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THE ROLE OF ACADEMIC FREEDOM IN DEFINING THE FACULTY EMPLOYMENT CONTRACT

Academic freedom guarantees college and university professors the right to research, publish, and teach without interference from outside sources. Since the concept is ambiguous, it is not incorporated readily into the employment agreement between the professor and the employing institution. This Note examines the concept of academic freedom by exploring the effect that the American Association of University Professors (AAUP) has had in institutionalizing the concept and by tracing the role of the judiciary in applying the concept of academic freedom to employment disputes. The Note also examines the role of the National Labor Relations Board (NLRB) as a possible source for the guarantee of academic freedom through faculty unionization. Concluding that neither the courts, the NLRB, nor the AAUP have effectively guaranteed academic freedom, this Note evaluates specific proposals designed both to provide security for the professoriate and to make more comprehensible the rights and obligations of both parties to the academic employment contract.

INTRODUCTION

THE CONCEPT of academic freedom\(^1\) plays a central role in the employment relationship between the college or university and the professor. This relationship, however, is usually defined in a form contract which contains only information about the individual professor’s school or department, rank, salary, and tenure posture\(^2\) and nothing regarding the effect of academic freedom on the employment contract. In an effort to provide

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1. See note 23 \textit{infra} and accompanying text for a generally accepted definition of academic freedom.


\begin{quote}
[It] [the faculty employment contract] is a most mysterious animal. Perhaps the first and most mysterious question is that of the terms of this professorial contract. I looked the other day at my own contract of employment, a curt document, containing little more than my name, address and position and on the back a few excerpts from the tenure by-law, which tells me, \textit{inter alia}, that the University may terminate the appointment of a Faculty Member with permanent tenure if, “The Board declares publicly that extraordinary financial exigencies at the University necessitate a reduction in the number of Faculty Members.” Other, however, than this one paper, there is nothing in the nature of express terms between the university and me. We must, therefore, look . . . to terms incorporated by reference or implied in fact or law. Not all universities . . . are so fortunate . . . to have a faculty handbook, stating which of its provisions are or are not binding. Some universities have no faculty handbook. . . .
\end{quote}
some guidance in determining the rights, duties, and obligations of the parties in the absence of such contractual details, some form contracts expressly incorporate the institution’s faculty handbook or other ancillary statements of policy and procedure. Where the form contract makes no express reference to ancillary sources, however, it is common for various additional sources to be assimilated implicitly into the employment contract. The college or university and the individual professor often differ as to which supplemental sources to incorporate since this basic determination materially impacts on the resolution of any dispute.

One commentator has argued that faculty employment contracts should be as complete and accurately worded as other legal documents. Faculty employment contracts, however, embrace nebulous conceptual principles such as academic freedom, tenure, and academic due process that are as difficult to define as the legal standards of “reasonable person” and “good faith.” The interaction of these nebulous principles makes academic employment contracts fundamentally different from other types of employment contracts.

Even where supplemental sources are incorporated to aid in the interpretation of the employment contract, it is difficult to define and apply the principles of academic freedom, tenure, and academic due process because they “vary with factual and institu-

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In the absence of terms incorporated by reference, we must fall back on the minimal implied terms at common law.

Even if terms are incorporated into the individual contracts from some other source, it seems that their protection may become illusory.

Id.

3. Debicka, supra note 2, at 23; Finkin, supra note 2, at 1125.
5. Finkin, supra note 2, at 1124–25. Professor Finkin describes the rather cavalier process of bargaining between the university and the prospective employee which usually culminates with the signing of a form or contract or the receipt of a letter. Another commentator has described the “negotiation” process as follows:

[Professors often lack vital information not only about job offers they consider and reject but also about the one they actually accept; over one-fourth of the more than one hundred professors interviewed confessed that they did not know about such matter such as . . . office facilities, fringe benefits . . . promotion possibilities, and committee responsibilities at the time they signed their contracts.

7. Id. at 237.
8. Id.
tional contexts [and] are intensely practical matters [which] negate any concept of inflexible procedures universally applicable to every conceivable situation." This inability to correct the ambiguity of employment contracts forces many institutions to state that the equally nebulous constructs of "fairness and reasonableness" should determine the parameters of academic freedom and academic due process. Unfortunately, such imprecise terminology only perpetuates the ambiguity already inherent in faculty employment contracts.

This Note contends that faculty employment contracts which lack such clarity and precision, coupled with an adverse market for professorial positions, threaten the fundamental concept of academic freedom. The threat is engendered by permitting college and university administrators to dismiss faculty personnel for purely "political" purposes under the guise of a legitimate exercise of administrative discretion. The resulting chill on academic freedom, in turn, causes a decrease in both the quantity and quality of independent scholarly research and teaching in our colleges and universities.

The Note begins with a historical overview of the role of the professor in higher education and the development of the concept of academic freedom. The Note then briefly discusses the formation of the American Association of University Professors (AAUP), the role of that organization in regulating faculty employment contracts, and the events which culminated in the promulgation of the 1940 Statement of Principles on Academic Freedom and Tenure (1940 Statement). Because the judiciary has become increasingly involved in the resolution of academic contract disputes, the Note also reviews a series of cases which interpreted the 1940 Statement and other AAUP policy documents as either reliable sources of custom and usage within the academic profession or an embodiment of the normative stan-

9. *Id.*
10. *Id.*
13. See notes 175–85 infra and accompanying text.
14. See notes 22–47 infra and accompanying text.
15. See notes 48–84 infra and accompanying text.
16. See notes 54–59 infra and accompanying text.
17. See notes 113–42 infra and accompanying text.
The impact of the extension of the jurisdiction of the National Labor Relations Board (NLRB) to include faculties of colleges and universities and the subsequent revocation of that jurisdiction by the Supreme Court is also a subject of the Note. Concluding that the AAUP, the judiciary, and the NLRB have failed to guarantee academic freedom through their definitions of the faculty employment relationship, the Note evaluates specific proposals designed to establish the terms and conditions of faculty employment more comprehensively and with greater clarity.

I. THE HISTORICAL DEVELOPMENT OF ACADEMIC FREEDOM

Academic freedom has played a central role in the evolution of the modern college and university. While recognized as an essential right, the concept of academic freedom is not readily defined. The more comprehensive explication of this illusive concept was published in 1930 by Arthur O. Lovejoy, the founder of the AAUP:

Academic freedom is the freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.

Academic freedom is a “qualified right” which guarantees an individual scholar limited protection from the retaliatory or retributive action of an employing institution. The Lovejoy definition, in particular, confines this protection to the right of a qualified scholar to research and publish without interference from outside sources. Notably, the right to academic freedom

18. See notes 143–85 infra and accompanying text.
19. See notes 186–237 infra and accompanying text.
20. See notes 238–92 infra and accompanying text.
21. See notes 293–313 infra and accompanying text.
25. Id. Professor Herberg notes that the scope of the Lovejoy definition is further
affords faculty members a protection which is supplemental to the protections provided by the first amendment. Furthermore, academic freedom is neither a fundamental human right nor a derivation of natural law. Rather, such freedom is an acquired right which society has granted because of the perceived relationship between unfettered academic inquiry and social advancement.

The American professoriate, however, has not always been the beneficiary of the protections afforded by academic freedom. The notion that faculty members should be afforded such freedom originated in the 18th century when external influences began to seriously impede the intellectual and technological development of colleges and universities. The two primary sources of such interference were the denominational influence of religion and the secular influence of university benefactors.

A. The University and the Church

Throughout the 17th and the beginning of the 18th century, most colleges maintained strong denominational affiliations. In fact, most institutions required conformity between the personal religious views of their professors and the religious philosophy of the institution. The imposition of this religious affiliation re-

limited to include only written and spoken communications in the professor's area of expertise engaged in during lectures or other classroom activities, professional meetings, or in journal or book publications. Id.

26. Id. Professor Herberg has argued that because the principle of academic freedom has been accepted so widely, it sometimes is viewed erroneously as a constitutional right subsumed within the first amendment. Herberg illustrates the operation of academic freedom by suggesting that a professor of meteorology would not be sheltered from penalty or reprimand if he or she continually lectured to his or her meteorology classes on an unrelated topic like sexual ethics. Academic freedom, however, would have protected Darwin's right to lecture to classes on his theories of evolution. Herberg further notes that while freedom of speech is protected constitutionally, there is no natural or constitutional right to membership on a university faculty. Herberg observes: "An academician, as citizen, is of course protected by the First Amendment, as is any other citizen. Only when acting as an academician is he protected by the special right to academic freedom." Id.


29. Herberg, supra note 24, at 1.

30. For a comprehensive discussion of the historical development of the American college under the auspices of a sponsoring religious institution, see R. Hofstadter & W. Metzger, supra note 22, at 114-85.

31. Id. Academic freedom also has been defined as "the principle designed to protect the teacher from hazards that tend to prevent him from meeting his obligations in the pursuit of truth." R. Kirk, supra note 27, at 1.

32. R. Hofstadter & W. Metzger, supra note 22, at 155. Hofstadter notes that
requirement created problems in the academic employment relationship. The institution created an atmosphere in which professors were viewed as mere pawns in the religio-educational process. It was more important for the professor to exemplify "piety and good morals"$^{33}$ than academic excellence. Consequently, the professoriate was dominated completely by the ecclesiastically controlled administrative branch of the college whose actions could be capricious.$^{34}$ Eventually, this clerical influence waned, but it was replaced gradually by the special interests of developing industry.$^{35}$

**B. The University and Business**

As the 18th century progressed, advancements in the natural sciences contributed to the secularization of college and university education.$^{36}$ The church's influence began to erode and a new alliance arose between the college or university and business interests. With the advent of the Industrial Revolution and the growth of large corporations, wealthy members of the business world began to support colleges and universities in an unprecedented fashion.$^{37}$ Concurrently, benefactors began to stipulate the ends to which their gifts were to be applied. The influence that these corporate benefactors exerted over educational institutions proved to

Yale's bylaws formalized the requirement of "[e]xacting of all incoming officers a public statement of assent to the Westminster Confession and the ecclesiastical discipline of the Connecticut Congregational churches as laid down in the Saybrook Platform of 1708." $^{33}$ Id. at 153.

$^{34}$ In response to a discovery that a French professor embraced "unsound doctrines," the Harvard Overseers passed the following resolutions, stating that as Overseers they had the right:

1. To Examine into the principles of all those that are employed in the instruction of the Students of the College upon any Just Suspicion of their holding dangerous tenents altho no Express Charge be layed in against them. . . . [A]nd that no person chosen into such an office shall be accepted or Continued who refuseth when desired to give Satisfaction to this board as to their principles in religion. $^{34}$ Id. at 157. Notably, the faculty reportedly did not protest the above resolution. $^{34}$ Id.

$^{35}$ See notes 113-39 infra and accompanying text for a discussion of instances where the actions and beliefs of the modern professor has resulted in questionable action by the university administration.

$^{36}$ R. Hofstadter & W. Metzger, supra note 22, at 185-201.

$^{37}$ The largest recorded gift to a college before the Civil War was $50,000. Business philanthropy in the latter 19th century, however, dwarfed earlier donations in both size and frequency. Some examples of the business philanthropy of the late 1800's are John D. Rockefeller's gift of $34 million to the University of Chicago and a $24 million gift by Leland Stanford to Stanford University. In addition to gifts to specific institutions, large educational foundations such as the Carnegie Corporation, founded in 1921 with assets of $151 million, and the General Education Board, founded in 1902 by John D. Rockefeller with assets of $46 million, also were established. $^{37}$ Id. at 413-14.
be a potent restraint on academic freedom.\textsuperscript{38}

The "trial" of Richard T. Ely, director of the University of Wisconsin School of Economics, demonstrated how a large donor could compel a university administration to infringe upon a professor's academic freedom. A committee of regents tried Ely for heretical social and economic writing.\textsuperscript{39} The specific allegations of the charge related to Ely's prolabor views.\textsuperscript{40} Although Ely ultimately prevailed, commentators indicate that the university retained him primarily because of his stature and contribution to the university's popularity and renown.\textsuperscript{41}

The increasing dominance of business interests over the college and university was joined by another more fundamental change in higher education. In the 1890's, the number of college and university professors increased by ninety percent. As a result, the professorial market became saturated. This phenomenon reduced the bargaining power of those individuals seeking jobs and rendered the job security of the employed more tenuous.\textsuperscript{42} In response to this trend, the professoriate began to demand explicit contractual tenure provisions.

