

The Dogs that Did Not Bark: The Silence of the Legal Academy during World War II

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I. Introduction

In Summer, 1943, the *Cornell Law Quarterly* published an article that began with this comment on the Japanese internment:

On January 9, 1942, the President of the United States issued a statement: “Remember the Nazi technique: ‘pit race against race, religion against religion, prejudice against prejudice. Divide and conquer.’ We must not let that happen here.” Yet within ninety days after those words were spoken we had evacuated 112,000 persons of Japanese ancestry, of whom 79,000 were American citizens, from five states on the west coast.¹

This critique sounds a now familiar refrain—the grim irony that Americans would resort to Nazi-style policies in a misguided attempt to protect their homeland, even while fighting the Nazi war machine abroad. What is more surprising about the critique is its author—Harrop Freeman, who published the article during a two-year stint as a visiting, untenured, professor at William and Mary Law School. It was the first academic publication of his career.

Two more law professors publicly voiced criticism of the internment during the war. Edwin Borchard, a tenured professor at Yale Law School, signed on to the amicus briefs for two of the Supreme Court cases spawned

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1. Harrop A. Freeman, *Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law*, 28 *Cornell L. Q.* 414, 414-15 (1943).

by the internment.² More famously, Yale Law professor Eugene Rostow—newly tenured and recently returned from two years of government service—published a scholarly article denouncing the Supreme Court opinions in the internment cases in June, 1945, calling them and the internment program a “disaster” for civil liberties.³ By this time, however, Rostow’s critique was cold comfort for those interned; the government had rescinded the internment order the day before the decisions in *Korematsu v. United States* and *Ex Parte Endo*,⁴ and the internees were already in the process of leaving the camps.

Given the modern notoriety accorded to the internment program, the silence of legal scholars on the topic during World War II is remarkable. But a quick survey of some of the most controversial government policies during the war shows that few law professors commented critically—or even uncritically—about the government’s domestic policies during the war. For the most part, legal academics kept quiet about events such as the secret trial of the German saboteurs, the “Great Sedition Trial” of American fascists, and the federal government’s failure to protect Jehovah’s Witnesses from state and local persecution; they even kept quiet about massive economic programs such as

2. Brief of the American Civil Liberties Union, *Amicus Curiae*, *Korematsu v. United States*, 323 U.S. 214 (1944) (no. 22); Brief of the American Civil Liberties Union, *Amicus Curiae*, *Ex Parte Endo*, 323 U.S. 283 (1944) (no. 70). Thomas Raeburn White, the president of the American Law Institute and former dean of the law school at the University of Pennsylvania, also signed on to the ACLU’s amicus briefs.
3. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L. J.* 489 (1945). Also during the war, Nanette Dembitz, an assistant to Ed Ennis at the Department of Justice, published an article critical of the internment cases. Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 *Colum. L. Rev.* 175 (1945); Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 148 (2d ed., Southern Illinois Univ. Press 1999) (noting that Dembitz was Ennis’s assistant). Two professors of political science published on the topic in law journals, one critical and one supportive. See Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 *Harv. L. Rev.* 1253, 1301–03 (1942) (professor of political science at Stanford, supporting internment); Robert E. Cushman, *Some Constitutional Problems of Civil Liberty*, 23 *B.U. L. Rev.* 335, 362, 377–78 (1943) (professor of government at Cornell, criticizing internment). In addition, several law journals published notes and comments, one supportive of the internment, two critical, and two neutral reports on the *Hirabayashi* decision. See Roald Hogenson, *Note*, 11 *Geo. Wash. L. Rev.* 482, 504 (1943) (supportive); Richard F. Wolfson, *Legal Doctrine, War Power and Japanese Evacuation*, 32 *Ky. L. J.* 328 (1944) (critical); *Comment*, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, 51 *Yale L. J.* 1316, 1330–38 (1942) (critical); *Note*, 17 *Tul. L. Rev.* 652 (1943) (neutral summary of *Hirabayashi*); *Recent Decision*, 41 *Mich. L. Rev.* 522 (1943) (mostly neutral summary of *Hirabayashi*). Finally, three more law journals published articles by lawyers in the employment of the federal government justifying the internment. See Maurice Alexandre, *The Nisei—A Casualty of World War II*, 28 *Cornell L. Q.* 385 (1943) (lawyer for Office of Price Administration); W. A. Graham, *Martial Law in California*, 31 *Cal. L. Rev.* 6 (1942) (JAG officer); Joel F. Watson, *The Japanese Evacuation and Litigation Arising Therefrom*, 22 *Or. L. Rev.* 46 (1942) (JAG officer).
4. Opinions in both cases were released on Dec. 18, 1944. *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944). On Dec. 17, 1944, the War Department had announced the revocation of the exclusion orders that had resulted in the internment. *Public Proclamation No. 21*, 10 *Fed. Reg.* 53 (1945) (effective Jan. 2, 1945).

Lend-Lease or the Office of Price Administration. What explains this silence? And what explains the rare courage shown by the few scholars who chose to speak?

The silence of the legal academy during World War II is even more startling when compared with the outspoken response of legal scholars to the current war on terror. As Peter Margulies, Joseph Margulies, and Hope Metcalf demonstrate their articles in this issue, the legal academy has seized upon the issue, writing hundreds of law review articles about the war in scholarly journals, establishing national securities clinics at law schools, and participating in litigation involving the Guantánamo detainees, both at the level of assisting detainees in their hearings before military tribunals and in writing amicus briefs to the Supreme Court. Law professors also have employed popular media to trumpet their opinions, appearing as expert commentators on television, writing op-eds in newspapers, blogging, and testifying before Congress on topics such as the treatment of prisoners at Abu Ghraib and Guantánamo, or the National Security Agency's warrantless wiretap program. The contemporary legal academy seems to have embraced a very public role as government watchdog, and the academic and popular media have provided a willing outlet for the publication of academic opinions on the current war.

While there were fewer types of media available to scholars in the early 20th century, law professors were not hampered by a lack of media outlets willing to publish their opinions, or a culture of scholarly noninvolvement. In the decade prior to World War II, a number of law professors had functioned as public intellectuals—that is, had participated in the public debate on contemporary issues using the mass media. Most famously, Felix Frankfurter, while a Harvard Law School professor, served on the board of the *New Republic* and contributed numerous articles and letters to that magazine, *The Nation*, and the *New York Times*.⁵ Frankfurter wrote on topics ranging from presidential candidates to the League of Nations to judicial misconduct;⁶ he published a scathing critique of the behavior of the judge who presided over the Sacco and Vanzetti trial in *The Atlantic Monthly*.⁷ Other professors who regularly published comments on current events in popular media included Borchard, Dean Lloyd K. Garrison of the Wisconsin Law School, Alexander Sack of New York University, and Thomas Reed Powell and E. Merrick Dodd of Harvard Law School.⁸

5. See Clyde E. Jacobs, *Justice Frankfurter and Civil Liberties 1* (Univ. of California Publications in Political Science 1974) (noting that “no justice at the time of his appointments was as well known through both the popular press and the law journals for persistent but responsible criticism of the Court and its decisions”).
6. See, e.g., Felix Frankfurter, *The I.R.T. Receivership: Criticism of Judge Manton's Course by a Law Professor*, *N.Y. Times*, Oct. 14, 1932, at 18; Felix Frankfurter, *Why I Am for Smith*, *The New Republic*, Oct. 31, 1928, at 292; Felix Frankfurter, *Joining the League*, *The Nation*, May 16, 1923, at 571.
7. Felix Frankfurter, *The Case of Sacco and Vanzetti*, *The Atlantic Monthly* 409–32 (1927).
8. See, e.g., Edwin Borchard, *The Treaty with Italy; Broadening of Our Embargo on Shipments Viewed as a Violation*, *N.Y. Times*, Nov. 20, 1935, at 22; E. Merrick Dodd, Jr., *Full Aid to Russia Favored; Interpretation of Lease-Lend Law by Hoover Group Criticized*, *N.Y.*

Nor were scholarly journals averse to publishing critical articles on current (and sometimes controversial) topics. The *Columbia Law Review*, in the interwar period, published articles criticizing the abusive use of labor injunctions and recent efforts at reform, questioning the rationale of recent decisions declaring minimum wage laws unconstitutional, and vigorously defending the National Labor Relations Board.⁹ The *Michigan Law Review* published articles questioning the legal basis of America's failure to recognize the Soviet government, lamenting the current state of the law on congressional redistricting, and arguing for the use of sociological data in litigation against racial segregation in housing.¹⁰ The *American Journal of International Law*—with Borchard on its board of editors from 1924 onward—routinely published timely commentary on international events, including Borchard's harsh critiques of American foreign policy.¹¹

Finally, several professors participated in litigation involving civil rights issues prior to World War II. Walter Gellhorn and Herbert Wechsler, as young professors at Columbia Law School, signed on to the appellant's brief in *Herndon v. Lowry*, arguing that a state insurrection law should be declared unconstitutional.¹² Dean Garrison lent his prestige to amicus briefs in *Lovell v. Griffin* and *Minersville v. Gobitis*,¹³ while George Gardner and Zechariah Chafee, professors at Harvard, authored both amicus briefs filed on behalf of the

Times, Aug. 12, 1941, at 18; Lloyd K. Garrison, Little Fault Found in Labor Act; Wisconsin University Dean Believes Measure Should Have Further Trial Before Changes Are Made, N.Y. Times, April 9, 1939, at E8; Thomas Reed Powell, For "Ills" of the Court: Shall We Operate?, N.Y. Times, Apr. 18, 1937, at 3; Alexander Sack, *see infra* note 82.

9. Felix Frankfurter & Nathan Greene, Congressional Power over the Labor Injunction, 30 Colum. L. Rev. 385 (1931); Robert L. Hale, The Constitution and Minimum Wages, 36 Colum. L. Rev. 629 (1936); Walter Gellhorn & Seymour Linfield, Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure, 39 Colum. L. Rev. 339 (1939).
10. Edwin D. Dickinson, Recognition of Russia, 30 Mich. L. Rev. 181 (1931); Harold M. Bowman, Congressional Redistricting and the Constitution, 31 Mich. L. Rev. 149 (1932); Arthur T. Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 721 (1934).
11. *See, e.g.*, Edwin Borchard, Neutral Embargoes and Commercial Treaties, 30 Am. J. Int'l L. 501, 505 (1936) (criticizing the recently announced expansive interpretation of goods subject to embargo as "unwise and unsound").
12. Brief for the Appellant, *Herndon v. Lowry*, 101 U.S. 242 (1937) (nos. 474 & 475) (signed by Whitney North Seymour and W.A. Sutherland, Herbert T. Wechsler, Walter Gellhorn, and Carol King, of counsel). Wechsler and Gellhorn were also "of counsel" on the briefs in *Herndon v. Georgia*, 295 U.S. 441 (1934) (no. 665).
13. Brief and Motion on behalf of American Civil Liberties Union, as Amicus Curiae, *Lovell v. Griffin*, 303 U.S. 444 (1937) (no. 391) (arguing that a city ordinance requiring a permit for leafleting is unconstitutional); Brief for American Civil Liberties Union, Amicus Curiae, *Minersville v. Gobitis*, 310 U.S. 586 (1940) (no. 690); Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, *Minersville v. Gobitis*, 310 U.S. 586 (1940) (no. 690) (arguing that compulsory flag salutes for children in the public schools are unconstitutional).

Gobitis family.¹⁴ Frankfurter and Chafee also had filed amicus briefs on behalf of twenty aliens slated for deportation due to their political beliefs.¹⁵

Thus, a cursory glance at the culture of the legal academy in the interwar period¹⁶ shows there was room in the academy for professors who were outspoken critics of government, for professors who wanted to educate the public—or debate with others—about the legal issues of the day, and for professors who wanted to litigate to protect civil liberties. And so the culture of non-engagement with government policies during the war years seems like a departure from the relatively open discourse that prevailed within the legal academy in the interwar years.

This Article examines published commentary on the government's domestic policy during World War II by legal academics and explains their behavior at the time—specifically, their choices to speak or remain silent about government policy during war.

