JOHN ADAMS, LEGAL REPRESENTATION, AND THE "CANCEL CULTURE"

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We recently celebrated the 100th anniversary of Justice Holmes's famous articulation of the value of free speech in his dissent in *Abrams v. United States*.[1] The First Amendment embodies the view, Holmes wrote, that "the ultimate good desired is better reached by free trade in ideas."[2] It is "the theory of our Constitution" that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[3]

Now, I admit to some doubt that fundamental truths are established in the same manner as the value of pork bellies. But Justice Holmes was right that the free exchange of ideas is at the core of the First Amendment and at the heart of our democratic government. And yet it is disfavored in some quarters today. That is most apparent at colleges and universities where conservative speakers have been disinvited, banned, assaulted, and—when allowed to speak—accused of harming students merely by expressing ideas

* Secretary of Labor. The following is an excerpt from Secretary Scalia's address at the 2019 Federalist Society's National Lawyers Convention. It has been edited for length and clarity.

1. 250 U.S. 616 (1919).

2. *Id.* at 630 (Holmes, J., dissenting).

3. *Id.*

that run counter to some students' preconceptions.[4] This intolerance is not isolated to our universities; it is a broad trend, so much so that it has drawn criticism from former President Obama.[5]

Intolerance and pressure to suppress ideas that may be unwelcome to some poses a special threat to the legal profession. One of the great traditions of the profession is respect for the right to representation of those with whom we disagree, and even to undertake that representation ourselves. John Adams's defense of the British soldiers charged with the Boston Massacre is one of the Nation's most important stories about the practice of law. Adams later described his defense of the soldiers as "one of the most gallant, generous, manly, and disinterested actions of my whole life."[6]

4. *See, e.g.*, Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/ [https://perma.cc/DE9G-FJNH] (recounting how student riots prevented Charles Murray from speaking and sent a Middlebury professor to the hospital); Morgan Baskin, *Cal State L.A. cancels conservative speaker, speaker coming anyway*, USA TODAY (Feb. 24, 2016), https://www.usatoday.com/story/college/2016/02/24/cal-state-la-cancels-conservative-speaker-speaker-coming-anyway/37413335/ [https://perma.cc/XDA8-3MNZ] (Ben Shapiro's invitation was revoked by California State University Los Angeles after students and faculty complained "Shapiro's remarks would promote 'racist, classist, misogynist, sexist, homophobic' speech."); Kristina Sguelglia, *Condoleezza Rice declines to speak at Rutgers after student protests*, CNN (May 5, 2014), https://www.cnn.com/2014/05/04/us/condoleeza-rice-rutgers-protests/index.html [https://perma.cc/GN8C-35JM] (Condoleezza Rice declined to speak "at the Rutgers University commencement this year, following student protests against her appearance.").

5. *See* Ashe Schow, *Obama defends free speech in comment on campus protests*, WASH. EXAMINER (Nov. 16, 2015), https://www.washingtonexaminer.com/obama-defends-free-speech-in-comments-on-campus-protests [https://perma.cc/W5E3-6AWR] ("I've heard of some college campuses where they don't want to have a guest speaker who is too conservative or they don't want to read a book if it has language that is offensive to African-Americans or somehow sends a demeaning signal toward women. I've got to tell you, I don't agree with that, either. I don't agree that you, when you become students at colleges, have to be coddled and protected from different points of view.")

6. DAVID MCCULLOUGH, JOHN ADAMS 68 (2001).

Adams was not our most modest Founder. But on this he was right. It is appropriate, admirable, and necessary for lawyers to take on clients and advance positions that may offend some observers; in this sense lawyers have a professional commitment to the free trade in ideas praised by Justice Holmes. They should be among its staunchest defenders and should recognize, too, in Justice Jackson's words, that the "freedom to differ is not limited to things that do not matter much."[7]

There are growing indications, however, that our most powerful law firms have become uncomfortable with this commitment. Last term the Supreme Court decided the "DACA" case, concerning President Trump's cancellation of the Obama Administration program under which certain young people who entered the country illegally received forbearance from deportation.[8] By my count, twenty-five large law firms filed amicus briefs opposing the President's action, on top of the three large firms representing the plaintiffs. Not a single large firm filed a brief supporting the Administration's position.

Similarly, in the same term, the Court decided a case concerning whether Title VII's prohibition of sex discrimination includes discrimination based on sexual orientation.[9] Around twenty large law firms filed amicus briefs supporting plaintiffs in a broad reading of Title VII; not a single large firm filed a brief supporting the defendant.

