NON-DISCIPLINARY PROFESSORIAL SPEECH:

The First Amendment and the Decay of Professional Norms

*MATTHEW FINKIN**

Abstract

A spate of recent postings on social media have gotten the posting professors into hot water. These expressions are not rooted in their academic disciplines, but address public and institutional controversies: condemning Israel as a "social cancer"; condemning a faculty advisor as "racist" for the campus organization he advised. May they be sanctioned?

In public institutions shelter might be sought in the first amendment. In all institutions shelter might be sought in institutional academic freedom policies rooted in national professional norms. On closer examination, however, the first amendment appears a rather weak reed to lean on; and protective policy appears enervated, the national norms in decay. This article explains how the robust, uninhibited, unfettered campus debate on public and institutional issues is now beclouded, and explores what this trend portends.

---

* Research Professor of Law, Swanlund Endowed Chair Emeritus and Center for Advanced Study Professor of Law Emeritus, the University of Illinois Champaign-Urbana. What follows are remarks prepared for the Colloquium, *Campus Speech and Academic Freedom*, organized by Professors Heidi Hurd and Michael Moore of the University of Illinois College of Law held in Champaign, IL (Jan. 24, 2025). Thanks are due Joseph Park and Bobby Mannis, class of 2025, for a quick dive into the law of disruptive speech; and for comments from the speakers Erwin Chemerinsky and Robert Post, and the attendees. The author served as an expert witness on the norms and usage of academic freedom and tenure in some of the cases treated herein.

TABLE OF CONTENTS

INTRODUCTION

A century ago, the emerging academic profession, acting through the newly created American Associations of University Professors (AAUP), sought institutional acceptance of academic freedom—primarily the liberty of instructors to teach, to research, and publish the fruits of their research according to their best professional judgment constrained only by the norms of teaching and research ethics. Over time, the wider academic community arrived at a consensus, the 1940 *Statement of Principles on Academic Freedom and Tenure* (or 1940 *Statement*), which included the AAUP's role in the generation of policies and investigative reports that gave an added texture of meaning to academic freedom; this by private action, "soft law," but acknowledged in institutional practice and, at times, by the courts.

A recent article in this *Journal*[1] details the quest for a firm constitutional grounding for faculty freedom in and of institutional autonomy for public institutions of higher education. Their work is stimulated by the radical actions by several state legislatures—they study Florida in detail, but Indiana should now be added—placing an ideological impress on teaching in their state universities. These laws challenge the fundamental idea of what university is on which the profession's claim of liberty depends.

They focus on the disciplinary grounding of academic freedom, of speech that is the product of the teacher's area of professional expertise. But, the academic community's 1940 consensus also addressed speech unconnected to the instructor's scholarship: speech addressing an issue of public moment—"extramural utterance"—or directed to a policy or action of the instructor's institution—"intramural utterance." The 1940 *Statement* treated speech of that nature as a matter of academic freedom as well.

What follows addresses the current state of that aspect of academic freedom in institutional actions and in the courts: how the reception of the liberty of non-disciplinary speech, once robust, is now eroding institutionally and judicially. It concludes with a rumination on the future, of what repression of non-disciplinary discourse holds for the future of the profession, the university, and the nation.

I. NON-DISCIPLINARY SPEECH: TWO ARCHETYPICAL CASES

Let us start with two recent cases. In the first a nontenured instructor in philosophy at a public university posted his thoughts on social media about "human racial equality," in particular to claim it lacked "a genetic basis":

> That Africans have an average IQ of around 75 whereas whites have an average IQ around 100, and Africans who have mixed with whites (for example in North America or South Africa) have an average IQ of around

---

1 Jeffrey Sun and Heather Turner, *Vice Gripping Academic Freedom: Controlling the Learning Movement That Supports Minoritized Voices*, 49 J. C. & U. L. 177 (2024),

> 85 has to do not with education or social conditioning, but with different genetic inheritances from extinct Hominid species.[2]

Straightaway, eighteen members of the university's Department of Biological Sciences condemned the posting for creating an intimidating educational environment which condemnation was echoed by numerous faculty members and faculty bodies there and elsewhere accusing the writer of legitimizing "discredited race-based ideas about intelligence" thereby creating a "hostile learning environment" and calling for his termination. The university acceded to the demand. This episode resonates with others where public address to a hot button issue—the Gaza War, Black Lives Matter, the transgendered—has gotten the speaker into hot water, the academy not excluded.[3]

In the second, a tenured professor of chemistry at a public university, long critical of her Department Chairman's administration of the Department (she had written to the President asking for an external review of the Department) learned that an adjunct professor of chemistry a friend whose work has been closely tied to hers, was given an unanticipated notice of nonreappointment. Shortly thereafter she encountered the chairman in a parking lot and proceeded to berate him for making the decision without any prior notice to or consultation with her. She termed the decision "an outrage," "unfair to [the named instructor]," and further illustrative of "the reason the department is failing," because he was "a screw up." The Chairman complained against her, and after investigation the chief academic officer issued notice of suspension for violating the University's policy on *Bullying in the Workplace*, which charge was sustained by a faculty grievance committee. The professor pursued an appeal to the President. The President did not sustain that particular ground of discipline, but termed her speech "unprofessional" and in light of that sustained discipline for her filing a complaint in response to the Chairman's complaint against her, as an act of wrongful retaliation.[4] This case also

---

2 The case is *Jorjani v. N.J. Institute of Technology*, 2024 WL 359440 (D.N.J., July 29, 2024) (appeal pending).

3 For example, *Tannous v. Cabrini University*, 697 F. Supp. 3d 350 (E.D. Pa. 2023), where a nontenured assistant professor of business in a private university posted the following on his social media:

> Zio[Zionist] controlled USGOV politicians promise to cancel 2T$ in student debt so that #donkeydemocrats would elect them yet sent that 2T$ to Ukraine, NATO, and Israel to rm NAZIs.… Israel and Ukraine are societal cancers and must be eradicated.

After substantial pressure from the Jewish community, he was terminated. See also, for example, the complaint in *Neel v. New York University*, N.Y. Sup. Ct., N.Y. County No. 655743/2023 (Feb. 1, 2024), wherein it is alleged that a distinguished tenured professor of medicine was sanctioned for reposting social media postings critical of Hamas and those who have supported it, for example, his posting of

> A tweet from Noah Blum who had reposted a tweet from Sharif Kouddous, which read: "The health ministry in Gaza just published a 200+ page report with all the names, ID numbers, and ages of 7,028 Palestinians killed in Gaza from Oct. 7 until Oct. 26, 3pm. I wonder if news outlets will drop the 'if verified' caveat now whenever citing Palestinian casualties." Kouddous' tweet also contained a list of names. In reporting Kouddous' tweet, Blum included the caption: "Hamas wrote names on a piece of paper so it's definitely accurate."

Id. at ¶ 25(b).