Part II argues that the legal academy's silence about government policies during World War II was caused by myriad historical factors. The most important of these may have been the economic strain of the war on law schools, which forced almost half of full-time law professors to take leaves of absence from their schools and find other employment—most often with the federal government, in the very departments that had ordered the internment of Japanese-Americans or brought indictments against American fascists. Second, law schools only recently had made a formal commitment to academic freedom and tenure when World War II began. The new, untested commitment of many law schools to these ideals reinforced the academy's perception of job insecurity. Third, civil rights jurisprudence—including the defensive use of the First Amendment—was in an early stage of development in the 1940s. There were some academics who strongly and publicly supported civil rights, but it is unclear that support for civil rights in the legal academy was especially strong or deep. Nor is it clear that many professors viewed themselves as government watchdogs or advocates who should participate in ground-breaking litigation. Even if academics were inclined to support civil rights causes, they might have been willing to temper their criticism for the sake of supporting the war effort; after all, World War II was a war against fascism and, thus, was supported by the very groups who championed civil rights.

Part III focuses on the few scholars who spoke out during the war: one who lost his tenured position after commenting favorably about America's alliance with Soviet Russia, and others who wrote about or worked against various violations of civil liberties that took place during World War II—the

14. Brief for American Civil Liberties Union, *Amicus Curiae, Minersville v. Gobitis*, 310 U.S. 586 (1940) (no. 690); Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, *Minersville v. Gobitis*, 310 U.S. 586 (1940) (no. 690); *see infra* text accompanying notes 159–162.

15. *Colyer v. Skeffington*, 265 F. 17 (D.C. Mass. 1920).

16. A more thorough analysis is outside the scope of this paper.

internment of Japanese-Americans, the sedition trial of the American Nazis, and the persecution of Jehovah's Witnesses. Part III also examines how and why these scholars participated in or commented upon current events, and the institutional responses and consequences of their involvement.

If the tone of the article seems critical of the legal academy in places, I want to emphasize my awareness that the circumstances of World War II imposed grave hardships on civil society. As noted by historians, when the existence of the country is endangered, and hostile nations are killing "our boys," military victory becomes a priority to which other social goals often bend.¹⁷ The universal draft took a dramatic financial toll on universities; enrollment diminished, and with it, the money to pay faculty to conduct classes. It made sense for law professors to seek war-time employment in the federal government: They were in the business of training graduates to become public servants, and were themselves often experts in public agencies and administration who already advised the government on policy. Thus, the departure of many professors for service to the state during war was not simply a matter of economic necessity; it also was a logical result of their expertise and training and an enactment (instantiation) of their exhortations to their students.

But the war also forced law professors to choose whether to give up their critical independence—the newly adopted notion of academic freedom that may have seemed like a peace time luxury. Most professors no doubt chose to subsume their qualms—or even their opinions—about war-time policies to their sincerely held desire for a speedy and victorious outcome to the war. And given the overwhelming social support for the war, this may not have felt like a choice. Some, however, took the remarkable step of maintaining their voice during the war. This Article is about those voices.

II. Historical Context

A. Institutions Under Economic Pressure

The most important reason for the silence of the legal academy during World War II was probably the economic fragility of law schools and the high percentage of legal scholars who found employ with the government that they might otherwise have criticized. The Selective Service Act of 1941 made all men between the ages of 18 and 45 liable for military service. The effect on law school enrollments—and the finances of law schools—was devastating. In 1940, the 95 member schools of the Association of American Law Schools (AALS)

17. See Letter from William E. Leuchtenberg to Sarah H. Ludington (Jan. 10, 2009) (noting that a likely reason for law professors to remain silent was that "large numbers of the young were being killed by Japanese and by the armies of the European fascists."); Carol S. Gruber, *Mars and Minerva: World War I and the Uses of Higher Learning in America* 5 (Louisiana State Univ. Press 1975) (discussing support among academics for World War I).

reported enrolling 18,011 students in total. By 1942, that number was down to 6,227, and by 1943, enrollment reached its nadir, at 3,663—a drop of 80 percent from 1940.¹⁸

The schools coped with tumbling enrollments in various ways. Six law schools became inactive; Duke and Wake Forest combined their law schools;¹⁹ many schools enrolled proportionally more women.²⁰ The most common financial strategy was for schools to put full-time professors on leave so that they could fulfill their military obligation or find employment elsewhere until the war's end or when a rebound in enrollment would allow schools to rehire them.

In 1943, the AALS published statistics on how many professors remained employed by the member schools. Before the war, AALS member schools reported employing 715 full- and 394 part-time faculty. By 1943, the schools reported employing 367 full- and 229 part-time faculty—barely more than half of the numbers employed before the war.²¹ A survey of member schools revealed that, of the 320 faculty listed as being on a “leave of absence,” 257 of them—80 percent—had taken a job with a federal paycheck. A good number of these professors were on active duty in the armed forces. Others took positions in war-related agencies, such as the Office of Price Administration, the Lend-Lease Administration, or the Office of Economic Warfare. Still others worked for federal agencies such as the Department of Justice or the Federal Bureau of Investigation.²²

18. Statistical Information on Enrollment, 1944 AALS Proc., 105 (1944).

19. Loyola University of Chicago, Mercer, St. Louis University, Santa Clara, Stetson, and Wyoming were inactive. Statistical Information on Faculties, Faculty Members on Duty in Member Schools, 1943 AALS Proc. 79–80 (1943).

20. The total number of female students did not increase significantly. In 1940, 716 women were enrolled; in 1942, 769; in 1943, 814. Because of the decrease in male students, however, women made up a greater proportion of the total student population: in 1940, 4 percent; in 1942, 12 percent; in 1943, 22 percent. Statistical Information on Enrollment, *supra* note 18, at 105.

21. Statistical Information on Faculties, *supra* note 19. The year 1943 was the nadir of employment and enrollment for law schools. In 1944, enrollment began to climb again as veterans returning from the war enrolled.

22. Law professors were in such demand by the federal government that a law school in the position to hire faculty found it difficult to find qualified candidates. James Miller, the dean of Faculty at William and Mary, discovered an “unexpected and very grave manpower shortage” when he was searching for a law professor in the fall of 1942: “Nearly everybody who was qualified for the temporary position at William and Mary was secure in his own position in a law school or had accepted a lucrative appointment in Washington or in some regional P.P.A. office or had joined the armed forces.” This shortage forced William and Mary to consider the candidacy of Harrop Freeman, who was qualified but had never previously taught, and had the political disadvantage of being a conscientious objector. Letter from James Wilkinson Miller, Dean of Faculty, to J. Gordon Bohannon, Rector of the Board of Visitors (Oct. 2, 1944); Facts Concerning Professor Harrop Freeman and Dr. Roderick Firth: A Summary of the Statement made by Dean James Wilkinson Miller to the Special Committee of the Board on June 4, 1944; *see infra* text accompanying notes 126–135.

Of the 367 faculty who remained as full-time employees of law schools, 93, or 25 percent, reported also working for a federal agency, such as the local selective service board. For example, seven of Columbia's fifteen full-time faculty reported also working for various federal entities. The additional employment of these full-time faculty may have allowed the school to reduce the professors' salaries, easing the school's financial burden.

The high number of law professors who found employment with the federal government during the war seems to have had a profound effect on their inclination to comment critically on government policies, and it should be clear why this would be so for those in active military service or federal employ. First, as public employees, the lawyers had no recourse to a First Amendment defense if fired for criticizing their employer.²³ Second, such criticism might have been viewed as a breach of the duty of loyalty, and thus a breach of a lawyer's ethical duties to his client. Herbert Wechsler, on leave from his position at Columbia Law School, worked as an assistant attorney general during World War II and helped write the government's brief in *Korematsu*. Wechsler later admitted that he had been "deeply disturbed" by the evacuation but at the time had "put aside his personal feelings and performed his duty as a lawyer."²⁴ While this comment has been criticized for being self-serving,²⁵ it illustrates that the duty of loyalty would have functioned as a powerful inhibitor to dissent for academics temporarily or even partly employed by the federal government.²⁶

Other factors increased the pressure on public employees not to criticize the government. The Dies Committee was still active during World War II, and in the early years of the war, it pressured the government into investigating thousands of federal employees for previous affiliations with left-leaning groups.²⁷ At the end of the investigation, a congressional committee found three federal employees—two of them former academics serving in government positions²⁸—to be subversive and unfit for federal employment. Over the

23. See *infra* text accompanying notes 62–65.

24. Peter Irons, *Justice at War: The Story of Japanese-American Internment Cases* 357–58 (Univ. of California Press 1993).

25. See, e.g., Malick W. Ghachem & Daniel Gordon, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 *Suffolk U. L. Rev.* 333, 359–60 (2007).

26. Other government employees were not as complicit as Wechsler. Edward Ennis, the director of the Alien Enemy Control Unit and the person in charge of the internment, parole, and repatriation of enemy aliens, also was deeply opposed to the internment of Japanese-Americans. He reputedly coached the ACLU on how to argue internment cases before the Supreme Court. Walker, *supra* note 3, at 146–47. His assistant, Nanette Dembitz, published a long article critical of the internment cases in 1945. Dembitz, *supra* note 3.

27. Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to 1976* 277–79 (Univ. of Illinois Press 2001). The Hatch Act prohibited the expenditure of federal funds on the salaries of anyone who had advocated the violent overthrow of government, so public employees who had previously been members of the Communist Party could lose their jobs.

28. Goodwin Watson had been a professor of psychology at Columbia University; Robert Morss Lovett had been a professor of literature at the University of Chicago.

objection of the agencies who employed them, Congress passed a law cutting off the salaries of the employees.²⁹ Furthermore, the Civil Service Commission actively investigated prospective employees for “loyalty” and failed to certify 1,300 applicants for jobs on these grounds during the war period.³⁰

Several academics who took temporary war-related positions with the government published articles explaining, defending, or promoting the agency or program that employed them. Dean Wayne L. Morse of the Oregon Law School took a leave of absence in 1942 to serve as a public representative on the National War Labor Board. Later that year, Morse published a long law review article entitled “The National War Labor Board, its Powers and Duties,” that justified the Board as a valid exercise of executive power during war time, explained and lauded its “democratic” procedures, and surveyed and defended its various decisions.³¹ Similarly, Eugene Rostow, while on leave from Yale and working for the State Department and the Lend-Lease Administration, published an article explaining how the lend-lease program served two beneficial economic purposes.³²

Meanwhile Dean Landis of the Harvard Law School, in one of his numerous appointments under Roosevelt, became the director of the regional and later the national Office of Civilian Defense (OCD).³³ Landis—an expert in administrative law and the architect of the Securities and Exchange Commission—began cheerleading for civilian morale and mobilization, publishing three articles in the *New York Times* justifying the frequency of air raid drills and extolling the “total mobilization” of the American people.³⁴ In 1941, he published an article on civilian morale in the *American Journal of Sociology*, arguing (among other things) that “Dissenters of every political or doctrinal persuasion must be reminded that there is a time for debate and a time for united action, and that full collaboration with other nations for the purpose of securing the defeat of Nazi Germany is now a public policy which

29. The U.S. Supreme Court later invalidated the act as an unconstitutional bill of attainder and awarded the men back pay. *U.S. v. Lovett*, 328 U.S. 303 (1946).

30. Goldstein, *supra* note 27, at 278 & n.186.

31. *See generally* Wayne L. Morse, *The National War Labor Board, its Powers and Duties*, *Or. L. Rev.* 1, 1-45 (1942). Morse also defended the Board in the *Los Angeles Times*: Wayne L. Morse, *Letters to The Times—In Which Dean Morse Replies*, *L.A. Times*, July 27, 1942, at A4.

32. Eugene V. Rostow, *Two Aspects of Lend-Lease Economics*, 33 *Am. Econ. Rev.* 377, 377-81 (1943).

33. Landis was appointed regional director in 1941 and national director in 1942, requiring him to take a leave of absence from Harvard. *AALS Directory of Law Teachers*, 1942-43 117.