Initially, the award of tenure proved inconsequential. Although isolated judicial opinions forced a college or university to

\textsuperscript{38} Some of the more outstanding examples of the adverse influence exercised by business donors is reflected in the following examples: Henry Carter Adams was dismissed from Cornell University for a prolabor speech; Edward W. Bemis was dismissed from the University of Chicago in 1895 for espousing antimonopolistic views, only to be viciously whipsawed by his new employer, Kansas State Agricultural College, in 1899. After his dismissal from Chicago, Bemis was hired by Kansas State Agricultural College when the Democrats and Populists gained control of the state legislature in 1896. Bemis subsequently was dismissed for his position "on economic questions" when the Republicans regained control of state government in 1899 and engaged in partisan reprisals against all faculty members who opposed "sound conservative economics." Bemis wrote to Richard T. Ely that it was readily apparent that the dismissals were "to prevent the possible development among students and in the state at large of a point of view different from that usually favored by the donors to the private universities and colleges." \textit{Id.} at 420–25.

\textsuperscript{39} \textit{Id.} at 426.

\textsuperscript{40} \textit{Id.} Specifically, Ely was accused of entertaining and advising a union delegate in his home, encouraging workers to strike, threatening to boycott personally a local antiunion firm whose workers were on strike and favoring the closed shop principle. \textit{Id.}

\textsuperscript{41} \textit{Id.} at 432. Not only was Ely "acquitted," but the regents issued a statement endorsing the concept of academic freedom which has been labeled the "Wisconsin Magna Charta." \textit{Id.} at 426–27. Edward Bemis, the academic reformer who had been dismissed from both the University of Chicago and Kansas State Agricultural College made the following observation in a congratulatory letter to Ely: "That was a glorious victory for you, . . . I was sorry only that you seemed to show a vigor of denial as to entertaining a walking delegate or counseling strikers as if either were wrong, instead of under certain circumstances a duty." \textit{Id.} at 434 (emphasis supplied).

\textsuperscript{42} \textit{Id.} at 454.
adhere to tenure rights which had been contractually granted, the majority of cases held that the trustees and regents retained unfettered power to dismiss professors, notwithstanding express contractual tenure provisions. In *Hartigan v. Board of Regents of West Virginia University* for example, the court held the Board of Regents' actions to be beyond the purview of the courts. This holding exemplifies the degree of deference the judiciary has accorded to the actions of trustees and regents. The court opined, "[I]s the Board of Regents to do as it pleases, without control, erroneous as its actions may be? Yes, so far as the courts are concerned." This judicial posture emasculated any protection of academic freedom offered by tenure provisions and effectively reduced the American professor to a pawn of the academic establishment. This attitude also created an environment which fostered the development of a professional organization, the AAUP.

43. *See, e.g.*, Kansas State Agricultural College v. Mudge, 21 Kan. 169 (1878) (award of damages given for the term remaining in a professor's employment contract despite the existence of a clause in the contract which empowered the board to remove a teacher "[w]henever the interest of the college shall require"); Butler v. Regents of the Univ., 32 Wis. 124 (1873) (professor at a state university is not a "public officer" in the sense that his employment by the state would preclude a contract from arising between the professor and the university).

44. Ward v. Board of Regents of Kan. State Agricultural College, 138 F. 372 (8th Cir. 1905). In *Ward*, the court, after vainly attempting to distinguish *Mudge*, held that the statute which empowered the regents to remove a professor in the interest of the college could not be used to impose any liability on the school for breach of contract. The court reasoned that judicial imposition of liability for following a statutorily mandated course of action essentially would overrule the statute sub silento. The court also cited Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N.W. 1042 (1894), for the proposition that exercise by the regents of their power of dismissal was not a proper area for judicial intervention.

In *Darrow v. Briggs*, 261 Mo. 244, 169 S.W. 118 (1914), the court held that the dismissal of a professor because of his religious preference was proper since the bylaws of the college provided for dismissal when the trustees determined that such action was in the best interest of the college. The court based its decision on the premise that when parents select a college for their children, it is desirable for the college to have a religious atmosphere harmonious with majoritarian religious doctrine in the western hemisphere. Thus, the court viewed the adherence to a nonwestern religious belief as adequate grounds for dismissal. *See also* Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N.W. 1042 (1894). In *Gillan*, the court not only held that a professor could be removed without a trial, but also stated that the Board of Regents may remove professors at pleasure, and such action "cannot be inquired into or questioned by the courts." *Id.* at 13, 58 N.W. at 1044.

45. 49 W. Va. 14, 38 S.E. 698 (1901).

46. *Id.* at 18, 38 S.E. at 700.

II. THE AAUP AND THE 1940 STATEMENT

Although American professors were slow to organize,\footnote{48. Three basic reasons have been offered for the reluctance of the professoriate to organize: 1) The nature of the work kept the members of the profession separated and out of contact and made meaningful and continuous communication difficult; 2) Each university tended to develop its own common law and internal dispute settlement system. There were also professorial associations which created a type of cast system within the profession by limiting membership to individuals who had achieved a certain status such as full professor; 3) Ego—the professoriate was reluctant to get involved in anything that resembled trade unionism and had material gain as its primary objective.} the dominating role which college and university administrations assumed over their professorial employees\footnote{49. See notes 44–47 supra and accompanying text.} and the stance the institutions adopted as the "voice of the profession"\footnote{50. R. Hofstadter & W. Metzger, supra note 22, at 471.} eventually forced the professors to unite. Moreover, the lack of judicial support for the professors’ claims of legally enforceable contract rights stimulated organization.\footnote{51. See notes 44–47 supra and accompanying text. In 1913, the watershed was reached when a professorial committee approached the president of Lafayette College to investigate a professor’s dismissal. Lafayette’s president summarily dismissed the committee’s inquiry, stating, “I trust you will pardon me if I say that your committee has no relation to me personally which would justify my making a personal statement to you with regard to these matters.” In its official report the committee made the following statement: The attitude thus assumed does not seem to this committee one which can with propriety be maintained by the officers of any college or university toward the inquiries of a representative national organization of college and university teachers. . . . [W]e believe it to be the right of the general body of professors . . . to know definitely the conditions of the tenure of any professorship . . . and also their right . . . to understand unequivocally what measure of freedom of teaching is guaranteed in any college, and to be informed as to the essential details of any case in which credal restrictions, other than those to which the college officially stands committed, are publicly declared by responsible persons to have been imposed. No college does well to live unto itself to such a degree that it fails to recognize that in all such issues the university teaching profession at large has a legitimate concern. R. Hofstadter & W. Metzger, supra note 22, at 475–76. It is interesting to note that two weeks after the adoption of the committee’s report, the Lafayette trustees dismissed the president. Id. 52. The AAUP began by offering membership on a very restrictive basis. The original constitution provided that only an individual who was “of recognized scholarship or scientific productivity who holds and for ten years has held a position of teaching or research”} in 1915, after inviting leading academicians at nine institutions to a conference, a group of eighteen professors at Johns Hopkins University formed the AAUP. As a result of the conference, invitations to join the national professional association were sent to virtually every full professor at well-established institutions; 867 professors, representing 60 institutions, accepted their invitations.\footnote{52. The AAUP began by offering membership on a very restrictive basis. The original constitution provided that only an individual who was “of recognized scholarship or scientific productivity who holds and for ten years has held a position of teaching or research”} By 1922, the AAUP
claimed over 4,000 members from 183 institutions. As the AAUP grew, it assumed a bifurcated role—that of codifying and disseminating accepted principles of academic freedom and that of investigating violations of those principles. These dual roles are discussed separately below.

A. The AAUP as a Legislative Body

The AAUP's initial attempt in 1915 to codify the principles of academic freedom and tenure was a dismal failure. Ten years later, the American Council on Education (ACE) successfully adopted a formal statement of those principles at a conference attended by AAUP representatives. This 1925 Statement, however, was not well received by professional organizations; in fact, only the AAUP and the American Association of Colleges (AAC) adopted its principles.

The 1925 Statement not only failed to win the approval of professional organizations, but it also failed to gain the widespread approval of college and university administrations. Many such administrations failed to adopt the Statement because its policies were in the form of specific rules which could be incorporated into an institution's bylaws. This incorporation, however, apparently would have constituted a violation of the provisions of many institutions' charters. To remedy this problem, the AAUP and the AAC reconvened in 1938 to formulate a comprehensive policy statement which would not be embodied in a statement of specific

was eligible for membership. These restrictions gradually were deleted and AAUP membership is now open to virtually anyone who wishes to join, including members of the general public. See AAUP CONST. art. II, § 1, cls. a-e, in AAUP, POLICY DOCUMENTS AND REPORTS 95 (1977).

53. R. Hofstadter & W. Metzger, supra note 22, at 478.
54. See R. Hofstadter & W. Metzger, supra note 22, at 480-86 for a brief discussion of the AAUP's 1915 Statement which articulated two principle objectives: the establishment of definite tenurial rules and the limitation of the trustee's power to dismiss professors. Id. at 480-81.
55. Id. at 486. The 1925 Statement was essentially a combination of the AAUP's 1915 Statement and a similar document issued in 1922 by the American Association of Colleges (AAC). The latter organization was the administrative counterpart of the AAUP because its membership was comprised primarily of college and university presidents. The most notable aspect of the 1925 Statement was that it marked the first cooperative effort between the AAUP and the AAC. As Professor Metzger states, "A great bridge had been crossed." Id. at 486.
56. Id.
57. By 1939, approximately seven boards of trustees in the United States had adopted the 1925 Statement. Id. at 487.
58. Id. at 486-87.
rules. After further negotiations and several amendments, the AAUP and the AAC jointly endorsed the 1940 Statement.\textsuperscript{59}

\textsuperscript{59} The 1940 Statement of Principles on Academic Freedom and Tenure provides:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

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.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he 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 he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the
B. The AAUP as an Independent Investigative Agency

The AAUP also serves as an independent agency which investigates infringements on academic freedom and breach of contract complaints. These investigations are used more to bring public pressure to bear on institutions than to provide a source of revenge for misused professors. The AAUP investigations are noted for their thoroughness and represent a potential source for developing a consistent body of university law. Such legal precedent is unlikely to evolve, however, because the AAUP views each investigation as a de novo application of the 1940 Statement to each particular set of facts. The AAUP defends this practice on the ground that parties might be unwilling to accept an AAUP decision if stare decisis is employed.

Probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.


61. Id. at 1105-06.

62. The AAUP's primary method of public pressure is the maintenance of a censure list of institutions which have infringed academic freedom. This list is published in the AAUP Bulletin and other professional journals. It also is made available to placement offices in colleges and universities around the country. This recordkeeping has proven to be reasonably effective as most institutions will capitulate to AAUP standards fairly quickly to get their names removed from the list. The average duration of censure is two to five years, although one institution has been on the censure list since 1956. Developments in the Law—Academic Freedom and Tenure 143-46 (L. Joughin ed. 1967).

