"A HIGHER ORDER OF LIBERTY IN THE WORKPLACE": ACADEMIC FREEDOM AND TENURE IN THE VORTEX OF EMPLOYMENT PRACTICES AND LAW

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I
INTRODUCTION

In 1915, the American Association of University Professors ("AAUP") issued a manifesto proclaiming the need for academic freedom and tenure for professors. Critics challenged these demands in part because they claimed for professors liberties and job security not vouchsafed to other employees. A committee of the Association of American Colleges ("AAC"), then the leading organization of liberal arts institutions, replied to the 1915 Declaration by invoking the principle of subordination embedded in the employment relationship:

It has been said that the man, to be efficient, must always come before the official. Not only is this not true in academic life, but it is not true in any form of organized activity. Official relationships form the circle within which individual initiative must find room for play, and sufficient academic freedom would seem to be granted when there is no interference within the circle first prescribed of research, thought and utterance.¹

The AAC left no doubt that the power so to prescribe did not lie with the faculty.² When a college president was urged some years later to provide a hearing before he dismissed a professor, he replied, "When you want to fire a cook, you don't go out and get a committee of the neighbors to tell you what to do, do you?"³

The 1940 Statement of Principles on Academic Freedom and Tenure, jointly formulated with the AAC, codified the profession's claims and has since achieved nearly universal institutional acceptance; however, the claim

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¹ Report of the Committee of the Association of American Colleges reprinted in The Reference Shelf: Academic Freedom 83, 83-84 (H.W. Wilson, 1925) (emphasis added). This was prefaced with the observation that: "When a new member is added to an academic staff, he, by virtue of the acceptance of the position, is under an obligation to recognize that the freedom of the institution must be placed before the freedom of the individual." Id at 83.

² Id at 85 ("No way has yet been found to play the 'cello or the harp and at the same time to direct the orchestra.").

that these demands are extraordinary has continued unabated. Tenure—"this peculiar right we claim"—has been attacked persistently on that very ground.⁴ And academic freedom in the broad sense espoused in the 1940 Statement, that is, as reaching not only teaching and publication but also extramural political utterance and intramural speech in matters of institutional policy and action, has been similarly challenged. As one critic put it, "Why would anyone have ever supposed that professors should have more liberty in the workplace than anyone else?"⁵ Another wrote,

> I do not think that academic freedom is simply another articulation of the goals of the labor reform movement. If it is, [house] painters ought to have the same range of protections. . . . The question is why academics, with respect to matters not directly related to teaching and scholarship, have a higher order of liberty in the workplace than others.⁶

What follows is an assessment of this argument from the perspective of the history of employment practices and law. As will appear directly, most of what may have appeared exceptional at the time of the 1940 Statement is no longer exceptional today, as employer policies and employment law have extended to employees in other fields much of the job protection and workplace liberty the 1940 Statement accorded to professors. Interestingly, the academic profession's demand for tenure and its broadly conceived scope of workplace liberty may have anticipated the development of security and freedom within the employment relationship in general.

II

ACADEMIC TENURE AND "TENURE-LIKE" EMPLOYER POLICIES

At the time of the 1915 Declaration, it was not generally assumed that the employment relationship would be of long duration. Federal civil servants had secured in 1897 the right not to be dismissed "except for just cause and upon written charges . . . of which the accused shall have full notice and an opportunity to make defense."⁷ But the federal sector, and public employment more generally, represented a relatively small component of the labor market.⁸ Industrial employees were commonly assumed to be in a

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⁸ Federal, state, and local governmental employees constituted about 1.8 million in a workforce of 23 million in 1915, that is, about 8%. This number has grown until it represented
continuous spot market for labor, in which they had to compete for their jobs virtually day by day with the unemployed waiting at the gate. There were few employer policies or benefits to encourage or reward long service; the handful of firms that had adopted profit sharing systems before 1900 had abandoned them by 1916; in 1929, only 17 percent of the firms reporting in one survey had a plan for internal promotion.9 One consequence was a yearly rate of employee turnover that would be considered horrendous by contemporary standards: 100 percent in Armour meat-packing in 1914, 370 percent at Ford in 1913.10 Another result was a kind of footloose independence, or a willingness (and ability) on the part of employees to quit.

Absent express agreement upon a fixed duration of employment, or terms such as an annual salary for middle-class white-collar employees that would imply such duration,11 the relationship was assumed to be one of employment at will: the employee was free to quit at any time, and the employer was equally free to discharge at any time and for any reason. The idea of "permanent" employment was considered so unusual, so unlikely, as to require consideration additional to the performance of service to render the promise contractually binding;12 and often the judicial understanding of "permanence" misidentified a commitment not to dismiss without just cause as one of lifetime employment, akin to a sinecure granted in return for a release of employer liability for an on-the-job injury.13

After World War II, the emergence of organized labor helped refashion these fundamental assumptions governing the employment relationship. Organized labor's consolidation in the mass production industries guaranteed that incumbent workers would not compete day by day for their jobs with the labor force at large. Workers would be retained by commitments to job security, a wide array of company benefits, and internal lines of progression and promotion. Nonunion firms, in order to remain nonunion, emulated the pattern in unionized industry. In 1929, 2 percent of industrial firms had pension plans; in 1957, 73 percent of industrial firms with more than 250 employees provided them.14 In 1929, 34 percent of those firms had personnel departments; in 1963, 81 percent did.15

Nowhere is the shift from the unstable, market-oriented employment system to the system of internal labor markets—and to the assumption of stability—better illustrated than in the dissemination of employee policy handbooks and manuals. In the

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10. Id.
12. See generally Annotation, Comment Note—Validity and Duration of Contract Purporting to be for Permanent Employment, 60 ALR 3d 226 (1974).
13. 1 Howard Specter & Matthew W. Finkin, Individual Employment Law and Litigation § 2.09 (Michie, 1989) ("Specter & Finkin").
15. Id.
nineteenth century the employer’s work rules, if not brutish, were short; as much information as the employee needed to know was ordinarily conveyed by the foreman. As late as 1935, only 13% of industrial firms had adopted employee rulebooks. The bureaucratization of work, however, enmeshes the worker in a “web of rules” and it requires that the rules be known. By 1948, 30% of industrial firms had adopted employee handbooks. A 1979 survey of 6,000 companies revealed that employee handbooks were distributed by approximately 75% of the companies responding. Notably, the employer’s personnel policies were included in 85% of the handbooks given to production workers, and in 90% of those given to office, clerical, and lower level exempt employees.16

Many of these policies contain rules providing for progressive discipline, fair evaluation, and just cause to discharge—rules, that is, that replicate in form the protections afforded by collective bargaining agreements, in part to maintain a stable complement of satisfied and therefore productive employees, and in part to avoid unionization. One consequence is the widespread expectation—and reality—of job security in a great many nonunionized jobs.17 Thus, the basic concept that after a period of probation the employee will not be dismissed except for just cause is, as a practical matter, no longer peculiar to the academic profession. It has become the norm for classified civil servants, for employees under collective bargaining agreements, and for a great many nonunionized employees as well.