34. James M. Landis, *Civilian Defense Necessary; National Director Explains Need for Frequent Air Raid Drills*, *N.Y. Times*, Apr. 21, 1943, at 21; James M. Landis, *Letter—Air Raid Signals Approved; Conditions Here Held To Make Present System Appropriate*, *N.Y. Times*, May 22, 1943, at 12; James M. Landis, *Two Years of OCD; Civilian Defense, says the director, has come to mean the total mobilization of the people*, *N.Y. Times*, May 30, 1943, at 10.

it is the duty of every American citizen to support.”³⁵ This position may have seemed incongruous from a man who, two years earlier, had been appointed to investigate the deportation of Harry Bridges, and—in the teeth of political pressure from the Dies Committee—had submitted a report absolving Bridges of any communist affiliation.³⁶ On the other hand, Landis was not alone in believing that free speech and dissent were peace time luxuries to be set aside for the sake of winning the war.³⁷

The authorship of law review articles during the war also reflects the paucity of law professors within the academy. Law reviews continued publishing commentary on domestic policy, but the articles mostly were written by practicing attorneys or authors outside the legal academy. For example, the *California Law Review* published five articles on martial law in the early years of the war, written by the attorney general of Hawaii and two colonels.³⁸ The only professor to contribute an article wrote a comparative historical analysis, contrasting the French model of martial law with the harsher Anglo-American model.³⁹ The *Cornell Law Quarterly* published numerous articles on war policy, on topics such as war-time price controls, federal emergency taxation, the powers of the alien property custodian, and the trial of the Nazi saboteurs. Almost without exception, these timely pieces were written by practicing attorneys or professors in fields other than law.⁴⁰ Whether professors were too overwhelmed by their teaching duties to write, or deliberately sticking to esoteric topics, or absent from the profession and thus from the compulsion to publish, is impossible to tell.

In sum, while many factors contributed to a climate hostile to speech critical of the government, the most important may have been the war-time economics that had depleted by half the ranks of legal academics who claimed full-time jobs in the academy.

35. James M. Landis, *Morale and Civilian Defense*, 47 *Am. J. Sociology* 331, 339 (1941).
36. Richard W. Steele, *Free Speech in the Good War* 101-02 (Palgrave Macmillan 1999); Landis Absolves Bridges of Charge of Red Affiliation, *N.Y. Times*, Dec. 30, 1939, at 1.
37. See *infra* text accompanying notes 68-69.
38. Garner Anthony, *Martial Law, Military Government, and the Writ of Habeas Corpus in Hawaii*, 31 *Cal. L. Rev.* 477 (1943) (Attorney General, territory of Hawaii); Col. W.A. Graham, *Martial Law in California*, 31 *Cal. L. Rev.* 6 (1942) (Judge Advocate, U.S. Army, retired); Garner Anthony, *Martial Law in Hawaii*, 30 *Cal. L. Rev.* 371 (1942) (written while Anthony was in private practice); Archibald King, *Legality of Martial Law in Hawaii*, 30 *Cal. L. Rev.* 599 (1942) (Colonel, Judge Advocate General's Section, U.S. Army).
39. Max Radin, *Martial Law and the State of Seige*, 30 *Cal. L. Rev.* 634 (1942).
40. See, e.g., John Foster Dulles, *The Vesting Powers of the Alien Property Custodian*, 28 *Cornell L.Q.* 245 (1943) (practicing attorney); Robert E. Cushman, *Ex Parte Quirin et al., The Nazi Saboteur Case*, 28 *Cornell L.Q.* 54 (1942) (professor of government); Randolph E. Paul, *The Emergency Job of Federal Taxation*, 27 *Cornell L.Q.* 3 (1941) (practicing attorney); Paul F. Hannah, *Some Aspects of Price Control in Wartime*, 27 *Cornell L.Q.* 21 (1941) (practicing attorney). The exception was Freeman's article about the internment, *supra* note 1.

B. Insecure Tenure

Reinforcing the climate of job insecurity, law schools had only recently committed themselves to the ideals of academic freedom and tenure. In 1940—one year before the Japanese bombed Pearl Harbor—the AALS for the first time adopted a statement on academic freedom and tenure. Previously, the articles of the AALS contained no statement on either subject.

It was not until 1934 that the AALS (founded in 1900) formed a Committee on Tenure to consider adopting a formal position on tenure.⁴¹ The committee initially recommended making no changes to the AALS articles, and relying instead on the general requirement in Article Six, Section Nine that member schools must conduct themselves in accordance with “sound educational policy,” which presumably included a commitment to academic freedom.⁴² The AALS members rejected this suggestion.

The Committee on Tenure went back to work and in 1940 recommended that the AALS adopt, with minor amendments, the most current statement on academic freedom and tenure of the American Association of University Professors (AAUP).⁴³ The AALS adopted the committee’s report, with some debate over whether the principles in the statement on academic freedom and tenure would be mandatory or advisory for member schools. The following year, the AALS adopted an interpretation of Article Six, Section Nine that clarified that failure to uphold the principles of academic freedom and tenure could result in exclusion from the association.⁴⁴

Because membership in the AALS was now conditioned on upholding the principles of the 1940 statement, the AALS effectively committed itself to investigating schools that violated the principles of academic freedom and tenure. Law professors who were dismissed from their jobs in violation of the statement could now appeal to the AALS, which would investigate and attempt to mediate the dispute.⁴⁵ As a practical matter, however, the AALS had little leverage over the schools, and short of publishing the results of its investigation or revoking membership for the school, could hope to do little more than negotiate a better severance package for the departing faculty.⁴⁶

41. AALS Proceedings 231 (1940).

42. AALS Proceedings 137, 233–36 (1940).

43. *Id.* The AALS adopted a draft version of what later became the 1940 statement. The most significant difference between the draft adopted by the AALS, and the final statement adopted by the AAUP, was a probationary period of seven rather than six years. The AALS changed its tenure period to match the one in the final AAUP statement in 1941. Report of the Committee on Tenure, AALS Proceedings 195–97 (1946).

44. Association Standards as to Tenure, AALS Proceedings 40–44 (1941); Report of the Committee on Tenure, AALS Proceedings 297–99 (1941).

45. *See* Report of the Committee on Tenure, AALS Proceedings 130–31 (1942) (noting that the work of the Committee on Tenure was now primarily one of answering broad policy questions about tenure and investigating reported abuses); AALS Proceedings 91 (1941) (same).

46. *See, e.g.*, Letter from Professor Everett Fraser, President, AALS, to Professor Erwin N.

Unlike the AALS, the AAUP had overtly committed itself to the principles of academic freedom from its founding in 1915. The AAUP's 1915 statement on academic freedom premised the need for academic freedom on the moral duty of scholars to seek and disseminate truth for the common good—rather than for the benefit of the boards of trustees.⁴⁷ The innovation of the 1940 statement was to require member schools to adopt a system of tenure after a probationary period.

The 1940 statement begins with the assertion that academic freedom—freedom in both teaching and research—is essential to the mission of higher education, which is the “the free search for truth and its free exposition.” It further asserts that tenure is a means for achieving the end of academic freedom:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.⁴⁸

The statement further provided that, after a probationary period not to exceed seven years, professors would have “permanent or continuous tenure” and could be terminated only for “adequate cause...or under extraordinary circumstances because of financial exigencies.”⁴⁹ In other words, the 1940 statement asserted that any professor who had been teaching full time for seven years held a tenured position could be fired only for misconduct; it also provided that teachers should have absolute freedom in their teaching, in their research, and in their speech as citizens—i.e., speech critical of the government.

The 1940 statement was weaker than the one in effect today because of a crucial ambiguity that resulted from a compromise between the AAUP and the American Association of Colleges (which represents university

Griswold (Nov. 9, 1945) (opining that “the principles of tenure are principles and not contractual rights,” and that the “principles of tenure are respected by universities, not because of any contractual obligation, but because of the censure that may result from disregard of them”).

47. Matthew W. Finkin & Robert C. Post, *For the Common Good: Principles of American Academic Freedom* 33–38 (Yale Univ. Press 2009); Sheila Slaughter, *The Danger Zone: Academic Freedom and Civil Liberties*, 448 *Annals Am. Acad. Pol. & Soc. Sci.* 48, 48–49 (1980).

48. 1940 Statement of Principles on Academic Freedom and Tenure, American Association of University Professors, *available at* <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm> (hereafter AAUP 1940 Statement).

49. *Id.*

administrators), which negotiated with the AAUP to produce the statement.⁵⁰ The 1940 statement cautions that professors need to be mindful of their “special position” in the community when speaking as citizens:

As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.⁵¹

The 1940 statement thus asks professors to exercise self-restraint (a.k.a. self-censorship) when speaking publicly on controversial issues.⁵²

Despite issuing “strong” statements on academic freedom and tenure (strong for the times), the AAUP had a spotty record in actually condemning schools that violated the principles of academic freedom prior to World War II. During World War I, the AAUP had strongly supported the war and essentially forbade professors from speaking out against it or encouraging anyone to resist service.⁵³ At least twenty professors lost their jobs for opposing the war; the AAUP did not come to their defense.⁵⁴ Nor was the AAUP active in defending professors during the Great Depression. In 1932, for example, Leo Gallagher was forced to resign his faculty position at Southwestern University Law School for defending the “Mooney Runners.” The AAUP did not come to Gallagher’s defense.⁵⁵

In sum, on the cusp of World War II, the faculty at an AALS member school would not have had encouraging precedent from the AAUP when considering how well the newly adopted statement of academic freedom and tenure would actually protect their jobs in case of controversy. And they would

50. Finkin & Post, *supra* note 47, at 47-48; Slaughter, *supra* note 47, at 56-57 (arguing that professors traded their civil liberties for tenure in the 1940 statement).

51. AAUP 1940 Statement, *supra* note 48.

52. William Van Alstyne has argued that the standard of accuracy apparently expressed in the 1940 Statement is “substantially more inhibiting of a faculty member’s freedom of speech than any standard that the government is [currently] constitutionally privileged to impose... [on]...public employees.” Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 *Annals Am. Acad. Pol. & Soc. Sci.* 140, 155 (1972). The AAUP did not reinterpret this part of the 1940 Statement until 1964, when it issued a report stating that “a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his position.” *Id.* (quoting Committee A Statement on Extramural Utterances (1964)).

53. Slaughter, *supra* note 47, at 52; *see also* Gruber, *supra* note 17, at 81-82 (noting the enthusiasm of most American professors for the war) and 165-66 (describing the AAUP’s official retreat from the 1915 statement on academic freedom at the beginning of World War I).

54. Slaughter, *supra* note 47, at 53.

55. Slaughter, *supra* note 47, at 55. Tom Mooney was a labor leader who was convicted (controversially) of planning the San Francisco Preparedness Day bombing of 1916. The “Mooney Runners” were students who disrupted an event at the 1932 Olympics in Los Angeles by running around the track wearing signs that read “FREE TOM MOONEY.”

have had no precedent whatsoever from the AALS.⁵⁶ The uncertain state of academic freedom and tenure, combined with the financially precarious state of law schools during the war, would have reinforced a professor's perception of job insecurity. Under such circumstances, a professor would hardly need encouragement to "exercise self restraint" before making controversial public statements about government policy.

