

ESSAY

THE LEGACY OF JUSTICE BRENNAN: CONSTITUTIONALIZATION OF THE LEFT- LIBERAL POLITICAL AGENDA

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Justice William J. Brennan, Jr. served on the United States Supreme Court for more than a third of a century, from 1956 to 1990, long after President Eisenhower, who foolishly appointed him to gain a temporary political advantage,¹ was gone from office and had passed away. Justice Brennan, previously an obscure state court judge in New Jersey,² made a lot of his lucky appointment, so much so that he made himself arguably the most important figure in American public life in the second half of the twentieth century, even though most of his fellow citizens would not have recognized his name. His importance derived, however, from his exercise of a power he had not been granted.

The pillars of the scheme of government created by the Constitution are republicanism, that is, representative self-government, and federalism, that is, a national government of limited power with most decisions of social policy made at the state level. These principles are the source of our unprecedented freedom, prosperity, and success as a Nation. Policymaking by the Supreme Court—by majority vote of a committee of nine lawyers, unelected and holding office for life, making policy for the Nation as a whole from Washington, D.C.—wholly undemocratic and wholly centralized, is the antithesis of these principles. Yet, the astounding fact is that virtually every major change in domestic social policy in the last four decades has been made not by decisions of elected legislators, state or federal, but by decisions of the Justices of the Supreme Court.³ The one

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1. See PETER IRONS, BRENNAN VS. REHNQUIST 24-25 (1994) (describing how President Eisenhower's desire to influence Catholic vote in northeast was factor in his decision to appoint Brennan to Supreme Court).

2. See *id.* at 23. Justice Brennan served as the chief justice of the Supreme Court of New Jersey before Eisenhower appointed him to the U.S. Supreme Court. See *id.*

3. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 3 (1991) (noting with approval the impact of Supreme Court's decisions on school prayer, abortion, desegregation, and apportionment over last 40 years). But see DAVID LOWENTHAL, NO LIBERTY FOR LICENSE: THE FORGOTTEN LOGIC OF THE FIRST AMENDMENT xiv (1997) (noting with disapprobation these same

person most influential in this perversion of our constitutional system of government was William J. Brennan, Jr.⁴

The changes brought about by the Supreme Court during Justice Brennan's tenure were truly revolutionary, remaking not only our form of government, but also the nature of our society and the quality of our civilization. The Court decided issues literally of life and death, such as abortion⁵ and capital punishment⁶; issues of public morality, such as pornography control⁷ and homosexual rights⁸; and issues of public order, such as limitations on street demonstrations⁹ and vagrancy control.¹⁰ The Court has taken religion out of public life by disallowing state-sponsored prayer in the public schools¹¹ while also prohibiting most forms of government aid, state or federal, to religious schools¹² and most displays of religious symbols in public places.¹³ Overturning centuries of tradition and the practice of almost all civilized societies, the Court has disallowed almost all distinctions on the basis of sex,¹⁴ alienage¹⁵ (removing the disadvantage of refusing to declare allegiance to the country), and illegitimacy¹⁶ (greatly reducing the stigma of out-of-wedlock births). During the

decisions and their effects).

4. See IRONS, *supra* note 1, at 326 (Harvard law professor Frank Michelman identifies Brennan as "the foremost judicial architect of American constitutionalism since John Marshall.").

5. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional the majority of states' laws restricting abortion); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming validity of *Roe v. Wade*).

6. See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding imposition of death penalty constituted cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

7. See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966) (holding that patently offensive book which appeals to prurient interests is entitled to protection of First and Fourteenth Amendments).

8. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Constitution does not confer fundamental right upon homosexuals to engage in sodomy).

9. See *Cox v. Louisiana*, 379 U.S. 559 (1965) (holding that statute prohibiting picketing near courthouse with intent to obstruct justice does not infringe on rights of free speech and assembly).

10. See *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (holding local vagrancy ordinance unconstitutional on vagueness grounds).

11. See *Engel v. Vitale*, 370 U.S. 421 (1962) (holding nonsectarian prayer prepared by New York Board of Regents and recited daily by each class in local school inconsistent with Establishment Clause).

12. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that state may not pay to send public school teachers into parochial schools to teach secular remedial courses), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *School Dist. v. Ball*, 473 U.S. 373 (1985) (holding that state may not pay teachers to conduct secular remedial classes in parochial school).

13. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (holding unconstitutional Kentucky law requiring posting of Ten Commandments in public school classrooms).

14. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding that higher drinking age for males than females violates Equal Protection Clause).

15. See *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (holding that requiring recipients of state educational aid to renounce foreign citizenship violates Equal Protection Clause).

16. See *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that denial to illegitimate children of right

Cold War, the Court disallowed the exclusion of Communist Party members from public school teaching positions¹⁷ and even from defense plants.¹⁸

The Court has devised and imposed on the states and the Federal Government a system of criminal procedure known to no other society. Apparently adopting the view, fashionable in the 1960s and 1970s, that society, not the criminal, is at fault, it vastly expanded the rights of the criminally accused.¹⁹ The result is a system of criminal justice—in which the guilt of the accused is often the least relevant consideration—so costly and complex as to make the prosecution of crime often seem not worthwhile. The Court expanded the jurisdiction of federal courts to permit detailed intervention and continuing supervision of the Nation's schools,²⁰ prisons,²¹ hospitals,²² and mental institutions.²³ The Court undertook the revision of welfare systems, providing benefits (and adding costs) beyond those provided by legislatures.²⁴

In perhaps the most impressive demonstration of its irresistible power, the Court ordered that school children be excluded from their neighborhood schools because of their race and transported to more distant schools in an attempt to increase school racial integration or “balance.”²⁵ By driving the mostly white, middle class from our urban public school systems, this massive social

to recover for wrongful death of their mother violates Equal Protection Clause).

17. *See Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding that state may not remove teachers for advocating overthrow of U.S. Government).

18. *See United States v. Robel*, 389 U.S. 258 (1967) (holding that section of Subversive Activities Control Act making it unlawful for member of Communist-action organization to engage in any employment in any defense facility violates First Amendment right of association).

19. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that admission of statements obtained in police station interrogation without full warning of constitutional rights violates Fifth Amendment privilege against self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained by search in violation of Fourth Amendment is inadmissible).

20. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that “desegregation” requires busing of students to increase racial mixing); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that school may not prohibit students from wearing black armbands in classroom as political protest due to First and Fourteenth Amendments); *Dunn v. Tyler Indep. Sch. Dist.*, 460 F.2d 137 (5th Cir. 1972) (holding constitutional the automatic suspension of students participating in walkout).

21. *See Ruiz v. Estelle*, 666 F.2d 854 (5th Cir. 1982) (holding that certain operations of Texas Department of Corrections—for instance, not providing at least 60 square feet per prisoner—were unconstitutional).

22. *See Simon v. Eastern Ky. Welfare Rights*, 426 U.S. 26 (1976) (addressing rights of indigents to treatment at hospitals classified as charitable organizations).

23. *See Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988) (ruling on permissibility of release of mental patient).

24. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (discussing constitutional limitations on termination of welfare benefits).

25. *See Swann*, 402 U.S. at 23.

experiment has made the schools less, not more, integrated, deprived of community support, and overwhelmingly nonwhite.²⁶ In Kansas City alone, orders of a single federal district judge, following policies decreed by Justice Brennan, have required expenditures approaching two billion dollars.²⁷ Neither integration nor learning increased, but the orders continued to be handed down and obeyed. This raises a real question of the limit, if any, on the power of federal judges. When, if ever, would such orders not be obeyed—when the costs reach ten billion dollars? A hundred billion? Is there any point at which present-day Americans or their elected representatives will rebel against this judicial usurpation of legislative power?

This catalogue of revolutionary Supreme Court decisions on fundamental issues of social policy, which could easily be extended, were all made under the leadership, or at least with the encouragement and concurrence, of Justice Brennan. The only ground on which he ever objected to the Court's assumption of policymaking power on an issue—for example, capital punishment,²⁸ sex discrimination,²⁹ and aid to religious schools³⁰—was that the Court did not go far enough.

Two things must be understood about these decisions, all highlights of Justice Brennan's career, to understand fully the magnitude of his achievement. The first is that they have virtually nothing to do with the Constitution and sometimes (for example, Justice Brennan's insistence that capital punishment is unconstitutional, despite being explicitly recognized by the Constitution)³¹ are in direct defiance of the Constitution. The irrelevance of the Constitution to these

26. See generally LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

27. See *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987); *rev'd in part, aff'd in part*, 495 U.S. 33 (1990) (holding that federal courts could require school district to levy taxes in excess of limits set by state statute in order to fund school desegregation plan).

