

Benjamin G. Davis, ordinary private citizen, Testimony, Ohio SB 117
May 29, 2023

I write to oppose SB 117, and the related bills SB 83 and HB 151, which as tandem will have the effect of:

- (1) dumbing down students with false consciousness indoctrination,
- (2) creating a separate and unequal track that will permit intellectual dishonest indoctrination of students, and
- (3) striking at the heart of academic freedom by intimidating faculty and staff in hiring, tenure and promotion while seeking to pursue their vital intellectual work as free thinkers.

I speak only for myself as an ordinary private citizen and write to make sure this coup does not pass.

1. My background

I am an Emeritus Professor of Law from the University of Toledo College of Law having retired in January 2021 after 18 years of loyal service. I am a graduate of Phillips Exeter Academy (where I just attended my 50th reunion), Harvard College, Harvard Business School, and Harvard Law School (where I was Articles Editor of the Harvard International Law Journal). I taught Contracts, Alternative Dispute Resolution, Commercial Law, International and Domestic Arbitration, and preparation for the Bar over my years in academia. I am a retired member of the New York Bar and the Supreme Court of the United States Bar. I have taught thousands of law students at the University of Toledo College of Law and other law schools such as the University of Illinois Chicago, Albany Law School, Hamline School of Law (now Mitchell Hamline School of Law), Texas Wesleyan School of Law (now Texas A & M School of Law), and Washington and Lee School of Law.

In 2021, the Republic of France awarded me the distinction of *Chevalier of the Ordre des Palmes Académiques*, a designation for scholars that dates back to 1808 in the official French honors lexicon. I am a former Chair of the American Bar Association Section of Dispute Resolution where I led the Section in its successful effort to have Resolution 105 adopted by the ABA in 2018 to encourage diversity in Alternative Dispute Resolution through concrete approaches. I was the recipient in 2021 of the D'Alemberte Raven Award, the Section's highest award, for significant contribution to the Dispute Resolution field. I am the 2022 Outstanding Contribution to Diversity Award recipient for significant contribution over the past

41 years to diversity in the international commercial arbitration part of the alternative Dispute Resolution field from the International Institute for Conflict Prevention and Resolution (CPR), a premier international center for the prevention and resolution of business and employment-related disputes. I am the 2018 Champion of Change Award recipient of Arbitral Women, the premier international commercial arbitration organization promoting women in the field. I am the recipient of the Eastman and Smith Faculty Achievement Award in 2016, the University of Toledo Outstanding Teacher Award in 2016, the United Muslim Association of Toledo, Community Service Award in 2009 and the Professor of the Year Award of the University of Toledo College of Law, Alumni Affiliate in 2009. In 2021, an anonymous donor endowed the Benjamin G. Davis Lecture Series at the University of Toledo College of Law. I am a Fellow of the National Center for Technology and Dispute Resolution of the University of Massachusetts, the premier world wide organization addressing online Dispute Resolution for the past 25 years. I founded the International Competitions for Online Dispute Resolution (ICODR) through which for free law students from around the world could compete as neutrals or advocates in online negotiation, online mediation, online arbitration, and online litigation.

For 17 years I worked in Paris first as a development and strategic business consultant. For 10 of those years I was the American legal counsel at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce – the World Business Organization – where I directly supervised 1000 international commercial arbitration and mediations with parties and neutrals from around the world, under different legal regimes, located in different countries, and in French and English. While at the Secretariat, I created the first international fast-track commercial arbitration that is now integrated in the ICC Rules of Arbitration. I led the team that designed the first electronic case management system for the Secretariat. I assisted the drafters of the Indian Arbitration and Conciliation Act. For three years I was the Director, Conference Programmes and Manager of the Institute of World Business Law developing skills of lawyers from around the world.

2. Intellectual diversity arguments are smokescreens.

There is no dearth of intellectual diversity at the College of Law. The intellectual diversity at the College of Law is extensive as evidenced by Professor Lee Strang as a representative of one of the variants of originalism and Professor and Associate Dean Rebecca Zietlow as a representative of a variant of living constitutionalism in constitutional law. The law professors in the classroom or at

the College of Law provide various approaches to the doctrines in their area of specialty so that students learn the law and learn the theories behind the law.

End of discussion.