Nor is tenure, as a legally enforceable obligation, exceptional. When Clark Byse considered the legal status of academic tenure a generation ago, it was not entirely clear that tenure would be legally enforceable. He identified four unresolved and potentially problematic questions: (1) whether institutional rules governing tenure and dismissal, in the absence of express incorporation into a contract of employment, would be understood to supply those terms; (2) whether the doctrine of mutuality of obligation would render tenure legally illusory; (3) whether an institutional disclaimer of contractual status for its rules would be given legal effect; and (4) whether a provision reserving to the governing board final power to decide if cause to dismiss were shown would preclude judicial review.18 A further question is what constitutes just cause for dismissal, and how it should be determined. As discussed in Parts IIA-E, all these questions have been more recently addressed by the courts. And, in answering them, the courts have developed a useful dialogue between the law of academic tenure and the law of individual (nonunionized) employment security. This dialogue demonstrates that tenure is not the only form of employment security that is legally enforceable.

A. The Role of Institutional Policies and Practices

In what has become the leading decision regarding faculty employment in higher education, *Greene v. Howard University*, Judge Carl McGowan observed

16. Id at 742-43.
that faculty employment contracts “comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs.”20 All the terms and conditions of professorial employment cannot be spelled out in the letter or notice of appointment—or even, for those institutions that use them, in a document expressly captioned as a “contract” of employment. The rules by which institutions govern themselves, including institutional commitments to academic freedom and tenure, as well as the procedures for according and terminating tenure, customarily are contained in a compendium of institutional policy statements, usually captioned as a Faculty Handbook or the like. The courts have treated these policies and procedures as contractual commitments, virtually without discussion.21 There is nothing exceptional in this. In the late 19th and early 20th centuries, employees were held to be bound by the employer’s posted rules providing for forfeitures, fines, or other terms and conditions of employment.22 However, the contemporary contractual status of employee manuals and handbooks issued by industrial employers has been strongly contested.23 A majority of jurisdictions have rightly recognized these policy manuals as stating contractual terms, though they have divided upon whether promulgation alone is sufficient—as in higher education—or whether express employee reliance must be shown. The decisions in the minority of jurisdictions rejecting contractual status have variously accepted one or another of the arguments that concerned Byse, and are discussed further here, as potentially vitiating the legal enforceability of academic tenure; these decisions are not legally defensible.

B. Mutuality of Obligation

A tenured professor is free to quit merely upon submission of a timely resignation. The institution, however, if it wishes to discharge a tenured professor, customarily must proceed through a trial-like hearing before a faculty hearing committee. The respective obligations are therefore unequal, and there is some authority in the law of employment—even relatively modern authority—for the proposition that, where the reciprocal obligations of employer and employee are not equal, the contract is unenforceable for

20. Id at 1135.
21. In addition to the cases cited elsewhere in this piece, see Rose v Elmhurst College, 62 III App 3d 824, 379 NE2d 791 (1978); Mendez v Trustees of Boston University, 362 Mass 353, 285 NE2d 446 (1972); Griffin v Board of Trustees of St. Mary’s College, 258 Md 276, 265 A2d 757 (1970); Bruno v Detroit Inst. of Technology, 36 Mich App 61, 193 NW2d 322 (1971). Compare Holland v Kennedy, 548 S2d 982, 986 (Miss 1989) (applying industrial case law to Belhaven College’s faculty manual and concluding that the plaintiff administrator may introduce “evidence of past employment practices of the college, oral representations made to him by agents of his employer as well as the policy handbook to support his claim that his employment was for a definite term”).
23. Specter & Finkin at §§ 1.28-1.72 (cited in note 13).
want of "mutuality of obligation." The doctrine, as so framed, makes no sense; so long as the employer and employee are both bound by the employer's rules, it should be irrelevant that there is no precise equality of obligation. At least one court has rejected the claim that academic tenure is unenforceable on this ground. The weight of modern authority in employment law has declined to hold employer policies assuring job security unenforceable based on lack of mutual obligation, in one case relying expressly on an analogy to tenure.

C. Disclaimer

An employer may wish to secure the benefit of rules assuring fair treatment of employees while simultaneously seeking to avoid having to subject itself to litigation about its adherence to them. In Greene v. Howard University, the court confronted such a disclaimer contained in rules providing for timely notice of nonrenewal of appointment. Judge McGowan noted the university's argument that "what it gave with one hand it took away simultaneously with the other." This it could not do:

Contracts are written, and are to be read, by reference 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 market place are not invariably apt in this non-commercial context.

The first sentence has it exactly right. Indeed, an entire body of law has developed, consistent with the general law of custom and usage, founded on the proposition that the "norms and expectations" of the academic profession give meaning to institutional rules. But Judge McGowan's latter two sentences give pause to the extent they suggest that the court's refusal to give effect to the disclaimer was for a reason particular to the academic setting. If Greene is good law—as it is—in the face of decisions that would give effect to disclaimers in employee handbooks, the case would be an instance of professorial exceptionalism. One cannot find a principled basis for:

26. Specter & Finkin § 1.06 (cited in note 13).
27. The federal district court reasoned:

Although this idea is not easily understood in the context of industrial employment, it is similar to the concept of tenure in the academic community. When a college grants a professor tenure, it is giving away its right to terminate the professor at will. The college usually retains the power to discharge the professor for specified causes. But so long as the professor faithfully performs his duties he usually has job security. Even though the professor is free to leave and his term of employment is indefinite, tenure rights are generally viewed as enforceable contract rights.

29. Id at 1135.
30. Id at 1133-34 n7. See also Browzin v Catholic University, 527 F2d 843 (DC Cir 1975); Krotkoff v Goucher College, 585 F2d 675 (4th Cir 1978); Drans v Providence College, 383 A2d 1035 (RI 1978); Jimenez v Almodovar, 650 F2d 363 (1st Cir 1981); McConnell v Howard University, 818 F2d 58 (DC Cir 1987).
distinguishing a professor from a painter in terms of an employer's ability to declare its internal rules unenforceable against itself. However, there is abundant precedent in the law of individual employment that denies an employer the power to declare its obligations an illusion. Greene stands for the proposition that an employer cannot take away with one hand what it gave with the other; and if that is so, it ought to be applicable in both professorial and nonprofessorial settings.

D. Finality and Preclusion of Judicial Review

A university's rules may reserve "final" decisional authority in dismissal cases to the institution's governing board. As Byse noted, it could be argued that such a reservation would work a preclusion of judicial review, akin to a participant's submission to a contest in which "the decision of the judges will be final." Such an approach, however, would produce the same result as a disclaimer; it would render the university's trustees, the final authority for the employer, judges in their own cause. There is authority in employment law