28. See *Hildwin v. Florida*, 490 U.S. 638, 641 (1989) (Brennan, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would . . . vacate the death sentence in this case." (citation omitted)); *Gregg v. Georgia*, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting) ("[O]ur civilization and the law [have] progressed to [the point at which punishment by death is morally impermissible] and that therefore the punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution.").

29. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (Brennan, J., plurality opinion) (holding that sex is "suspect" criterion requiring "strict scrutiny").

30. See *Wolman v. Walter*, 433 U.S. 229, 255-56 (1977) (Brennan, J., concurring in part and dissenting in part) (state statute authorizing funds for private sectarian schools "in its entirety offends the First Amendment's prohibition against laws 'respecting an establishment of religion'"); *Meek v. Pittenger*, 421 U.S. 349, 373-85 (1975) (Brennan, J., concurring in part and dissenting in part) (same).

31. See U.S. CONST. amends. V, XIV.

decisions should be clear enough from the fact that the great majority of them involved state, rather than federal, law, and nearly all of those purported to be based on a single constitutional provision, one sentence of the Fourteenth Amendment, and indeed, on four words: “due process” and “equal protection.” It requires no jurisprudential sophistication to understand that the Court does not decide myriad difficult issues of social policy by studying those four words. The claim that the Court reaches its remarkable decisions by “interpreting” the Constitution is entirely false; nothing is, in fact, being interpreted. For example, what do you suppose Justice Harry Blackmun interpreted in *Roe v. Wade*,³² “due” or “process”? In each case, the Court simply substituted the policy preferences of a majority of the Justices for the preferences of elected legislators, and the only question presented by the decisions is why it is the preferences of the Justices that should prevail.

No one was more opposed than Justice Brennan to the Constitution meaning what it was intended to mean or to its having any definite meaning. His agenda required that it be made, as Thomas Jefferson feared, a “mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”³³ The intent of the Constitution’s framers and ratifiers, Brennan insisted, was unknowable and, in any event, irrelevant, the product of a world that is “dead and gone.”³⁴ To him this meant, however, not that the Constitution had no discernable meaning, but that it had any meaning he chose to give it. It was, he said, “the lodestar for our aspirations,”³⁵ a mysterious thing both “luminous and obscure.”³⁶ This deprived it, of course, of an essential quality of law—knowability—and made it a private crystal ball in which he could discover things others could not see. That this made him the Nation’s ultimate lawgiver on any issue of his choosing, if he could persuade four of his fellow liberal activists to go along,³⁷ disturbed him not at all. Indeed, he clearly saw it

32. 410 U.S. 113 (1973).

33. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON 212, 213 (Andrew A. Lipscomb ed., 1905).

34. William J. Brennan, Jr., Speech to the Text and Teaching Symposium, Georgetown University (October 12, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 17 (Federalist Soc’y ed., 1986); see also Lino A. Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1986, at 19.

35. Brennan, *supra* note 34, at 11.

36. *Id.*

37. “[W]hoever hath an absolute Authority to interpret any written, or spoken Laws; it is He, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them.” Benjamin Hoadly, The Nature of the Kingdom, or Church, of Christ, Sermon Preached Before the King (Mar. 31, 1717), in 2 THE WORKS OF BENJAMIN HOADLY 402, 404 (John Hoadly ed., 1773).

as an improvement on the science of government.

Justice Brennan's disdain for a Constitution of definite meaning was matched, as was to be expected, by his contempt for popular self-government. By the end of his career, he had grown sufficiently arrogant and confident of his power to make this explicit. With a candor unique in our judicial history, he openly rejected "faith in the majoritarian process" because it "counsels restraint" on the part of judges.³⁸ Respect for representative self-government, he pointed out, could lead the Court to "stay its hand" when "invalidation of a legislature's substantive policy choice" is involved.³⁹ He simply could see no reason why anyone would prefer the judgment of elected legislators to his own.

"Faith in democracy is one thing," he warned, but "blind faith quite another."⁴⁰ Although Brennan conceded that resolution of policy issues "through the majoritarian process has appeal," he insisted that "it ultimately will not do," because elected representatives might do foolish or even terrible things.⁴¹ We were fortunate, therefore, he was convinced, to have someone as wise and good as himself as the ultimate policymaker, and his confidence in his power and ability to fill the role was unbounded. A clearer illustration of the truth of Lord Acton's dictum that power corrupts would be difficult to find. It corrupts not by making men venal, but worse, as in Justice Brennan's case, by making them arrogant, by giving them an exaggerated view of their wisdom and competence.