As should be apparent from my remarks thus far, I have no objection to any of these firms providing the representation they did. I congratulated colleagues at my former firm on their successes in left-of-center representations; I may have disagreed with their cli-

7. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
8. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019).
9. Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019).

ents and legal arguments, but I respected their lawyering and freedom to take the matter on.[10] My concern is not the particular position taken by any individual firm in any specific case, but the complete absence of any large firm on the other side of either of those two recent Court cases, and a similar imbalance in other cases involving hot-button issues.

Everyone familiar with the practice of law knows that these lopsided representations had nothing to do with the legal merits of the two cases, or an absence of lawyers at large firms who would have been interested in representing a client on the other side. There are lawyers in large firms who would have welcomed the opportunity to file a brief supporting the government's position in the DACA case or supporting the defendant employer in the Title VII case.

One factor preventing that, in these and other cases I believe, is self-censorship. Elite law firms are hesitant to let their lawyers get involved in cases that might generate criticism from the left or that conflict with the views many lawyers in the firm hold personally. Second, and related, firms fear repercussions from certain well-heeled corporate clients if they take positions disfavored by progressives. And sadly, there's reason for that concern. Some years ago, a prominent law firm was pressured by clients to end its representation of the House of Representatives in connection with the Defense of Marriage Act. To his credit, former Solicitor General Paul Clement, the lawyer for the House, left the firm in response.

In the aftermath of that episode, I believe that firms are even more hesitant to get involved in high-profile, controversial cases taking right-of-center positions. Today, it is difficult for certain clients to obtain representation from our top law firms because the firms fear repercussions for doing so. Fortunately, smaller, boutique litigation

10. These remarks should not, therefore, be construed as a criticism of that firm, which represented some of the DACA plaintiffs.

firms often step in to provide representation. But it remains troubling that the largest law firms increasingly shrink from representing clients in right-of-center positions in controversial cases. John Adams would be concerned by this trend, and it should trouble the legal profession too.

Lawyers should be leading defenders of Justice Holmes's vision of a free trade in ideas. Law firms should pride themselves, as they have in the past, on representing people and positions that are disfavored in some quarters. They should educate the public that a firm's representation of a particular client or its presentation of a particular position does not necessarily reflect its lawyers' personal views, much less the position of the firm itself. And firms should staunchly push back on clients who seek to judge or muscle them because of the firm's representation of another client.

Corporate executives cannot be expected to know, respect, or defend the values of the legal profession. That is the role of members of the bar. Firms therefore must explain to clients that no single representation defines the firm. The firm will allow its lawyers to provide pro bono representation to murderers without approving of murder. Its lawyers will represent companies charged with securities violations without approving of defrauding widows and orphans. And its lawyers will represent the Little Sisters of the Poor without, heaven forbid, accepting the teachings of the Catholic Church.

This independence of the lawyer from his client is integral to the freedom and autonomy that are among the privileges of private practice, and it is essential to lawyers' effective performance of their role in our system of justice. Among other things, it facilitates firms' representation of corporate clients accused of troubling misconduct. Today, a corporation accused of environmental crimes objects to a lawyer at its outside law firm filing a brief in support of the unborn. Tomorrow, why can't someone schooled in today's cancel

culture use the same logic to attack the firm for defending that company's environmental depredations?[11] To answer, "this is different—we profit from this work," is not going to satisfy critics in a culture that devalues the First Amendment, and which has lost sight of the special place and independence of members of the bar. Instead, firms must be prepared to explain that attorneys at the firm represent diverse clients advancing a range of positions, and positions taken on behalf of a client are not thereby the position of the firm. Rather, representing a person with whom we may disagree is a hallowed, essential tradition of the profession.

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A central reason many of us attend meetings like this is the Federalist Society's commitment to the principle I've been discussing: the free exchange of competing ideas. As has been observed in the past, if this were an organization dedicated to promoting one single narrow-minded view of the law, it invites the wrong people to come talk. I hope that when you return home, each of you has occasion to promote these First Amendment principles within our profession as a whole.

11. *See* Umair Irfan, *The surprising protest of Exxon's law firm at Harvard Law,* VOX (Jan. 16, 2020), https://www.vox.com/2020/1/16/21067763/harvard-law-climate-protest-exxon-paul-weiss [https://perma.cc/UM8P-RJTL] ("A group of Harvard Law School students on Wednesday shouted down speakers and stalled a campus recruitment dinner hosted by a major law firm that represents fossil fuel interests in climate change lawsuits.").