31. Thus an employer may not enter upon a contract of fixed duration while reserving to itself the power to terminate earlier for no reason. See, for example, Carter v Bradlee, 245 AD 49, 280 NYS2d 368, aff'd 269 NY 664, 200 NE 48 (1936) (followed in Rotherberg v Lincoln Farm Camp, Inc., 755 F2d 1017 (2d Cir 1985)). See also Yazujian v J. Rich Steers, Inc., 195 Misc 694, 89 NYS2d 551 (Sup Ct 1949); Dallas Hotel v Lackey, 203 SW2d 557 (Tex Civ App 1947); King v Control Systematologists, Inc., 479 S2d 955 (La App 1985). An employer's reservation of "sole discretion" to pay a commission may not defeat an obligation to pay. See, for example, Allen D. Shadron, Inc. v Cole, 101 Ariz 122, 416 P2d 555, aff'd 101 Ariz 341, 419 P2d 520 (1966); Spencer v General Elec. Co., 243 F2d 934 (8th Cir 1957); Tymrshare, Inc. v Covell, 727 F2d 1145 (DC Cir 1984). Similarly, an employer may not obligate itself to pay a bonus while disclaiming a legal obligation to pay. See, for example, Wellington v Con P. Curran Printing Co., 216 Mo App 358, 268 SW2d 396 (1925); George A. Fuller Co. v Brown, 15 F2d 672 (4th Cir 1926); Molbey v Hunter Hosiery, Inc., 102 NH 422, 158 A2d 288 (1960); Ellis v Emhart Manuf. Co., 150 Conn 501, 191 A2d 546 (1963); Patterson v Brooks, 285 Ala 349, 232 S2d 598 (1970); Oiler v Dayton Reliable Tool & Mfg. Co., 42 Ohio App 2d 26, 326 NE2d 691 (1974); Cinelli v American Home Products Corp., 785 F2d 264 (10th Cir 1986); Goudie v HNG Oil Co., 711 SW2d 716 (Tex App 1986). Nor may an employer promise benefits while disclaiming a legal obligation to pay, see, for example, Tilbert v Eagle Lock Co., 116 Conn 357, 165 A 205 (1933); Mabley & Carew Co. v Borden, 129 Ohio St 375, 195 NE 697 (1935); Psutka v Michigan Alkali Co., 274 Mich 318, 264 NW2d 385 (1936); Schofield v Zion's Co-op Merchandise Institution, 85 Utah 281, 39 P2d 342 (1934).


33. As Byse cautioned:

Not many trustees can be expected to take a completely independent and objective position if dismissal proceedings are instituted by the president, for it must be remembered that the president was appointed by the trustees and in a very real sense is their representative. If the president, perhaps after consultation with the chairman or executive committee of the governing board, alleges that the acts committed by the teacher disqualify him from continuing as a member of the faculty, it would not be surprising if most trustees were to conclude that the president correctly interpreted the termination criteria. If in turn the reviewing court must defer to the governing board's interpretation of termination criteria, the tenure principle could be seriously undermined by a parochial or prejudiced president.

disallowing the preclusive effect of such provisions;\textsuperscript{34} and, more recently, preclusion has been rejected in higher education.\textsuperscript{35}

E. Cause to Discharge and Deference to Employer Judgment

Where, by individual contract, the employer has bound itself for a term of employment, and so by law cannot dismiss except for good cause, adjudication is necessary in contested cases to determine what conduct the employee engaged in and whether the conduct justified discharge. This would seem to be so whether or not the just cause obligation was contained in the individual contract or in a statement of employer policy. But this area is not altogether free of confusion.

Where tenure is held in a public institution by virtue of state law or of institutional policy authorized by law, some jurisdictions have held that a decision of the trustees to dismiss, challenged as a matter of state administrative law, is to be reviewed judicially only under a standard of "loose rationality."\textsuperscript{36} In fact, even in a recent dismissal case in a private university, where the faculty hearing committee found no cause to discharge a professor of twenty years' service on grounds of alleged incompetence, the trustees dismissed nevertheless, and the appellate court seems to have assumed that the dismissal, challenged as a breach of the individual's tenure contract, would be reviewed as if it were subject to the same loose rationality standard.\textsuperscript{37}

Moreover, some courts have taken an analogous approach where an industrial employer's commitment to job security arises under the employer's rules rather than under a contract of express duration. In Oregon and Washington, the test is whether the employer had a good faith belief that the facts relied upon justified the discharge; there is no independent fact-finding.\textsuperscript{38} These courts have reasoned that because the rules are self-limiting, and are unilaterally adopted by employers, the meaning intended by the employer, "the drafter," is controlling: "[T]here is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exist."\textsuperscript{39} California allows a role for the

\textsuperscript{34} The Michigan Supreme Court observed regarding the dismissal of a steamboat captain that, in the absence of a finality clause, "We think there is neither reason nor law for making employers, in such cases, final judges in their own behalf of the propriety of dismissing their employees during their term of employment. They cannot avoid the responsibility which attaches to dismissals without actual cause." Jones v Graham & Morton Transp. Co., 51 Mich 539, 541 (1883). For the treatment of expressed finality clauses, see In the Matter of Arbitration between Cross & Brown Co., 4 AD2d 501, 167 NYS2d 573 (1957); Burger v Jan Garment Co., 52 Luz L Reg 33 (Pa Com Pias 1962).

\textsuperscript{35} Manes v Dallas Baptist College, 638 SW2d 143 (Tex App 1982) McConnell, 818 F2d 58.

\textsuperscript{36} Harris v Board of Trustees of State Colleges, 405 Mass 515, 542 NE2d 261, 268 (1989). Chief Judge Liacos was evidently troubled by the standard. Id at 267-68.

\textsuperscript{37} Olivier v Xavier University, 553 S2d 1004 (La App 1989), cert denied, 556 S2d 1279 (La 1990).


\textsuperscript{39} Baldwin, 112 Wash 2d at 138, 769 P2d at 304, quoting Simpson, 293 Or at 100, 643 P2d at 1278. This reasoning neglects even to mention the common maxim that contractual ambiguities are to be resolved against the interests of the drafting party.
finder of fact, but has stressed that the employer must be allowed to set its own standards of performance, and that the question for the jury—once the facts have been found—is to determine whether a discharge for the reasons found is within the bounds of discretion accorded to the employer.\textsuperscript{40}

The issue of the appropriate standard of review was squarely presented in \textit{McConnell v. Howard University}.\textsuperscript{41} McConnell, a tenured professor of mathematics, refused to continue teaching a class in which an obstreperous student had enrolled unless the student apologized (for calling him a racist) or the administration either removed her from the class or took some other remedial action. Instead, the administration sought to dismiss Professor McConnell for neglect of duty. The faculty hearing committee found no basis for dismissal; nevertheless, the trustees discharged. The professor sued for breach of contract, and the university administration argued that the trustees' decision should be given deference, either by analogy to the scope of review in the public sector or because of the "special nature" of the university. The District of Columbia circuit, in an opinion written by Judge Harry Edwards, rejected the administration's argument and rather bluntly.

\begin{quote}
If we were to adopt a view limiting judicial review over the substance of the Board of Trustees' decision, we would be allowing one of the parties to the contract to determine whether the contract had been breached. This would make a sham of the parties' contractual tenure arrangement.