4 The professor sued, and the matter was settled to her satisfaction. Schelble v. Bd. of Trs.of

resonates with other recent episodes of employees disciplined or discharged for public criticism of the actions or policies of their employers, again, the academy not excluded.[5]

These are archetypical instances of non-disciplinary discourse, of professorial speech not grounded in the speaker's field of study. In the profession's taxonomy, the first case is one of "extramural utterance"—of address to an issue of public interest. The second is an instance of "intramural utterance"—speech concerning a policy of or action taken by the speaker's institution.[6]

What follows will sketch how the First Amendment relates to these forms of speech; of how, today, the constitution protects, or not, professors housed in public universities when they engage in non-disciplinary speech. Though the focus of this colloquium is on extramural utterance, inclusion of intramural utterance is useful for the contrast in approach and important for what is will say later to the temper of the time. The treatment of the First Amendment will be contrasted with

---

Metropolitan State Univ. of Denver, Colo. Dist. Ct. Denver, No. 2023-cv-32299 (May 8, 2023). The institution's *Bullying in the Workplace* policy defines "bullying" as

> Unwanted, repeated, aggressive behavior that manifests as verbal abuse, conduct that is threatening, humiliating, intimidating, or acts of sabotage that interfere with work, consequently creating a hostile, offensive and toxic workplace.

5 For example, *Phillips v. Collin Community College District*, 701 F. Supp. 3d 525 (E.D. Tex. 2023), where a professor of history was nonreappointed for postings critical of the college's state-mandated COVID-19 policy that was hostile to masking and social distancing, for example. that (1) "… your employer is basically saying the loss of your life is an acceptable calculated risk"; (2) "… it looks like we're opening in the fall. Masks will be recommended but not required. There has been no discussion of capping class sizes to allow any degree of social distancing …"; and (3) "With my employer apparently willing to put my life at risk this fall. …" *Id*. at 533. The Provost "found the posts concerning because she thought they lacked dignity and respect and Plaintiff had not raised the concerns to his leadership." *Id*.

See also *DePiero v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), in which a nontenured professor of writing at a public university who had published an op-ed criticizing the "race-based curriculum" objected to the content of mandatory anti-racism workshops one of which,

> included a required reading titled "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." After the training "accused white faculty of 'unwittingly reproduce[ing] racist discourses and practices in our classrooms,'" DePiero [the plaintiff] … asked for specific examples of what it meant to "reproduce[e] racist discourses."

Id. at 417. The Chair of the English Department, who directed the training, complained of feeling bullied by his asking questions that challenged the race-based curriculum. He resigned, but sued on several grounds including the First Amendment. Inasmuch as the training was mandated across the curriculum, it was not geared to any academic specialty. The criticism was grounded in an objection to the instructional policy at large though applied to instruction in writing. See also *Reges v. Cauce*, 733 F. Supp. 3d 1025 (W.D. Wash. 2024) reviewing how the balance is to be struck when an investigation was ordered into a faculty member's posting of a satirical response to the administration's suggestion that "Indigenous Land Acknowledgement Statements" be attached to course syllabi. Interestingly, the court was singularly concerned with the fact that the syllabus' posting was considered as more significant than had the instructor merely posted the satire on social media.

6 The two are disaggregated in Matthew Finkin & Robert Post, For the Common Good: Principles of American Academic Freedom chs. 5 & 6 (2009).

the academic profession's understanding of academic freedom, which has come to subsume these forms of speech into a conception historically grounded in research and teaching in one's discipline; that is, an understanding that applies to private as well as public institutions and, if incorporated into institutional policy, as a great many have, would have legal effect as a matter of contract independent of the First Amendment. The comparison sets the stage for a deeper dive into how our two archetypical cases speak to the temper of the time in which the profession's norms are under attack and to the implications of normative decay for the enterprise of higher learning.

II. PUBLIC EMPLOYEE SPEECH UNDER THE FIRST AMENDMENT

A. Constitutional Doctrine

For most of our history public employees labored under a constitutional law that saw public employment to be in no way different from employment by a private entity. In a sort of "reverse state action" manner of reasoning, the public employer was no more "hampered" by the Fourteenth Amendment than its private-sector counterpart.[7] When a policeman in Boston was dismissed for circulating a political petition he had no free speech claim to make: He had a "constitutional right to talk politics," opined Holmes, J., then sitting on the Massachusetts Supreme Court, "but he has no constitutional right to be a policeman."[8] This applies as much for a university professor as for a cop on the beat. Employees, public or private, could be discharged for speech on political or social issues save only when some statute or their employment contracts restrained that power.[9] Employees, public or private, were held to the same obligations of respectful obedience arising out of a master–servant relationship no matter how well educated or well paid the employee was.[10]

It was in this legal environment that the architects of the American conception of academic freedom set about to craft the 1915 *General Declaration of Principles on Academic Freedom and Tenure*,[11] a document that will engage us presently.

---

7 *See, e.g.*, Scopes v. State, 289 S.W. 363, 365 (Tenn. 1927) ("In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of … the Fourteenth Amendment of the Constitution of the United States.").

8 McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1882).

9 Annot., *Discharge from Private Employment on Grounds of Political Views or Conduct*, 51 A.L.R.2d 742 (1957).

10 A comprehensive treatise of 1913 treated instances of public and private employment interchangeably. The common law rule was that, "Every servant implicitly stipulates that … his words … in regard to his master … .shall be respectful and free of insolence." 1 C.B. Labatt, Commentaries on the law of Master and Servant § 299, at 930 (1913). This implied obligation applied to the uttering of "insulting, disrespectful, or abusive" language to any superior.

11 *Reprinted in* 2 American Higher Education: A Documentary History 860 (Richard Hofstadter & Wilson Smith eds., 1961). The historical background of the 1915 *Declaration* is explored by Richard Hofstadter & Walter Metzger, The Development of Academic Freedom in the United States (1955); Hans-Joerge Tiede, University Reform: The Founding of the American Association of University Professors (2015).

It is important to stress that the First amendment makes no appearance in that document, not out of negligence or indifference, but for the simple reason that, at the time, the First Amendment had no bite.

With the advent of state loyalty–security measures in the 1930s imposing restrictions on teaching and associational liberty, the profession engaged in a decades-long struggle to persuade the U.S. Supreme Court to assimilate the freedom of teaching and research into the First Amendment. Eventually, the effort proved successful.[12] In an early landmark case, *Sweezy* v. *New Hampshire*,[13] the academic freedom concern, which the Court saw as spoken to by the First Amendment, was not what Paul Sweezy had actually said in his lectures—in fact, we cannot know what he said as the dispute concerned the constitutionality of the state's demand for disclosure of the contents of his lecture[14]—but his right to lecture free of state surveillance. It would make no difference whether his lecture was on a topic of immediate public moment or of only esoteric academic interest. Either would be vehicles to instill in students a critical habit of mind, a desideratum of a higher education. As the Court put it, "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."[15]

In other words, the Court's academic freedom jurisprudence was specific to disciplinary discourse in higher education; the right–privilege distinction was otherwise undisturbed. That changed in 1968 when Marvin Pickering, a high school teacher in Illinois, was discharged for publishing a letter to the editor in the local newspaper critical of his school board and opposing a bond issue the board was seeking. The Court made a clear doctrinal break: Schoolteachers, and so most other public employees, do not relinquish their First Amendment rights at the workplace door.[16] However, what would seem at first blush to extend the right of robust, unfettered, uninhibited speech to public employees was immediately circumscribed in two consequential regards that were to take on a thick texture in the unfolding jurisprudence.

As the proscription of speech was not that of the citizenry at large, but of those in an employment relationship with the public employer, the Court described the task before it: to strike a balance between the employee's interest in "commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[17] The first prong of the balance was not simply a passing descriptive. The First Amendment

---

12 What that extension entailed was taken up by William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, *in* Freedom and Tenure in the Academy 79 (William Van Alstyne ed., 1993) and more recently by David Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024).

13 354 U.S. 234 (1957).