63. Developments in the Law—Academic Freedom, supra note 60, at 1110.

64. Id. at 1107.

65. Id.
The principles contained in the 1940 Statement are general and provide the flexibility necessary to continue to apply the Statement. The generality and vagueness inherent in such a document, however, necessitates subsequent interpretation. Two primary sources supply such interpretation: the application of the 1940 Statement to disputes which the AAUP has mediated and the promulgation of official interpretations, most notably the 1970 Interpretive Comments. The 1940 Statement, officially endorsed by over 100 organizations, and its interpretive gloss occupy a prominent position in disputes involving the reciprocal rights and obligations of the professor and the university.

C. Interpretive Gloss on the 1940 Statement

The 1940 Statement embodies three principles which the AAUP has tried to fulfill since the Statement was promulgated. The first and most critical objective is to provide protection and guidance for professors by defining the parameters of protected speech and action. Second, the 1940 Statement attempts to provide guidance for institutional administrators in drafting personnel regulations such as faculty handbooks. Finally, the Statement tries to assist both the professor and the institution in assessing the propriety of each other's actions.

To add further substance to the admittedly vague guidelines of the 1940 Statement, the AAUP promulgated additional statements on such issues as extramural utterances and procedural standards for faculty dismissal hearings. These statements and other reports form a substantive gloss on the general policies outlined in the 1940 Statement. In 1969, apparently in response to a sentiment that the 1940 Statement was outdated, the AAUP and the

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66. See note 59 supra.
68. Id. at 1106.
69. Id. at 1107.
70. For a list of endorsers, see AAUP, POLICY DOCUMENTS AND REPORTS 1 (1977).
71. Developments in the Law—Academic Freedom, supra note 63, at 1106.
72. Id.
73. Id. For a slightly different view of the objective of AAUP policy statements, see Brown & Finkin, The Usefulness of AAUP Policy Statements, 59 EDUC. REC. 30 (1978).
76. All of the major interpretive documents are contained in AAUP, POLICY DOCUMENTS AND REPORTS (1977).
AAC established a joint reevaluation committee. Rather than re-drafting or recommending textual changes in the Statement—a task which would have required re-endorsement by those institutions which had previously endorsed the Statement—the committee footnoted the Statement with “interpretations.” It is noteworthy that only the AAUP, and not the AAC, subsequently endorsed the 1970 Interpretive Comments.

A major issue, therefore, is how the courts should use the 1940 Statement and the 1970 Interpretive Comments to interpret employment contracts. Two commentators, Professors Brown and Finkin, suggest that the 1940 Statement and its interpretive gloss be used to interpret vague employment contract terms. Brown and Finkin note that courts, in interpreting faculty employment contracts, often rely on the relevant institution’s faculty handbook and personnel regulations to supply information not contained in the contracts. When these sources refer to such concepts as “academic freedom” and “tenure,” however, the courts should examine the AAUP’s Statement and its interpretive gloss to give these terms meanings consistent with those held by the academic community.

Brown and Finkin further suggest that when the faculty handbook or other personnel regulation explicitly refers to the 1940 Statement, the courts, in interpreting the contract, should consider the history of the Statement as well as bilateral and unilateral AAUP interpretations. The relative weight to be allocated a specific statement should depend on whether it was the product of a cooperative, interorganizational effort, like the 1940 Statement, and whether the document received sufficient support, as evidenced by official endorsements. The AAUP contends that when courts are faced with an academic controversy, the AAUP policy documents can provide a valuable source of information

77. See note 70 supra.
78. The 1970 Interpretive Comments constitute a valuable source of additional information which courts can use when interpreting vague provisions in an academic employment contract. For the complete text of these interpretations, see AAUP, Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments, in AAUP, POLICY DOCUMENTS AND REPORTS 1 (1977).
79. For a chronological listing of all the major AAUP policy documents and the action taken on these documents by the AAUP and other organizations, see Furniss, The Status of "AAUP Policy," 59 EDUC. REC. 7, 16-18 (1978).
80. Brown & Finkin, supra note 73, at 41.
81. Id.
82. Id.
83. Id. at 42.
and insight for the courts; "[t]o the extent that they reflect a reasoned exposition of how the controversy should be resolved, a court may well be persuaded by them." 84

III. THE JUDICIARY AND THE AAUP

The early history of judicial protection of professors' rights in employment contracts was erratic and discouraging to the individual professor. 85 In the late 19th century, it was not unusual for a professor, employed under a contract with a fixed term, to be dismissed before the expiration of the term on the premise that the term contract itself was an invalid attempt to restrict the college or university governing board's power. 86 As recently as 1958, judges viewed tenure as irrelevant to an institution's decision to employ and dismiss faculty members. 87

A possible rationale for the earlier court decisions is that those cases were decided when tenure plans were novel concepts. 88 Furthermore, few courts at that time understood that the viability of academic freedom depended almost entirely on the legal enforceability of tenure. Yet, if society is to benefit from unfettered intellectual inquiry, 89 faculty members must be secure in both their positions as professors and their belief that they are free to research and publish without fear of retaliation if such efforts prove to be unpopular. 90

84. Id.
86. See, e.g., Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N.W. 1042 (1894). But see Kansas State Agricultural College v. Mudge, 21 Kan. 169 (1878). In Mudge, the court awarded damages to a professor dismissed in violation of his employment contract, despite the existence of a contractual clause permitting the board to remove a professor "whenever the interests of the college shall require." 21 Kan. at 173. In a subsequent case, a lower Kansas court interpreted the clause in a one-year term contract permitting early dismissal by vote of the governing board to be limited to removal for good cause. Board of Educ. v. Cook, 3 Kan. App. 269, 45 P. 119 (1896).
88. Professor William Murphy observed that:
[I]n view of the conflict in the earlier authorities, it cannot be said that there is any settled "law" which makes tenure plans either enforceable or unenforceable. Furthermore, these earlier cases are dubious sources of guidance in any event, since most of them were decided in the days before tenure plans came into widespread use and acceptance, at a time when employer prerogatives in all areas were largely unlimited, and professors too were considered to be mere hired hands.
Murphy, Educational Freedom in the Courts, 49 AAUP Bull. 309, 312 (1963).
89. See text accompanying note 28 supra.
90. Professor Murphy also has observed:
In this century . . . , great importance has been attached to the concept of aca-
A. The Role of the 1940 Statement

Faculty members in the late 1950's and 1960's experienced an unprecedented demand for their services. As a result, the 1940 Statement gained increasing acceptance among institutions attempting to attract professors to their faculties. During this period, conflicts between a professor and a college or university rarely were litigated. The infrequency of such litigation was causally related to two factors: dismissed professors found it easier to move to a new institution than to litigate their claims; and, historically, the judiciary had been unsympathetic to faculty contract claims.

In the early 1970's, institutions of higher education were faced with a significant decrease in enrollment which resulted in the curtailment of tenure and faculty members' mobility. These changes further increased litigation, particularly where a material breach of the employment contract was at issue. The courts' inability to grasp the novel concept of academic freedom aggravated the professoriate's situation. Thus, this "new depression in higher education" created a "rising sense of insecurity" which chilled any exercise of academic freedom approaching the periphery between protected and unprotected behavior.

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demic freedom as an essential attribute of a socially useful and intellectually healthy university community. . . . The AAUP recognized that professors must be protected from arbitrary and punitive discharges in order to assure freedom of research and teaching. Academic tenure has rightly been considered to be the handmaiden to academic freedom . . . .

Murphy, supra note 87, at 310.
91. Finkin, supra note 2, at 1121.
92. Professor Finkin observes:
Formal institutional adherence to the 1940 Statement was initially far from uniform; but, especially since World War II with the enormous growth of higher education, the rise in demand for professional training and scientific research, the elevated prestige of individuals of learning, and the 'massive authority of the law of supply and demand,' institutions have increasingly come to accommodate these claims in institutional policy, most frequently by explicit endorsement of the 1940 Statement or by the adoption of policies modeled on it.

Id. (citations omitted).
93. Id.
94. See notes 44-46 supra and accompanying text.
95. Finkin, supra note 2, at 1122 n.10.
96. Id. at 1123.
97. Professor Finkin states: [W]hile a considerable body of academic lore developed around the concepts of academic freedom and tenure, little law on these subjects was declared by the courts, and the law that did result from the judiciary's fitful encounters with the professoriate did not encourage faculty members routinely to seek relief in the courts.
Id. at 1121-22.
99. Finkin, supra note 2, at 1122.
The heightened tendency of professors to litigate their claims forced courts to interpret the sketchy terms of academic employment contracts.\textsuperscript{100} To fill the frequent lacunae and give meaning to "academic freedom" and "tenure," several courts looked to the custom and usage of these concepts in academia. To define custom and usage, these judicial bodies looked to the 1940 \textit{Statement} and other AAUP policy documents.\textsuperscript{101}

The court's failure to rely on AAUP documents to define an employment contract often led to unsatisfactory results. In \textit{Zimmerer v. Spencer},\textsuperscript{102} for example, the court had to define the contract terms of "academic due process" and "tenure" in reviewing the dismissal of a professor who had been a faculty member for six years.\textsuperscript{103} The court could have drawn significant support from the 1940 \textit{Statement} and the 1970 \textit{Interpretive Comments} since the college's notice of nonrenewal procedures bore a striking resemblance to those procedures advocated by the AAUP. The court, however, relied on the "unwritten common law" of the college to reach its decision.\textsuperscript{104}

Dr. Zimmerer argued that although the college did not have an explicit tenure system, she was entitled to \textit{de facto} tenure because the \textit{San Jacinto Junior College Faculty Handbook} contained the statement: "Tenure is expected to be stable."\textsuperscript{105} The court stated that it was necessary to define the term "tenure"\textsuperscript{106} but that neither the \textit{Faculty Handbook} nor the college's brief provided insight into the word's meaning. Abandoning its interpretive efforts, the court simply asserted that the facts were sufficient to support a finding that Dr. Zimmerer had a legitimate claim to continued employment.\textsuperscript{107} Furthermore, the court, in determining the appropriate scope of relief, noted the college's procedure of awarding a one-year terminal contract to those professors whose employment the college desired to terminate. Since the district court determined that reinstatement was inappropriate and the college had adequate cause to terminate Dr. Zimmerer,\textsuperscript{108} the appellate court awarded her the salary she would have received had

\begin{footnotesize}
\begin{enumerate}
\item[100.] See notes 2-13 \textit{supra} and accompanying text.
\item[101.] See notes 113-39 \textit{infra} and accompanying text.
\item[102.] 485 F.2d 176 (5th Cir. 1973).
\item[103.] \textit{Id.} at 178.
\item[104.] \textit{Id.} at 177.
\item[105.] \textit{Id.} at 178 (quoting \textit{SAN JACINTO JUNIOR COLLEGE, FACULTY HANDBOOK}).
\item[106.] 485 F.2d at 178.
\item[107.] \textit{Id.}
\item[108.] \textit{Id.} at 179.
\end{enumerate}
\end{footnotesize}
she been awarded a one-year terminal contract.\textsuperscript{109}

Although not explicitly stated by the court, it appears that the college's dismissal notice provision was essentially a verbatim recitation of the AAUP's recommended provision. The 1940 \textit{Statement} requires that one year's notice be given if the professor is not going to be continued in service at the termination of the probationary period.\textsuperscript{110} Furthermore, the 1976 \textit{Recommended Institutional Regulations on Academic Freedom and Tenure} provide for a one-year terminal contract or salary for a tenured professor dismissed for cause unless "the conduct which justified dismissal involved moral turpitude."\textsuperscript{111}

The court would have been on firmer ground had it relied on these policy documents as embodying academic custom and usage rather than merely asserting that the facts were sufficient to support a claim for relief. Had the court in \textit{Zimmerer} taken judicial notice of the AAUP documents as establishing the reasonable expectations of the contractual parties, it would have provided solid precedent and guidance for future decisions; unfortunately, it failed to do so.\textsuperscript{112}

Not all courts, however, have failed to utilize AAUP documents for guidance. One of the most notable examples of a court's use of the 1940 \textit{Statement} is \textit{Greene v. Howard University}.\textsuperscript{113} In \textit{Greene}, a group of faculty members and students created several disturbances on the university's campus. To prevent further disruptions, the university sent a letter to the involved faculty members informing them that their appointments would

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} AAUP, \textit{Academic Freedom and Tenure, 1940 Statement of Principles} and 1970 \textit{Interpretive Comments}, in AAUP, \textit{Policy Documents and Reports} 1 (1977). The 1970 \textit{Interpretive Comments}, in AAUP, \textit{Policy Documents and Reports} at 3, also require at least one year notice prior to terminating a faculty member with two or more years of service. \textit{See} note 124 \textit{infra}.

