THE CHRONICLE OF HIGHER EDUC A ION

The Strange, Secret History of Tenure

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

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

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

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

Tenure may or may not survive this moment intact. But we shouldn't abandon or diminish tenure without first considering all of the reasons for retaining and even expanding it. Opponents and proponents of tenure alike have left understudied one

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

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

Significantly, these two scholars had also worked together to challenge the system of the elective judiciary that had come to dominate state courts since the mid-19th century, when a wave of Jacksonian democracy abolished state judges' lifetime tenure of office. In contrast to other legal progressives, whose outrage over the Supreme Court's

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

From this, Wigmore drew several conclusions. The first was a claim that persists today in the debate over extramural utterances. Just as judicial immunity protects judges from civil action only in their official capacity, and not in all domains of their life, so too “academic immunity” (as Wigmore called it) should protect professors only when they speak to matters related to the fields to which they’re appointed, and not in everything they say. For this reason, Wigmore suggested, professors should act like judges in another way as well: They should refrain from the most extreme forms of direct involvement in partisan politics (such as giving stump speeches or interviews in general newspapers). Because professors enjoy speech protections that ordinary citizens lack, in other words, it’s not unreasonable to by party loyalties, enthusiasms, antagonisms, and personal political ambitions — a position that seemed to vindicate Wigmore. But the also repeated the claim that “it is neither possible nor desirable to deprive a college professor of the political rights vouchsafed to every citizen.” This, basically, had been Lovejoy’s point.

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

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

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

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

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

But take a step back, and this lost confidence appears in a new light. Our present is characterized by worldwide democratic decline. The symptoms are everywhere:
.3 (c) (e) 0.1 (n) 0.5 (d) 0.8 (i) 0.3(s) 0.8 (r) 0.1 (e) 0.1 (g) 0.6 (a) -0.1 (r) 0.1(d) 0.

consideration for what Madison called the community’s “permanent and aggregate interests.” The authors of

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

This democratic theory of academic tenure is certainly compromised by the elitism tenure often entails. But notice how much the elitist concept of tenure depends on a prior elision in the way we today talk about tenure. In current parlance, tenure is either something an individual scholar "gets" or "has," or else a set of long-term commitments an institution attaches to a "track" or opinions of their colleagues and fellow citizens, most of whom also lack the job security they enjoy. If this is all there were to tenure, who would dare defend it?