On remand, the trial court must consider \textit{de novo} the appellant's breach of contract claims; no special deference is due the Board of Trustees once the case is properly before the court for resolution of the contract dispute.\textsuperscript{42}
\end{quote}

As in any other contract case, there must be a "\textit{de novo} determination of the facts and of the application of the facts to the terms of the contract."\textsuperscript{43} \textit{McConnell} represents the better view.\textsuperscript{44}

Turning to the question of what constitutes cause to dismiss, it was not contested that Professor McConnell refused to perform an assigned duty; to the district court, that put an end to the matter.\textsuperscript{45} But the court of appeals held that that question "must be construed in keeping with general usage and custom at the University and within the academic community,"\textsuperscript{46} noting cases that have relied upon AAUP standards as evidencing the custom and usage of the academic community. The court noted that the faculty hearing committee's findings suggested that Professor McConnell's actions did not constitute neglect of professional responsibility under all the circumstances in the case, and that his action might be justifiable in light of the administration's

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\item \textsuperscript{40} Pugh v See's Candies, Inc., 203 Cal App 3d 743, 250 Cal Rptr 195 (1988); Wilkerson v Wells Fargo Bank, 212 Cal App 3d 1217, 261 Cal Rptr 185 (1989).
\item \textsuperscript{41} 818 F2d 58 (DC Cir 1987), rev'g 621 F Supp 327 (DC 1985).
\item \textsuperscript{42} 818 F2d at 68.
\item \textsuperscript{43} Id at 70 n14.
\item \textsuperscript{44} See, for example, Danzer v Professional Insurers, Inc., 101 NM 178, 679 P2d 1276 (1984); Davis v Tucson Ariz. Boys Choir Soc'y, 137 Ariz App 228, 669 P2d 1005 (1983) (rejecting employer good faith as a defense). See generally Specter & Finkin at § 4.13 (cited in note 13).
\item \textsuperscript{45} 621 F Supp 327, 331 (DC 1985).
\item \textsuperscript{46} 818 F2d at 64.
\end{itemize}
abnegation of a responsibility it arguably had to the professor vis-a-vis the student.

The court's approach does not establish a different set of rules for professors than for other employees. The law regarding the determination of sufficient cause to discharge has always rested upon the nature of the particular employment. A factory superintendent's refusal to obey an order of the corporation's board of directors to present himself before them might not supply a basis for discharge, grounded in the common law duty of obedience, because a court should consider not only "the reasonableness and importance of the order when given," but also "the degree of discretion entrusted to the employee or required by the nature of [the] work." An employee's lack of wit or charm," one court more recently opined, "is more tolerable in the accounting or shipping department than in the sales or personnel department." And it is black letter law that relevant customs and usages inform the meaning of contract terms.

In sum, the principle of tenure, that is, of a right not to be dismissed except for just cause, as a mutually engendered expectation and as an enforceable obligation, is not peculiar to the academic world. What remains unique to academic tenure, and defensible in terms of the special relationship of tenure to academic freedom, are the requirement of a hearing by one's academic peers before the dismissal may occur, and the limitation the tenure obligation independently imposes upon the institution's ability to reallocate resources. These are important but subsidiary features of the principal obligation; the obligation itself may no longer be criticized on any ground of special pleading.

III

ACADEMIC FREEDOM AND WORKPLACE LIBERTY

The 1940 Statement recognized academic freedom as extending to professors simultaneously as "... citizen[s], ... member[s] of a learned profession, and ... officer[s] of an educational institution." Thus, it accorded the freedom of utterance due a citizen in the larger body politic; the

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47. Crabtree v Bay State Felt Co., 227 Mass 68, 116 NE 535 (1917). When a foreman was discharged for absenting himself for a day on pressing personal business over the objection of his employer, the Supreme Court of Michigan held it to be a jury question whether such disobedience constituted cause to dismiss, observing:

In such employments as involve a higher order of services, and some degree of discretion and judgment, it would in our opinion be unauthorized and unreasonable to regard skilled mechanics or other employees, as subject to the whim and caprice of their employers or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences.

Shaver v Ingham, 58 Mich 649, 654, 26 NW 162, 165 (1886).


49. 1940 Statement of Principles on Academic Freedom and Tenure ("1940 Statement"), in Policy Documents and Reports 3, 4 (AAUP, 1990) ("1990 AAUP Redbook"); see Appendix B, 53 L & Contemp Probs 407 (Summer 1990). As Henry Wriston, President of Brown University and the AAC's chief negotiator, put it in presenting the document to the AAC, "The new statement ... recognizes the tri-
freedom due a member of a discipline to teach, research, and publish; and the freedom of speech on any matter of intramural concern due an "officer," or, as Henry Rosovsky has more recently put it, a "shareholder"^50 of the institution.

A. Political Speech

The extension of academic freedom to political utterance has been powerfully criticized by Professor William Van Alstyne.51 One cannot, he argues, abstract a liberty for utterance unrelated to vocation from a doctrine grounded in the need to protect vocational utterance. From this perspective, the negotiators of the 1940 Statement, acting out of a laudable impulse and at a time when the political expression of public employees was not constitutionally protected, nevertheless sought the wrong shelter. Effectively, they separated out a special claim for academics from what should have been a general claim of civil liberty. Moreover, to categorize professorial political utterance as an aspect of academic freedom is, Van Alstyne argues, necessarily to hold it to a professional standard of care—as the 1940 Statement seems rather straightforwardly to do^52—that results in academics having potentially less protection for their political speech than other employees. The 1940 Statement’s special claim of protection is no longer necessary, even as a prudential factor, inasmuch as the Supreme Court has extended the protection of the first amendment to the political utterances of public employees in *Pickering v. Board of Education.*53

The force of Van Alstyne’s argument is illustrated, if unintentionally, in John Silber defense of action he had taken while a dean at the University of Texas to deny the reappointment of a young professor of philosophy. The young academic had given a political speech on the steps of the state capitol before a crowd containing a large number of students, and had, in Silber’s terms, “willingly and knowingly told a lie in order to make a rhetorical point”^54 by asserting the existence of concentration camps in the state. This, to Silber, was “a clear case of poisoning the well in the marketplace of ideas, and a gross betrayal of academic freedom through gross academic

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52. The 1940 Statement provides in pertinent part that when the academic speaks as a citizen 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.
irresponsibility." On those grounds, Dean Silber decided not to reappoint the instructor. "[T]he academic," Silber argued, "neither needs nor deserves greater protection for his political freedom than that afforded the ordinary citizen. There is (and in my opinion, should be) a price for glory."

But the philosophy professor was not accorded the same protection by Dean Silber that the law accords to other public employees. Pickering supplies a two-part test for public employee speech. First, the speech must itself be upon a matter of public concern to the larger body politic. Second, the speech must be weighed in a balance against the employer's need to maintain the discipline of the workforce and to ensure harmony with superiors and among coworkers.

The young academic's speech was on a matter of public concern and did not bring him into conflict with his immediate superiors or coworkers; indeed, his departmental colleagues voted to recommend his renewal, a recommendation Dean Silber rejected. Had a house painter employed by the university been dismissed for making the same political harangue, the university could not have defended itself against first amendment attack. Dean Silber extended the claim of academic freedom to the young instructor's political speech, and then took that extension to impose a standard of care as to the accuracy of his statements; the extension would grant the instructor less political freedom than the hypothetical house painter.

It is far from clear, however, that the young philosopher had fallen afoul of the profession's norm for political expression. Before Pickering, the AAUP's Committee A on Academic Freedom and Tenure reconsidered the appropriate standard of institutional sanction for political speech under the 1940 Statement and concluded:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

And the Pickering court was at pains later to observe:

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.