\textsuperscript{111} AAUP, 1976 \textit{Recommended Institutional Regulations on Academic Freedom and Tenure} § 8, in AAUP, \textit{Policy Documents and Reports} 15, (1977). Section 8 provides in part: "If the appointment is terminated, the faculty member will receive salary or notice in accordance with the following schedule: . . . at least one year, if the decision is reached after eighteen months of probationary service or if the faculty member has tenure." \textit{Id.} at 20 (emphasis added).

\textsuperscript{112} \textit{See} Loebbeck v. Idaho State Bd. of Educ., 96 Idaho 459, 530 P.2d 1149 (1975). The Idaho Supreme Court in \textit{Loebbeck} held Idaho State University to the plain meaning of its notice of nonrenewal standards which were essentially a verbatim recitation of the AAUP standards. Assimilation of the AAUP standards would have provided significant support for the court's disposition of the case.

\textsuperscript{113} 412 F.2d 1128 (D.C. Cir. 1969).
not be renewed.114 The faculty members filed suit alleging breach of contract and seeking renewal of their appointments because they had not received the requisite notice of nonrenewal to which they were entitled under the university regulations.115 The professors also asserted that the university was required to provide the terminated faculty members with hearings because nonrenewal had been predicated on charges of misconduct.116

In asserting their claims, the faculty members were confronted with language in the Howard University Faculty Handbook which not only established specific nonrenewal notice guidelines, but also declared that the university would not be contractually bound to follow the guidelines.117 The faculty argued they were entitled to the notice of nonrenewal established by the Faculty Handbook, and the university's failure to so provide required automatic renewal of their appointments.118 The district court held, "the faculty plaintiffs were not entitled to a renewal of their appointments as a matter of law, and that the university had a legal right to dismiss them. Complete discretion in the matter is vested in the university authorities."119

115. Id.
116. The relevant section of the faculty handbook provided: "The Board of Trustees reserves the right of dismissal, regardless of tenure, in cases of . . . personal conduct incompatible with the welfare of the University. . . . The person concerned, upon written request, shall be given a hearing before a committee of the Board of Trustees . . . ." HOWARD UNIVERSITY FACULTY HANDBOOK, quoted in 412 F.2d at 1132.
117. The relevant sections provided:
   It will be the practice of the University, without contractual obligation to do so, to give written notice at the following times to officers of instruction whose services are no longer required:
   A) Deans will give notice each year to those whose terms expire and whom they do not propose to recommend for reappointment, not later than December 15 of that year;
   B) The Board of Trustees will give notice to those teachers whose terms expire and whose services are no longer required, directly following its meeting in January of each year.
HOWARD UNIVERSITY FACULTY HANDBOOK, quoted in 412 F.2d at 1132 (emphasis added).
118. 271 F. Supp. at 614.
119. Id. at 615 (emphasis added). Although the court's holding was rational, it completely disregarded the most fundamental tenet of academic freedom—namely, that professors must be free from arbitrary threats of discharge. See note 90 supra and accompanying text. See also Fellman, Academic Freedom—The Price is Eternal Vigilance by Professors (I), in ON ACADEMIC FREEDOM 20 (V. Earle ed. 1971). For a discussion of the nexus between the privilege of academic freedom and the concept of tenure, see Fellman, id. at 19.

The district court stated in dicta:
   It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to im-
In reversing the lower court, the appeals court took judicial notice of the fact that the university had endorsed AAUP policy\textsuperscript{120} and rejected the university's argument that it was not obligated contractually to follow the notice guidelines.\textsuperscript{121} The court inferentially endorsed the AAUP notice guidelines by stating that qualifications on the university's power to terminate arise when notice of nonreappointment fails to comply with previously established guidelines. These qualifications cannot be negated by the university's disclaimer that it will not be contractually obligated to adhere to the notice provisions.\textsuperscript{122} The court then observed:

Contracts are written, and are to be read, by references to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this non-commercial context.

The employment contracts of appellants here comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs.\textsuperscript{123}

The AAUP's notice standards, as initially established in the 1940 Statement, were the source of the "norms of conduct and expectations" relied upon by the court.\textsuperscript{124} Thus, the court, utilizing the AAUP standards, bound Howard University to its official notice pose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.


120. 412 F.2d at 1133-34 n.7. See note 124 infra for the AAUP notice guidelines.
121. 412 F.2d at 1135. See note 117 supra for the text of the notice guidelines contained in the Howard University Faculty Handbook.
122. 412 F.2d at 1135.
123. \textit{Id.} (emphasis added).
124. \textit{Id.} The AAUP Standards for Notice of Nonreappointment relied on by the court are as follows:

Because a probationary appointment, even though for a fixed or stated term, carries an expectation of renewal, the faculty member should be explicitly informed of a decision not to renew his appointment, in order that he may seek a position at another college or university. Such notice should be given at an early date, since a failure to secure another position for the ensuing academic year will deny the faculty member the opportunity to practice his profession. The purpose of this Statement is to set forth in detail, for the use of the academic profession, those standards for notice of nonreappointment which the Association over a pe-
guidelines despite the university's stated intent not to be bound contractually.\footnote{125}

The Ninth Circuit explicitly endorsed the 1940 Statement as embodying the common law of academe in Adamian v. Jacobsen.\footnote{126} A tenured assistant professor in that case allegedly used profane language to incite a group of antiwar demonstrators into confrontation with officials, thereby creating a danger of violence.\footnote{127} The university brought charges against the professor, al-

\begin{quote}
\textbf{Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:}

(1) \textit{Not later than March 1 of the first academic year of service}, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

(2) \textit{Not later than December 15 of the second academic year of service}, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

(3) At least twelve months before the expiration of an appointment after two or more years in the institution.
\end{quote}


125. Shortly after Greene, the Supreme Court endorsed the position that faculty employment contracts can be interpreted in light of academic custom. In Perry v. Sindermann, 408 U.S. 593 (1971), a discharged professor argued that certain college rules and practices created a de facto tenure program and that as a result of his length of service, the professor acquired a "legitimate claim of entitlement to continued employment absent 'sufficient cause.'" \textit{Id.} at 602–03. The court opined:

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular plant" that may supplement collective-bargaining agreement, \textit{so there may be an unwritten "common law" in a particular university} that certain employees shall have the equivalent of tenure.

\textit{Id.} (citation omitted) (emphasis added).

Thus, \textit{Perry} further supports the argument that when faced with the typical academic employment contract, the court's relevant inquiry is to determine the scope and content of the common law in a particular university. It seems plausible that the judiciary could rely on documents such as the 1940 Statement and other AAUP policy documents to provide this information. Because the 1940 Statement has been accepted so widely, it would be advantageous to both the professoriate and the American university system to defer to the Statement as the clear explication of the customs, usages, and reasonable expectations of those persons in the academic profession. Moreover, the establishment of concrete, comprehensible standards is necessary for the preservation of academic freedom. \textit{See} Fellman, supra note 119, at 20; Murphy, supra note 88, at 310. \textit{See also} notes 43–47 supra and accompanying text.

126. 523 F.2d 929 (9th Cir. 1975).

127. \textit{Id.} at 931.
leging that he violated a vague section of the University Code, proof of which would have constituted "adequate cause" for dismissal.\textsuperscript{128} Although a Faculty Senate committee recommended Adamian's retention, the Board of Regents ordered dismissal.\textsuperscript{129} Adamian sued, alleging the abridgement of his first amendment free speech and assembly rights by the university.\textsuperscript{130} The district court agreed with Adamian and ordered him reinstated.\textsuperscript{131}

On appeal, the Ninth Circuit determined that the relevant section of the University Code\textsuperscript{132} did not regulate the content of a professor's speech but regulated the manner in which the expression was made.\textsuperscript{133} Nevertheless, the court thought that the Code language was "susceptible of interpretations which would render it overbroad."\textsuperscript{134} To cure the potential overbreadth, the court took judicial notice of the fact that the language was excerpted almost verbatim from the 1940 Statement.\textsuperscript{135} Furthermore, the court noted that the AAUP had issued a statement interpreting "appropriate restraint" to refer "solely to choice of language and

\begin{itemize}
\item \textsuperscript{128} Id. Ch. 4, § 2.3 of the University Code stated:
\begin{quote}
The faculty member is a citizen, a member of a learned profession, and a representative of the University. When he speaks or writes as a citizen, he will be free from university censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not a spokesman for this University.
\end{quote}
\item \textsuperscript{129} Id. at 932.
\item \textsuperscript{130} Id. at 931.
\item \textsuperscript{131} Id. at 932.
\item \textsuperscript{132} 359 F. Supp. 825 (D. Nev. 1973). It should be noted that courts do not always adhere to the traditional rule that specific performance will not be awarded for personal service contracts. Professor Williston has stated that "appealing factual situations may occasionally induce a court to enforce a personal service contract specifically, particularly in the absence of any substantial relationship between the parties." 11 W. Jaeger, Williston on Contracts § 1423, at 786 (1968) (emphasis added). Accord, Jones v. Williams, 139 Mo. 1, 39 S.W. 486 (1897); AAUP v. Bloomfield College, 129 N.J. Super. 249, 273, 322 A.2d 846, 859 (Super. Ct. Ch. Div. 1974).
\item \textsuperscript{133} 523 F.2d at 932.
\item \textsuperscript{134} See note 128 \textit{supra} for the text of § 2.3 of the University Code.
\item \textsuperscript{135} 523 F.2d at 933.
\item \textsuperscript{136} Id. at 934. The court cited Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), for the proposition that:
\begin{quote}
[i]the desire to maintain a sedate academic environment, 'to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,' is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. . . . Only where expressive behavior 'involves substantial disorder or invasion of the rights of others' may it be regulated by the state.
\end{quote}
\end{itemize}
to other aspects of the manner in which a statement is made. *It does not refer to the substance of a teacher's remarks.* . . . "A violation may not lie, however, in the error or unpopularity . . . of the ideas contained in the utterance."

The court ultimately held that the AAUP interpretive language eliminated the potential overbreadth which gives rise to constitutional difficulties.137 After suggesting that the regents might have implicitly assimilated the subsequent AAUP interpretations, the court remanded the case to the district court for a determination of whether the regents had in fact assimilated the AAUP's interpretation of the University Code.138 If such assimilation could be established, Adamian's dismissal would be proper.139

The above discussion suggests several conclusions regarding the role of the 1940 Statement in employment contract disputes. Courts know that academic employment contracts are usually facially simple and incomplete documents, making it necessary for the courts to assimilate ancillary materials into the agreements to integrate the contracts. Obvious sources of such supplemental terms and conditions are the 1940 Statement, the 1970 Interpretive Comments, and the faculty handbook of the particular college or university.140 AAUP policy also can provide insight, direction, and support to courts grappling with ambiguous terms, such as "financial exigency" and "academic freedom," in an attempt to discern accepted customary and usual practice at the academic institution.141 Finally, AAUP policy is not a one-sided weapon to be wielded only by the professoriate, as Adamian indicates.142


137. 523 F.2d at 934-35. The court stated that it was readily apparent that the AAUP "intended to assure a professor his full measure of first amendment rights." *Id.* at 935.