We should not be naïve about appeals to intellectual diversity. Appeals to intellectual diversity are merely an attempt by right wing and not necessarily conservative but radical elements to co-opt the important concerns for diversity in education so as to recast that concern from its core mission in a way that allows them to not appear racist, sexist, heterosexuality fixated, and smug about disabilities. For the heart of diversity efforts has been to increase the number of women and minorities, LGBTQ+ and persons with disabilities in the field which is totally consistent with Goal III of the American Bar Association.

The intellectual diversity canard is an effort to turn us away from that important work of broadening and deepening the field to create a protected reserve for intellectual indoctrination of students in extreme right wing thought to be taught primarily by white men. It is to turn back the clock to what I experienced. My entire educational career from 1st grade through graduate school, I was one of two to four blacks in the classes at the schools I went to and never had a teacher of color until I got to college. In my work career I have been only one or one of two or three blacks in any positions in business or academia with a plethora of positions being held by whites. This reality is why diversity has been and is so important: to make the field reflect the society after hundreds of years of being reserved primarily to white males.

There is no radical element in the academic field that like a bogeyman is turning institutions into hotbeds of radical leftist dogma. Those who make that argument are espousing sheer nonsense in order to put forward their own agenda of intellectual indoctrination and protectionism for rancid intellectual oppression.

3. This proposed institute is a Trojan horse that, in association with the other bills noted above, will lead to repression of intellectual diversity.

This Institute will not welcome intellectual leadership that does not toe a hard right line. That has been made plain by Professor Lee Strang saying with pride in an interview that, at the charter school he heads that follows the right wing Hillsdale approach that can only be called indoctrination, he has made quite clear his

opposition to what he termed critical race theory (CRT).¹ That means that persons who might do their academic work in what might be perceived as being in that arena are destined to be looked at by such an Institute in a hostile manner and that their work will not be supported. Purporting this to be an institute to encourage intellectual diversity is a bold faced lie: it is a center for indoctrination in right wing visions of the legal field. In that way, it will dumb down our students by having them have an incomplete understanding of the law, its history and its complex gender, race and class traditions and aspects.

I have spent years at the College of Law listening to right wing speakers blather on about thoughts and matters that I personally have found repugnant. But, I have never stated that I reject an academic theory out of hand like Professor Strang did. I have objected in intellectual argument in the healthy intellectual environment at the College of Law.

For example, I have held a long-standing objection to originalism due to my ancestors having been enslaved by the Founder and Framers Benjamin Harrison V family and William Henry Harrison, 9th President of the United States, my ancestor impregnating my ancestor his enslaved mulatto concubine who I recently learned was named Delicia. She gave him six children all of them the results of rape (property cannot consent). To this date, I have never had a response to that objection that was coherent from an originalism proponent with the exception of the late Justice Antonin Scalia who told me to “Get over slavery!” Hardly an intellectual stimulating response.

¹ <https://wspd.iheart.com/featured/fred/content/2023-01-31-fred-and-lee-strang-talk-about-northwest-ohio-classical-academy/> . As you know, this use of CRT is the current euphemism used in political and social media circles to cover the effort to erase blacks and other minorities from educational material that we are seeing across the country in the hundreds of bills like the ones Senators Cirino and McColley have introduced. It is the new version of the Lee Atwater Southern Strategy (<https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/>) where increasingly abstract euphemism (in Ohio things like « urban voters » or « Cleveland and Columbus urban voters » or « being anti-Woke » or « anti-CRT » or « voter integrity ») are used to mask efforts to dilute and suppress minorities and minority votes. I am not duped and you should not be by these 21st century efforts at positive polarization.

I also object to living constitutionalism because all the laws up until 1920 were made by propertied white men and without the participation of women in the vote. In fact, the somewhat full participation of women and people of color only really came with the Voting Rights Act of 1965. To date, I have not heard a response to that objection from the living constitutionalists either. I have no faith that this Institute will be a source of fresh thinking but will be a bastion of the same tired constitutional law debates that led me to withdraw from a constitutional law professors listserv. And I am certain that a scholar who wished to explore just these two analyses of the dominant doctrines would be labeled unfairly a CRT scholar and neither be hired nor supported in their work by this Institute.