55. Id.
56. Id at 39.
58. 391 US at 572-73 (footnote omitted). It went on to illustrate and emphasize the point in a note:

[T]his case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

Id at 573 n5 (emphasis added).
The constitutional standard embraced in the emphasized portion of the opinion\textsuperscript{59} seems congruent with the gloss placed on the 1940 Statement by the AAUP. Consequently, a singular incident of knowing misrepresentation as part of a patently radical political harangue would not be expected to provide cause to inquire into the young instructor's professional fitness, Dean Silber's decision to the contrary notwithstanding. At a minimum, the seemingly perverse reversal of protections Van Alstyne contemplated would appear to be obviated by the Court's conflation of the professional and constitutional tests; this is not to say that the test itself is without difficulty.\textsuperscript{60}

More important, the professional standard may at one point be more protective than the first amendment as currently construed. The Court has stressed that the impairment of workplace discipline and the creation of "disharmony" with coworkers\textsuperscript{61} are factors to be weighed in the balance, and at least theoretically, may deprive the utterance of constitutional protection. The constitutional question whether a sufficient level of disharmony would justify the dismissal of an employee even for speaking dispassionately and accurately to issues of public concern remains unresolved.\textsuperscript{62} But the profession has understood that sharp, even violent, disagreement with the content of the utterance cannot supply grounds for discharge if the expression is otherwise consistent with the exercise of academic freedom. A professor's outspokenness in defense (or criticism) of efforts to legalize homosexual relations; to equate Zionism with racism; to urge the transportation of the Palestinian population; to suppress (or secure) the availability of abortion or pornography; to assert the genetically transmitted intellectual inferiority (or superiority) of a particular race; and the like—expression, in other words, that fires deep contemporary passions, is not

\textsuperscript{59} See note 58.

\textsuperscript{60} Professor Van Alstyne has been critical of the test. William Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L J 841, 854.


\textsuperscript{62} In National Gay Task Force v Board of Education, 729 F2d 1270 (10th Cir 1984) aff'd, 470 US 903 (1985), the Tenth Circuit struck down on overbreadth grounds portions of a statute that provided for the refusal to hire school teachers who "advocate" homosexual activity in a manner such that prospective co-workers may become aware of it. On appeal, the Board of Education argued that a limitation, which required that the advocacy have an "adverse effect" on coworkers, saved the statute: "When [the advocacy] comes to the attention of other teachers or co-workers, it is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal loyalty and confidence requisite to particularly close employee relationships." Appellant's Brief at 36, quoted in AAUP's Brief as Amicus Curiae at 12, 470 US 903 (No 83-2030). The AAUP took sharp issue with the argument:

An advocate upon any controversial subject could be disqualified not because the speech fell afoul of any test of lawlessness, not because it reflected any want of scholarship, and not because it lacked in moderation or restraint in any way, but because one's prospective colleagues or superiors found the advocate's position upon a general question of public policy too "controversial" and so "disharmonious." But to make appointment contingent upon the degree of approval of one's social, economic, or political views by one's co-workers or supervisors is to eviscerate the First Amendment.

Id at 13-14. Ominously, the Tenth Circuit's decision was affirmed by an equally divided Court. 470 US 903.
subject to sanction based upon the depth and intensity of collegial sentiment contrary to the ideas expressed.

From an historical perspective, the demand for freedom of political expression and activity in the employment relationship, as an aspect not only of citizenship but of status, is not unprecedented. In the early days of the Republic, employer efforts to control the political behavior of employees were strenuously and sometimes violently resisted as a threat to democracy and an affront to artisanal independence, in appeals straightforwardly to the solidarity of the "mechanical class." Most states now forbid by legislation employer attempts to control employees' political activity, and some insulate political speech and association generally from employer reprisal. In addition, the emerging tort of discharge for reasons violating public policy has been extended to encompass the dismissal of a manager for refusal to support his employer's lobbying effort on behalf of a bill favorable to the company; the dismissal of an employee for protesting the unauthorized use of his name in the company's lobbying effort; and the discharge of a bank executive for the content of testimony he gave a committee of the United States Senate. In other words, the law of employment may be edging toward a general public policy forbidding employers from interfering in employee political speech and activity. If this is so, and putting the question of standards aside, it would not appear that professors have claimed a higher order of workplace liberty than that claimed by others.

B. Speech on Workplace Issues

The profession has subsumed as an aspect of academic freedom intramural speech on any matter of academic interest—that is, speech made as a "shareholder" in the institution. That formulation has been challenged by

63. In 1798, the "mechanics" of Baltimore protested vehemently about a Federalist employer who would hire no men opposed to his candidate. They published a statement in the press: "The statement claimed that 'unwarrantable and degrading means' had been used to manipulate the mechanics' vote, that these 'base designs' must be frustrated, and that the mechanics 'have and will maintain an opinion of our own.'" Charles G. Steffen, The Mechanics of Baltimore: Workers and Politics in the Age of Revolution 1763-1812, 162 (Univ of Illinois Press, 1984). Howard Rock recounts a series of such incidents—and protests—in New York City around the turn of the century, including a broadside of 1808: "Fellow citizens—LET us support our independence! If we are Mechanics, Labourers and Artizans — Why should we surrender our opinions and our rights to the arbitrary mandate of a Tory Employer, and that employer, perhaps a foreign emissary!" Howard Rock, Artisans of the New Republic: The Tradesmen of New York City in the Age of Jefferson 54 (New York Univ Press, 1979) ("Artisans"). Similar employer action was later to occur, especially in the presidential election of 1896. See Walter Licht, Working for the Railroad: The Organization of Work in the Nineteenth Century 230-31 (Princeton Univ Press, 1983); Lawrence Goodwyn, The Populist Moment 286 (Oxford Univ Press, 1978).

64. Specter & Finkin at § 10.25 (cited in note 13).
65. Id at §§ 10.33-10.48.
Dean Mark Yudof. Unlike Van Alstyne’s treatment of professorial political speech, which he would shelter under a more generous rubric of civil liberty, and which he would extend to private institutions under that head, Yudof’s criticism is not solely a matter of the derivation of the claim. Even had the profession claimed academic freedom only for disciplinary discourse, and coupled it, following the line of Van Alstyne’s argument, with an assertion of academic civil liberty for nondisciplinary discourse, Yudof’s question—why academics should have workplace liberties higher than those conceded to others—would seem to persist.

The question assumes that other occupations have failed to propound, and secure, any analogous freedom. A fuller examination of that question is called for, and for that an historical perspective is essential.

In the pre-industrial, artisanal world of the early Republic, the implied obligations of obedience and respectfulness owed by servant to master were, at least for the highly skilled, irrelevant. Journeymen worked under little supervision; and, for some, any supervision was not to be endured. Paid by the piece, artisans often came and went as they pleased. Drinking on the job was asserted not only as a matter of custom, but as of right. Independence from authority was insisted upon. “If a master said a word that wasn’t deserved,” Andrew Mayhew was told by a hatmaker in 1850, “a journeyman would put on his coat and walk out.” If a word could capture the spirit of these craftsmen, it would be “manliness.” As David Montgomery explains:

> Few words enjoyed more popularity in the nineteenth century than this honorific, with all its connotations of dignity, respectability, defiant egalitarianism, and patriarchal male supremacy. The worker who merited it refused to cower before the foreman’s glares—in fact, often would not work at all when a boss was watching.