138. *Id.* at 935.

139. *Id.*


141. One year after the Ninth Circuit issued its Adamian opinion, it heard another teacher dismissal case. In Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976), Judge Hufstedler wrote that AAUP policy, "[w]hile . . . not binding upon us, . . . is useful." *Id.* at 1043.

142. The opening paragraph of the 1940 Statement supports the Adamian holding. The paragraph states in part, "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole." AAUP, 1940 *Statement of Principles on Academic Freedom and Tenure*, in AAUP, *Policy Documents and Reports* 2 (1977).
Because it is difficult to codify clear, precise, and acceptable standards of behavior, dismissals based on conduct or speech pose the most dangerous threat to academic freedom. If the boundaries of protected speech and action are not demarcated clearly, academic freedom will become an empty privilege. The 1940 Statement and other AAUP policy documents, however, provide clarity and substance to the typical academic employment contract. Without such clarity in employment contracts, faculty members will continue to be victimized by vague contracts and indeterminate personnel regulations, such as those in Adamian.

B. AAUP Policies as Normative Standards

Within three months after the Ninth Circuit issued its opinion in Adamian, the Court of Appeals for the District of Columbia decided Browzin v. Catholic University of America.143 Browzin provides substantial support for utilizing the 1940 Statement and other AAUP policy documents to interpret academic employment contracts. The court's opinion suggests that AAUP policy is designed to protect the legitimate interests of both the professoriate and college or university administration.

In Browzin, a tenured engineering professor was dismissed because of the university's financial condition.144 Browzin sued the university for breach of contract, alleging that the institution failed to make a good faith effort to find him alternative employment within the university.145 Before trial, the parties stipulated several issues, most notably "that Catholic University was faced with a bona fide financial exigency . . . ." and that the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure (RIR), promulgated by the AAUP, were to provide the governing standards.146 The relevant standard provided in pertinent part: "Before terminating an appointment because of the

143. 527 F.2d 843 (D.C. Cir. 1975).
144. Id. at 844–45.
145. Id. at 845.
146. Id. The AAUP revised the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure (RIR) in 1976, modifying the language on which the court in Browzin relied to reflect the court's interpretation. The basic objectives of the 1976 RIR, however, are the same as the objectives of the 1968 RIR; each seeks to provide, "in language suitable for use by an institution of higher education rules which derive from the chief provisions and interpretations of the 1940 Statement of Principles on Academic Freedom and Tenure and of the 1958 Statement of Procedural Standards in Faculty Dismissal Proceedings." AAUP, 1976 Recommended Institutional Regulations on Academic Freedom and Tenure, in AAUP, POLICY DOCUMENTS AND REPORTS 15 (1977) (emphasis supplied).
abandonment of a program or department of instruction, the institution will make every effort to place the affected faculty members in other suitable positions."  

The district court, noting that this language made no reference to termination caused by financial exigency, dismissed the complaint, holding that the "suitable position" requirement applied only to terminations resulting from "discontinuance of programs or departments of instruction." The court held, therefore, that the university was under no contractual obligation to find Browzin another position within the institution since his dismissal had been predicated on a bona fide financial exigency.

Although the appellate court upheld Browzin's dismissal on other grounds, the court's opinion provides substantial support for the proposition that it is proper for a court to use the Statement and other AAUP material to interpret the employment contract. Browzin argued on appeal that the "suitable position" requirement applied to dismissals for financial exigency and those necessitated by a program or instructional department's termination.

Although the court did not rule on that particular issue, it stated that the AAUP's amicus brief cited the 1968 RIR which presented strong evidence that the "suitable position" requirement

147. 54 AAUP BULL., 448, 449 (1968), quoted in 527 F.2d at 845 (emphasis added). The standard's language has been amended to delete any reference to "abandonment of a program or department of instruction" and to include a clause requiring faculty participation in the search for another suitable position. The new standard states, "Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution." AAUP, 1976 RIR, in AAUP, POLICY DOCUMENTS AND REPORTS 18 (1977).

148. 527 F.2d at 846.
149. Id.
150. The district court had made an alternative finding that if its interpretation of the pertinent regulation were reversed, Browzin's claim should fail because he failed to show lack of good faith effort by the university to find him an alternative position. Furthermore, the court noted that the administration had undertaken a "detailed review of all programs and positions" before dismissing Browzin. Id. at 849.
151. Id. at 847-48.
152. Id. at 846.
153. Brief Amicus Curiae of the Am. Ass'n of Univ. Professors at 11-15, quoted in Browzin v. Catholic Univ. of America, 527 F.2d 843, 846-48 (D.C. Cir. 1975). Of particular relevance to the court was a quote from the Operating Guidelines on Institutional Problems Resulting from Financial Exigency issued by the AAUP in 1972 which provided: "Tenured faculty members should be given every opportunity, in accordance with Regulation 4(e) . . . to readopt [sic] within a department or elsewhere within the institution; institutional resources should be made available for assistance in readaptation." Id. at 14, quoted in 527 F.2d at 846.
applied to dismissals resulting both from program discontinuance and from financial exigency. More importantly, the court stated in a footnote that its use of interpretive documents such as the 1925 and 1940 Statements and other AAUP reports "could hardly be questioned." The court further asserted that the materials cited "form a kind of legislative history for the 1968 Regulations" since they were accepted by organizations representing both university faculty and administrators. Judge Wright's opinion in Browzin provides authority for the proposition that AAUP policy statements represent a legitimate informational source from which to establish normative standards in higher education. As such, a court should utilize these materials when confronted with a dispute based on an alleged breach of an academic employment contract.

Krotkoff v. Goucher College provides further judicial support for the proposition that the 1940 Statement and other AAUP policy documents properly establish normative standards in higher education and are appropriate sources of information to a court interpreting an employment contract. In Krotkoff, the college dismissed a tenured professor due to financial exigency which threatened the entire institution. Krotkoff sued alleging that Goucher College's tenure policy, as articulated in the college bylaws, provided that a tenured faculty member would be retained until retirement or dismissal for cause. The college acknowledged that the bylaws did not explicitly include financial exigency as a permissible basis for dismissal. The college argued, however, that the common understanding of the academic community, as embodied in the 1940 Statement, included "the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is de-
monstrably bona fide." The college's position was that the express terms of the employment contract were supplemented by the 1940 Statement.

After reviewing the basic policy underlying the principle of tenure, examining the testimony of Krotkoff and Goucher faculty members regarding their understanding of tenure contracts, and realizing that there was no understanding at Goucher that tenured faculty had greater protection from financially based dismissal than faculty at other colleges, the court held that the Goucher employment contract must "be interpreted consistently with the understanding of the national academic community about tenure and financial exigency." Consequently, the court upheld Krotkoff's dismissal.

The AAUP, intervening as amicus curiae, argued that if the college desired to assimilate the 1940 Statement into the contract, the court should recognize that the term "financial exigency," as employed in academia, "carries with it certain counter-balancing obligations and constraints." Furthermore, dismissal due to financial exigency imposes an affirmative obligation on the institution to find the professor another "suitable position" within the college. The court did not rule expressly on this issue; rather, it noted that the evidence supported the inference that "a demonstrably bona fide termination includes this requirement."

Notably, neither the 1940 Statement nor the 1970 Interpretive Comments expressly impose the "suitable position" requirement as a condition of invoking the financial exigency clause. Thus, it is possible to construe the court's language in Krotkoff as permitting invocation of the financial exigency clause through assimilation of the 1940 Statement into the employment contract without

161. Id. See note 59 supra.
162. 585 F.2d at 679.
163. Id.
164. Id. at 680.
165. Id. The court also quoted the language from Greene, set forth in the text accompanying note 123 supra, for additional support for the proposition that it was appropriate to consider AAUP policy documents to interpret the employment contract. Id.
166. Brief Amicus Curiae of the Am. Ass'n of Univ. Professors at 4, Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978), on file with the Case Western Reserve Law Review.
167. Id. at 19–21, quoted in 585 F.2d at 682.
168. 585 F.2d at 682.
imposing the correlative "suitable position" obligation developed in subsequent AAUP interpretations of the clause.

It appears that the AAUP's work, both as an investigative agency and as a quasi-legislative body,\(^{170}\) has had a profound influence on the law of higher education.\(^{171}\) Because the academic employment contract is generally brief and incomplete,\(^{172}\) the central issues when a breach is alleged are often those of defining and interpreting the content of the agreement.\(^{173}\) The difficulty in analyzing these employment contracts lies in determining the appropriate sources to supply supplemental contract terms and defining those terms in the context of the academic environment.\(^{174}\) As was observed in Greene,\(^{175}\) "The readings of the market place are not invariably apt in this non-commercial context."\(^{176}\) As a result of this unusual "non-commercial context," strict application of traditional contract law will yield predictable, possibly justifiable, results; but such results will not serve adequately the needs of the academic profession.\(^{177}\)

In an effort to aid in the interpretive process, courts are begin-

\(170.\) See notes 55–70 supra and accompanying text.
\(171.\) See generally Finkin, supra note 2, at 1121; Murphy, supra note 88. See also Furniss, Faculty Tenure and Contract Systems: Current Practice, A.C.E. SPECIAL REPORT (July 27, 1972), quoted in Finkin, supra note 85, at 598 n.84. Dr. Furniss, surveying 413 educational institutions, states that "in the past, the policies and practices of large numbers of institutions were inadequate or repressive. This survey indicates, however, that AAUP policies with respect to length of probationary period, credit for prior service, written reasons for nonrenewal, and the availability of appeal procedures are widely observed . . . ." Furniss, supra at 2.

\(172.\) See, e.g., Loebeck v. Idaho State Bd. of Educ., 96 Idaho 459, 462, 530 P.2d 1149, 1152 (1975) (employment contract described as "a simple printed one page document [which does] not purport to set forth the entire contractual agreement between the parties").

\(173.\) See notes 113–69 supra and accompanying text.

\(174.\) See notes 1–13 supra and accompanying text.

\(175.\) 412 F.2d 1128 (D.C. Cir. 1969).

\(176.\) Id. at 1135.

\(177.\) Professor Finkin argues that the absence of a prior course of dealings between the professor and the institution, which would give rise to terms implied by law, requires that the total agreement be viewed as limited to expressly stated terms. Finkin continues:

\[\text{[T]he law of contract, developed primarily in the commercial setting, is a machine that churns out predictable, doctrinally mandated results such as: (1) if the institution expressly disclaims that it is legally bound by the award of tenure, the tenure commitment becomes purely moral, rather than legal; (2) even in the absence of a disclaimer, the "promise" of tenure is a nullity for want of mutuality of obligation or for additional consideration adequate to support a contract of possibly lifetime duration; (3) the very lack of clarity in the terms of the tenure contract as, for example, the salary that will be paid in the future, renders the contract voidable for want of agreement on a material term, and so on.} \]

Finkin, supra note 2, at 1125-26.
ning to examine the major policy documents propounded by the AAUP.178 Academic employment contracts only can be understood in light of the established custom and usage of the academic profession.179 As one court stated: "Every trade, art and profession, has a language in some degree peculiar to itself, and it is only by reference to the general understanding of those who are accustomed to use it, that we arrive at the meaning."180 Although judicial use of the 1940 Statement to supply ancillary terms and define custom and usage in the profession seems to be increasing, its use is still infrequent and the results often inconsistent.181 Declining enrollments and increasing costs continue to plague the nation’s colleges and universities. It is predicted that the market for doctoral degree holders will continue to be saturated until the mid-1990’s.182 Thus, it seems plausible that faculty contract litigation will continue and possibly increase.