C. Intellectual Flux and Emerging Legal Doctrines

Another factor that contributed to the silence of legal scholars was the inchoate state of First Amendment and civil rights jurisprudence in the early 1940s. The period immediately preceding World War II was a time of extraordinary doctrinal and intellectual flux, particularly pertaining to the field that is now known as civil rights. The legal doctrines that have come to protect civil liberties still were emerging in the 1930s and 40s.⁵⁷ Prior to 1937, when the Supreme Court definitively rang the death knell of substantive due process,⁵⁸ the concept of civil liberties was, as often as not, associated with conservatism and the staunch protection of contract and private property. The Court had hinted in 1938 that it would turn its attention to issues of civil liberties and the protection of "discrete and insular minorities,"⁵⁹ but at the beginning of World War II, the doctrinal foundations for the legal protection of civil liberties were still uncertain.⁶⁰ In 1940, there was no such thing as a civil rights "field" of practice or area of study;⁶¹ consequently, it is not at all clear that a sector of

56. The AALS did not hold annual meetings during World War I, and, in any event, did not have a stated position on academic freedom and tenure at this time. Its Committee on Tenure did not actually investigate any tenure cases until 1939. AALS Proceedings 138-42 (1939) (describing a joint investigation of the AALS and the AAUP into the dismissal of three law professors at Stetson University).
57. See generally Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *Duke L.J.* 1609 (2001) (tracing the development of modern doctrines of civil rights from 1939-54).
58. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
59. *U.S. v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).
60. Goluboff, *supra* note 57, at 1612, 1630-34. The ACLU, founded in 1920 in response to the political repressions of World War I, had actively litigated civil rights issues between the wars, but with only limited success. Walker, *supra* note 3, at 16-26; Paul L. Murphy, *The Constitution in Crisis Times 1918-1969* 69-71 (HarperCollins College Div. 1972). Ironically, the U.S. Supreme Court definitively announced its standard of heightened scrutiny for laws involving racial discrimination in the *Korematsu* opinion in 1944. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).
61. Goluboff, *supra* note 57, at 1612 ("In fact, at the time, 'civil rights' did not refer to a unified, coherent category; the content of the term was open, changing, and contradictory, carrying resonances of the past as well as of several possible contending futures."); Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 154 n.35 (W. W. Norton & Co. 1979) (noting that the term "civil liberties" came into use just prior to World War I); *but see* *Civil Liberties—A Field of Law*, 1 *Bill Rts. Rev.* 7 (1940) (describing civil rights as a

the legal academy—or even the bar—had set itself up to be watchdogs of the government or eternally vigilant for the suppression of civil liberties.

Significantly, First Amendment “rights” as we know them now also were in their doctrinal infancy at the beginning of World War II; this had two important consequences for law professors. First, as a practical matter, a professor at a public university who was fired based on his speech had no legal recourse to the First Amendment.⁶² Under the then-prevailing doctrine, a citizen surrendered his right of free speech when he entered into an employment relationship with the government.⁶³ The Supreme Court began rolling back this doctrine in the 1950s,⁶⁴ but the first successful case of a public school teacher suing his employer for firing him in violation of his First Amendment rights did not occur until 1968.⁶⁵ Thus, recorded cases of tenure disputes from the 1940s tend to concern contractual disputes—whether a school violated the terms of its contract with a professor, or whether the school correctly followed its own regulations and procedures for dismissing the professor.⁶⁶ Not many dismissals made their way into the courts, and, in those that did, the underlying reasons for the adverse employment decision are usually not reported.⁶⁷

“distinct field of law...emerging and taking its place along with older established fields”); Harry Shulman & Herbert A. Fierst, *Teaching Civil Liberties in the Law Schools*, 1 *Bill Rts. Rev.* 122, 122-27 (1941) (suggesting that Civil Rights should be taught as a special subject in law school).

62. *See, e.g.*, *Cobb v. Howard Univ.*, 106 F.2d 860, 862 (D.C. Cir. 1939) (refusing to reinstate law professor denied reappointment because he testified before a congressional committee in opposition to university appropriations).
63. *See, e.g.*, *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) (upholding the New York Civil Service Law section relating to ineligibility for employment of any person advocating or belonging to organizations advocating overthrow of government by force or violence on the following grounds: “It is clear that such persons have the right under our law to assemble, speak, think and believe as they will.... It is equally clear that they have no right to work for the State in the school system on their own terms.... They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.”) (citations omitted); *see also* *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892) (Holmes, J.) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”).
64. *See, e.g.*, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).
65. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
66. *E.g.*, *State ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Cobb v. Howard Univ.*, 106 F.2d 860 (D.C. Cir. 1939); *State ex rel. Bourgeois v. Bd. of Sup’rs of La. State Univ.*, 17 So.2d 25 (La. 1944); *Ironside v. Tead*, 13 N.Y.S.2d 17 (1939); *State ex rel. Keeney v. Ayers*, 92 P.2d 306 (Mont. 1939); *Becker v. Barry*, 165 Misc. 877, 300 N.Y.S. 1153 (1937).
67. *But see* *Bd. Of Higher Ed. Of City of N.Y. v. Cole*, 263 A.D. 777, 31 N.Y.S.2d 176 (N.Y.A.D. 3 Dept. 1941) (“The grounds given for her removal are that she has ‘failed to teach history at college level satisfactorily by reason of her inability to inspire students with intelligent interest in their subject and consequent insistence on the performance of onerous mechanical tasks;...by reason of her incapacity to see history as a moving pattern and consequent reliance on intensive drill in pedestrian memorization of isolated fact, not intelligibly interrelated;...’

Second, while the ideal of free speech generally was supported by the intellectual elite in the 1930s, the parameters of this freedom were ill-defined and the depth and strength of the support for the idea had not yet been tested.⁶⁸ The Supreme Court, for example, had yet to decide a case that exonerated a defendant using the Holmes test for sedition (the “clear and present danger” test). And as World War II loomed, the expansive notion of free speech came under attack from some of the very intellectuals who previously had extolled it. A group of “militant” liberals, many of whom had actively opposed American involvement in World War I, concluded in the 1930s that free speech and civil liberties were not privileges that could be extended to groups—i.e., fascists—who would destroy the very system of government that created those liberties. *The Nation*, a periodical known for its staunch liberalism, advocated for an aggressive defense of American nationalism, intervention in the war against fascism, and ultimately, diminished civil liberties for those who stood in the way.⁶⁹

The legal academy also had strongly conflicting attitudes about civil rights, rooted in the intellectual ferment of the previous two decades. The 1920s and 30s saw the rise of legal realism, which challenged prior “classical” modes of thinking about law, and in particular had weakened the classical notions of private rights.⁷⁰ But legal realism also came under attack with the rise of fascism in Europe, as the logical implications of realism “undermined the concept of a rationally knowable moral standard,” and thus undermined any rational critique of Nazi atrocities and totalitarian statism.⁷¹ As legal scholars came under increasing attack for being relativists and anti-democratic, they retreated from the extremes of legal realism. Roscoe Pound famously turned on realism in the 1930s, calling it a “give-it-up” philosophy that “leads logically to absolutism.”⁷²

Further complicating matters were the sometimes contradictory attitudes taken by civil libertarians and legal realists—groups who might otherwise be aligned as liberals. ACLU-style liberals tended to focus on the “negative” liberties of the individual and were skeptical of the state, even when it was

and ‘by reason of her ineptitude in efforts to utilize students’ individual backgrounds in relation to the general plan of the course and consequent harassing of students without laying the necessary foundation for subsequent courses in history.’”)

68. Steele, *supra* note 36, at 69.

69. Steele, *supra* note 36, at 69–71; see also Geoffrey Perret, *Days of Sadness, Years of Triumph: The American People 1939–45* 95, 99–101 (Coward, McCann & Geoghegan 1973) (noting the liberal turn to militarism during World War II).

70. Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law: A Progressive Critique* 32–36 (David Kairys ed., Pantheon 1998).

71. Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* 172 (Univ. Press of Kentucky 1973).

72. Roscoe Pound, *Contemporary Juristic Theory* 36–38 (Claremont Colleges 1940).

engaged in progressive activity.⁷³ But legal realism, which essentially was a continuation of early-20th century Progressivism,⁷⁴ took a more positive view of the state. Realists were more likely to believe in the power of a properly run state to provide for the welfare of the populace, and generally favored the New Deal and a strong executive with almost unfettered discretion to enact reforms and manage the economy.⁷⁵

World War II began in the midst of this intellectual and doctrinal ferment. Thus, as difficult as it is to generalize about the opinions of any groups, it is exceptionally difficult to generalize about the opinions of the legal academy during this time period because of the shifting attitudes at play. To the extent that a professor identified with the progressive movement, the legal realists, or the New Deal, that professor may have been unwilling to criticize the government's conduct of the war—either because he had faith in the state, was a supporter of Roosevelt, or feared to appear anti-democratic or pro-fascist. To the extent that a professor identified with civil libertarians, he might have been more willing to speak up against the perceived abuses of the war-time state. Finally, to the extent that a professor adhered to classical legal notions such as the sanctity of contract and private property, he also might have been willing to speak with the civil libertarians against the perceived abuses of a state run by a powerful executive.⁷⁶

Finally, it bears repeating that World War II was a popular war, with the nation's fervor stoked against the Japanese in particular, due to the fatal attack on Pearl Harbor and how it so surprised and shocked Americans. Three days after that bombing, a poll revealed that 96 percent of the nation approved of Congress's declaration of war on Japan.⁷⁷ In this context, academics—like many Americans—may have been willing to turn a blind eye to civil rights abuses or questionable government policies in the interests of winning the war. In fact, academics had overwhelmingly supported America's involvement in World War I,⁷⁸ and World War II may have been even easier to support because it was a war against fascism; the government was not busy targeting groups or causes that liberals or progressives supported, as had happened in World War I.⁷⁹

73. Murphy, *Origin of Civil Liberties*, *supra* note 61, at 174-75, 264-65.

74. Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 169 (Oxford Univ. Press 1994).

75. *Id.* at 213-14.

76. *See* Murphy, *Constitution in Crisis Times*, *supra* note 60, at 170-76 (noting that radicals and conservatives alike opposed the New Deal state, albeit for different reasons).

77. Lawrence S. Wittner, *Rebels Against War: The American Peace Movement, 1941-1960* 34 (Columbia Univ. Press 1969). By contrast, the highest approval rating of the war in Iraq measured by CNN was 63 percent, in August of 2003; Poll: Capture boosts Americans' confidence, *available at* <http://www.cnn.com/2003/US/12/14/sprj.nirq.saddam.poll/index.html>.

78. Gruber, *supra* note 17, at 81-82; Walker, *supra* note 3, at 20-21.

79. Goldstein, *supra* note 27, at 284; Perrett, *supra* note 69, at 95, 358.

Even the National Lawyers Guild, a radically progressive legal organization, pledged the “full support of this organization and its thousands of members to the successful prosecution of the war.”⁸⁰ Given these circumstances, one would hardly expect more mainstream voices to speak up in dissent.

III. Vocal Professors and Institutional Consequences

A. Alexander Sack at New York University

To get a stronger sense for the practical consequences of the context described in Part I, it is useful to examine the stories of the few legal scholars who did speak up about aspects of U.S. policy during the war. Of these professors, none better illustrates the institutional weakness of tenure, and the financial strains of the war, than Alexander Nahum Sack.

When World War II began, Sack was a full-time professor of international law at New York University Law School (NYU).⁸¹ In 1940, Sack, who was Russian by birth, had begun writing letters to the *New York Times* on war-related topics such as neutrality, maritime warfare, and the justification for sending aid to Soviet Russia.⁸² In 1942, the newspaper published his letter arguing that the future of world peace depended on friendly relations with the Soviet Union and that communism was not an “insuperable barrier for mutual friendship” between Americans and the Soviets.⁸³ Sack’s argument contained nothing remotely critical of U.S. policy; rather, it participated in a larger public debate about the Eastern European power. However, the piece’s publication provoked a response from a Catholic priest who obliquely criticized the professor as a communist apologist.⁸⁴ The response outraged and offended Sack, who had left his native land soon after the communist revolution and now thought he

80. Robert W. Kenney & Martin Popper, Letter to Guild Members, 2 *Law. Guild Rev.* 1, 1 (1942).

81. For more on the life and writings of Alexander Sack, see Sarah Ludington & Mitu Gulati, *A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts*, 48 *Va. J. Int’l L.* 595 (2008).