By the time of the 1915 Declaration, however, much had changed. The small artisanal workshop had been replaced by the factory. Many of the traditional crafts had become totally deskilled; the craftsmen were replaced by

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69. *Musings* at 1355 (cited in note 6). Interestingly, action taken not as a metaphorical but as an actual shareholder of an employing corporation has been held in several jurisdictions to be insulated from employer reprisal. Specter & Finkin at § 10.44 (cited in note 13).

70. *Specific Theory* at 81 (cited in note 51).


> We unto no bosses humble
> When our trade begins to flag
> When they begin to growl and grumble
> We resent and give the bag (quit)

Id.

semiskilled machine operators, who were subject to industrial demands of punctuality and discipline, enforced by fines, forfeitures, harsh words, and summary dismissal. In some employments, the regulation of even private life could be far-reaching.\(^75\)

At the same time, however, the academic profession was emerging from the era of the “Old-Time College”\(^76\)—where professing was a brief interlude for the young bent upon a clerical career, or for the old in a case of downward mobility, and where institutions were more concerned with doctrinal fidelity and social acceptability than the advancement and testing of truth—to the “Age of the University,”\(^77\) collectively to demand its freedom in 1915. While, in other words, artisans were becoming workers,\(^78\) and, in the process, losing their traditional independence, college and university teachers were developing into a profession seeking to establish theirs. Thus Yudof is partially correct: the claims of freedom of speech on intramural policy and action codified in 1940 may appear remarkable when measured by the practices of much unskilled and semiskilled factory labor of the time. But the claim was modest measured by the practices of artisanal employment in the early to mid-nineteenth century.

Nor is the profession’s demand unique even in terms of law. To be sure, speech in the public sector in connection with workplace disputes that do not implicate any matter of “political, social, or other concern” to the larger community is not constitutionally protected. But under the National Labor Relations Act (“NLRA”), enacted only a few years before the 1940 Statement was adopted, speech connected to workplace issues and disputes having no larger political content at all were insulated against employer reprisal as a

\(^75\) Many of these intrusions were part of company welfare plans, intended to “uplift” their working forces, and were often received less than enthusiastically by the intended beneficiaries. The “service secretary” of a Maine manufacturing firm recalled the occasion when “thirty angry girls descended on her office and declared that they were just as clean as she was and that they would not submit to physical examinations or take off their shoes and stockings for anyone.” Stuart D. Brandes, *American Welfare Capitalism, 1880-1940*, 139 (Columbia Univ Press, 1970).


\(^77\) Id at 275.

\(^78\) Bruce Lurie, *Artisans into Workers: Labor in Nineteenth Century America* (Noonday Press, 1989). The change was graphic. An American woodcut of 1836, reproduced in Howard B. Rock, *The New York City Artisan 1789-1825* at 116 (State Univ of New York Press, 1989), depicts a turner’s shop. In the background, a boy—presumably an apprentice, perhaps the master’s son—turns a wheel that supplies power to the belting. In the left middle ground, a worker with an awl is cutting wood blanks; and in the right foreground, another is turning the wood on the hand-powered lathe. The men are virtually identical; both are wearing long-sleeved shirts, vests, aprons, and the high stiff hats of the period. It is impossible to tell which is master and which is journeyman; or, perhaps, both are journeymen, working quite independently. An oil painting of 1902 by Iwan Wladimiroff entitled “Werkstückkontrolle” (roughly, “quality control”) shows a contemporary workplace. In the background a boy is holding a small piece of apparatus. In the foreground are two men. One, bearded, slightly gaunt, of middle age, dressed in work clothes, applies himself to a piece of equipment on a workbench attached to mechanically powered belting. Next to him stands another, observing every detail of the work, dressed in grey trousers, a frock coat, vest-with gold chain, a stiff collar and cravat; he is expressionless, hands in his pockets, smoking a cigar. At a glance one sees immediately who is the worker and who is the boss. The painting is reproduced in *Industrie Im Bild* 19 (Westfälisches Landesmuseum für Kunst und Kulturgeschichte, Münster, 1990).
matter of industrial liberty.\textsuperscript{79} Analogous legislation has been adopted by a number of states providing parallel protection for public employees.\textsuperscript{80}

The theory of industrial democracy underpinning the NLRA drew a close connection between the employee's liberty in the workplace, including freedom of expression on workplace issues, and the maintenance of a political democracy. Rather than compartmentalize the industrial employee into a worker, who must obey unquestioningly, and a citizen, who is free to question, the reformers of the period thought the employee's habituation in the one sphere might have consequences in the other.\textsuperscript{81} Thus, one could well argue that the 1940 Statement assured for professors the protection of speech on internal issues, as a matter of the academic freedom of institutional citizens, that external law guaranteed to other work groups as a matter of industrial democracy.

C. Disciplinary Discourse and Professional Autonomy

Dean Yudof concedes the claim of academic freedom in the unique function of institutions of higher education to test, advance, and disseminate knowledge when that claim is grounded not in personal autonomy but in social utility.\textsuperscript{82} But he has distinguished and resisted the claim when based upon a theory of professional autonomy:

The problem is that the equation of academic freedom with a broad conception of professionalism releases academic freedom from its conceptual moorings. The engineer at NASA, the physician at a public hospital, and the accountant in the state budget office have equally plausible claims to such a distended version of academic freedom, though they are not working in the academy.\textsuperscript{83}

On such a theory of vocational freedom, he argues, professors are no different from other employees, such as house painters. They too may lay claim to

\textsuperscript{79} 29 USC §§ 151 et seq (1988). See, for example, \textit{NLRB v Coca-Cola Co. Foods Div.}, 670 F2d 84 (7th Cir 1982).
\textsuperscript{81} The view was shared by Louis Brandeis: "Can this contradiction—our grand political liberty and this industrial slavery—long coexist? Either political liberty will be extinguished or industrial liberty must be restored." Louis D. Brandeis, \textit{The Curse of Bigness} 39 (Kinnelat Press, 1934). By the reformer and department store tycoon, A. Lincoln Filene:

And it is still harder to see how we can much longer send Jones the worker in steel or shoes or sealing-wax to the exercise of his rights as an American, and if an industrial order in which he is habituated to an autocratic control that was old before his country was born.

A. Lincoln Filene, \textit{A Merchant's Horizon} 47 (Houghton-Mifflin, 1924). By the industrialist, John D. Rockefeller: "Surely it is not consistent for us as Americans to demand democracy in government and practice autocracy in industry." John D. Rockefeller, Jr. \textit{The Personal Relation in Industry} 86 (Boni & Liveright, 1923). By attorney Donald Richberg, who participated in drafting both the Railway Labor Act, 45 USC § 151 et seq (1926), and the Norris-LaGuardia Act, 29 USC §§ 101-115 (1932), "To put it bluntly, an economic autocracy and a democratic government cannot support each other long. There will be an eventual choice between the ideals of mastery and service." Donald R. Richberg, \textit{The Rainbow} 47 (Doubleday, 1936). And by Senator Robert F. Wagner: "Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship." Quoted in R. W. Fleming, \textit{The Significance of the Wagner Act}, in Milton Derber & Edwin Young, eds, \textit{Labor and the New Deal} 121, 135 (Da Capo Press, 1972).