While the courts began to view AAUP documents as interpretive guides to faculty employment contracts, college and univer-

178. See notes 113–69 supra and accompanying text.

179. Cf. Krotkoff v. Goucher College, 585 F.2d 675, 680 (4th Cir. 1978) (Krotkoff’s “contract must be interpreted consistently with the understanding of the national academic community . . . .”); Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C Cir. 1969) (academic employment contracts must be interpreted “by reference to the norms of conduct and expectations founded upon them”).


181. The decisions discussed in notes 113–69 supra and accompanying text should not create the impression that the 1940 Statement and subsequent AAUP policy documents have been recognized universally as authoritative sources of ancillary contract terms, custom and usage, and normative standards in academe.

Although significant progress in this direction has been made in the federal courts, the state court trend is less than encouraging. See, e.g., Scheur v. Creighton Univ., 199 Neb. 618, 260 N.W.2d 595 (1977); Baker v. Cooper Union, N.Y.L.J., Aug. 2, 1976, at 5 (Sup. Ct. N.Y. County 1976). Additionally, some of the federal interpretations are narrow. See, e.g., Browzin v. Catholic Univ. of America, 527 F.2d 843 (D.C. Cir. 1975). Others contain disturbingly noncommittal passages. See, e.g., Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978). See Finkin supra note 2, at 1127–41 for an excellent critique of the Baker and Scheuer opinions. See also Fellman, supra note 119, at 17. In his article, Fellman concluded with the following observation:

Academic freedom is one of America’s most precious assets. Without it our colleges and universities cannot accomplish the indispensable purposes of higher education. . . . Courts are powerful agencies of social control, and even their inactivity may entail serious consequences. They have much to offer in the defense of intellectual freedom. When American courts come to understand that the right of teachers and students to academic freedom is a fundamental legal right which is a much entitled to judicial protection as any other constitutional right, then indeed, will the cause of intellectual liberty acquire a powerful and most welcome ally.

Id. at 46.

182. Finkin, supra note 2, at 1122.
sity faculty examined another source of judicial intervention to secure their positions in academia—the National Labor Relations Board (NLRB). Although the professoriate succeeded in its initial attempt to organize, that success was short-lived, as evidenced by the Supreme Court's decision in *NLRB v. Yeshiva University.* Only with the advent of the NLRB did the true collectivization commence. The following section describes the professoriate's history of unionization and concludes with a discussion of *Yeshiva.*

IV. THE NLRB AND THE AAUP

During the post World War II era and continuing through the 1960's, there was a great demand for academicians. Beginning in the early 1970's, however, as a result of declining student enrollment, the demand for such individuals experienced a marked decline. Consequently, faculty members who thought they had been mistreated litigated their claims to protect their positions. Not only did faculty members pursue judicial remedies with increasing frequency, but they also became the beneficiaries of a new position adopted by the National Labor Relations Board (NLRB).

A. The Development of NLRB Jurisdiction Over Faculty Bargaining Units

Prior to the economic decline of the early 1970's, the NLRB refused to extend its jurisdiction to labor disputes at private colleges and universities. The NLRB adopted this position in 1951

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183. 444 U.S. 672 (1980).
184. See notes 188–237 infra and accompanying text.
185. See notes 239–87 infra and accompanying text.
186. See note 92 supra.
187. Finkin describes the institutional response to the new economic climate as follows:
On the institutional level, administrations have engaged in programs of retrenchment, resulting in the termination of tenured faculty; some institutions have modified their tenure policies to be less protective of the faculty than the protections accorded by the 1940 Statement. . . . The labor market no longer functions as an important constraint on administrative behavior as it did in the previous decade. Finkin, supra note 2, at 1122.
188. The jurisdiction of the NLRB includes all "employers" and "employees" as defined by the National Labor Relations Act (NLRA) who do not meet certain specific exceptions, 29 U.S.C. § 152(2), (3) (1976), and whose labor disputes may create a substantial disruption of the free flow of interstate commerce. 29 U.S.C. § 151(1). While the NLRA's language appears to extend the NLRB's jurisdiction to any commercial activity affecting commerce, the NLRB has refused to extend its jurisdiction to cover employers who do not affect commerce significantly. To determine when its jurisdiction is appropriate, the
in *Trustees of Columbia University*. In *Columbia*, the NLRB held that assertion of its jurisdiction over a bargaining unit consisting of the university library's clerical employees would not effectuate the policies of the National Labor Relations Act (NLRA) which dictated the elimination of obstructions upon interstate commerce caused by labor unrest. The Board in *Columbia* believed that assertion of its jurisdiction was inappropriate because "the activities involved were noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."

The Board predicated the nonassertion of its jurisdiction over private university employees on its analysis of the legislative history of the 1947 Taft–Hartley Amendments to the NLRA. The House version of the amendments initially excluded a number of nonprofit organizations from the definition of "employer." The Senate bill, in contrast, initially failed to provide an exclusion for

NLRB has promulgated a list of minimum financial standards which must be met before the NLRB will assert jurisdiction. *See generally* R. Gorman, Basic Text on Labor Law ch. 3, § 2 (1976).

189. 97 N.L.R.B. 424 (1951).

190. 29 U.S.C. § 159(b) (1976) provides that the NLRB will determine the scope of the employee unit "appropriate for the purposes of collective bargaining." *Id.* Determining the proper scope of a bargaining unit ensures that all of the employees contained within the unit share a community of interest. *See R. Gorman, supra* note 188, ch. 5, § 2.

191. 97 N.L.R.B. at 427.

192. 29 U.S.C. § 151 (1976). Section 7 of the NLRA, which concerns the rights of employees to form labor organizations and to bargain collectively, also asserts another purpose of the Act:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).


193. 97 N.L.R.B. at 427 n.98.


[A] any corporation, community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

*Id.* at 34. (emphasis added)
any charitable or nonprofit organizations, although ultimately the Senate did include an exemption for nonprofit hospitals. As adopted in its final form, the Labor Management Relations Act (LMRA) of 1947 included only the Senate's limited exemption of nonprofit hospitals.

The Columbia University employees argued that the limited exemption enacted by Congress implied that extension of the NLRB's jurisdiction to private colleges and universities was appropriate. The Board rejected this argument, noting that language in the conference report indicated that despite the failure to enact the broad exemptions proposed by the House, assertion of NLRB jurisdiction to any of the organizations contained in the House version should, nevertheless, be rare. The conference believed that the NLRB should assert jurisdiction only "in connection with the purely commercial activities of such organizations." The Board thought that the activities of the proposed bargaining unit were related to the charitable and educational purposes of the university; therefore, jurisdiction was deemed to be improper and in conflict with the purposes of the Act. The NLRB adhered to this position, originally adopted in Columbia, and rarely asserted its jurisdiction over private colleges and universities.

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197. 93 CONG. REC. S4997 (daily ed. May 12, 1947). The exemption covered "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." Id.


199. 97 N.L.R.B. at 427.

200. See note 195 supra.

201. 97 N.L.R.B. at 427 (citing H.R. REP. No. 510, 80th Cong., 1st Sess. 32, reprinted in I NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 536 (1948)). The Conference Report contains the following statement when explaining why the specific exclusions for nonprofit organizations originally provided by the House version of the bill were not included in the final draft of the bill.

The conference agreement ... follows the Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for "only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."

Id. (emphasis added).

202. Id. (emphasis added).

203. 97 N.L.R.B. at 427.
iversities during the ensuing two decades.\textsuperscript{204}

As the academic profession entered a period of economic decline in the early 1970's, the NLRB decided \textit{Cornell University}.\textsuperscript{205} In \textit{Cornell}, the Board reconsidered the issue of whether a university's commercial activities had a significant enough impact on interstate commerce to warrant the assertion of NLRB jurisdiction. The Board, after noting the size and scope of operations of the modern university, observed that Cornell had approximately 5,700 nonacademic employees throughout the state.\textsuperscript{206} The Board also determined that Cornell's interstate commerce activities were substantial and held that assertion of jurisdiction was proper and necessary "to insure the orderly, effective, and uniform application of the national labor policy."\textsuperscript{207} As a result of \textit{Cornell}, private nonprofit educational institutions were considered to be "employers" as defined by the NLRA.\textsuperscript{208} It is notable, however, that the bargaining unit sanctioned in \textit{Cornell} was limited to dining hall employees and, more importantly, specifically excluded all academic and professional employees.\textsuperscript{209} Shortly after the \textit{Cornell} decision, the Board promulgated an official jurisdictional standard stating that NLRB jurisdiction could be asserted over any proceeding involving a private nonprofit college or university whose gross annual revenues exceeded one million dollars.\textsuperscript{210}

The NLRB initially considered the specific issue of faculty unionization in 1971 in \textit{C.W. Post Center of Long Island University}.\textsuperscript{211} The university, attempting to resist the extension of NLRB jurisdiction over a proposed faculty bargaining unit, argued that the NLRB's jurisdiction was improper because the

\textsuperscript{204} For specific cases where the NLRB denied jurisdiction because the relevant activities generally were involved in the commercial aspects of the college or university, see 97 N.L.R.B. at 425 n.3.

\textsuperscript{205} 183 N.L.R.B. 329 (1970).

\textsuperscript{206} Id. at 330.

\textsuperscript{207} Id. at 334. The Board prefaced the above quoted statement with the observation that "it is no longer sufficient to say that merely because employees are in a nonprofit sector of the economy, the operations of their employers do not substantially affect interstate commerce." Id. at 333.

\textsuperscript{208} 29 U.S.C. § 152(2) (1976).

\textsuperscript{209} 183 N.L.R.B. at 336.

\textsuperscript{210} 29 C.F.R. § 103.1 (1980) provides:

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

\textsuperscript{211} 189 N.L.R.B. 904 (1971).
faculty functioned in a managerial and supervisory capacity, and, as such, the faculty was excluded from coverage under the NLRA's "supervisor" exemption. In response, the Board noted the significant scope of the C.W. Post faculty's traditional power to formulate and propound policy but observed that the Board of Trustees was vested with the final authority to take any action.

Furthermore, the Board noted that in exercising its duties and responsibilities, the faculty acted "on the basis of collective discussion and consensus." The Board, however, did not elaborate on the relevance of this collegial or quasi-collegial authority structure. In conclusion, the Board rejected the university's argument, stating that "the policymaking and quasi-supervisory authority which adheres to fulltime faculty status but is exercised by them only as a group does not make them supervisors within the meaning of § 2(11) . . . or managerial employees. . . ." Thus, the faculty's exercise of "managerial and supervisory authority" on a collective basis was deemed sufficient justification to override the supervisory and managerial statutory exceptions and

212. The NLRA specifically excludes "any individual employed as a supervisor" from the statutory definition of an employee. 29 U.S.C. § 152(3) (1976). The Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11) (emphasis added). The NLRA neither specifically defines managerial employees, nor explicitly excludes them from the NLRA's coverage. The Board, however, has defined managerial employees as "executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer." Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947). The exclusion of managerial employees from the NLRA's coverage was established judicially in NLRB v. Bell Aerospace Co., 416 U.S. 267, 286-90 (1974).

213. The faculty traditionally formulated policy regarding student admission, curriculum and graduation requirements, along with rules for grading and honor assignments. The faculty also exercised power in the areas of faculty appointment, reappointment, tenure, and dismissal. 189 N.L.R.B. at 905.

214. Id.

215. Id.

216. Such an authority structure is typical in most universities. The Board expanded on the relevance of the concept of collegial authority in a subsequent opinion, Adelphi Univ., 195 N.L.R.B. 639 (1972), where it stated that a true collegial authority system envisions all "power and authority [being] vested in a body composed of all one's peers or colleagues . . . ." Id. at 648. See text accompanying notes 218-25 infra.

217. 189 N.L.R.B. at 905.
permit the extension of NLRB jurisdiction to faculties at private colleges and universities.