But who cares what I think for I am retired. My point is that this Institute will not encourage free thinkers but is rather structured to have conformist thinkers. The decisions now given to the President and the head of the Institute are decisions that are made without the benefit of the Dean and Faculty governance. This Institute would be a parasitic structure within the College of Law sucking vital resources away from the College of Law's mission as the Institute pushes its intellectual dishonest views that are repressive of free thinkers. I will have none of it.

4. Let us not be naïve and see these efforts of SB 117, SB 83, and HB 151 for what they are: a naked attempt at educational indoctrination and intimidation of faculty and staff.

These bills are attempting to use the power of the purse to teach the teachers pedagogy. Just as we are ignorant and incompetent in the ways of politics, the proponents of this legislation are ignorant and incompetent as to understanding pedagogy and academic freedom. These ham-handed efforts are deleterious to the well being of law students and all students by creating a disfavored separate and unequal path for certain thought while promoting an express lane for indoctrination of them into a false consciousness that permeates our country. This approach might have worked in the 19th century and for much of the 20th century, but it will not work in the 21st century as these proponents seek to increase the space for arcane "acceptable discrimination."

I would particularly highlight two nefarious aspects of this effort.

First, the attack on DEI is an attack on helping those students from heretofore marginalized communities and first generation in higher education from getting the support they need to prosper in their education. It returns the burden of helping those students to the status it had when I was teaching. That status is that faculty

and staff who out of a sense of duty took on the task of addressing those students' needs were both unrewarded and unfunded in those efforts at their workplace. Those faculty and staff who ignored these needs were free riders on that effort that was not recognized in the tenure and promotion process, nor meaningfully funded. Your efforts are to return to that position of privileged obliviousness and callousness.

That is not pedagogy. That is intellectual terrorism.

DEI was created precisely to meet those needs of those students in an institutionalized and funded manner and it levels the playing field across faculty and staff by removing this heretofore unfunded and unrecognized mandate from those with the temerity to actually care for the well being of these students from marginalized and first generation groups.

Second, I want to set the record straight. Part of this effort has been built on a direct slur to me and the College of Law faculty and staff. In the testimony of House member Josh Williams, one of my former students in commercial law, he gave the impression that I had responded to him in the classroom or in the College of Law in an intimidating manner. This is serious calumny.

I draw your attention to the misrepresentation of me and the slur against my dear College of Law faculty and staff contained in the Ohio Senate testimony of House Member Josh Williams. He and I have had exchanges about it on Facebook and he denies misrepresenting me so I will put a link to his written testimony here and highlight to you the misrepresentation.

https://search-prod.lis.state.oh.us/cm/pub/api/api/unwrap/general_assembly_135/chamber/135th_ga/ready_for_publication/committee_docs/cmte_s_workforce_higher_ed_1/testimony/cmte_s_workforce_higher_ed_1_2023-04-19-0400_373/sb83repwilliams.pdf

Here is my exchange on the misrepresentation with House Member Joshua Williams:

« Joshua Williams- I am getting tired of this.

Here is your language.

« During a discussion in a law school course on Administrative Law, I commented that our nation should not adopt an open-border policy, a common-sense declaration in my point of view. However, this honest expression of a commonly held belief precipitated a barrage of discrimination against me, led by one of my own professors. **Responding to my comment**, a tenured faculty member at the University of Toledo College of Law replied to a Facebook post of mine that my views reminded him of the Nazi party in Germany.” (Emphasis added)

« Responding to my comment » in the context gives the impression that the response is to the comment in the classroom in the sentence before. Slick. A classroom that I was never in.

Sick sick sick.«

I am still awaiting him sending me the Facebook comment he made to which I was responding on Facebook. I give notice as a public service announcement periodically on my Facebook page that it is a full contact space and that if someone does not like something I say, they should unfriend me.

As I have noted, none of this occurred at the College of Law or in a classroom, notwithstanding the impression attempted to be made.

It is a slur on me and the College of Law faculty and staff to suggest otherwise. None of this has to do with academic freedom which is the so-called basis for this legislative submission. I am appalled that you would be taken in by such a misrepresentation.

Thus I am duty bound to correct the record.

5. What you should do: stay in your lane

Withdraw or oppose these three bills. They are not helpful to our students nor to Ohio. You should fund better the universities and the College of Law without placing perverse indoctrination strings on that funding. That

funding is sorely needed, has been insufficient for years, and is your job to do in order to make sure Ohio has an educated and diverse community.

Respectfully submitted,



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