82. Alexander N. Sack, *Neutrality and International Law; Status of the United States in the Present Conflict Is Considered in the Light of Precedent*, *N.Y. Times*, Jan. 19, 1941, at E8; Alexander N. Sack, *Reassertion of Our Rights on the High Seas Is Urged; Unrestricted Maritime Warfare Viewed as Contravening International Law and Rules To Which Even Nazi Germany at One Time Subscribed*, *N.Y. Times*, Apr. 27, 1941, at E10; Alexander N. Sack, *Our Aid to Russia Deemed Warranted; Aims of the Axis Against Our Form of Life and Resources Considered to Point Necessity*, *N.Y. Times*, Aug. 31, 1941, at E6. The *Times* published at least thirteen of Sack’s letters between 1940 and 1942.

83. Alexander N. Sack, *Russia Viewed as Vital Factor in Winning the Peace; For All Her Size and Resources, She Is Regarded as in No Position to Jeopardize Her Existence by Engaging in a Future War of Aggression*, *N.Y. Times*, July 26, 1942, at E6.

84. Bertrand Weaver, *Our Own System Is Held Irreconcilable with Russia’s; Their Form of Government and Inspired Trend of Thought Viewed as Diametrically Opposed to All Our Long-Accepted Standards*, *N.Y. Times*, Aug. 23, 1942, at E6.

was being accused of being a communist.⁸⁵ Nevertheless, the assistant dean of the NYU law school advised him not to reply to the letter, advice that Sack took.⁸⁶

Four months later, NYU informed Sack that it was experiencing a financial emergency and that he should seek employment elsewhere for the war's duration.⁸⁷ This news prompted him to seek advice of independent legal counsel, a move that backfired dramatically. A lawyer Sack had consulted wrote to a member of the Board of Trustees, asking whether the opposition to the professor came from pro-Catholic and anti-Semitic influences in the law school.⁸⁸ The letter was forwarded to the dean of the law school, who angrily instigated a hearing to "investigate" the charges, which the dean believed had come from Sack.⁸⁹ In March, 1943, NYU fired Sack.⁹⁰

In 1940, NYU employed eleven full-time professors and relied on twenty more part-timers to teach 808 students enrolled in its four-year degree program.⁹¹ Sack had taught at the school since 1933. He served two years as part-time faculty, then eight more full-time.⁹² By Fall, 1942, he was "tenured," according to the rules of the AALS.⁹³ NYU experienced a dramatic drop in enrollment when the war began; by 1942, its enrollment had shrunk to 307, yet it still employed eleven full-time faculty.⁹⁴ To cope with its shrinking tuition income, the law school had dispensed with all but a few of its part-timers, encouraged older professors to retire, granted unpaid leaves of absence to professors so they could find employment elsewhere, and reduced the salaries of some of its full-timers.⁹⁵ But Sack was the only full-time professor at NYU whose job was terminated as a result of economic distress.⁹⁶

85. AALS Tentative Report In the Matter of Alexander N. Sack vs. New York University and New York University School of Law, Part V(c), ¶11 [hereinafter AALS Tentative Report]. The author was not able to find a copy of a final report in the Sack matter.

86. *Id.* at Part V(c), ¶55.

87. AALS Tentative Report, *supra* note 85, at Part V(b). The AALS submitted its tentative report to the parties for comment. It then referred the case to its executive committee which also tried, unsuccessfully, to negotiate a settlement to the dispute. Letter from Erwin N. Griswold to Alexander N. Sack (Sept. 11, 1945).

88. *Id.* at Parts V(c), ¶22.

89. *Id.* at Parts V(c) & VII.

90. *Id.* at Part III ¶1.

91. Developments in Member Schools; Statistical Information on Enrollments, 1944 AALS Proc. 110, 114 (1944).

92. AALS Tentative Report, *supra* note 85, at Part I.

93. *Id.* at Part II. The 1940 Statement provided that a professor was tenured after seven years of full-time teaching at a law school.

94. *Id.* at 110, 114.

95. *Id.* at Part V(a).

96. *Id.* at Part V(b) ¶7.

Sack challenged his dismissal before the AALS Committee on Tenure. At the hearing, Sack was represented by Erwin Griswold—then a professor at Harvard Law School—who saw this case as an opportunity to make “a real contribution to the cause of academic freedom.”⁹⁷ After the hearing, the committee tentatively found the termination wrongful and that NYU had “violated the recognized principles of academic tenure in both procedural and substantive respects.”⁹⁸ During the hearing, the chancellor of the university had testified that its practice of granting yearly appointments to all full-time faculty was consistent with tenure standards established by the AALS and AAUP.⁹⁹ The law school dean, however, testified that the university had “the absolute right to refuse to reappoint,” even in the case of full-time professors who had taught for fifteen years.¹⁰⁰ This notion of tenure displeased the AALS, which concluded that “sound and healthy principles of tenure” had not permeated the “lower levels” of the university, such as the office of the dean of the law school.¹⁰¹

The AALS also was unhappy to learn that the law school routinely vetted Sack’s *New York Times* articles. In 1941, the school had created a one-member “Committee on Publication,” ostensibly for the purpose of “inducing” more faculty publications and helping with the placement of such articles.¹⁰² In reality, the committee was formed to supervise Sack, who thereafter was required to submit his articles to a faculty member—Professor Alison Reppy—for “editorial supervision” before sending them to the newspaper.¹⁰³ While Sack had largely complied with the rules, the AALS concluded that the restrictions placed on his freedom of expression “amounted to censorship... unsound academic practice and a clear violation of the principles of academic freedom.”¹⁰⁴

Finally, the AALS concluded that NYU had used improper procedures in conducting a hearing into allegations of “pro-Catholic and anti-Semitic influences” at the school. The hearing suffered from “undefined issues, confused objectives, [and] the merger of judge and prosecutor,” and quickly “degenerat[ed] into an unfair trial of Dr. Sack.”¹⁰⁵

97. Letter from Erwin N. Griswold to Alexander N. Sack (Aug. 5, 1944). Griswold wrote a personal letter to the chair of the committee after he withdrew as Sack’s counsel, expressing his personal belief that NYU had behaved “not only wrongfully but cruelly” towards Sack, and should not be given “a clean bill of health, no matter what errors Dr. Sack may make.” Letter from Erwin N. Griswold to Prof. James William Moore (Jan. 23, 1945).

98. *Id.* at Part VII.

99. *Id.* at Part II.

100. *Id.* at Part II, Discussion.

101. *Id.* at Part II, Discussion.

102. *Id.* at Part V(c), ¶16.

103. *Id.* at Part V(c), ¶1–5.

104. *Id.* at Part VI, ¶3.

105. *Id.* at Part V(c), ¶53. A complicating factor in his trial was Sack’s own difficult personality.

Despite condemning certain of NYU's policies and procedures, the AALS could not save Sack's position. The AALS criticized NYU for wrongfully firing Sack from a tenured position and for holding an unfair hearing into charges mistakenly attributed to him. It also condemned NYU for its censorious "Committee on Publications." But the AALS ultimately concluded that Sack was fired due to severe economic strain, not in retaliation for publishing in the *New York Times*.¹⁰⁶

Several aspects of Sack's story are worth emphasizing. First, Sack clearly wanted to participate in the public discussion of war policy, and the *Times* considered his opinions worth publishing; Sack's status as a professor of international law and his personal experience with the Soviet Union gave his opinions credibility. Sack's success in publishing his letters confirms that a legal academic who wanted to comment publicly on current events could find a ready publisher and a wide audience.

Second, NYU obviously was anxious about Sack's desire and ability to participate in public discussion of war policy. The AALS report suggests that NYU established its Committee on Publication specifically to deal with Sack. And while NYU never forbid Sack's publishing, the mere fact of its publication committee would have sent a clear message that the institution was unhappy about his exercise of his First Amendment freedoms. Despite working in a climate that was unfavorable to free speech, and being actively discouraged from speaking up, Sack persisted in publishing at least thirteen pieces before losing his position.¹⁰⁷

Third, the entire episode shows the weakness of the culture of academic freedom and how it probably bowed to the practical problems faced by a law school whose enrollment had shrunk by more than half. While Griswold considered the AALS Tentative Report a "great victory" for academic freedom, the report also can be seen as "splitting the baby;" Sack won a (barely) moral victory, but lost his job.¹⁰⁸ Sack, certainly, went to his grave convinced that NYU had done him a great wrong.

B. Harrop Freeman at the College of William and Mary; Edwin Borchard and Eugene Rostow at Yale: The Japanese Internment and Legal Academics

Unlike Sack, the legal academics who publicly opposed the Japanese internment during the war did so without any clear institutional reprisals. Their number was remarkably small—three, to be exact—and is too minuscule

Over the course of his dispute with NYU, he managed to alienate himself from the entire NYU law faculty and Griswold. See Ludington & Gulati, *supra* note 81, at 618–20; 636–37. Still, irascibility is not grounds for dismissal from a tenured position.

106. *Id.* at Part V(c), ¶13.

107. See *supra* note 82.

108. Letter from Erwin N. Griswold to Alexander N. Sack (Aug. 4, 1944). Sack and NYU ultimately settled their differences for the sum of \$6,000. Agreement Between Professor Alexander N. Sack and New York University (June 18, 1946).

for tenure to have been a major factor in allowing these men to speak, as there were hundreds of others with tenure who did not. Instead, in each of these cases, the professors' personal backgrounds, strongly held beliefs, and employment outside the government provided the necessary conditions for speaking up.

While a detailed history of the internment is beyond the scope of this Article, it is useful to review some background. The Japanese internment program was set into motion soon after the United States entered World War II. On February 19, 1942, President Franklin Delano Roosevelt issued Executive Order 9066, allowing local military commanders to designate "military areas" as "exclusion zones," from which "any or all persons may be excluded." The military swiftly issued orders that resulted in the internment of 120,000 Japanese-Americans, 79,000 of whom were citizens. On March 24, 1942, General John L. DeWitt imposed a curfew on "all enemy aliens and all persons of Japanese ancestry" within "Military Area No. 1," which comprised the entire Pacific coast to about 100 miles inland. On the same day, he issued the first of many exclusion orders forcing all people of Japanese ancestry within Military Area No. 1 to report to assembly centers, where they would live until being moved to "Relocation Centers."¹⁰⁹

While most Japanese-Americans complied with the orders, twelve individuals resisted and four of their cases eventually reached the Supreme Court. Early in the litigation, members of the Portland bar wrote Zechariah Chafee at Harvard Law School to request help from the ABA Committee on Civil Rights¹¹⁰ to participate in a curfew trial as *amicus curiae*.¹¹¹ In a memorandum to the chair of the ABA Committee, Chafee opined that the internment was part of the "inevitable hardships of war," but carried with it "a real danger of abuse:" "The idea that certain American citizens can be singled out for special restraints on their liberty and freedom of movement is staggering."¹¹² Accordingly, he viewed judicial oversight of the internment as "all for the good," and while he recommended not intervening at the trial level, he suggested that the committee should watch the case carefully and consider intervening at the appellate level.¹¹³

As the cases progressed, the ACLU provided the litigants with varying levels of support and representation.¹¹⁴ Western chapters of the ACLU were involved on behalf of plaintiffs Gordon Hirabayashi and Fred Korematsu from the beginning, but the national ACLU board split on whether and to what to degree to assist with the litigation.