The NLRB rendered two additional decisions after *C.W. Post Center* establishing further justification for the inclusion of private college and university faculties within the jurisdictional scope of the NLRB. In *Adelphi University*, the university administration attempted to exclude fourteen faculty who were members of the personnel and grievance committees from the bargaining unit. Despite the fact that the Board agreed with the university's contention that the faculty exercised supervisory authority, it determined that assertion of its jurisdiction was proper.

The Board's basis for asserting its jurisdiction in *Adelphi* was built upon the *C.W. Post Center* rationale that faculty members cannot be classified as supervisory or managerial employees when their authority is exercised collectively. The Board opined that a true collegial authority system simply would fail to provide a rational basis for the supervisory exclusion in the NLRA, and thus, by definition, faculty members engaging in collective decisionmaking could not be supervisors. The difficulty, according to the Board, was that neither the faculty acting collectively in *C.W. Post Center* or the faculty acting by committee in *Adelphi* "quite fit the mold of true collegiality," nor did they "fit the traditional role of 'supervisor' as that term is thought of in the commercial world or as it has been interpreted under our Act." The Board asserted, however, that the collegial principle is to be "recognized and given some effect."

As additional support for its conclusion that faculty unions were covered by the NLRA, the Board specifically held that the faculty committee's lack of final authority was also sufficient to

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219. Id. at 639.
220. Id. When discussing the personnel committee the Board observed, "The function of the committee is to pass on all matters of tenure, hiring or promotions to associate or full professor, granting sabbatical or honorary leaves-of-absence, and suspending or terminating full-time faculty members during the term of their contracts." *Id.* at 647.
221. *Id.* at 648.
222. *Id.*
223. *Id.* See note 212 supra.
224. 195 N.L.R.B. at 648. The Board noted that the problem with transplanting the NLRA from the industrial sphere to the academic sphere was due to the existence of the concept of collegial authority in academia. The NLRA was designed to deal with traditional hierarchial authority structures which are endemic to the commercial world. *Id.*
225. *Id.* (emphasis supplied).
override the supervisory and managerial exceptions. Thus, the members of the committees engaging in collective decisionmaking and lacking "ultimate authority" were included properly within the bargaining unit.

In *University of Miami*, the NLRB proposed a third justification for the assertion of its jurisdiction to cover faculty bargaining units at private colleges and universities: Faculty members cannot be characterized as supervisors because faculties act in their own interests rather than in the interest of the university. In *Miami*, the university advanced arguments regarding the managerial and supervisory role of the faculty similar to those asserted in *C.W. Post Center* and *Adelphi*. The Board summarily dismissed the university's arguments regarding the status of the faculty as supervisors and managers and then reaffirmed support for the two previously established justifications: collective action and lack of final authority. The Board, citing section 2(11) of the NLRA, held that faculty members could not be characterized as supervisors because they acted in their own interests rather than in the interest of the university. Thus, despite the absence of precedence for its holding, the Board chose to uphold the rulings of the Hearing Officer by straightforwardly applying the definition of "supervisor" which requires the employee to exercise authority "in the interest of the employer."

The crucial aspect of the *C.W. Post Center*, *Adelphi*, and *Miami* decisions was their timing. As institutional support for the 1940 Statement eroded, faculty members had an opportunity to bolster their positions through collective action. The benefits and uniform standards once secured by the 1940 Statement now could be embodied in the labor agreement negotiated through the collective bargaining process. This benefit was ephemeral, however, as NLRB jurisdiction was shortlived.

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226. Id. See note 212 supra.
229. Id.
230. Id. For the administration's arguments, see text accompanying notes 212 and 220 supra.
231. C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).
233. See note 218 supra for the text of § 2(11).
234. 213 N.L.R.B. at 634.
235. See note 212 supra.
236. See note 187 supra.
237. For a general discussion of collective bargaining in a university setting, see Fen-
B. Yeshiva

NLRB jurisdiction over the faculty of private colleges and universities was revoked in 1980 when the Supreme Court decided *NLRB v. Yeshiva University*.238 The Yeshiva Faculty Association sought NLRB certification as the official bargaining unit for full-time faculty at Yeshiva.239 The university opposed the certification, arguing that the faculty functioned in a managerial or supervisory capacity.240 Following its well-established precedent,241 the NLRB rejected the university's arguments and held that the faculty members were professional employees entitled to the benefits of the NLRA.242

The Supreme Court, in a 5–4 decision, affirmed the appeals court decision, which had reversed the NLRB,243 and held that full-time faculty of Yeshiva were managerial employees and excluded from NLRA coverage.244 Justice Powell began the major-
ity opinion by noting that the legislative history of the NLRA revealed Congress' belief that colleges and universities, because of their nonprofit nature, were not covered by the NLRA. Justice Powell then discussed the precedent justifying the assertion of NLRB jurisdiction over nonprofit educational institutions. The majority, however, summarily dismissed the jurisdictional rules established in C.W. Post Center and Adelphi as "flatly inconsistent with its [NLRB] precedent. . . ." indicating that the only argument supporting NLRB jurisdiction was that faculty, as professional employees, acted in their own interests rather than in the interests of the university.

The Court, however, noted that professional employees may be excluded properly from NLRA coverage if they can be characterized as "managerial employees." Previously, the Supreme Court had defined "managerial employees" as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." The Court noted that prior to Yeshiva the NLRB applied the managerial exclusion to an employee who "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." In Yeshiva, the NLRB shifted its focus to determine whether the interests of the faculty were aligned sufficiently with the interests of management. The Court criticized this "alignment with management" criterion as being a wholly new jurisdictional theory without support in prior Board opinions.

In reality, however, the "alignment with management" criterion was only a refinement of the University of Miami rule—namely, the NLRB jurisdiction was proper when the faculty

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245. See notes 195-204 supra and accompanying text.
247. Id. at 681.
248. 444 U.S. at 685.
249. Id.
250. Id. at 682.
252. 444 U.S. at 683.
253. Id. at 684.
254. Id. at 685. See text accompanying notes 233-35 supra.
exercises authority in its own interest rather than in the interest of the university.\textsuperscript{255} Accordingly, the NLRB argued that because faculty members were not "expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies," the interests of management and faculty were insufficiently aligned, and therefore, the faculty could not be considered managerial employees.\textsuperscript{256} Furthermore, the NLRB argued that classifying faculty as managerial employees was improper because the faculty, when involved in academic governance, was expected to exercise "independent professional judgment."\textsuperscript{257}

The Court rejected the NLRB's argument that the faculty's interests were aligned insufficiently with the interests of the institution to warrant a finding that the faculty members were managerial employees.\textsuperscript{258} Instead, the Court asserted that the Yeshiva faculty's authority must be characterized as managerial.\textsuperscript{259} Justice Powell also noted that the NLRB routinely excluded professionals occupying executive positions in a commercial setting without any inquiry into "whether their decisions were based on management policy rather than professional expertise."\textsuperscript{260} Furthermore, the Court noted that permitting the Board to apply an "independent professional judgment" test in industrial situations could lead to the recharacterization of current supervisory and managerial professionals as covered employees.\textsuperscript{261} Finally, the Court concluded that acceptance of the "independent professional judgment" criterion implied that the

\textsuperscript{255} See text accompanying notes 229-35 supra.

\textsuperscript{256} 444 U.S. at 684.

\textsuperscript{257} Id. When discussing the respective roles of the administration and the faculty, the Court observed that the faculty of each of the university's component schools "effectively determine[s] its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules." Id. at 676. The central administration solicited the faculty's recommendations in all "non-academic" matters such as faculty hiring, tenure, sabbaticals, termination and promotion. Id. at 677. The Court noted further that "some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school." Id.

\textsuperscript{258} Id. at 686.

\textsuperscript{259} Id. Justice Powell noted that the faculty's "authority in academic matters is absolute." Id. When describing the specific instances of the faculty's exercise of authority Justice Powell stated, "They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated." Id.

\textsuperscript{260} Id. at 687.

\textsuperscript{261} Id.
interests of the faculty were distinct and separable from the interests of the institution and that the faculty could not be aligned with its own interests and institutional concerns simultaneously. The Court summarily rejected this distinction.

The majority's position—that institutional and faculty interests are indistinguishable—is fundamentally flawed. The central problem with the majority opinion, as the dissent observes, is that "the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom." The structure of the modern college or university is no longer accurately characterized as a collegial institution as the majority suggests. Colleges and universities are now "big business" with their financial and operating activities controlled by the administration. Justice Brennan, writing for the dissent, noted the majority's failure to comprehend the authority structure of the modern educational institution. The dissent asserted that the majority opinion misconstrued the role of the faculty in the "mature" university where there are typically two distinct lines of authority. The first and primary line of authority is administrative, with ultimate authority vested in the Board of Trustees.

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262. Id. at 688.
263. The Court concluded:

In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution. The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. . . . Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. . . . [T]he quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal.

Id.

264. Id. at 700 (Brennan, J., dissenting) (emphasis added). See note 23 supra and accompanying text.

265. Finkin, supra note 237, at 615. For a comparison of the elements of a "true" collegial form of government with the elements of a bureaucratic form, see F. KERMER & J. BALDRIDGE, UNION ON CAMPUS 14-16 (1975). Kermer and Baldridge concede that "the collegial model is a value-laden conception of how higher education organizations should function. It seems less descriptive of what actually happens and more instructive of how decision making should be conducted." Id. at 15. The authors observe that the bureaucratic model is a more realistic reflection of reality in the modern university. Id.

266. See Fordham Univ., 193 N.L.R.B. 134 (1971), Petitioner Fordham Law School Bargaining Committee Exhibit 8, Transcript at 600–601 for statement of President of the University, quoted in Finkin, supra note 237, at 616.

267. 444 U.S. at 696 (Brennan, J., dissenting).

268. Id. at 696–97 (Brennan, J., dissenting). See also Finkin, supra note 237, at 615.
Board of Trustees then delegates authority to conduct the daily activities involved in the ongoing university business to lower officials, such as vice presidents and deans. This structuring of authority is similar to the industrial setting. There is also a "parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process." Justice Brennan correctly argued that the majority failed to comprehend that any influence or decision-making authority attributable to the faculty is a result, not of any managerial prerogatives, but rather, of their "collective expertise as professional educators."

The faculty in the "mature" college or university is given an advisory role; its recommendations serve the faculty's professional interest both in creating and maintaining an environment conducive to a rewarding learning experience and in ensuring that its other professional goals will be represented. The fact that the administration often may agree with faculty recommendations cannot be interpreted as evidence of a unity of faculty-administration interests; rather, the administration often defers to faculty recommendations that are within the faculty's area of professional competence.

The relevant inquiry in determining whether an employee is characterized as "managerial" is reflected in the interest alignment analysis. This analysis requires a determination of whether the employee's actions are "undertaken for the purpose of implementing the employer's policies" or whether "the employee is acting..."
only on his own behalf and in his own interest." If the former condition exists, then the employee is "managerial" and excluded from the Act's coverage; if the latter condition exists, then inclusion under the Act is appropriate.

Despite their different perceptions of the faculty's role in the administration of modern colleges and universities, the dissent and majority seem to agree that to be deemed "managerial," the employee must act on behalf of, and be answerable to, the employer. The majority and dissent differ, however, in their application of the standard to academia.

