that tenured professors represent a threat to their dominance of state politics, and also that students should not be learning as much in the fields of humanities, including history, civics and foreign languages.¹⁷⁶ In the case of the University of Wisconsin, the University of Iowa and other public institutions, legislators have pushed the concept that universities should be engaged more directly in job training, and that professors

170. Schuman, *supra* note 12.

171. Kaufman, *supra* note 21.

172. *See generally* Giroux, *supra* note 6, 454-55 (discussing the idea of anticorporate struggles and student protests).

173. *Id.*

174. *See* Kaufman, *supra* note 21 (arguing that Wisconsin public employees as a whole are losing protections).

175. *Id.*

176. *Id.*

should be subject to a regime of review that weakens, and in many cases, eliminates tenure.¹⁷⁷

It is no accident that red states have turned away from the more humanistic subjects, now preferring engineering and career-oriented training.¹⁷⁸ This can be presented to the public in two ways: one, as a way of counteracting supposed “poor performance” by professors, and two, by making university education both more affordable and more practically relevant, thus placating the public as to possible legislative motives.¹⁷⁹ As parents are increasingly concerned about the debt burden borne by their children, it is a fairly easy task to blame this on overpaid professors, as opposed to tax cuts given to corporations and the wealthy, leaving little for the state to provide for public education. This tragic misperception on the part of the public has left professors, as a group, exposed to popular wrath, a situation exploited to the maximum by politicians such as Wisconsin’s former governor, Scott Walker.¹⁸⁰

The University of Wisconsin has long been known as one of America’s premier research universities, a powerhouse of scholarship and intellectual inquiry in every conceivable subject. During the Vietnam War, Wisconsin found itself in the crosswinds, with frequent anti-war demonstrations participated in by a politically engaged student body.¹⁸¹ The state of Wisconsin was famous during that period for its liberal politics, tolerance, and notably for its impressive university. Over many decades, the UW-Madison campus has enjoyed a high level of respect among academics and students.¹⁸² However, the UW system experienced a significant loss in funding between 2011 and 2018, amounting to over 250 million dollars being cut.¹⁸³ As has also happened in other states, a Republican governor and friendly Republican legislature made it a priority to clip the wings of an independent faculty, by

177. See generally Merkel, *supra* note 47, at 535 (arguing that jobs as the end goal skews the role in academia); Claudette Riley, *Proposal Aims to Eliminate College Tenure, Require Disclosure of Degree Costs, Job Options*, SPRINGFIELD NEWS-LEADER (Jan. 19, 2017), www.news-leader.com/story/news/education/2017/01/19/proposal-aims-eliminate-college-tenure-require-disclosure-degree-costs-job-options/96506412/; Zamudio-Suaréz, *supra* note 119.

178. See Sandeen, *supra* note 72.

179. *Id.*

180. Flynn, *supra* note 28.

181. See Scott Bauer, *FBI Releases 1970 UW Bombing Documents*, MILWAUKEE J. SENTINEL (Apr. 6, 2011), archive.jsonline.com/news/wisconsin/119369749.html/ (discussing one of the most volatile periods in UW history where students bombed a building on campus in protest over the University’s cooperation with military research).

182. *University of Wisconsin, Madison*, FORBES, www.forbes.com/colleges/university-of-wisconsin-madison/ (last visited Oct. 14, 2019).

183. Luke Schaetzel, *Just How Much Has the UW System Lost Since 2011?*, OBSERVATORY (Nov. 9, 2016), observatory.journalism.wisc.edu/2016/11/09/just-how-much-has-the-uw-system-lost-since-2011/.

changing the terms and conditions of tenure.¹⁸⁴ As mentioned above, Scott Walker took on the special mission of destroying the public sector unions in Wisconsin, as well as weakening tenure for UW's world-renown faculty.¹⁸⁵ A college dropout himself, he could hardly be said to be an intellectual in any sense.¹⁸⁶ He knew precisely what he wanted to achieve, however, in ending the independence and free-thinking of the UW professoriate.¹⁸⁷