14 Wyman v. Sweezy, 121 A.2d 783, 789 (N.H. 1956) ("The questions concerning the subject matter of the defendant's lecture…directed and ascertaining what, if anything, the defendant said … ").

15 *Sweezy*354 U.S. at 250.

16 Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

17 *Id*. at 568.

applies to speech on matters of "public concern"—economic, political, social—to matters of moment in a democracy, not to matters of merely parochial concern.

The Court refined what that meant in 1983 when a disgruntled assistant district attorney in New Orleans was fired for circulating a questionnaire to her coworkers of their thoughts about the office—speech tending to foment what one manager termed a "mini-insurrection."[18] The Court held that most of what the questionnaire treated and the reasons for circulating it arose out of and were in pursuit of Ms. Myers personal grievance. The Court was not prepared to hold that expression of that nature was entitled to absolutely no protection whatsoever but that on an apparently sliding scale of speech protection, the value was close to negligible. However, one of her questions could be read to implicate a wider public interest, in the quality of management, at which point the second prong of the balancing test—the threat of disruption to or disharmony within the public service—had to be taken into account.

On that, the second prong of the balance, the Court has laid weight on the employer's judgment of the prospect of disruption, disharmony, or inefficiency when "those working relationships are essential to fulfilling public responsibilities."[19] It noted that that actual disruption was not required; in the absence of the passage of time sufficient to ascertain whether and what disruption has ensued, a reasonable expectation of such a threat at the time of utterance would suffice.[20]

The constitutional conundrum of unacceptable "viewpoint discrimination"—of the government allowing speech on one side of an issue while sanctioning speech on the other—has been avoided by maintaining that the speaker is not being sanctioned because the government is offended by the speaker's words—indeed is altogether agnostic about it—but because others are, and are so deeply as the reverberations to pose a threat to government efficiency. So, too, the criticism that the exemption for disruption condones a "heckler's veto" has been distinguished when those repulsed by the speech, to whose objections the employer is reacting, are persons in the relationship of stakeholders of or in the employing entity whose sentiments stand on a different footing from those with no connection to it.[21] The logic is questionable insofar as these combine to privilege the sensibilities of some who take offense over others depending on the strategic situation of the person or groups whose sensitivities are aroused. These distinctions do not rest on logic; they rest on experience.

---

18 Connick v. Myers, 461 U.S. 138, 151 (1983). The denigration of insurrectionary speech resonates sympathetically with the common law of master and servant. In *Lucy* v. *Osbaldson*, 8 C&P 83, 173 ER 408 (1837), when the acting manager of Covent Garden asked a performer singing in the opera *Zampa* how she "can perform in such rubbish," it was held to be a question for the jury whether he had wrongfully excited "discontent" in the workplace.

19 *Connick*, 461 U.S. at 151.

20 *Id*. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," later echoed by the plurality in *Waters v. Churchill*, 511 U.S. 661 (1994).

21 In which *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir. 2003) (parental outrage resulting from a teacher's associational affiliation justified the teacher's termination) has been influential.

B. Applied

Let us return to our illustrative cases taking intramural utterance first: the professor of chemistry's criticism of her department chair. The public may have some interest in how well a chemistry department in one of its state universities is being administered, but it would seem to be the case that that element would be eclipsed by the fact that the speech was a spontaneous face-to-face outburst stemming from a decision personally deeply felt; it would be most unlikely to cross the threshold for constitutional protection.[22] Even if a balance were to be struck, the words used to characterize her chairman—that he was a "screw up"—could be understood to pose the threat of disqualifying disruption and disharmony in the setting of a supervisory relationship.

Were the chemist's accusation more widely disseminated—on social media, for example—it might have greater call on the public interest[23] but yet pose a greater claim of potential disruptive impact. In *Gruber* v. *Bruce*,[24] for example, a campus chapter of Turning Point USA "(TPUSA) was established with a named professor as faculty advisor. TPUSA is a right-wing advocacy group most well known for maintaining the "Professor Watchlist," which its website explains is fashioned "to expose and document" named professors. Two faculty members circulated a flyer on campus declaring TPUSA to be a "racist" organization and condemning the faculty advisor, whose face was shown on the flyer. They were sanctioned and sought relief under the First Amendment. The administration was granted summary judgment under the second prong of *Pickering*. The Sixth Circuit affirmed:

> The dissemination of "disrespectful, demeaning, insulting, and rude" messages targeting a colleague and students—*regardless of whether some accusations may have had basis in fact*—to the entire university community

---

22 The fact that the criticism was not widely published would detract from its bearing on the public interest. Clermont v. Sound Mental Health, 632 F.2d 1091, 1104 (9th Cir. 20110 (reviewing authority); Anderson v. Burke County Ga., 239 F.3d 1216, 221 (11th Cir. 2020) (reviewing authority). More importantly, the fact that the jibe—calling the chairman a "screw up"—could be viewed as a personal gripe would sound a death knell to constitutional protection. In *De Pietro v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), the professor's protest over antiracism training was in a matter of public interest, but as his objections were of a purely nature, his speech amounted to a personal grievance and so lacked constitutional protection; *cf*. Monroe v. Central Bucks School District, 805 F.2d 454 (3d Cir. 2015). A series of vents on social media by a school teacher complaining about her students were personal grievances or expressions of her visceral reactions to her daily experiences, which, only for the sake of argument, the court was willing to assume could satisfy the public concern requirement.

23 Whistleblowing, "speech that seeks to expose improper operations of the government or questions the integrity of government officials clearly concerns vital public interests" weighs heavily in *Pickering's* balance. McFall v. Bedar, 407 F.3d 1081, 1089 (10th Cir. 2005) (reference omitted); *see also* Salge v. Edna Indep. Sch. Dist., 411 F.3d 178 (5th Cir. 2005); Lindsey v. City of Orrick, 491 F.3d 892 (8th Cir. 2007); Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011); Mosholder v. Barnhardt, 679 F.3d 443 (6th Cir. 2012).

24 643 F. Supp. 3d 824 (M.D. Tenn. 2022).

> undoubtably threatened to disrupt TTU's learning environment and academic mission.[25]

Now to extramural utterance, to the to the philosophy instructor. That his speech addressed an issue of public interest is patent, evidenced in the very intensity of the widespread outrage over what he said. However, that very hostility, widely expressed within the university, could be and was taken by the court to allow the administration to terminate his appointment for the prospect of disruption his speech threatened.[26] The court acknowledged that higher education has been recognized as a "special environment" in which institutions function as "marketplaces for ideas"[27]; but, the court found nevertheless that his expressions on eugenics and on human rights presented a "level of hostility" likely to "disrupt [the university's] mission of fostering a collegial pedagogical environment."[28]

* * *

Such is the state of the freedom of non-disciplinary expression under the First Amendment. Assume instead that these instructors were housed in universities, private or public, whose academic freedom policies incorporated by reference or reiterated verbatim the 1940 *Statement of Principles on Academic Freedom and Tenure*, widely accepted as the norm in the academic community, or simply assured the faculty of "academic freedom," no more being said, which commitment would draw sustenance from the national norm governing the understanding of it. Assume further that the jurisdiction is one in which the institution's policies are given legal effect, commonly stating a term assimilated into the contract of employment.[29] How would these speakers fare if legal reliance was placed on the institution's provision for academic freedom, not the First Amendment?