109. Freeman, *supra* note 1, at 418-20.

110. See *infra* text accompanying notes 146-148.

111. Telegram from Robert F. Maguire to Zechariah Chafee (June 12, 1942).

112. Letter from Zechariah Chafee to Douglas Arant (June 13, 1942).

113. *Id.*

114. Walker, *supra* note 3, at 138-39.

In 1942, the national board voted on two litigation-related resolutions. The first resolution would have supported a direct constitutional challenge to the president's power to issue an order removing citizens from designated military zones; the second, a compromise resolution, supported a more indirect attack on the executive order, challenging whether the government had met its burden of proving the necessity of evacuating all Japanese-Americans from the military zone.¹¹⁵ The compromise resolution prevailed, thanks to a coalition of "conservatives, liberals, and leftists" on the ACLU board who opposed any challenge to the president's order. The conservatives believed they should defer to the executive during wartime, while the leftists similarly believed that successful prosecution of the war was essential because the Soviet Union, at that time, was carrying the burden of the war in Europe. Illustrating the split among liberals at the time, those who voted for the compromise believed they should be loyal politically to Roosevelt, were horrified by Nazism, and saw successful prosecution of the war as the nation's top priority.¹¹⁶

The ACLU board members who staunchly opposed the president's order included committed pacifists and liberals, such as Arthur Hays and Edwin Borchard, who feared a concentration of power in the executive branch of government.¹¹⁷ Borchard was a tenured professor of international law at Yale University. He had made a name for himself as an outspoken critic of expansive executive authority in general (and of Roosevelt in particular), and as a "non-interventionist" (a.k.a. isolationist) who remained critical of U.S. involvement in World War II even after the bombing of Pearl Harbor.¹¹⁸ Borchard was on the national board of the ACLU in the 1940s, and he voted to approve "resolution number 1," which would have authorized a direct challenge to the validity of Executive Order 9066.¹¹⁹

Borchard provided nominal support for the ACLU's litigation on behalf of the internees. In 1943, Hirabayashi's attorneys approached the ACLU seeking the names of "distinguished counsel" who might sign on to their brief.¹²⁰ Arthur Hays contacted Borchard, who agreed to sign on to the principal briefs for

115. Walker, *supra* note 3, at 141-42.

116. *Id.*

117. Walker, *supra* note 3, at 139.

118. Justus D. Doenecke, Edwin M. Borchard, James Basset Moore, and Opposition to American Intervention in World War II, 6 *J. Libertarian Stud.* 1, 9-12, 23 (1982). For biographical material on Borchard, see Justus D. Doenecke, Edwin Montefiore Borchard, in *Dictionary of American Biography, Supplement 5: 1951-55*, 81-82 (5th ed., Charles Scribner 1977); Richard H. Kendall, Edwin M. Borchard and the Defense of Traditional American Neutrality (1961) (unpublished Ph.D. dissertation, Yale University).

119. Letter from Edwin M. Borchard to American Civil Liberties Union (June 13, 1942).

120. Letter from Arthur Hays to Edwin M. Borchard (May 3, 1943).

Hirabayashi and later signed on to the ACLU amicus briefs in *Korematsu* and *Ex Parte Endo*.¹²¹ Borchard apparently had no other involvement with preparing the briefs, nor did any other legal academic.

Borchard, who at this point in his career was a distinguished professor, did not experience any negative institutional consequences as a result of signing the briefs. Like other schools, Yale Law School faced severe economic hardship during the war. Yale's enrollment dropped from 386 students in 1940 to 68 in 1944; it had employed 24 full-time teachers in 1940, but only 11 in 1944.¹²² For part of the war, the military occupied the student rooms in the law school.¹²³

The second scholar to speak out against the internment was Herrop Freeman, a visiting professor at the law school of the College of William and Mary. He published the first war-time law journal article critical of the internment. The article appeared in the *Cornell Law Quarterly* in June, 1943, published with a companion piece justifying the internment.¹²⁴ Freeman had just finished his first semester of teaching at William and Mary; he had been hired earlier that year to temporarily replace a professor who had entered military service.¹²⁵ In his article, Freeman argued that the executive order was unconstitutional, drawing support in part from the emerging doctrines of civil rights. First, Freeman traced the recent demise of Lochnerism (in today's terms), and suggested that the individual rights of Japanese-Americans must be protected, even at some risk to the public generally.¹²⁶ Second, he argued by analogy to the clear and present danger test developed in recent free speech cases, concluding that the danger to the public must be "immediate, imminent, and impending" to justify such restrictions on civil liberties.¹²⁷

As a visiting professor, Freeman was not protected by tenure, but apparently experienced no institutional reprisals for criticizing the internment; the threat came, instead, from outside the college. Freeman, a Quaker, was a conscientious

121. Letter from Arthur Hays to Edwin M. Borchard (Jan. 7, 1944); Letter from Hays to Edwin M. Borchard (Sept. 21, 1944).

122. 1944 AALS Proceedings, *supra* note 18, at 113, 115.

123. Gaddis Smith, Politics and the Law School: The View from Woodbridge Hall, 1921-1963, *as reprinted in* History of the Yale Law School 138, 144 (Anthony T. Kronman ed., Yale Univ. Press 2004).

124. Prior articles had appeared in law reviews justifying the internment; the only other critical articles were either student notes or written by professors not on law faculties. *See supra* note 3.

125. *See supra* note 22.

126. Freeman, *supra* note 1, at 424-30.

127. Freeman, *supra* note 1, at 430-33. The pedigree of the legal rule announced in *Korematsu* is evident in Freeman's article, which relies on the writings of scholars such as Roscoe Pound, Herbert Wechsler, David Riesman, and Zechariah Chafee, who had previously written about the idea of judicial deference and balancing interests. Thus, while civil liberties were still an emerging field in 1942, it was possible to raise a civil liberties objection to the internment in terms that sound quite similar to the arguments made after *Korematsu*. *See, e.g.*, Freeman, *supra* note 1, at n.45, 65, 86 & 262 (citing to scholarly articles on civil liberties).

objector. In Summer, 1944, a local post of the American Legion wrote the president of the university asking him to dismiss Freeman immediately, on the grounds that it opposed in principle the employment of any conscientious objectors, regardless of ability.¹²⁸

The College of William and Mary at the time had no official statement of academic freedom and tenure; the law school, which had been reestablished in 1922, had been a member of the AALS only since 1936. The law school was in a “perilous financial” state even before the war began. It had graduated only 28 students from 1922–1939, and was dependent for its existence on tuition and state funding.¹²⁹ In 1944, the school reported employing two full time faculty and four part-timers, with a total of 24 students enrolled.¹³⁰

Nevertheless, the faculty at William and Mary responded with strong support for Freeman, who had “proved to be a magnificent teacher and a very active research student of the law.”¹³¹ In a 56–1 vote, the faculty adopted a resolution requesting that “all appointments in all capacities be made solely on the merits of the appointees without respect to their religious views or other beliefs.”¹³² James Miller, the dean of faculty, informed the board that it would be a violation of academic freedom to dismiss Freeman or to limit the possibility of his reappointment.¹³³ The president of the university recommended that the Board reject the demand of the American Legion as it would infringe Freeman’s “constitutional guarantee of liberty of conscience.”¹³⁴ The Board of Visitors ultimately retained Freeman without making a statement about academic freedom or liberty of conscience; it tersely informed Post No. 39 that it could not dismiss Freeman because his contract did not terminate until June 30, 1945.¹³⁵

128. Resolution of Peninsula Post No. 39 of the American Legion, 1944. The Resolution also demanded the dismissal of Roderick Firth, a conscientious objector who had been hired to teach psychology.

129. Susan H. Godson, II, *The College of William & Mary: A History 572–73*, 587 (King and D Mary 1994).

130. 1944 AALS Proceedings, *supra* note 18, at 113, 115. Freeman was one of the full-time professors. *Id.* at 146.

131. Letter from Miller to Bohannon, *supra* note 22; Facts Concerning Professor Harrop Freeman and Dr. Roderick Firth, *supra* note 22.

132. Letter from W.G. Guy, Secretary of the Faculty, to J. Gordon Bohannon, Rector of the Board of Visitors (Sept. 29, 1944) (setting forth the text of the resolution and providing four reasons, including that “If such requests were granted, the College would be held up to ridicule and contempt as being the scene of the first World War II ‘witch hunt,’ and discredited in the eyes of all accrediting agencies”).

133. Letter from Miller to Bohannon, *supra* note 22. According to Miller, the law school dean was “delighted” with Freeman and had “already urged that he be given a permanent appointment on the faculty.” *Id.*

134. Recommendation of Pomfret, Oct. 7, 1944.

135. By order of the Board of Visitors of the College of William and Mary, Oct. 7, 1944. A few months later, Freeman became embroiled in a controversy at the school involving a student who wrote an editorial advocating the end of segregation. The student was dismissed

After Freeman, Eugene Rostow was the next legal academic to publish articles critical of the internment. Rostow was an assistant professor of law who left Yale University to work in various federal agencies during the war while the internment cases were being litigated. He returned to Yale in Fall, 1944, as a tenured professor. In June, 1945—after VE day but before VJ day—he published a denunciation of the internment in the *Yale Law Journal* and a variation of the article in *The New Republic*.

In several private letters, Rostow indicated that his law review article was to be a kind of “celebration” of his return to the freedom of legal academia. Rostow wrote in Fall, 1944, to a government law clerk hoping to obtain materials about the internment cases:

I am thinking in a dim sort of way of celebrating my return to the law by kicking, gouging, and otherwise assaulting the Supreme Court for its Japanese follies, and I should appreciate it if you could let me have any materials which you are unable by reason of your official position fully to exploit. If you are planning to get out an article in the near future on the matter, however, I shall gladly pick another topic on which to raise hell.¹³⁶

A few months later, Rostow repeated that “I have been boiling about the Japanese cases ever since I came back here, and intending to celebrate my return to the law by tearing the court to pieces, in the classic law review manner.”¹³⁷ Rostow also apparently asked Felix Frankfurter if he would comment on his views of the cases; Frankfurter replied, “You may try anything on me, of course. But it may well be that I may not be able to respond. You have no idea how often I have nostalgia for the freedom I gave up and which you now again enjoy.”¹³⁸ Rostow apparently experienced no institutional consequences from his criticism of the internment.

Three aspects of these stories are worth emphasizing. First, it is clear that both Yale and William and Mary were under severe financial pressure during the war, similar to NYU. But unlike NYU, Yale and William and Mary had strong cultures of academic freedom that had permeated the faculty and the administration. In Freeman’s case, the faculty and administration persuaded the Board of Visitors to protect Freeman (if not to take a strong stand on

from her editorial position. President Pomfret later reported to the Board of Visitors that one member of the faculty had complained that Freeman had helped students organize a protest. The Flat Hat, Report of John E. Pomfret to the Board of Visitors, June 1, 1945, at 3. Despite his glowing reports from the previous fall, Freeman did not receive a continuing appointment at William and Mary. He later joined the faculty at Cornell Law School, where he taught for the remainder of his career.

136. Letter from Eugene Rostow to John Frank (Oct. 6, 1944). Rostow may have used such an informal tone because he either knew Frank, or because Abe Fortas, whom Rostow knew, had directed him to write to Frank. Letter from Abe Fortas to Eugene Rostow (Sept. 26, 1944).

137. Letter from Eugene Rostow to David Riesman (Mar. 26, 1945).

138. Letter from Felix Frankfurter to Eugene Rostow (Jan. 11 1945).

academic freedom). In the cases of Borchard and Rostow, the university apparently took no notice of the professors' controversial stands. The culture of academic freedom was strong enough at Yale for Rostow to feel liberated upon his return to teaching, and to celebrate his freedom by skewering the Supreme Court in print.

Second, Rostow's case underscores the significance of employment outside of the government. His sense of liberation at his return to academia may have been enhanced because he had spent the prior two years in government service, where he had been stewing in quiet over the internment. Herbert Wechsler's experience provides a contrast to Rostow's. As a professor at Columbia prior to the war, Wechsler had signed on to a brief challenging a state insurrection statute; while working for the Department of Justice during the war, he was the lead attorney in the internment cases.¹³⁹

Finally, it is clear from Freeman's example that the guarantees of tenure were hardly a condition for speaking out. Freeman apparently was motivated to write about the internment by the legal argument against it and perhaps his personal religious convictions. He was employed for a limited time and probably knew that writing a critical article might have jeopardized his position at the university. As a conscientious objector, however, he lived that risk on a daily basis.

C. Zechariah Chafee at Harvard University

Of the few legal scholars who questioned domestic policies during World War II, Zechariah Chafee stands out for his consistent activity. Chafee was a distinguished professor of law at Harvard University and an acknowledged expert on the First Amendment by the time World War II started. Because of his stature, he was approached often by litigants for help. His general approach to the civil liberties causes of the war was to work quietly behind the scenes, rather than take a public stand.