Walker did not choose the slash and burn route when it came to tenure, instead working with his appointed university regents in order to create what some called “fake tenure” or “tenure lite.”¹⁸⁸ In contrast to the high and difficult standard set by the AAUP for terminating faculty positions, Walker made it easier to eliminate positions following certain periodic review procedures, a favorite method of attacking faculty without seeming to do so, and making it difficult for faculty to defend themselves without appearing to be against review itself.¹⁸⁹

It was precisely that characteristic of faculty autonomy and faculty control that was lost in the regime Walker brought into being—the very result he sought.¹⁹⁰ Professors could be eliminated in situations where program review led to a decision to close or downsize the program, potentially tied to the perceived value of the degree or department. Walker repeatedly propped up his proposals and efforts to reshape the state university system as a way to cut costs, ensure accountability and guarantee graduates were better prepared for jobs.¹⁹¹ Other red states have followed Walker's lead, transforming universities from potential sources of social critique to career training grounds, with teaching personnel dependent on the goodwill of administrators and politicians.¹⁹² This process represents a severe loss to the nation itself.¹⁹³ It should come as no surprise that the University of Arkansas board of trustees has recently agreed to change the definition of “just cause” for purposes of terminating tenured faculty—now including not only the original four reasons for termination, but an astonishing eighteen, including not being sufficiently “collegial!”¹⁹⁴ The matter is being challenged

184. *Id.*

185. See Kaufman, *supra* note 21 (describing the actions of Scott Walker and the effects of actions aimed at public sector unions and university faculty).

186. *Id.*

187. See Flynn, *supra* note 28 (describing the expansion of reasons the university can rely on as just cause for firing tenured professors).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Alice Miranda Ollstein, *Backlash Against Scott Walker's War on the University of Wisconsin*, THINKPROGRESS (June 17, 2015), www.thinkprogress.org/backlash-against-scott-walkers-war-on-the-university-of-wisconsin-f8bb7d3a5e91/.

194. See generally Max Brantley, *Lawsuit Challenges University of Arkansas*

in court by tenured faculty, although with little or no hope that the policy change can be permanently resisted.¹⁹⁵

*B. A Private Law School with a Public Interest Image
Takes an Axe to Tenure*

Tenure is disappearing at a rapid pace in private institutions of higher education, both explicitly and in more discreet ways, as outlined above. The percentage of courses being taught by grossly underpaid adjunct faculty is well-known.¹⁹⁶ Tenured faculty are increasingly seen as the privileged minority, thus making it harder for them to gain sympathy when their tenure is under attack by central university administration. However, certain aggressive moves against faculty still have the power to startle and amaze the public, such as the recent move by Vermont Law School (“VLS”) to remove tenure protection for almost all faculty.¹⁹⁷

What makes this case particularly interesting is that it involves a law school, especially one best known as a powerhouse in environmental law.¹⁹⁸ Ironically, their new president was an adjunct professor at the school, but one who came from the corporate side of environmental law, not the environmental protection side.¹⁹⁹ Like many other law schools, VLS had suffered in recent years from declining enrollment, leading to reduced revenues, but it had been recently working its way back into financial solvency.²⁰⁰ With a relatively modest one million dollar deficit being run each year, the newly installed president took this as his opportunity to make a stealth run at the institution of tenure at VLS, essentially frightening tenured faculty into agreeing to work without tenure or resign.²⁰¹ As mentioned above, he was assisted in this stealth plan by accompanying non-disclosure agreements, which would keep the full scope of his actions from the public gaze.

Lost in the story was the irony that by eliminating the separate and very highly paid administrative positions (of which the president was one), and instead rotating these upper administration positions among faculty, the deficit could have been

Tenure Policy, ARK. TIMES (June 1, 2019), www.arktimes.com/arkansas-blog/2019/06/01/lawsuit-challenges-university-of-arkansas-tenure-policy (showing the expansion of reasons the university can use as just cause for firing tenured professors).