III. PROFESSORIAL NORMS: THE 1940 *STATEMENT*

A. Text and Exegesis

The 1940 *Statement* is a pact, the product of years of negotiation between the AAUP and the Association of American Colleges (AAC), at the time the leading organization of four year liberal arts colleges, predominantly private, many with denominational affiliation. It set out three provisions governing academic freedom. The first and second deal with disciplinary utterance, with freedom of research

---

25 Gruber v. Tenn. Tech. Bd., 2024 WL 3051196 (6th Cir., May 16, 2024) (italics added) (opinion not officially reported).

26 Jorjani v. N.J. Inst. of Tech., 2024 WL 359440 (D.N.J., July 29, 2024), slip op. at 10.

27 *Id*. (reviewing authority).

28 *Id*.

29 Leading cases: AAUP v. Bloomfield Coll., 322 A.2d 846 (N.J. Ch. Div. 1974) *aff'd as modIfied*, 346 A.2d 846 (N.J. App. Div. 1975); Browzin v. Catholic Univ., 527 F.3d 843 (D.C. Cir. 1975); Drans v. Providence Coll., 383 A.2d 1053 (R.I. 1978) *judgment vacated and remanded*, 410 A.2d 972 (R.I. 1980); Krotkoff v. Goucher Coll., 585 F.2d 675 (4th Cir. 1978); Saxe v. Bd. of Trs. of Metro St. Coll., 179 P.3d 67 (Colo. App. 2007), *on remand* 29 IER Cases 1996 (Colo. Dist. Ct. 2009); McAdams v. Marquette Univ,, 914 N.W.2d 708 (Wis. 2018); Crenshaw v. Erskine Coll,, 850 S.E.2d 1 (S.C. 2020); Wortis v. Trs. of Tufts Coll., 228 N.E.3d 116 (Mass. 2024).

and publication, and freedom of teaching. So long as the instructor has adhered to the profession's standards of disciplinary care and ethics in research and teaching, what the teacher says cannot be subject to sanction; no other limiting condition is recognized. The third addresses non-disciplinary speech:

> College and university teachers are citizens, members of a learned profession and officers of an educational institution. When they speak or write a citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they 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 they are not speaking for the institution.

Note that the provision starts with a tripartite division of the teacher's role—as a member of a learned profession, an officer of the institution, and a citizen. It then focuses on the latter, according speech as a citizen freedom from "institutional censorship," subject to what is either an admonition ("should remember") or a binding stricture ("imposes"); nor is it clear that what must be observed applies equally to speech in the capacity of an "officer" of the institution as well as a "citizen" at large, that is, whether it conflates the standard of care applicable to extramural utterance—whatever that standard might be—with standards applicable to intramural utterance, to speech as an "officer" of the institution. The waters are further muddied by an official "Interpretation" appended to this provision by the drafting parties at the time of adoption that calls the provision an "admonition" but then contemplates that institutions may proceed on a deviation from it as a basis for discipline when the utterance raises "grave doubts concerning the teacher's fitness for his or her position," the determination of which is made subject to a hearing before a faculty body.[30]

The current status of the "speech as a citizen" clause will be taken up below, but the history of the provision, explored by Walter Metzger, should be noted.[31] He starts with the profession's foundational document, the 1915 *Declaration of Principles*. The *Declaration* included the "freedom of extramural utterance and action" as having "an importance of its own,"[32] that is, as something apart from

---

30 AAUP, 1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents and Reports 3, 6 (10th ed. 2006), 1970 Interpretation No. 4:

> If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

31 Walter Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, *in* Freedom and Tenure in the University 3 (William Van Alstyne ed., 1993).

32 1915 *Declaration*, *reprinted in* 2 American Higher Education, *supra* n. 11, at 861.

disciplinary speech that ought to be protected. Scholars should not be "deterred from giving expression of their judgments on controversial questions … outside the university," nor should they "be limited to questions falling within their own specialties."[33] But then the *Declaration* adumbrated the tension to later follow. It acknowledged, as "obvious," that academics "are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."[34] These it termed "restraints," but "such restraints as are necessary should in the main … be self-imposed, or enforced by the public opinion of the profession":[35] "[i]n the main," but, apparently, not exclusively. Anticipating the 1940 *Interpretation*, the *Declaration* allowed for the "occasional," "aberrational" case to require disciplinary action, which it cabined by requiring faculty, not administrative disposition.

The tension in the 1940 *Statement* between the liberty of non-disciplinary discourse and the question of its subjection to a standard of care was not the product of conflict between a presidential delegation that sought to secure institutional accountability—for fear of reputational (and financial) repercussions in influential quarters as a result of offense taken to what a professor said—and a professorial delegation that sought to deny the institution that power. In fact, a cohort of cosmopolitan presidents would have abjured any institutional power, and some in the AAUP's leadership were favorably disposed toward the presence of it. As Metzger put it, "They [the drafting parties] faced the problem of reconciling two opposed ambitions—to hold the academic professional to high standards of public conduct and to secure for the academic professional the *ordinary right to free speech*."[36]

The tension came to a head in 1963 when a professor at the University of Illinois was terminated for having published a letter in the student press endorsing premarital sexual intercourse. The AAUP's ad hoc committee of investigation, chaired by Professor Thomas Emerson of the Yale Law School, a distinguished scholar of the First Amendment, rejected the admonition as being capable of sanction: A rule to observe "appropriate restraint" did not state an intelligible governing principle.[37] Some on the parent committee agreed, but a majority did not. The upshot was the issuance of a *Statement on Extramural Utterances* the following year, which the joint drafting parties appended as an Interpretive Comment to the 1940 *Statement* six years later, that the "speech as a citizen" clause should be interpreted "in keeping" with the "controlling principle"

> 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 or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position …

---

33 *Id*. at 874.

34 *Id*.

35 *Id*. at 875.

36 Metzger *supra* note 30, at 51 (emphasis added).

37 *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP Bull. 25 (1963).

There the text rests. The AAUP has never undertaken to give content to what unfitness manifested in speech does or might entail. In all the many cases of extramural utterance it has entertained in the ensuing half century that question has never been addressed, this residual—or vestigial—constraint has tacitly been excised.[38] The practical result today is what several of the presidential and faculty negotiators sought the policy to express in 1940: that the scholar is not to be held accountable to the institution for her non-disciplinary public utterances, though what is said, if knowingly false or uttered in willful neglect of fact, might open a door to whether the speaker's scholarly work manifests a lack of disciplinary care. When, for example, Ward Churchill, a professor of American Indian Studies at the University of Colorado, publicly applauded the terrorist attack on the World Trade Center, terming the victims "little Eichmanns"—a morally squalid pronouncement if ever there were—he was not to be nor was he sought by the university to be sanctioned for having said it; but he was investigated for complaints of analogous professional lassitude in his publications, was found guilty of it by a faculty hearing committee, and was dismissed.[39] Thus, it is the case today that under the 1940 *Statement* the liberty of academic expression on matters of public moment not grounded in the speaker's discipline is not only not held to a disciplinary standard of care, it is not held to any short of ethical breach or that which could subject the speaker to criminal or civil legal sanction.