\textsuperscript{83} Yudof, 66 Tex L Rev at 1354-55 (cited in note 6).
professional autonomy based upon their mastery of the craft—so to require, for example, "'brush work' over rollers" as part of their freedom on the job.

The distinction is important to the extent that it is grounded in the first amendment, as Yudof's implications illustrate; but that would assume the profession's claim of autonomy was anchored in—or seeking to be anchored in—the constitution, the source of the arguably indistinguishable claims of other publicly employed professionals, and of painters. However, such was not the case.

The 1940 Statement, a pact between representatives of institutions and the professoriate, is normative. It speaks to how institutions of higher education, public and private, ought to behave. The 1940 Statement claimed no support in the first amendment, or in external law. Indeed, given the state of constitutional law in 1940, it would have been difficult to fashion any such constitutional theory at the time. That kind of theorizing came later, following Supreme Court decisions that seemed to begin to join academic freedom with the first amendment, a jointure that has, at best, been imperfectly realized.

Moreover, Dean Yudof seems to assume that other vocations have failed to propound (and secure) analogous workplace freedom. But, as noted earlier, before artisanal manufacture was eroded by technology and the extensive division of labor, workers often did control a good deal of the job. As a leader of the painters' union in New York City lamented in 1926:

The painter has drifted, under the pressure of new building methods, from the highly skilled craftsmanship of the past to a semi-skilled laborer. When painting was a real craft, the men served apprenticeship, attended schools of drawing and design, learned the nature of the pigments which are used in paints, studied the idea of the relation of color to paints and of color harmony. They had to know the nature of the different woods and the reaction of the various chemicals—for dyeing, finishing, etc.

84. Id at 1351.
85. This is made explicit in his earlier piece:
Is there a constitutional right to embrace an assertedly superior educational philosophy or are we left only with recent yuppies theories of free speech, the assertion that expression promotes self-realization? If so, why do not engineers at NASA have the constitutional right to engineer rockets in the most efficient, productive and self-realizing manner—even if their managers and the Congress disagree with them? To be sure, professors speak and write for a living and engineers conceptualize problems and design solutions (a form of communication) but why should that matter? So too, hot tubs, home ownership, and football games, sometimes, may also promote self-realization; but constitutional entitlements to those aspects of the good life have yet to be established.

Yudof, 32 Loyola L Rev at 840 (cited in note 82) (footnotes omitted).
88. William P. Murphy, Academic Freedom—An Emerging Constitutional Right, 28 L & Contemp Probs 447, 453-57 (Summer 1963), Thomas I. Emerson & David Haber, Academic Freedom of the Faculty Member is a Citizen, 28 L & Contemp Probs 525 (Summer 1963).
It is entirely different today. The painting business is a highly commercialized industry. Buildings comprising hundreds of rooms must be completed in 5% of the time it took fifteen or twenty years ago. To meet that condition, the chemist has been brought into play. Employed by the paint manufacturer, he solves all the problems of the contractor concerning the application of paint. The painter's job is not to reason why; his is but the task of doing what the chemist and the contractor find it necessary to do.90

Even at the time the 1940 Statement was promulgated, organized house painters had unilaterally adopted work rules that, among other things, did limit the use of rollers in preference for brush work,91 as well as regulate the width of the brush to be used (not more than four-and a half inches),92 and, later, limit the number of rooms per week painters would paint.93

Were the academic profession's appeal grounded in the authority of the constitutional, statutory, or common law, the profession would have had to explain why workplace liberties ought be conceded to academics that the law did not accord to others. But in speaking to its own institutions, the profession labored under no such obligation.94 Organized painters demanded and exercised important unilateral controls over the manner in which their jobs would be performed, even the amount of work they would do. Organized printers had the right to determine if there was cause to dismiss a fellow printer, to control their supervision (even to the point of...

90. Quoted in William Haber, Industrial Relations in the Building Industry 42 (Harvard Univ Press, 1930).
91. The painters' locals have adopted somewhat similar policies toward the use of the roller as toward the spray gun, although the restrictions were much less severe in some localities.


92. The reasons given for limiting the brush width on oil paint were two. First, oil paint is relatively heavy, so that it imposes a fatiguing “drag” on the arm and wrist when it is applied. Second, the painter must maintain a “wet edge,” that is, he must apply the paint continuously so that the edge of the paint does not become too dry before the next stroke is applied; otherwise, a poor quality finish is the result. Contractors generally agreed, therefore, that a painter cannot steadily maintain a good quality and quantity of work over a period of time unless the width of the brush is not too great; the continued use of a too wide brush would impose a strain, cause excessive fatigue, and result in a poorer quality finish. In the case of water paint, a wider brush was both feasible and permitted.

Id at 164-65.
93. The latter was declared an unfair labor practice on the odd theory that the union had not first bargained before it, rather than the employer, unilaterally changed terms of employment. New York Dist. Council No 9, Int'l Brotherhood of Painters & Allied Trades v NLRB, 453 F2d 783 (2d Cir 1971).

94. Had the profession asserted that institutional observance of its standards was a legal obligation imposed from without, such, for example, that an institution's violation of academic freedom were to be a tort, Thomas A. Gowen, Interference with Academic Freedom: The Pre-Natal History of a Tort, 4 Wayne L Rev 205 (1958), it would have to explain why faculty speech on workplace disputes was protected while painters' speech was not. But the profession never has so asserted. It has argued, and with considerable success, that institutional acceptance of the 1940 Statement's conception of academic freedom becomes an express or implied obligation to the faculty. Note, The Role of Academic Freedom in Defining the Faculty Employment Contract, 31 Case W Res L Rev 608 (1981) (authored by Richard H. Miller).
excluding management from the pressroom when the presses were running), and to designate a substitute if they decided to take the day off. Organized symphonic musicians have more recently secured final authority in disputed cases of seating and tenure. None of them was obliged, in order to sustain their claims, to explain why professors could not routinely escape teaching as a matter of right merely by designating substitutes, could not collectively dictate the number of classes they would teach, and had nowhere achieved final authority in cases of dismissal. Nor would we expect professors to lay claim to these rights because painters, printers, and pianists had them. “Questions,” William Gerhardie observed, “no less than answers, can be demonstrably wrong.” And the question—why academics should have a “higher order of liberty in the workplace” than others—is wrong, not only because other employees do have such liberties, but because the comparison is irrelevant.

Of the freedoms the 1940 Statement vouchsafed, the freedom of teaching, research, and publication remains the least controversial, perhaps for the

95. [International Typographical Union] laws which determine conditions of employment, maximum length of work week or work day, priority, closed shop, use of reproduced material, control over all composing room work, and other work conditions, are nonnegotiable in local contracts. All union employers must accept all provisions of the ITU law. Any dispute about such laws between an employer and his employees can be appealed only within the political structure of the union. For example, if an employer wishes to discharge a man with priority standing and the local union objects, the employer can appeal the decision of the local union to the international Executive Council of the ITU and to its annual convention if the issue in dispute involves a point of union law. The ITU’s position regarding union law is that workers have a right to set the conditions under which they will work, and employers must accept these conditions or face sanctions. These rigid provisions have led to many disputes with newspaper publishers and other printing employers, but in general the ITU has been able to enforce union law.