195. *Id.*

196. *See generally* Benjamin, *supra* note 5, at 14 (explaining the history of the effects of bureaucratic organization on the professorate).

197. Savage, *supra* note 41.

198. *Id.*

199. *Id.*

200. *Id.*

201. Cohen, *supra* note 86.

easily dealt with in that manner.²⁰² In the VLS example, the NDA guaranteed that there could be no public discussions by the affected persons, so that the administration would control the narrative completely.²⁰³ The fact that several of the president's own close associates retained tenure was a further irony. The president casually used the phrase "financial exigencies" (in the plural) in a way that distorted the original purpose of that concept, as set out in the relevant AAUP documents.²⁰⁴

As envisioned by the AAUP, financial exigency could only be used to eliminate tenured positions if the sense of urgency was broadly shared across the university, including by the faculty, and that the university would be required to make a declaration to that effect, for which there would inevitably be a reputational price.²⁰⁵ Instead, the VLS president treated this notion like a set of passing troubles that would, as in the business setting, allow him to terminate or weaken faculty positions at-will.²⁰⁶ The VLS case appeared to demonstrate a well thought through attempt to suppress faculty comment and dissent, preventing such faculty moves as adopting no confidence resolutions or otherwise undermining the credibility and authority of top administrators.²⁰⁷

It is instructive that the new president of VLS has publicly stated that his actions made the law school "[a] much better place than it was two months ago"—as if eliminating tenure as we have known it is a positive development.²⁰⁸ Leadership in other law schools remained silent. As argued above, faculties need to work together, and with a renewed sense of purpose, to save what is left of tenure, especially in light of tenure's importance in a free society. Because the cost of law school in particular is so enormous, and the prospects of making a large enough salary to justify the costs are so slim, Vermont's attack on tenure is feeding into an "I told you so" narrative, wherein the weakening of tenure is a logical extension of the supposed crisis in professional salaries relative to tuition.²⁰⁹ The events at Vermont Law School may well prove to be an audacious turning point in a long-running tragedy within higher education.²¹⁰

In the wake of these actions at VLS, the AAUP decided to issue a rare censure of the school.²¹¹ In unusually strong language, the

202. *Id.*

203. *Id.*

204. Savage, *supra* note 41.

205. See Euben, *supra* note 61 (showing that the post-tenure review trend is on the increase and often mandated, prompting AAUP guidance recommendations).

206. Cohen, *supra* note 86.

207. *Id.*

208. *Id.*; Amanda Reilly, *Vermont Law School Hires New Director*, E&E NEWS (Aug. 6, 2018), www.eenews.net/stories/1060092829.

209. Savage, *supra* note 41.

210. *Id.*

211. *Unacceptable Conditions for Academic Governance at Vermont Law*

AAUP charged the VLS leadership with failing to meet standards of conduct and protections for faculty in light of the financial constraints the school was facing.²¹² The report provided a chronology of developments at VLS, including cutting salaries and requiring faculty to sign non-disclosure agreements, while also showing that the administration had an unfavorable view of the faculty, comparing them to “children being ‘handled.’”²¹³ While the censure is strongly worded, it remains to be seen what the long-term effects of AAUP intervention on Vermont Law School might be.

C. Death by a Thousand Reviews: The At-Will Professoriate

It is not surprising that tenured professors at colleges and universities across the United States have felt themselves under siege in recent years. There are many ways in which a new regime in a university’s administration can weaken tenure and cause stress for the faculty without coming right out and eliminating tenure, which would be both more drastic but, in a sense, more honest. On the one hand, fewer faculty are being hired on the tenure track, and instead, colleges and universities are relying on adjunct or visiting faculty, working without any permanence to their situation or institutional status.²¹⁴ On the other hand, a principal means of weakening the professional confidence and autonomy of tenured professors is via the “review”: notably post-tenure review and program review. While not explicitly aimed at tenure, these techniques remove the traditional autonomy that is at the heart of the tenured faculty’s role.²¹⁵ These forms of supposed “accountability” imply that with more bureaucratized review, professors are more likely to “perform,” with the implied threat that failure to do so could potentially lead to termination. These reviews often include standards that are written *ex post* and applied retroactively, giving greater discretion to administrators/authors of mission statements and strategic plans.