Chafee had not always been so circumspect. In the 1920s, as a relatively new professor at Harvard, Chafee had been "tried" by the Board of Overseers on charges that he had published inaccuracies in a law review article criticizing the trial in *Abrams v. United States*.¹⁴⁰ Chafee's "trial" was orchestrated by a number of Harvard alumni who objected to his criticism of the prosecutor in *Abrams*; Chafee's reputation and job were put at stake. He was supported strongly by the faculty and administration of the university, with A. Lawrence Lowell, the

139. See *supra* text accompanying notes 12 & 24-26.

140. Zechariah Chafee, Jr., A Contemporary State Trial—The United States versus Jacob Abrams et al., 33 Harv. L. Rev. 747, 747-777 (1920). Chafee also had angered various Harvard alumni by engaging in other public activities. For example, he criticized Justice Holmes and Attorney General Thomas Gregory in a 1919 law review article, and signed a petition criticizing the Palmer Raids. See Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 932-73 (1919); R.G. Brown, et al., Report upon the Illegal Practices of the United States Department of Justice (1920). See generally Donald L. Smith, Zechariah Chafee, Jr.: Defender of Liberty and Law 37-57 (Harvard Univ. Press 1986) (describing Chafee's trial and circumstances leading up to it).

president of Harvard, delivering a closing argument in his defense.¹⁴¹ Chafee was narrowly acquitted of the charges.¹⁴² Harvard emerged from the trial with a stronger commitment to academic freedom,¹⁴³ but Chafee was chastened by his experience; thereafter, he increasingly turned from direct and public criticism to scholarly commentary on civil rights, and more distanced methods of assisting those who had grievances against the government.¹⁴⁴

Harvard Law School maintained its commitment to academic freedom and tenure during World War II. Its enrollment dropped from 1,249 in 1940 to 162 in 1944, and it cut the rolls of full-time professors from 33 to 11.¹⁴⁵ Still, as previously mentioned, Erwin Griswold—one of the remaining full-time professors at Harvard—devoted hours of his time during the war to representing Alexander Sack in his dispute with NYU. And Chafee—another of the remaining full-time professors—was actively involved with unpopular causes through the ABA Committee on Civil Rights. This time, there were no institutional reprisals for Chafee.

The ABA Committee on Civil Rights had been formed in 1939, with the mission of taking “a staunch and militant stand...whenever it is found that [the Bill of Rights is] being threatened or impaired.”¹⁴⁶ Despite this ringing rhetoric, the committee was formed, in part, to regain public credibility for the ABA after its public efforts to oppose New Deal reforms. True to these origins, the committee in its early years involved itself with cases that particularly illustrated the dangers that a powerful government posed to the individual liberties guaranteed by the Bill of Rights.¹⁴⁷ Chafee was invited to be one of the original members of the committee; upon accepting the invitation he jokingly remarked that the public probably expected the committee to defend civil rights by defending against the high taxes of the New Deal.¹⁴⁸

1. Equitable relief for internees

The ABA committee was cautious in its involvement in cases. As already noted, the committee declined to participate in the curfew trials in Oregon. At Chafee's behest, however, the ABA Committee already was investigating reports that internees had been pressured to sell property at sacrifice prices

141. Lowell was an early and passionate supporter of academic freedom, and particularly defended the Harvard faculty during World War I. Henry Aaron Yeomans & Walter P. Metzger, *Abbot Lawrence Lowell, 1856-194, at 308-12* (quoting at length from Lowell's 1916 statement on academic freedom).

142. Smith, *supra* note 140, at 52-55.

143. Erwin N. Griswold, Zechariah Chafee, Jr., 70 *Harv. L. Rev.* 1337, 1338 (1957).

144. Smith, *supra* note 140, at 8-9.

145. 1944 AALS Proceedings, *supra* note 18, at 108, 114.

146. Frank J. Hogan, *Lawyers and the Rights of Citizens*, 24 *A.B.A. J.* 615, 617 (1938).

147. Murphy, *Constitution in Crisis Times*, *supra* note 60, at 175-76.

148. Smith, *supra* note 140, at 195 (quoting Letter from Zechariah Chafee to Grenville Clark (Sept. 28, 1938)).

before their removal. In August, 1942, the committee wrote the War Relocation Authority suggesting that property sold under duress might be recovered under the principles of equity. Chafee, who lectured in equity, offered to supply the legal authority for such suits.¹⁴⁹ Soon thereafter, the War Relocation Authority established an Evacuee Property Board with the power, among other things, to reexamine the terms of completed sales.¹⁵⁰ Chafee supplied a long memorandum of cases and arguments to assist the attorneys.¹⁵¹ In this instance, Chafee was not so much criticizing government policy but rather using the prestige of the ABA Committee to pressure the War Relocation Authority, and then assisting the government in mitigating the losses of the internees.

2. Amicus briefs on behalf of Jehovah's Witnesses

Chafee and the ABA Committee also participated in two cases involving the Jehovah's Witnesses. Although the persecution was mild compared with what occurred in World War I, Jehovah's Witnesses were attacked and persecuted by state and local governments during World War II, particularly in the years between the Supreme Court's 1940 ruling in *Minersville v. Gobitis*—that a local school district could expel children who refused to salute the flag—and the 1943 decision that overturned it, *West Virginia v. Barnette*. Estimates of the numbers of Witnesses attacked and injured vary, but somewhere between 800 and 2,000 Witnesses suffered beatings, kidnappings, tar and feathering, vandalism to their property, and even castration at the hands of angry mobs.¹⁵² There were less violent but serious consequences to the Witnesses' refusal to salute the flag: children were expelled from school and their parents consequently imprisoned for delinquency and neglect; Witnesses were fired from jobs; and Witnesses registering for the draft were not treated as conscientious objectors but rather were imprisoned.¹⁵³

The public was well aware of the violence, as it was reported by major newspapers and magazines, including *The New Republic*, *Time*, *Newsweek*, *The Christian Century*,¹⁵⁴ *The Saturday Evening Post*,¹⁵⁵ and in at least one scholarly journal.¹⁵⁶ Still,

149. Letter from Ross L. Malone, Jr. to Director, War Relocation Authority (Aug. 6, 1942).

150. Letter from Phillip M. Glick to Zechariah Chafee (Sept. 14, 1942).

151. Letter from Phillip M. Glick to Zechariah Chafee (Oct. 15, 1942); Letter from Zechariah Chafee to Ross L. Malone (Oct. 28, 1942); Letter from Phillip M. Glick to Zechariah Chafee (Nov. 2, 1942).

152. Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution 8–10, 309 n.21 (Univ. Press of Kansas 2000); see also Goldstein, *supra* note 27, at 283–84; Perrett, *supra* note 69, at 91–92.

153. Peters, *supra* note 152, at 13; Perrett, *supra* note 69, at 359.

154. See generally Peters, *supra* note 152 (citing newspaper articles from these and other periodicals).

155. Perrett, *supra* note 69, at 91–92.

156. Victor Rotnem & F.G. Folsom, Recent Restrictions on Religious Liberties, 36 Am. Pol. Sci. Rev. 1061 (1942).

state and local authorities did little to stop vigilante mobs (which frequently involved American Legion chapters), and in many instances looked the other way or openly assisted them. The Justice Department, though bombarded with complaints from Witnesses, refused to prosecute under federal civil rights laws. Instead, the agency issued public statements denouncing the violence.¹⁵⁷

Whereas the Witnesses were reviled in small town America, their battles for religious freedom were regarded sympathetically in intellectual circles.¹⁵⁸ In 1939, before the war, the ABA Committee began considering whether to get involved with the *Gobitis* litigation. Another member of the Harvard law faculty—George Gardner, a contracts professor with an interest in civil rights—helped Chafee convince the committee to submit a brief in *Gobitis*. Chafee co-wrote the ABA Committee brief, while Gardner wrote a brief for the ACLU and argued on behalf of the appellants.¹⁵⁹ After the decision, Chafee and other scholars—including two on law faculties—roundly criticized Frankfurter’s majority opinion.¹⁶⁰ In 1943, Chafee wrote the brief submitted by the ABA Committee in *Barnette*.¹⁶¹ By this time, Gardner was on war-time leave from the Harvard faculty and did not participate in the case.¹⁶²

157. Peters, *supra* note 152, at 10–11. The ACLU also assisted the Witnesses during this time, making public statements condemning the violence against Witnesses, demanding that state and federal authorities intervene, and providing legal assistance in court. *Id.*

158. See generally Edward F. Waite, The Debt of Constitutional Law to Jehovah’s Witnesses, 28 Minn. L. Rev. 29 (1944) (Waite was a retired state judge).

159. Smith, *supra* note 140, at 202–04.

160. See, e.g., Zechariah Chafee, Jr., Free Speech in the United States 405 (Harvard Univ. Press 1941) (opining that the free exercise clause would be better served by reversing the outcomes in *Cantwell* and *Gobitis*); Smith, *supra* note 140, at 205 (describing Chafee’s reaction to the decision); see generally Francis H. Heller, A Turning Point for Religious Liberty, 29 Va. L. Rev. 440, 450–53 (1943) (noting scholarly and popular criticism of *Gobitis*); Heller had been a Research Fellow in Political Science at the University of Virginia; he was serving in the U.S. Army when his article was published. *Id.* at 486. Two then-current members of a law faculty—Charles E. Carpenter at the University of Southern California and Ignatius M. Wilkinson, dean of Fordham University School of Law—published comments critical of *Gobitis*. Ignatius M. Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham L. Rev. 50, 58 (1942); Charles E. Carpenter, Current Constitutional Law Decisions of the United States Supreme Court, 14 S. Cal. L. Rev. 56, 58 (1940). Other professors of constitutional law teaching in schools of government or political science published articles critical of *Gobitis*. E.g., Edward S. Corwin, The Constitution and What it Means Today 99 (7th ed., Princeton Univ. Press 1941); Constitutional Revolution, Ltd. 112 (Claremont Colleges 1941) (professor of jurisprudence at Princeton University); Robert E. Cushman, Constitutional Law in 1939–1940, 35 American Political Science Rev. 250, 271 (1941) (professor of political science at Cornell University); Beryl H. Levy, Our Constitution: Tool or Testament? 260–89 (Univ. of Chicago Press 1941) (professor of philosophy at Hofstra University); Benjamin F. Wright, The Growth of American Constitutional Law 230–31 (Houghton Mifflin 1942) (associate professor of government at Harvard University).

161. Smith, *supra* note 140, at 209–12.

162. 1943 AALS Proc., *supra* note 19, at 91.

The Witnesses' persistent recourse to the courts during World War II resulted in several cases that made their way to the high court and are foundational in free speech and civil rights law. For example, the Supreme Court carved out a "fighting words" exception to free speech doctrine in *Chaplinsky v. New Hampshire*,¹⁶³ a case involving a Witness who resisted arrest, and ruled in *Jones v. Opelika*¹⁶⁴ that a city could not impose a peddler's tax on Witnesses for distributing literature. Chafee and Gardner were the only law professors who directly contributed to these landmark civil rights cases involving Jehovah's Witnesses.

3. Moral support for the defendants in the Great Sedition Trial

Chafee also was approached for help by numerous defendants in the Great Sedition Trial, yet his assistance to them extended no further than private opposition to the proceeding and the doctrinal aid provided in his treatise on free speech.

The far-right opposition to World War II was, for the most part, tiny and marginalized. Still, American fascists were vocal and persistent in their criticism of Roosevelt and the war. Popular opinion strongly supported legal action, and Roosevelt soon began to pressure Attorney General Frank Biddle to silence the fascist fringe.¹⁶⁵ In March, 1942, the federal government indicted Walter Pelley, known as the "American Hitler," for sedition.¹⁶⁶

Four months later, the Justice Department brought a second sedition indictment against a motley group of lesser-known American fascists.¹⁶⁷ The indictment brought 28 defendants from various parts of the country to Washington, D.C., where—after two years and two superseding indictments—they were tried for conspiracy to "cause insubordination, disloyalty, mutiny, and refusal of duty" in the armed forces.¹⁶⁸ The trial went slowly as the more flamboyant defendants used the proceedings as a bully pulpit for their causes, and it became increasingly clear that the government had no evidence of contact between the defendants and a foreign power, or even of contact between the various defendants. A mistrial was declared when the presiding judge died of a heart attack shortly after the prosecution rested its case. By then, the war was all but over and prosecutors declined to renew the charges.¹⁶⁹

163. 15 U.S. 568 (1942).