In contrast, the liberty of intramural utterance lacks any texture in the negotiations leading to the 1940 *Statement* analogous to its extramural counterpart, any discussion of what, if any, standard of care attaches to speech in that guise. Nevertheless, intramural protest has been a rich source of campus contention and AAUP investigation, which, over time, has resulted in the assimilation of that speech into the 1940 *Statement*: The profession has come to see academic freedom as including a right to criticize or to protest admission standards,[40] athletics,[41] library policy,[42] the award of a degree,[43] the quality (and probity) of administrative leadership,[44] salary policies,[45] and appeal to a college's governing board against a president's decision to non-reappoint a colleague and over the president's

---

38 It was agreed at the time of adoption that the AAUP would retain its case investigation process to apply the 1940 *Statement*, but that the AAC would perform a consultative role for those matters that require a "fuller examination." Robert Lincoln Kelly, The American College and the Social Order 124 (1940). (The author was the AAC's Executive Director, 1917–1937.) That consultative process was never pursued. The AAUP assumed the role of sole arbiter of the 1940 *Statement*'s meaning.

39 The episode is analyzed in Matthew Finkin, *Academic Freedom and Professional Standards: A Case Study, in* Academic Freedom in Conflict ch. 3 (James Turk ed., 2014).

40 *Academic Freedom and Tenure: The University of Nevada*, 42 AAUP Bull. 530, 554–55 (1956).

41 *Report of the Committee on the Dismissal of Professor Wells from Washington and Jefferson College*, 8 AAUP Bull. 53, 69 (1922).

42 *Academic Freedom and Tenure: Montana State University*, 24 AAUP Bull. 321, 337–41 (1938).

43 *Academic Freedom and Tenure: Eastern Washington College of Education*, 43 AAUP Bull. 225, 235 (1957).

44 *See, e.g., Academic Freedom and Tenure: Report of the Sub-Committee of Inquiry for William Jewell College*, 16 AAUP Bull. 226, 228 (1930).

45 *Academic Freedom and Tenure: Montana State University*, 24 AAUP Bull. 321, 337–41 (1938).

prohibition against an appeal being lodged.[46] In none of these has any serious question been raised of the presence of some "special obligation" that would constrain the speech.

One of the rare if terse dilations on point appears in connection with the dismissal of Professor Ekow O. Hayford by the President of Stillman College in 2008. Professor Hayford publicly held the president of the college responsible for declining student enrollment, for a crisis in cash flow, and for low faculty morale; he called on the president to resign.[47] The president invoked the College's Policy prohibiting *Malicious Gossip or Public Verbal Abuse*:

> Malicious gossip is rumor or innuendo based on incomplete facts or downright fiction intended to cause harm or discredit individuals or the institution.
>
> It may also be rumor based upon assumptions about what the future holds or what is going on currently. Gossip of this nature can have serious repercussion on the morale and productivity of the institution. Verbal abuse is the use of malicious or hostile language by a supervisor or colleague that is intended to harm or embarrass another individual. Individuals who repeatedly engage in these types of behavior may be terminated for cause.[48]

The ad hoc committee of investigation took note of the right of faculty members to speak on matters of institutional policy and action without fear of reprisal. It then viewed the Policy on "rumor or innuendo" to be "so broad as to allow infringement of academic freedom." Even so, it found that the president had not presented any evidence of "knowing falsehood or irresponsible recklessness" in Professor Hayford's charges. The latter is instructive insofar as it implies that in intramural speech, uttering a false statement knowing it to be false or uttering it in reckless disregard of its falsity—that is, with reason to believe it to be false—would fall afoul of the 1940 *Statement*, aligning the profession's standard of care in intramural utterance with First Amendment law governing the defamation of a public figure.[49]

However, under the First Amendment the speaker has no duty to investigate the matter before speaking to it. In *extramural* utterance the professor stands no differently; a professor of textile art, just as a university groundskeeper, may condemn climate change as "false science" without knowing or seeking to know a whit about it. Unaddressed so far is whether in *intramural* utterance, the professor should be required to have made an effort to confirm the facts before speaking.[50]

---

46 *Academic Freedom and Tenure: Winthrop College*, 28 AAUP Bull. 173 (1942).

47 *Academic Freedom and Tenure; Stillman College (Alabama)*, 95 Academe 94 (2009).

48 *Id*. at 96.

49 New York Times v. Sullivan, 376 U.S. 254 (1964).

50 The reader will recall that in the case of the flyer labelling TPUSA and its faculty advisor "racists," the Sixth Circuit said it was of no moment whether the accusation was true. Gruber v. Bruce, 643 F. Supp. 3d 824 (M.D. Tenn. 2022).However, the trial court noted Tennessee Tech's Policy 007 "Free Speech on Campus":

B. Applied

Let us return to our illustrative cases. First, of extramural utterance, the espousal of eugenics caused controversy. Fifty years ago, the academic world was roiled by the strident advocacy of eugenics by William Shockley. He was a professor of electrical engineering at Stanford and holder of the Nobel Prize in Physics for his discovery (with two others) of the transistor effect. Although he was not a population geneticist, or even a biologist, he came to embrace eugenics full-throatedly including advocacy of the view that, genetically, black people were intellectually inferior to white people. His classes were disrupted; there were calls for his dismissal,[51] and when invited to speak in other venues, the invitations were protested,[52] his attempts to speak disrupted. In the event, Stanford did not dismiss him. His right to speak was affirmed. Shockley's experience at Yale resulted in the appointment of a Committee on Freedom of Expression chaired by the historian C. Vann Woodward whose Report affirmed the right of an invited speaker to be heard.[53] The AAUP's Committee A on Academic Freedom and Tenure issued a statement criticizing those in the academic community who would "suppress unpopular opinions." It reasserted

> the paramount virtue of the open forum for the dissemination of ideas through publication, exposition, and debate. No less importantly we commend open channels of expression as the basic source of counter-positions and correctives, where critics of distasteful views can express themselves without restraint.[54]

Were the policies of the New Jersey Institute of Technology to have afforded its faculty academic freedom, embracing the profession's norm as it has been understood for a half a century, and were that policy to be legally binding, it should be the case that the speaker could not be terminated for having spoken as he did.[55]

Tennessee Tech is committed to maintaining a campus as a marketplace of ideas for all Students and Faculty in which the free exchange of ideas is not to be suppressed because the ideas put forth are thought by some or even most members of Tennessee Tech's community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.

Gruber supra at 833. The trial court distinguished the policy's application to the flyer thusly: "[N] amelessly identifying a group as promoting hate *without substantiating the allegation* cuts against the promotion of the "free exchange of ideas" contemplated by Policy 007." *Id*. at 840 (italics added). The Sixth Circuit cut through that knot. It was irrelevant whether or not the accusation had been investigated; even if accurate the flyer would be a ground of sanction based on threat of disruption it created.

51 Doyle McManus, *William Shockley and His Opponents*, STANFORD DAILY (Jan. 14, 1974).

52 Tom Bailey et al., *Shockley and Free Speech*, HARVARD CRIMSON (Nov. 6, 1973). The authors, identified as members of Students for a Democratic Society (SDS), defended disinvitation to a racist.

53 *Report of the Committee on Freedom of Expression at Yale. Yale College, yale.edu* (Dec. 23, 1974). *See also* Anthony Lewis, *A Report on the Dangers to the Right of Free Speech*, N.Y. TIMES (Jan. 26, 1975).

54 *On Issues of Academic Freedom in Studies Linking Intelligence and Race*, 60 AAUP BULL. 148, 153 (1974). The statement was more concerned with the freedom of research and publication in the subject.