School, AM. ASS’N U. PROFESSORS (May 8, 2019), www.aaup.org/news/unacceptable-conditions-academic-governance-vermont-law-school#.XVbiu5NKhao.

212. *Id.*

213. *Id.*

214. See Louis Carlet, *Are University Teachers in Japan Covered by the ‘Five-Year Rule?’*, JAPAN TIMES (July 30, 2017), www.japantimes.co.jp/community/2017/07/30/issues/university-teachers-japan-covered-five-year-rule (explaining that in Japan, contractual protections for professors are not available until 10 years into teaching); see also Jaschik, *supra* note 57 (showing that courts rule that applying corporate hierarchy standards to professorate does not match what exists on campus); June, *supra* note 75.

215. See Robbins, *supra* note 158, at 389 (presenting the idea that law school presents a complex intersection of the need for scholarship, practice preparation and longevity).

Further, these reviews are designed to reverse-engineer the university power structure that has made American universities the envy of the world. Traditionally led and directed by faculty members, with a *supporting role* for administration, the contemporary American university is relentlessly proceeding to relegate tenured faculty to the role of corporate employees—fine if they are doing a job considered worthy by the top administration but under threat of termination otherwise.²¹⁶ The “under the radar screen” approach built around “reviews” is convenient for administrators because it avoids calling attention to conflict with faculties over university policy. Professors are also put in a difficult position, as they are, in essence, required to resist being “reviewed” in order to defend traditional tenure.²¹⁷ However, it goes without saying that an intellectual whose work is reviewed and evaluated, in a manner that relates to job security, will perform in a very different way from someone who considers himself or herself to be self-directed and independent, an “appointee” rather than an employee.²¹⁸ Tenured professors have not traditionally been known as cooperative team players, nor should they be seen in this way. There is little room for intellectual rebellion in a culture of economic insecurity, and fear can never be a breeder of great ideas. At the end of the day, it is tenure, as conceived and promoted by the AAUP in the United States, that is the most reliable, and the most truly unpredictable guarantor of the success of the American university.

IV. TENURE AND POLITICAL FREEDOM

As a test of the significance of tenure, we need only consider what happens to university professors in countries where democratic freedoms are under attack.²¹⁹ It is almost inevitable that the government of the day will act to restrict the freedom of speech and action of these professors, terminating the employment of those who raise uncomfortable issues, or dare to resist the regime.²²⁰ Along with judges, university professors are often the principal targets of repressive regimes. Dissident professors are accused of such misapplied crimes as terrorism, incitement to rioting, threatening social peace, etc. Like journalists trying to instruct the public in the face of political repression, professors are often accused

216. *Id.* at 389-90; *see also* Flaherty, *supra* note 19 (showing that recent changes would allow administration, not faculty, to have final sign-off on post-tenure review reports).

217. Flaherty, *supra* note 19.

218. *But see* Savidge, *supra* note 55 (showing that Walker’s cutting of funds for universities is also causing the removal of tenure from within).

219. MacFarquhar, *supra* note 83; Hansen *supra* note 44; Shattuck, *supra* note 27.

220. *See* Shattuck, *supra* note 27 (existing prejudices against the West, liberalism, and elitism allowed Orban to attack universities systemically); *Hungary Passes Bill*, *supra* note 44; Lowen, *supra* note 47.

of leading youth astray, acting as a threat to public safety, and similar outlandish dangers.²²¹ By contrast, in countries where there is a reasonable degree of freedom to engage in civil society and democratic norms, it is far more likely that even troublesome professors have the opportunity to act as public intellectuals, sharing their views without the threat of termination or even arrest.²²² In some countries, virtually all higher education occurs in public institutions, making professors civil servants with full job security, as distinct from our notion of tenure per se. This would be the case in countries like Germany, for instance.²²³