164. 319 U.S. 103 (1943).

165. Steele, *supra* note 36, at 143-44, 151-52; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 256-58 (W. W. Norton & Co. 2004).

166. Steele, *supra* note 36, at 206-07; *see also* Stone, *supra* note 165, at 258-72 (discussing Pelley, his trial, and conviction).

167. Stone, *supra* note 165, at 272-73.

168. Indictment at 25, *United States v. Winrod* (D.D.C. July 23, 1942).

169. Steele, *supra* note 36, at 227-29; Stone, *supra* note 165, at 274-75.

The indicted war critics were widely regarded as pariahs and reviled for their anti-Semitic, pro-fascist rhetoric. They struggled, unsurprisingly, to find legal representation. The ACLU was riven on the issue; the same coalition that had limited ACLU involvement in the Japanese internment cases successfully blocked the group from participating in the defense of the sedition trial, adopting a policy of not assisting sedition defendants who may have been aiding the enemy.¹⁷⁰

Chafee received numerous letters from defendants and others begging him for legal assistance. He took the appeals to the ABA Committee but it refused to get involved.¹⁷¹ Chafee, in turn, declined to offer his individual assistance. In his correspondence with the defendants, he gave various reasons: his teaching duties; his preference, as an academic, to allow practitioners to handle trials and to observe legal matters for some time before becoming directly involved; and his desire to “let my book speak for me.” His letters invariably are kind, indicating he is “troubled” by the nature of the prosecution and expressing his hope that the defendants are “represented by competent counsel” and will be able to “properly present” their cases.¹⁷²

In other correspondence, Chafee criticized the indictment more harshly. In a private letter to an ACLU attorney, he described it as “indefensible.”¹⁷³ In a letter to Burton Wheeler, an anti-interventionist senator from Montana who had publicly attacked the indictment and written to Chafee for his thoughts, the professor wrote that he had been “considerably disturbed” by the indictment and that “many of the utterances charged seem to me not worth bothering about, although the tone of some of these was very distasteful to me.”¹⁷⁴ Burton repeated Chafee’s criticism of the indictments to the press,¹⁷⁵ and, thus, Chafee inadvertently became the only legal academic to publicly criticize the sedition trial. While he clearly intended to keep his views on the

170. Walker, *supra* note 3, at 155-57; *see supra* text accompanying notes 115-116.

171. *See, e.g.*, Letter from Zechariah Chafee to Edward James Smythe (Feb. 18, 1943); Letter from George E. Deatherage to Zechariah Chafee (Mar. 9, 1944); *see also* Steele, *supra* note 36, at 214 (citing Minutes of Meeting of Special Committee on the Bill of Rights, Apr. 17, 1942, Chafee Papers, 9-1); Letter from Zechariah Chafee to Hon. Burton K. Wheeler (Jan. 12, 1943) (noting that it was unlikely that the ABA Committee would agree to get involved at the trial level of a proceeding).

172. *See, e.g.*, Letter from Zechariah Chafee to Miss Edith Wynner (June 9, 1942); Letter from Zechariah Chafee to Hon. Burton K. Wheeler (Jan. 12, 1943); Letter from Zechariah Chafee to Edward James Smythe (Feb. 18, 1943); Letter from Zechariah Chafee to Ralph Townsend (Feb. 17, 1943); Letter from Zechariah Chafee to George E. Deatherage (Mar. 13, 1944).

173. Letter from Zechariah Chafee to A.L. Wirin (Oct. 13, 1942) (Box 9, folder 2) (quoted in Steele, *supra* note 36, at 214).

174. Letter from Zechariah Chafee to Hon. Burton K. Wheeler (Jan. 12, 1943).

175. *See, e.g.*, John Fisher, Harvard Legal Expert Decries U.S. Actions in Sedition Case, Chicago Daily Tribune, Feb. 4, 1943, at 4.

matter out of the press,¹⁷⁶ he received at least one letter of gratitude from a defendant, who stated that Chafee alone, through the statement made public by Wheeler and his writings on free speech, had done more for the defendants than the entire bar and legal academy.¹⁷⁷ Indeed, a letter to Chafee from one attorney in the trial indicated that over the two years of proceedings in the case, his book had “been in the hands not only of counsel but also of the trial judges.”¹⁷⁸

One scholar has obliquely chided Chafee’s lack of involvement with the sedition trial, attributing his passivity to the unpopularity of the defendants, Chafee’s increased age, his chastening by his trial at Harvard, or his indifference to the relatively small scale of repression in World War II.¹⁷⁹ But Chafee still was clearly willing to offer his personal assistance when he considered the cause compelling. In July, 1942, he wrote Kenneth Royall and Cassius Dowell—the military lawyers assigned to defend eight German saboteurs apprehended on U.S. soil—to offer his personal assistance with the trial. Royall thanked him for his offer, noting that “[n]umerous attempts to obtain civilian counsel were unsuccessful. In fact, you were the only one who expressed a willingness to go ahead under any conditions; and we were unable to get anyone to join you.”¹⁸⁰

IV. Conclusion—A Culture of Silence

In 1946, the Committee on Tenure of the American Association of Law Schools (AALS) reported an “unruffled” year:

Not only has its record been entirely free of fresh complaints involving tenure of teachers in member schools, but the difficult outstanding case mentioned by this [c]ommittee’s report for 1944...has come to a satisfactory termination by settlement.¹⁸¹

Professor John M. Maguire, the committee’s chair, ventured two reasons for its “clear docket:” that professors were enjoying a sellers’ market, and that schools had instituted rules and procedures for the “just and satisfactory” resolution of tenure disputes.¹⁸² As anecdotal evidence that law schools were

176. Letter from Zechariah Chafee to H.B. Elliston, Esq. (Feb. 6, 1943) (emphasizing that his written remarks to Senator Burton were “not for publication”).

177. Letter from Ralph Townsend to Zechariah Chafee (Sept. 11, 1943).

178. Letter from E. Hilton Jackson to Zechariah Chafee (Mar. 17, 1944).

179. Steele, *supra* note 36, at 214.

180. Letter from Kenneth C. Royall to Zechariah Chafee (Aug. 5, 1942). Royall wrote to Chafee at his vacation home in Maine. *See also* *Ex Parte Quirin*, 317 U.S. 1, 18–23 (1942) (outlining the facts and proceedings in the case of the saboteurs).

181. Committee on Tenure, 1946 AALS Proc. 195 (1946).

182. *Id.*

committed to putting in systems for tenure dispute resolution, Maguire noted that “probably less than 1 percent” of the nearly 600 tenure disputes brought before the AAUP in the past decade had involved law schools.¹⁸³

In fact, during the four years of America’s involvement in World War II, the AALS Committee on Tenure handled only two tenure disputes, one of which was Sack’s.¹⁸⁴ Maguire’s optimistic assessment of the lack of tenure disputes in law schools thus raises the question whether law schools were in fact strongly committed to the academic freedom and tenure of their faculty in the early 1940s, or whether war-time faculty had believed that it was wiser to keep one’s head down and mouth shut rather than take a chance on the fair-mindedness of the administration.

As shown here, a number of historical factors contributed to pressure the legal academy into staying quiet about policy matters during World War II. The national mood strongly favored the war, law schools faced dire economic hardship and many professors had found a paycheck elsewhere—often in the service of the government. Those few professors who remained in teaching had a strong incentive not to stir up any controversy, as they would have felt lucky to have kept their positions. Further, the doctrinal flux of the early 1940s contributed to this culture of silence. Civil rights had not yet developed into a separate field of study, and despite Chafee’s groundbreaking work, the First Amendment was still emerging as a viable legal defense. These factors would have made it seem extremely risky for a professor to speak up or advocate on behalf of an unpopular group.

The one factor that might have strengthened the resolve of law professors to continue acting as public intellectuals during the war was the newly adopted commitment to academic freedom and tenure at AALS-member law schools. However, it is unclear that the 1940 statement did much to promote detached, critical commentary by law professors, especially in the face of such severe economic pressure. For one thing, the respect for tenure and academic freedom was too fragile in some institutions, as at NYU Law School; further, an institution could plausibly point to severe economic strain to justify any firing, even of a tenured professor, as happened to Alexander Sack.

On the other hand, several law schools maintained a robust culture of academic freedom, despite economic hardship. The financially teetering William and Mary strongly protected a visiting (untenured) professor from attack based on his conscientious objector status. Harvard and Yale were home to the highest number of tenured professors—three—who remained engaged with public policy issues during the war. Eugene Rostow celebrated his return to Yale by engaging in a full-throttle attack on the Japanese internment cases;

183. *Id.*

184. See Report of the Executive Committee, 1945 AALS Proc. 99 (1945). This author has been unable to locate any records concerning the substance of the other dispute, which involved a law professor at the University of Missouri Kansas City School of Law. Report of Committee on Tenure, 1947 AALS Proc. 200 (1947). The AALS did not begin archiving the records of the Committee on Tenure until 1952.

clearly, he felt more empowered to criticize the government from Yale than he had while working for the Lend-Lease Administration. Still, it is difficult to draw any strong conclusions about the influence of tenure on academic speech during the war as the sample set of outspoken professors is so small.

Those who worked in private practice rather than in academia were probably better situated to comment on domestic policy during the war—provided that they did not alienate clientele by advocating on behalf of unpopular groups—making the contribution of groups such as the ACLU and the ABA Committee on Civil Rights so important in litigating on behalf of the interned Japanese-Americans and Jehovah's Witnesses. But splits and divisions among these groups, and at times a wavering commitment to First Amendment freedoms, restrained their advocacy. And when the ACLU and ABA refused to act, professors like Borchard and Chafee, who otherwise might have assisted them, kept out of the fray.

This small cadre of vocal professors were, by modern observation, outsiders in the white, male academy of the day; Rostow, Borchard and Sack were Jewish; Sack was foreign-born, and Freeman was a conscientious objector. However, identity politics does not fully explain their willingness to speak up, as Chafee was well within the mainstream, even before he expressed divergent views in World War I. Further, other Jewish and foreign-born professors who remained on law faculties chose not to comment on the war. Finally, Sack—who perhaps qualifies as the most “outside” of the four—was probably the least critical of the government in his speech.

The contrast between the culture of silence in the legal academy of World War II and the legal academy of today could not be starker. The response of law professors to the war on terror has been public, voluminous, disseminated in the academic and popular media alike, and overwhelmingly critical. Yet not one tenured professor has lost his position after voicing an opinion on the war on terror.

The sheer volume of the academic commentary on the war on terror has been extraordinary, and so it is unsurprising that this body of work can be criticized for being facile, or representing nothing more than a ritualized or “safe” form of dissent. But the outpouring of academic literature has served the important purpose of providing a safe space or cover for the publication of the most trenchant and controversial critiques—in the words of Margulies and Metcalf, those rare articles that “forcefully” examine “the continuities between post-9/11 policies and American practices and attitudes toward crime, risk, security and socially constructed ‘[o]thers.’” Furthermore, to pan the general quality of the academic literature on the war is not to accuse it of being futile, or to argue that the criticism and attention from the legal academy went unnoticed by the public and the courts, or had no effect in checking abusive executive policies. Quite the contrary, it seems to have had a demonstrable effect on the unpopularity of the Bush Administration.

As we look back on the history of legal education in the United States, it is remarkable and admirable that any academics dared to speak and write about controversial domestic policy events during World War II, given the pressures not to. While the basic building blocks of the legal academy remain the same today as they were in World War II, other factors such as strong institutional commitments to academic freedom and tenure, a robust First Amendment, and economic prosperity have significantly changed the roles that law professors do—and should—play in society, most significantly as the watchdogs of government.