55 The nontenured professor terminated at a private university for his anti-Zionist social media

Now to intramural utterance, to the case of the angry chemist. As the brief snapshot of only a handful of AAUP reports evidences, the profession has long understood criticism of institutional policies, actions, and actors to be encompassed by academic freedom. This includes the right to rise to the defense of a colleague the speaker believes to have been wronged[56]; this not only goes back to episodes in the 20s, 30s, and 40s, but in the AAUP's very first investigation in 1915. The inquiry was instigated by the resignation of seventeen members of the faculty at the University of Utah in protest over the dismissal of two colleagues, one, A.A. Knowlton, a physicist, for having "spoken very disrespectfully" of the Chairman of the University's governing board. Knowlton had said in private conversations, "'Isn't it too bad that we have a man like that as Chairman of the Board of Regents' or words to that effect."[57] To this, the AAUP's Committee of Inquiry responded brusquely, "The law of *lèse-majesté* cannot with advantage … be applied to university faculty in America."[58]

Our angry chemist accused the Chairman of "outrageous" treatment of a colleague, of failing the department in leadership, and, generally, of "screwing up." The latter was a frank assessment phrased in common parlance—calling a spade a spade. It had no element of profanity, harsh abuse, intimidation or threat; it could not constitute wrongful "bullying" within the institution's exemption of speech of that nature from the accepted zone of intramural criticism.[59] Were that

---

post sued for breach of contract, for his termination during a contractual term of service. He claimed the contract to have incorporated the university policies set out in its Faculty Handbook, which included the 1940 *Statement*. Tannous v. Cabrini Univ., 697 F. Supp. 3d 350 (E.D. Pa. 2023). The University defended its action as consistent with the "appropriate restraint" clause. As the Handbook was not authenticated, was not made part of the record, the court declined to reach the issue. The University's argument disregarded the restriction of that clause to professional unfitness. Were incorporation to have been found, that would be the question to be decided.

56 In the case the speaker was a tenured professor protesting the way an adjunct, nontenured instructor had been treated. One of the arguments for academic tenure essayed by the Princeton economist, Fritz Machlup, was that it provided protection to exercise that right:

> [W]e need and want teachers and scholars who would unhesitatingly come to the defense of the "odd ball," the heretic, the dissenter, the troublemaker, whose freedom to speak and to write is under some threat from colleagues, administrators, governing board, government, or pressure groups. The impulse to take up the cudgels for the "odd ball" is all too easily suppressed if unpleasant consequences must be feared by those who defend him.

Fritz Machlup, *In Defense of Tenure*, 50 AAUP BULL. 112 (1964).

57 *Report of the Committee of Inquiry on Conditions at the University of Utah*, 1 AAUP BULL. 3 (1915). The Report did not address what prompted Knowlton to speak as he had. In private communication to the author, a student of this episode explained that Professor Knowlton had appeared before the Board on some matter during which the Chairman asked him what he professed. "Physics," he replied. To which the Chairman observed that as he suffered from dyspepsia he wondered what "physic" Knowlton would advise.

58 *Id*. at 15. The Committee, chaired by E.R.A. Seligman, included John Dewey, Arthur Lovejoy, and Roscoe Pound.

59 The *Faculty Employment Handbook* of Metropolitan State University of Denver (July 1, 2022) "adopts the principles of academic freedom as defined by … the 1940 *Statement*," and goes on to add (references omitted):

> Academic freedom also encompasses the right to address, question, and criticize institutional policy or action—both as an individual and in one's role as part of an institutional body engaged

not so, were our chemist to have said, "Isn't it too bad we have a man like that as chair of our department," and then, on inquiry, explained that he had "screwed up," she would be discharged for the explanation Here, too, even as the speech would not be in exercise of a constitutional civil liberty, it would be in exercise of an academic liberty assured in any institution that had adopted on that abides by the 1940 *Statement*.

To return to the faculty members disciplined for calling TPUSA and its supporters including the named faculty advisor "racist,"[60] recall that the speech was held constitutionally unprotected. But when a graduate student instructor stood beside a TPUSA recruitment table at another institution with a sign labelling it "fascist," and was terminated, the administration, when pressed by an AAUP investigative committee, disclaimed that her termination was for that speech; instead, it maintained that she was terminated for her allegedly blocking access to the recruitment table.[61] For academic, not First Amendment purposes the specter of disruption or disharmony consequent to her speech was not mentioned by the administration; its invocation would have been inconsistent with the profession's understanding of the freedom of intramural utterance and the university's professed adherence to it.

IV. THE ACADEMIC FREEDOM OF NON-DISCIPLINARY DISCOURSE FURTHER EXPLORED

As the AAUP's incorporation of non-disciplinary speech into the concept of academic freedom has not passed without criticism, some further note should be made.

A. Extramural Utterance

The most cogent critique of extending academic freedom to extramural utterance was voiced by William Van Alstyne in 1972, in *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*.[62] His critique has recently been seconded by David Rabban.[63]

Van Alstyne mounts two major arguments. The first is to equality: that insofar as political speech is protected not as a matter of general civil liberty enjoyed by all, but as a claim special to the professoriate, it would elevate the professoriate above the citizenry without any warrant in disciplinary expertise—an ordinary citizen who expresses unpopular opinions may have to suffer economic or social

in institutional governance. The University recognizes the inextricable link between academic freedom and shared governance.

60 Gruber v. Tenn. Tech. Bd., 2024 WL 3051196 (6th Cir., May 16, 2024).

61 *Academic Freedom and Tenure: The University of Nebraska-Lincoln*, 103 Academe 1 (May, 2018).

62 William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 Annals Am. Acad. Pol. & Soc. Sci. 140 (1972) [hereinafter *Specific Theory*].

63 Rabban, *supra* note 12, at 155–61.

repercussions for it[64]; there is no reason to insulate an academic elite when voicing the same unpopular opinions ungrounded in academic expertise.[65]

The second is the obverse of the first: that inasmuch the exercise of disciplinarily grounded academic freedom is held to a standard of professional care, subsuming political speech into it bears the risk of non-disciplinary speech being sanctionable for failure to observe professional standards. In this way, the professorial speaker would be less free under the 1940 *Statement* than her non-professorial counterparts. This was Van Alstyne's deeper concern.[66]

The latter should be addressed first. Van Alstyne wrote in 1972. He viewed *Pickering*, the ink of which was scarcely dry, as more protective of that robust, unfettered, and unhindered debate speakers in the public sphere should enjoy than the 1940 *Statement* would appear to allow even under less restrictive joint disposition made in 1970. He could not have anticipated how the restriction to unfitness for office as a constraint on extramural utterance acknowledged in 1970 would atrophy so totally; nor could he know how large the limiting constraint on civil liberty, worked by the threat of disruption or disharmony, would loom. Accordingly, it is not obvious, insofar as it was more the practical consequence than the doctrinal dissonance than was Van Alstyne's deeper concern, that he would hold to that critique today. However, as we will see, others have turned to the 1970 *Interpretive Comment* to give it the very effect Van Alstyne feared.

So, to the former ground, of inequality, the courts have laid considerable emphasis on how job specific *Pickering's* limiting condition is: that the extent of speech protection varies from job to job. There are, for example, numerous cases of police officers, firefighters, and corrections officers whose negative comments on race, a matter of intense public interest, have been held to provide grounds for discipline, including discharge, resulting from the anticipated lack of confidence by members of the community in the speakers' ability to serve it free of any suspicion of animus or discrimination. These, as "paramilitary organizations," have a "need to secure discipline, mutual respect, trust, and particular efficiency among

---

64 And they do. Matthew W. Finkin, *Social Media, Social Sensibilities, and the Employment Relationship*, __ J. Contemp. Legal Probs. __ (in press).