The second and final thing to note about the Court's controversial "constitutional" decisions during Justice Brennan's tenure—in addition to the irrelevance of the Constitution—is that they have not been random in their political impact. On the contrary, they have in nearly every case disallowed a policy choice made in the ordinary political process in order to substitute a choice further to the left on the political spectrum, the policy preference of, for example, the American Civil Liberties Union ("ACLU").⁴² Isn't that an amazing coincidence? Who would have suspected, without Justice Brennan's guidance, that the Constitution is a codification of the far left's political agenda?

How are we to explain this extraordinary uniformity of result? The answer,

38. Brennan, *supra* note 34, at 15.

39. *Id.* at 16.

40. *Id.*

41. *Id.*

42. See Lino A. Graglia, Church of the Lukumi Babalu Aye: *Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 63 (1996) [hereinafter Graglia, *Of Animal Sacrifice*]; Lino A. Graglia, *A Conservative Court? No*, 1993 PUB. INT. L. REV. 147. For a representative case, see *Board of Education v. Pico*, 457 U.S. 853 (1982), in which the ACLU helped parents and students bring suit against the school district for removing allegedly inappropriate books from the school library.

very briefly, is that government by the Supreme Court in present-day America is government by and for an educational and cultural elite. Academics, particularly at our leading law schools, are—along with other members of the “knowledge class”—overwhelmingly to the left of the majority of the American people. The Justices are almost always graduates of these schools and members of this class. Free from electoral accountability, they are much more subject than other public officials to the influence of academics. The legitimacy their policymaking lacks in democratic theory they must seek, instead, in academic approval.

No one was more attuned to liberal academic opinion than Justice Brennan, and the function of the Court as he saw it was to make that opinion, rather than conflicting popular opinion, the basis of social policy. Under his influence, the Court became the mirror and mouthpiece of liberal academia, essentially the enacting arm of the ACLU. The nightmare of the American academic intellectual is that public policymaking should fall into the hands of the American people. The American people, after all, actually favor such policies as capital punishment, suppression of pornography, prayer in the schools, effective criminal law, and neighborhood schools. It is only the Supreme Court that can keep their views from prevailing. Academics, and specifically professors of constitutional law, see it as their function, in turn, to defend Supreme Court policymaking by arguing that the Justices are uniquely trustworthy, nonpartisan public servants and that their revolutionary decisions are unavoidable mandates of the Constitution.⁴³

Lord Acton’s dictum applies more, however, not less, to Supreme Court Justices than to other public officials. The Justices are, it seems sometimes to be forgotten, all lawyers. Isn’t it odd that lawyers, rightly derided as persons whose primary professional skill is manipulation of language in the interest of evading truth, should be revered as moral leaders and social policy experts upon donning a black robe? More important, among our public officials, the Supreme Court Justices are the least accountable for their actions because they are the only public officials not subject to judicial oversight. “We are not final because we are infallible,” Justice Jackson once pointed out, “but we are infallible only because we are final.”⁴⁴ Supreme Court Justices are therefore the officials least to be trusted with policymaking power.

Lord Acton’s dictum certainly applied to Justice Brennan, who was

43. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1308 (2d ed. 1988) (arguing that judges have responsibility to develop and defend theory of what rights are “preferred” or “fundamental” in constitutional adjudication); see also Graglia, *Of Animal Sacrifice*, *supra* note 42, at 22 n.158.

44. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

thoroughly unscrupulous as to truth, fact, and logic when they stood in the way of his desired result in any case. This can be clearly seen, for example, in his decisions and behavior in regard to issues of race. Although *Brown v. Board of Education*⁴⁵ is seen as the climactic and pivotal constitutional decision of this century, it happens that a much less well-known decision, *Green v. County School Board*,⁴⁶ decided in 1968 with an opinion for the Court by Justice Brennan, is even more important in terms of contemporary race issues. It is *Green*, not *Brown*, that is the source of all the legal disputes as to race that we are dealing with today, the genesis of “affirmative action.”