As evidence of the faculty's pervasive managerial influence, the majority cited both the Yeshiva faculty's role in determining the curriculum, grading system, admission criteria, matriculation standards, academic calendars and course schedules, and also the administration's habitual acquiescence in faculty recommendations. The dissent argued, however, that the conclusion that the interests of the faculty and administration are aligned sufficiently does not necessarily follow from a coincidence on certain issues. Rather, the "managerial" employee must be shown to be a 'true representative of management'. A true management representative is defined by the dissent as an employee who is "expected to conform to management policies and is judged by his

276. Id. (Brennan, J., dissenting).
277. Id.
278. Compare 444 U.S. at 683 (An employee is managerial "if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.") with 444 U.S. 698 (Brennan, J., dissenting) (A managerial employee "is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities.").
279. 444 U.S. at 676. It is notable that many of the examples of the faculty's managerial authority cited by the majority were connected intimately with the educational, as distinguished from the business, aspects of the institution. See notes 257 & 259 supra.
280. 444 U.S. at 700 (Brennan, J., dissenting). Justice Brennan observed out that the right to collective bargaining never has been predicated on a determination that employee-employer interests are diametrically opposed. Furthermore, unity of interest on certain issues never has been grounds for forfeiture of the collective bargaining right. Justice Brennan noted further:

Ultimately, the performance of an employee's duties will always further the interest of the employer, for in no institution do the interests of labor and management totally diverge. Both desire to maintain stable and profitable operations. . . . Differences of opinion and emphasis may develop, however, on exactly how to devote the institution's resources to achieve [its] goals. When these disagreements surface, the national labor laws contemplate their resolution through the peaceful process of collective bargaining. And in this regard, Yeshiva . . . stands on the same footing as any other employer.

Id. at 701.
effectiveness in executing those policies . . . "

281 The dissent noted that neither the Yeshiva faculty collectively, nor its members individually, were accountable to the administration when acting in a governance capacity.282 Finally, the dissent emphasized that unlike managers in an industrial setting, faculty members are not hired to implement administrative policy,283 rather, they are hired to teach. Thus, the majority's classification of professors as managers because of a mere coincidence of interest on academic issues was erroneous.284

The majority's withdrawal of NLRB jurisdiction was untimely because many educational institutions are facing severe financial problems.285 Additionally, the nation's faculties are being pressured into becoming more responsive to a number of disparate groups, such as alumni, legislators, administrators and students.286 The majority, by concluding that faculty members are "managerial" and thus are to be denied the benefits and protections of the NLRA, has subjected the faculties to the repressive influence of outside pressures.287

As the threat of such outside pressure increases, the need for defenses against the demands of special interest groups also grows. The most notable defenses are the tradition of academic freedom and the institution of tenure.288 It must be remembered, however, that academic freedom is a privilege with a limited scope289 and tenure permits dismissal for cause.290 If these defenses are not defined explicitly in the terms of the employment contract, their usefulness will decrease, particularly in an adverse economic climate and "tight" academic job market.291

282. 444 U.S. at 699 (Brennan, J., dissenting). See Finkin, supra note 237, at 618.
283. 444 U.S. at 699-700 (Brennan, J., dissenting).
284. See text accompanying note 264 supra.
285. Finkin, supra note 2, at 1122-23.
286. J. GARBARINO, FACULTY BARGAINING 13 (1975). Garbarino notes that alumni and legislators often believe that faculties are not ministering properly to their primary obligation—teaching students. Instead, these groups often believe that faculty members are "directing their energies to the conduct of often dubious research projects, the cultivation of exotic special topics, and the cultivation of graduate student disciplines." Id.
287. For examples of such outside pressure, see notes 36-47 supra and accompanying text.
289. See notes 24-31 supra and accompanying text.
290. See Fellman, supra note 119, at 20-21.
291. See A. THOMSON, supra note 11, at 9.
The two most promising methods of providing the necessary clarity and completeness to the employment contract, however, seem to have been lost. Institutional support for the 1940 Statement has eroded due to severe budgetary restrictions. Moreover, embodying the fundamental terms of the employment relationship in a collective bargaining agreement, possibly predicated on the 1940 Statement, seems unlikely after Yeshiva. The future of college and university faculties as independent scholars, therefore, depends on the professoriate's ability to institutionalize concepts of academic freedom and tenure.

V. AFTER YESHIVA: RECOMMENDATIONS FOR CHANGE

Although courts are using the 1940 Statement to explicate ambiguous contract terms with increasing frequency, the results of these cases are inconsistent. Thus, a faculty member embroiled in an employment contract dispute would be justified in viewing litigation as an unpromising avenue for the vindication of the claim.

One reason for the present inconsistency in judicial opinions is that the principle of academic freedom, which usually pervades faculty contract litigation, cannot be categorized easily or assigned to a developed area of law. The concept of academic freedom is:

    tightly bound up with special needs, problems and expectations of the teaching profession. A judge who does not understand these needs, problems, and expectations is not likely to be very helpful in dealing with a case in which academic freedom is the central issue. . . . [H]e may do more harm than good, simply because he does not understand the nature of the academic life.

Faced with inconsistent judicial interpretations of academic freedom, college and university faculties must find a means of providing security for the members of the professoriate while making the rights and obligations of both the individual faculty member and the employing institution more comprehensible. One possible solution is to draft faculty employment contracts as completely and accurately as other similar legal documents.

292. See Finkin, supra note 2, at 1122.
293. See note 181 supra.
294. Fellman, supra note 119, at 19.
295. Id.
296. See note 6 supra and accompanying text.
Faculty employment contracts, however, are inherently different from other types of employment contracts because they must incorporate ambiguous principles, such as academic freedom and tenure, and thus, are not readily susceptible to detailed and accurate particularization. Nevertheless, the customary academic employment contract would be improved substantially through more comprehensive drafting.

If, for example, the institution's faculty handbook is to be incorporated into the employment agreement, the contract should expressly incorporate that source. Moreover, additional "fundamental" considerations, such as the terms of the tenure policy, length of the probationary period, notice provisions for the renewal and nonrenewal of contract, and standards establishing the dismissal procedure for tenured and nontenured professors should be identified clearly. Adoption of such policies and procedures would contribute greatly to reducing litigation.

In interpreting faculty employment contracts, courts often must determine which ancillary sources should be assimilated into the contract. Once the court makes this determination, it simply applies the adopted standard to the facts involved in the case. If the relevant policies and procedures were established clearly at the outset, there would be less need for a judicial resolution of the dispute. A college or university academic tribunal could displace judicial interference in contractual disputes, as it could readily apply a clear standard of conduct to a given set of facts. Thus, the parties' respective rights and obligations would be established clearly and resort to a judicially imposed solution would be infrequent.

A second possible method of providing security for the professoriate and defining ambiguous terms inherent in the college or university employment relationship would be to use the AAUP as a formal arbitration agency. The AAUP has been instrumental in developing the 1940 Statement. As a result, some courts today view the Statement as a codification of accepted custom and usage in higher education. Assuming that the 1940 Statement sets the standard, it seems that the AAUP would be the best source for the Statement's interpretation and application. One rather significant drawback to this approach, however, is that as faculty contract

297. See notes 7-13 supra and accompanying text.
298. See text accompanying notes 80-84 supra.
299. Finkin, supra note 2, at 1150-51. See note 171 supra for further evidence on the acceptance of AAUP standards.
litigation has increased, the AAUP has been perceived as a professorial organization dedicated to supporting the aggrieved professor. Regardless of the lack of justification for this belief, if a college or university administration believes that it will not receive an impartial hearing, it will never consent to allow the AAUP to mediate.

Professor Finkin recently has advanced an innovative proposal designed to allay the university administration’s fears that it would not receive impartial treatment in AAUP arbitrated disputes. Under this proposal, a commission comprised of an equal number of faculty and administrative representatives would be established. This commission would assume the role presently filled by Committee A of the AAUP which entails the “processing of complaints, mediation of disputes, appointment of committees of investigation, adoption of guidelines refining the 1940 Statement, . . . and the like.” The results of the commission’s work would be published in the AAUP Bulletin. Finally, the commission would not impose censure, as the AAUP presently does, nor any other direct sanction.

Professor Finkin hopes that the immediate benefit of the proposal would be a halt to the erosion of institutional support for the 1940 Statement which occurred during the last decade. The proposed commission, however, would result in an even greater benefit; its representative composition would make it difficult for a court involved in academic litigation to ignore any decisions or guidelines which the commission might propound. As the proposal’s advocate has stated: “[T]he courts might be expected to defer more readily to the interpretive opinions of such an independent, bipartite body.” To create such a bipartite group, the commission’s future membership would be comprised of indi-

300. See Browzin v. Catholic Univ. of America, 527 F.2d 843, 847-48 n.8 (D.C. Cir. 1975). See also Developments in the Law—Academic Freedom, supra note 60, at 1109-12.

301. Professor Finkin is currently a Professor of Law at the University of Michigan. Finkin served as General Counsel of the AAUP for the 1976-78 term. Finkin also authored the amicus briefs, notes 153, 166 & 167 supra, and numerous additional articles used extensively in the preparation of this Note. The proposal is outlined in Finkin, supra note 2, at 1192-96.

302. Finkin, supra note 2, at 1193.

303. Id.

304. Id. The commission’s funding is to be apportioned half to the AAUP, with the balance to be allocated pro rata among participating institutional organizations.

305. Id. at 1194. See note 181 supra.

306. Finkin, supra note 2, at 1194.

307. Id.
individuals, "jointly designated by the participating faculty and administrative organizations." This requirement would ensure that the commission would not assume the appearance, and possibly the role, of an intra-institutional collective bargaining committee comprised solely of zealous representatives of the "opposing" constituency.

Professor Finkin's proposal is innovative and well-founded. The only drawback to the proposal is that it may be difficult, given the present atmosphere in academia, to achieve such cooperation and support. It might be advisable, therefore, to attempt several "half-way measures" as stepping stones in the implementation of Professor Finkin's proposal. First, a committee of the American Association of Colleges (AAC) should meet with a group of AAUP members to resolve differences on the AAUP statements and interpretive comments which the AAC has yet to endorse. Second, after both groups have agreed on these fundamental documents, the groups should issue a joint statement of standards similar to the 1976 Recommended Institutional Regulation on Academic Freedom and Tenure.

An intra-institutional agreement on a set of operative regulations would establish the basis for a joint standing commission such as that envisioned by Professor Finkin. Perhaps the commission initially should be comprised of members selected by the AAUP and the AAC collectively. Gradually, the commission could assume the role of Committee A, placing initial emphasis on mediation and dispute resolution. After the commission functioned successfully, there might be enhanced interest in expanding its organizational base. At that point, the commission could assume the structure and role proposed by Professor Finkin which has been characterized as "a private analogue to . . . [a] governmental regulatory agency."

308. Id. at 1195.

309. Id. As Professor Finkin observes, under the proposed system "it is more likely than not that the parties will tend to agree on persons of professional eminence and broad experience, . . . whose quality of mind will tend to contribute to the Commission as [a] collegial body, despite the difference in perspective . . . ." Id.

310. See generally J. Garbarino, supra note 286, at 1-21.

311. The most notable of these unendorsed documents are the 1970 Interpretive Comments to the 1940 Statement and the Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments. Furniss, supra note 79, at 17 (1978).

312. See note 146 supra.

313. Finkin, supra note 2, at 1192.
VI. Conclusion

The 1940 Statement has become a normative standard governing the fundamental principles of academic freedom. The current economic environment of budgetary cutbacks and concomitant staff reductions, however, has eroded the principles on which the 1940 Statement was founded and has chilled the exercise of academic freedom. Intra-institutional cooperation between the AAUP and organizations representing various administrative interests, most notably the AAC, provides the best solution to the current problems. Most likely, there will be a continuing period of painful readjustment to compensate for the over-expansion of the 1950's and 1960's. This readjustment, however, must not be at the expense of academic freedom because such freedom attracts capable individuals to the academic sphere. Chief Justice Warren clearly recognized the importance of academic freedom when he admonished:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

Richard H. Miller

314. Id. at 1150-51. See note 171 supra for further evidence on the acceptance of AAUP standards.
315. See Finkin, supra note 2, at 1122.