65 David Rabban particularizes the disparity even more:

> [I]f the university is the institutional embodiment of a general societal commitment to free inquiry and free expression, the entire university community, not just professors, should enjoy those freedoms. … General principles of free speech under the First Amendment accomplish these goals. Principles of academic freedom do not because they give professors rights that others cannot claim.

Rabban, *supra* note 12, at 157.

66 Van Alstyne, *supra* note 62, at 155:

> [T]he trade-off the AAUP appeared to have accepted with the Association of American Colleges in 1940—namely, to cultivate public confidence in the profession by laying down a professionally taxing standard of institutional accountability for all utterances of a public character made by a member of the profession—is substantially more inhibiting of a faculty member's civil freedom of speech than any standard that government is constitutionally privileged to impose in respect to the personal political or social utterances of other kinds of public employees.

the ranks" that differentiate these employments from others.[67] If paramilitary organizations function in an environment special to them such that more restrictive speech constraints are allowed than could be allowed in other employments—say, a public library[68]—it should be the case that a university's commitment to the free exposition of ideas and robust intramural debate creates an environment special to it in which greater freedom attuned to that specific institutional attribute should be recognized.[69]

When a high school football coach was fired for praying quietly but publicly, midfield after a game, and the Court held his expression protected as in free exercise of religion, it confronted as well the application of *Pickering*.[70] The expression was of public moment, but countervailing disruption played no role: The coach had done so for years without objection from students or parents; indeed, protest was generated only when the school ordered him to desist.[71] This prompts the question, what if the coach was not a devout Christian in a fervent Christian community, but a devout Muslim in the same community whose religious display triggered vociferous and vehement objection by parents and families? Were that disruption to be an allowable basis for discharge, one religion would be favored over another. That cannot be acceptable, but the result could be avoided by holding that all religious expression conducted in that way is protected, any disruption notwithstanding. However, that ground would elevate religious expression over, say, political expression where even the potential for disruption has negated speech in some settings.

The setting may be key. The Court has said that a public school should teach students "how to live in a pluralistic society, a society which insists upon open

---

67 *E.g.,* Anderson v. Burke Cnty. Ga., 239 F.3d 1216, 2122 (11th Cir. 2001) (reference omitted) (fire department) (reviewing authority); Hicks v. Ill. Dept. of Corr., 109 F.4th 895 (7th Cir. 2024) (corrections officer); Hussey v. City of Cambridge, 720 F. Supp. 3d 41 (D. Mass. 2024) (police officer); Johnson v. City of Kissimmee, Fla., 2024 U.S. Dist. LEXIS 199964 (M.D. Fla.) (Nov. 4, 2024) (police officer) (reviewing authority); Grutzmacher v. Howard Cnty., 851 F.3d 332 (4th Cir. 2017) (paramedic); *Compare* Bonifacio v. Sewell, 212 N.Y.S.3d 307 (App. Div. 2024) (police officer) (posting a racist meme grounds for dismissal as conduct "prejudicial to the good order, efficiency, or discipline" of the department) *with* Moser v. Las Vegas Metro Police Dept., 984 F.3d 900 (9th Cir. 2021) (police officer posting presents fact question of disruptive effect) (Berzon, J. dissenting in favor of trial court's grant of summary judgment for the Police Department).

68 *See, e.g,.* Noble v. Cincinnati & Hamilton Cnty. Pub. Lib., 112 F.4th 373 (6th Cir. 2024) (offensive social media posting by a security guard working for a public library was protected; Sutton, C.J. dissenting); *but see* McCullars v. Maloy, 369 F. Supp. 3d 1230 (M.D. Fla. 2019) (offensive social media by an employer of the Office of the Clerk of the Court was not protected in view of the need for public confidence in the court); and *cf*. Festa v. Westchester Med. Center, 380 F. Supp. 3d 308 (S.D.N.Y. 2019) (termination of a health network's "compliance coordinator" who posted on Facebook in response to the sighting of a tornado over a Hasidic community that it was "too bad it didn't suck them all the way" addressed a matter of public concern and stated a fact question under *Pickering's* balancing that could not be resolved on a motion to dismiss, but with strong dicta explaining why it would not be protected).

69 To which the *Jorjani* court gave lip service. See text accompanying *supra* note 26.

70 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2408 (2022).

71 *Id*. at 2416, 2426.

discourse toward the end of a tolerant citizenry,"[72] including their exposure to speech when consistent with the maturity of the students and the fact of compulsory school attendance. If so, tolerance for speech in order to instill a critical habit of mind in more mature students voluntarily in attendance should be the sturdy sounding board against which the claim of disruption for *Pickering's* purposes resonates.

A high school guidance counselor may be discharged consistent with the First Amendment for publishing a book of "relationship advice," *It's Her Fault*, advising women to use sex appeal in power relationships and approving a certain level of promiscuity before marriage, for the "potential disruption" the book could cause predicated on a prediction that the book "would 'create an intimidating educational environment'," particularly in how the author's "female students would respond upon reading or hearing about the hypersexualized content" of it.[73] The profession maintained sixty years earlier that a professor of English cannot be fired for publishing a novel, *Brood of Fury*, which the college was advised was "the filthiest book" some had ever read, on the ground that he had occasioned "a severe censure of the college" from its "constituency."[74] The AAUP's ad hoc committee of investigation rejected that as a permissible ground of action: "[I]t is the duty of a college or university to withstand and to defend itself against 'censure' by its 'constituency' when the cause of the criticism is the responsible exercise of academic freedom by members of its faculty."[75]

B. Intramural Utterance

The same two limbs of Van Alstyne's critique of subsuming extramural utterance under academic freedom has been voiced about intramural utterance as well: that it bears no relationship to any grounding in disciplinary expertise; and it offends the principle of speech equality as the professoriate would have a higher right to express intramural grievances than is accorded nonprofessorial workers. As the focus of this colloquium is on extramural utterance, especially that which offends or outrages institutional constituents, the texture of debate on intramural utterance need not be rehearsed.[76] It is enough to say that the profession's claim

---

72 Lee v. Weismann, 505 U.S. 577, 590 (1992).

73 Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110, 1119 (7th Cir. 2023). A school teacher's anti-Islamic social media postings have been held to allow her termination as antithetical to the school's mission to provide a "safe and nondiscriminatory school environment." Durstein v. Alexander, 629 F. Supp. 3d 408 (S.D. W. Va. 2023), *app. dism*issed, Aug. 23, 2023.

74 *Academic Freedom and Tenure: Mercy College*, 48 AAUP Bull. 245, 246 (1963).

75 *Id*. at 250, "responsible" apparently meaning consistent with professional standards of care and ethics. The committee did not discuss the academic freedom issue any further. It did not, for example, discuss whether in writing a novel a professor of English is subject to a disciplinary standard or, if he were, what that would be. Suffice it to say, no standard would appear to be violated in the writing of a novel whose treatment of sex is considered by some readers to be "immoral."