Brown prohibited school racial segregation and, it soon became clear, all racial discrimination by government. *Brown* became a reality with the 1964 Civil Rights Act,⁴⁷ in which Congress ratified and extended the *Brown* nondiscrimination principle. In *Green*, however, the Court, under the leadership of Brennan, converted *Brown*'s prohibition of all official racial discrimination into something like its opposite, a requirement of racial discrimination in order to increase integration. The 1964 Civil Rights Act made *Brown* a success; legally compelled racial segregation quickly came to an end, but perfect racial equality did not result. Hubris resulting from the success and acclaim of *Brown* made it possible for the Justices to think it was time for another “civil rights” advance, to move from prohibiting segregation to the vastly more ambitious and questionable project of attempting to compel integration.⁴⁸

The Court could not, however, openly announce that the principle of the great *Brown* decision had suddenly been overturned or drastically qualified, that the Constitution not only did not prohibit, but actually required racial discrimination when necessary to achieve greater school racial integration. As always, Brennan did not let this difficulty stand in his way. He simply decided to have it both ways, to impose a requirement of racial discrimination in the name of prohibiting it, logic not being a requisite for an institution subject to no review. In *Green*, Brennan repeatedly insisted that the constitutional requirement continued to be the requirement of *Brown*, the elimination of all racial discrimination.⁴⁹ He nonetheless found, reversing the lower courts, that the defendant school system was not in compliance with *Brown* despite the fact,

45. 347 U.S. 483 (1954).

46. 391 U.S. 430 (1968).

47. 42 U.S.C. §§ 1971, 2000c (1994).

48. See generally GRAGLIA, *supra* note 26.

49. 391 U.S. at 435-38 (requirement continues to be only “racially nondiscriminatory school system” mandated by *Brown*, a school system “in which racial discrimination would be eliminated root and branch”).

which he did not question, that all racial discrimination *had* been eliminated.⁵⁰ In response to the school board's argument that the Constitution could not be read to compel integration, Brennan simply denied that the Court was imposing such a requirement⁵¹ but imposed it nonetheless by holding that the school system was still unconstitutional—not “unitary”—because not sufficiently integrated.⁵²

A few years later, Chief Justice Burger, newly appointed by President Nixon, argued that the Court should resolve this contradiction, that it really should make clear to the Nation's school boards what the constitutional requirement actually was.⁵³ Justice Brennan, however, was strongly opposed and successfully prevented this from happening. “[A]ny ‘realistic’ definition” of a “unitary” system, he argued in a Court memorandum that has become public, “would appear to be a retreat from *Brown* and any other type of definition would, given the views of most whites, simply be impractical.”⁵⁴ That is, to openly state that the requirement was racial discrimination to increase integration—a requirement that would apply to the schools of the North and West as well as the South—would make it impossible for the Court to purport to be merely enforcing *Brown*, but compulsory integration could not be imposed except under the pretext of enforcing *Brown*. It was honesty that was “impractical” and that Brennan successfully opposed.⁵⁵

What public officials cannot do honestly, however, they almost certainly should not do at all. It should come as no surprise, therefore, that a policy founded on fraud, imposing a requirement of racial discrimination in the name of enforcing a prohibition of racial discrimination, has proved to be a disaster. The effect of court-ordered busing for school racial balance has been to expedite the exodus of the middle class from our public school systems and cities, leaving them less integrated and in rapid decline. But then, much of what Justice

50. *See id.* at 432. To set up a test case, the NAACP Legal Defense and Education Fund stipulated that the school system was being operated free of racial discrimination. *See* Lino A. Graglia, *When Honesty is “Simply . . . Impractical” for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153, 1158 (1987). The district court and the Fourth Circuit Court of Appeals, therefore, held that the school system was in full compliance with *Brown* and dismissed the case. *See* *Bowman v. County Sch. Bd.*, 382 F.2d 326, 328 (4th Cir. 1976), *vacated sub nom.* *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

51. *See Green*, 391 U.S. at 437 (stating that school board was mistaken in arguing that Court was “universally requiring ‘compulsory integration’”).

52. *See id.* at 437-38. For a fuller exposition of Justice Brennan's reasoning in *Green*, see Graglia, *supra* note 50, at 1158-62.

53. *See Northcross v. Board of Educ.*, 397 U.S. 232, 236-37 (1970) (Burger, C.J., concurring).

54. BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* 90 (1986).

55. *See* Graglia, *supra* note 50.

Brennan has wrongfully done—most clearly in the area of criminal procedure—though wildly applauded by academia, has proved or will likely prove to be a disaster. Whatever its other results, Justice Brennan's career should serve to prove that centralized government by unelected and unremovable Supreme Court Justices is not an improvement on representative self-government in a federalist system. This is so despite, or perhaps even because of, the fact that it reliably enacts academia's liberal policy preferences.