The nature of the job control exercised by the ITU has meant that to a considerable extent the workers run the composing room. The employers’ main rights concern the way in which work shall be done. The job, however, belongs to the man rather than to the foreman or the shop. So strong is the workers’ proprietary right to their jobs that a printer with a regular situation designates the substitute who shall take his place if he decides to take a day off or is obliged to take one off because of the need to cancel overtime. This rule that a man may designate his temporary replacement has been in existence since the turn of the century.


96. This concession to professional musicians was adverted to in arguing that college and university faculty members should not be held to be managerial employees under the National Labor Relations Act:

Master Agreement of the Milwaukee Symphony Orch. 1974-1977 § 10.5 (tenured musician may have Music Director’s dismissal order reviewed by a player committee whose decision is final and binding), Master Agreement of the Buffalo Philharmonic 1976-1977 Art. IX(d) (Auditioning Committee’s Control of Reseating and Non-Renewal), Master Agreement of the National Symphony 1973 § 6.05 (Player’s Committee review of dismissal and demotion based upon musical deficiency).

AAUP’s Brief as Amicus Curiae at 21-22 n12, NLRB v Yeshiva University, 582 F2d 686 (2d Cir 1978) (No 77-4182), aff’d 444 US 672 (1980).

simple reason that it is contradictory to demand that professors test, explore, and disseminate knowledge, and then to punish them for doing precisely what they were asked to do. Interestingly, even in industrial employment, an employee discharged for doing what was expressly authorized has been afforded a remedy. And the law of contract has long recognized that the relationship may cede large areas of liberty to an employee, even if the exercise of that liberty is in derogation of the implied obligations of servant to master, of obedience and respectfulness.

IV

Conclusion

The critics of the profession's expansive notion of academic freedom proceed from the idea of a core disciplinary claim, deriving from the special function of institutions of higher education. They see the profession's extension of the claim beyond the core, to reach speech as citizen, in Van Alstyne's case, or speech as employee, in Yudof's, as unjustifiable; the illegitimacy is emphasized by comparison with the liberties of nonacademics, who have potentially greater liberty of political utterance in Van Alstyne's analysis, and lesser liberty of intramural utterance in Yudof's. Even a writer as sympathetic to the profession as David Rabban would shelter "aprosfessional" speech only "to give 'breathing room' to the professional speech that is the special subject of academic freedom." 

The process of drawing lines, however, is not without difficulty. If a professor draws upon the discipline in taking a political position, by what standard is the utterance to be measured? Must a professor of chemistry addressing a political audience in the matter of acid rain observe a more exacting standard of accuracy than a professor of French? When is a speech by a philosopher ever aprofessional? And to make some, but not all, speech on matters of intramural concern an exercise of academic freedom because of its connectedness to core faculty concerns such as curriculum and hiring, as

98. Van Alstyne, Specific Theory at 77 (cited in note 51).
100. An actress, for example, was held privileged to offer criticism for the betterment of the performance:

   Was respondent compelled by the contract to go through her scenes as a mere puppet responding to the director's pull of the strings, regardless of whether or not he pulled the right or the wrong string, or was she called upon by the language and spirit of the contract to give an artistic interpretation of her scenes, using her intelligence, experience, artistry, and personality to the ultimate end of securing a production of dramatic merit? We believe that the latter is the correct interpretation.

102. Yudof, 66 Tex L Rev at 1355 (cited in note 6).
Dean Yudof concedes, that is to place the professor in the position of having to guess where his or her utterance might lie on a spectrum from the purely professional to the purely aprofessional. A complaint to an accrediting association? A protest of unfair treatment of a colleague? An expression of lack of confidence in the administration?

More important, the architects of the American idea of academic freedom declined the invitation to engage in line drawing, not only as a potential trap for the unwary, but as an activity at odds with the theory of the profession they propounded. They, like the Progressive reformers' connection of political with industrial democracy, saw the professor as an uncompartmentalized whole, in consequence of which no hierarchical significance was attached to the category of utterance, no core identified from which some, but not other, emanations could be derived.

One does find in their theory a concern for the profession's dignity and self-respect. But these did not derive from an anachronistic "yuppie theory of free speech"; the claim was not premised upon any notion of "self-realization." It was an assertion of the total condition of freedom under which the profession best performed and, importantly, of the kinds of persons it is most desirable to attract. If there is an historical antecedent, it may be the pre-industrial artisanal ideal. The mechanic of the new Republic asserted simultaneously an independence of craftsmanship that brooked no supervision, a vigorous defense of workplace rights—of artisanal dignity

103. Id.
106. Yudof, 66 Tex L Rev at 1356 (cited in note 6).
107. As the 1915 Declaration put it:

The . . . conception of a university as an ordinary business venture, and of academic teaching as a purely private employment, manifests also a radical failure to apprehend the nature of the social function discharged by the professional scholar. . . . [I]t is to the public interest that the professorial office should be one both of dignity and of independence.

If education is the corner stone of the structure of society and if progress in scientific knowledge is essential to civilization, few things can be more important than to enhance the dignity of the scholar's profession, with a view to attracting into its ranks men of the highest ability, of sound learning, and of strong and independent character.

Richard Hofstadler & Wilson Smith, eds, 2 American Higher Education: A Documentary History 860, 864 (Univ of Chicago Press, 1961); see Appendix A, 53 L & Contemp Probs 393, 396 (Summer 1990). As Arthur O. Lovejoy was later to opine concerning a college president's demand that faculty members who disagreed with him should leave:

The position and utterances of President Holt . . . were, in the Committee's opinion, a manifest infringement of academic freedom, though the issue over which it took place was an educational rather than a theological, political, or economic one. . . . No teacher having a high degree of professional self-respect is, the Committee believes, likely to accept service in an institution in which freedom of individual opinion, and the exercise of professional responsibility, on educational matters is denied in the degree in which it was denied by President Holt on this occasion.

Lovejoy, 19 AAUP Bull at 421-22 (cited in note 3).
108. Marc Linder has explained the law of respondeat superior at the time of the 1915 Declaration: "Where the worker possessed a skill the employer did not possess and could not integrate into its business, courts held the workers to be pursuing an independent . . . calling." Marc Linder, Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for
and self-respect—and a robust liberty of political association and expression. It was this very combination of attributes that was taken by the mechanical class to distinguish it, as “free labor,” from apprenticeship, domestic service, indentured servitude, and slavery. Rather than claiming a novel “higher order of workplace liberty” for professors, the 1940 Statement resonates against an older ideal, one to which the nation may be returning in some aspects of the unfolding law of employment.

Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons, 66 U Det L Rev 555, 570 (1989). See also Marc Linder, The Employment Relationship in Anglo-American Law: A Historical Perspective 142-143 (Greenwood Press, 1989). In other words, despite the obvious fact of an employment relationship, for the purpose of vicarious liability the employee was not legally to be thought of in those terms because of the employer's inability to control the employee's work. Judge Cardozo applied that body of law to case of alleged professorial negligence in the conduct of a laboratory experiment:

The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters, and not servants, in the conduct of the classroom. They have the independence appropriate to a company of scholars.

Hamburger v Cornell University, 240 NY 328, 336, 148 NE 539, 541 (1925).