But even in the West, nations prized for intellectual achievements and forward-looking discoveries struggle with the notion of academic freedom and its counterpart, academic tenure. European countries vary in their conceptions of tenure and academic structures.²²⁴ For example, the Netherlands sees professors as civil servants, but collective bargaining and contracting are carried out within the university.²²⁵ Britain relies on systems of indefinite contracts in lieu of legal tenure, and in Germany the system allows for variations in job security, depending on seniority and specific job title.²²⁶ It is important to note that the populist Hungarian government has attempted to rein in the renown European University in Budapest, allegedly for its support of “globalist” ideas and its alleged coddling of liberals opposed to the nationalist agenda of the current Hungarian regime.²²⁷ Turkey has purged its universities with a single-minded determination, placing every academic in a situation of extreme fear.²²⁸ In Russia, professors who spoke out against the Russian annexation of Crimea soon found their lives upended.²²⁹ The close link between academic and political freedom is not simple, but it is undeniably present.

V. CONCLUSION: WHY THE (GENUINELY) TENURED PROFESSOR MATTERS

This article has made the argument that a tenured professoriate is necessary to the functioning of democracy itself.

221. Lowen, *supra* note 47.

222. MacFarquhar, *supra* note 83.

223. Jürgen Enders, *Explainer: How Europe Does Academic Tenure*, CONVERSATION (June 29, 2015) theconversation.com/explainer-how-europe-does-academic-tenure-43362.

224. Enders, *supra* note 223; *see also* Carlet, *supra* note 214 (noting how Japan’s academic system is in a gray area of permanency for professors and academics and plans like that listed in the article are beneficial, but force many to consider other careers with less demands).

225. Enders, *supra* note 224.

226. *Id.*

227. Gorondi, *supra* note 44.

228. Lowen, *supra* note 47.

229. MacFarquhar, *supra* note 83.

Tenure is not a uniform institution; in different countries, its rigors differ widely. Yet it is characteristic of healthy democratic societies that university faculty are free to speak and criticize, and to live without undue interference in their intellectual work. It is in the universities that one can find the cutting-edge work, the unpopular and inconvenient critiques and the ideas that hold promise of change. In the United States, red state politicians may think that in diminishing academic tenure, they are making it more difficult for universities to act as “recruiting grounds” for the Democratic Party. However, the destruction of traditional tenure has dire effects that go well beyond any particular political perspective.

The free, unreviewed, unafraid tenured professor, who enjoys both job security and freedom of expression, is one symbol of a functioning democracy. The absence of this figure is a likely indicator that democracy is dead or dying. It is no accident that countries experiencing severe repression have seen many academics seek refuge abroad, even creating “universities in exile” to keep alive the particular national tradition of criticism and debate.²³⁰ Not every administrator who takes action to curb or rein in tenured professors is motivated by a specific political agenda, yet many are modelling their careers on corporate executives, moving from institution to institution and spreading the supposed values of efficiency and fiscal responsibility. This is easily sold to parents worried about exorbitant costs and student debt. What goes unremarked, however, is that the proliferation of contingent and adjunct faculty does nothing to restrain tuition costs, and the high “price” of the top administrators itself is rarely if ever questioned.

Of course, not all tenured faculty critique public policy. However, the vast majority at least provide a storehouse for publicly available knowledge; that is the essence of teaching. Where certain thoughts or books or theories are off limits because of government diktat, the quality of the knowledge is lessened. Not all tenured professors are heroes by any means, but the best professors are lightning rods for social, scientific and political progress. The rest do the unglamorous, routine work of guarding essential human knowledge and saving it for the next generation.

Those who have retained their academic tenure in this difficult academic market should take as one of their collective actions to defend the role and function of tenure in our larger American society and in the world; and resist the expenditure of resources on highly paid administrators who have little more to offer than their willingness to attack an institution that has served the American republic well for a hundred years, and the enlightened world for hundreds more.

230. Lowen, *supra* note 47.