76 The debate is captured in the following: Matthew Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323 (1988); Mark Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 Tex. L. Rev. 1351 (1988) and Matthew Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment*

to a freedom of intramural utterance rests on an understanding of the role of the faculty in the institution, as akin to being not employees but citizens of it free to speak to all that the institution does. This, too, is an environment specific to institutions of higher learning.[77] The *Connick* Court allowed that a speaker could be sanctioned when the speech disrupts "those working relationship [that] are essential to fulfilling public responsibilities."[78] But the relationship of a professor to a high officer of administration—a president, a provost, a dean—bears no such essentiality.[79] Disagreements between colleagues, including colleagues who serve as department chairs,[80] over matters of policy or action are part and parcel of daily institutional life in which acrimony may be no stranger, which the courts have acknowledged if sometimes only in the breach.[81] It should be enough to

Practices of the Law, in FREEDOM AND TENURE IN THE ACADEMY 357, 373–77 (William Van Alstyne ed., 1993) (replying to Yudof); Stanley Fish, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION ch. 5 (2014); RABBAN, *supra* note 12, at 153–58.

77 Val Alstyne, *supra* note 62, at 156 (emphasis added):

> It may be conceded that circumstances will sometimes arise where the personal conduct of a faculty ember may *so immediately involve the regular operation of the institution itself* or otherwise provide firm ground for an internal grievance that internal recourse, consistent with academic due process, is offensive neither to the general protection of civil liberty nor to the standards of this Association. Decision such as that in the *Pickering* case are instructive, however, that this exception is not nearly so broad as the presumption of custom has supposed.
>
> The emphasized passage puts the nub of that which the freedom of intramural speech would not protect. A faculty member who makes meritless, endless motions to correct the minutes of previous department faculty meetings in order to obstruct the faculty from doing its needful work can, for example, be excluded from attendance.

78 Connick v. Myers, 461 U.S. 138, 151 (1983).

79 J. McKeen Cattell, a founding figure in American psychology, had a long running feud with President Nicholas Murray Butler of Columbia University. Cattell gave a speech in which he said he had incited his little daughter to name her doll "Mr. President" on "the esoteric ground that he will lie in any position in which he was placed." J. McKeen Cattell, *Academic Slavery*, 6 SCH. & SOC'Y 421, 426 (1917). Butler eventually did engineer Cattell's dismissal, not for his criticism but on a trumped-up charge of treason during the first world war. HOFSTADTER & METZGER, *supra* note 11, at 499–502.

80 HENRY L. MASON, COLLEGE AND UNIVERSITY GOVERNMENT: A HANDBOOK OF PRINCIPLE AND PRACTICE 79–81 (1972), on the situation of the departmental chair. Little has changed on that.

81 Some courts have expressed appreciation for this fact in applying the *Pickering* balance. *E.g.*, Higbee v. E. Mich. Univ., 399 F. Supp. 3d 694, 704 (E.D. Mich. 2019): "in the academic setting 'dissent is expected'," citing Smith v. Coll. of the Mainland, 63 F. Supp. 3d 712, 718–19 (S.D. Tex. 2014). But it has been ignored or paid lip-service, for example, Tennessee Tech's commitment to the "free exchange of ideas," even when "offensive" or "indecent" was ignored when a flyer accused an organization and its faculty advisor of being racist. Gruber v. Bruce, 643 F. Supp. 3d 824 (M.D. Tenn. 2022).. *See also* Phillips v. Collins Cmty. Coll. Dist., 701 F. Supp. 3d 525 and DePiero v. Pa State Univ., 711 F. Supp. 3d 410 (E.D. Pa. 2024),.

> A professor of computer science at Alabama A&M University was terminated for sending email messages to his Dean and colleagues that compared his Dean to named dictators accusing him "of being a 'dictatorial leader' who went against 'democracy.' Shi v. Montgomery, 679 Fed. App'x. 838, 835 (11th Cir. 2017). His, said the court, was "an embarrassing, vulgar, vituperative, ad hominem attack that was perceived in the workplace as disrespectful, demeaning, insulting, and rude," *id.*, that lost any color of free speech protection. The fact is that authoritarian, even dictatorial presidents have not been unknown in higher education. *See* UPTON SINCLAIR, GOOSE STEP (1922). In 1978, Peter O. Steiner, a distinguished professor of economics at the University

note the many occasions where entire faculties have voted "no confidence" in their institutions' administrative officers, have fomented actual "insurrections" in exercise of the freedom of intramural utterance.[82]

V. THE MODERN TEMPER: MARKET FAILURE OR "FAILURE OF NERVE"[83]

A half century ago, the profession's answer to offensive, to some, repulsive extramural speech—eugenics was and is a superb example—was to call for more speech: to treat what was said as an invitation to an extracurricular exercise in learning. This in extension of the purpose of a higher education: to instill in students a critical habit of mind; to have them learn to seek out and dispassionately dissect the facts, to analyze the facts through the lens of applicable epistemological categories and to weigh the arguments, especially when a proposition fires the strongest passions, is most likely to have reason blurred by emotion. The call rested on faith in the institution's capacity to do that, in the willingness of students and faculty to accept the responsibility that that entailed. As Derek Bok put it in 1980, echoing the AAUP's statement on eugenics six years before, members of a university community have the right to resist unpalatable ideas not by expelling the speaker, but by opposing her with reasoned arguments. This he put in probing rhetorical questions:

> Do we have so little confidence in the ability of our students to judge for themselves what opinions to accept within the open marketplace of ideas? And should our fears on this score justify the use of standards that would endanger academic freedom and invite interference from all manner of groups holding strong views concerning the proper moral environment for our students?[84]

---

of Michigan, then President of the AAUP and later Dean of the College of Liberal Arts and Sciences at Michigan, a scholar not much given to hyperbole, called attention to the rise of what he termed "the plantation campus." Peter O. Steiner, *The Current Crisis of the Association*, 68 AAUP Bull. 135, 137 (1978). Were Steiner to have professed at Alabama A&M, to have reached the same conclusion as Professor Shi and to have uttered those words, according to the Eleventh Circuit he could be fired for saying it, as a matter of constitutional law. As a matter of academic freedom, he could not.

It may be instructive for those critical of the liberty of intramural utterances as according professors more voice than, say, blue collar workers, and for the Eleventh Circuit's indignation that an administrator could be called a "dictator," that our labor law allows employees to call their employer a "Dictator," San Juan Hotel, 289 N.L.R.B. 1453, 1454 (1988), or to accuse the employer of running a "plantation." Polynesian Cultural Ctr., 222 N.L.R.B. 1192, 1205 (1976).

82 *See, e.g.*, *Special Committee on Hurricane Katrina and New Orleans Universities: Loyola University New Orleans*, 92 Academe 88–99 (2007) (on a faculty's calibrated use of votes of no confidence).

83 On the latter to borrow from Gilbert Murray, Five Stages of Greek Religion ch. 4 (1925).

84 Derek Bok, *Reflections on Academic Freedom: An Open Letter to the Harvard Community*, Harv. Gazette Supp. at 4(Apr. 11, 1980). Of those faculty members today who call for the abolition of the State of Israel, who claim its relationship to its Palestinian citizens to be one of colonialism, its treatment of them a form of Apartheid, instead of opponents crying "*Antisemite!*" and calling for their dismissal, the approach in the previous century would invite the speaker to explain just who the colonial power is, to detail those features of Israeli law that echo prior South African law, and to submit these explanations to critical assessment. That approach is based on the premise that the speaker has the freedom to utter all manner of ignorant foolishness but has no right not to be exposed as an ignorant fool for having uttered it.

Faith in the power of education is being tested today—sorely and this time even more from within. The faculty members of the New Jersey Institute of Technology outraged by the profession of eugenics pointed in passing to the lack of scientific foundation, but with much greater vehemence they called not for engagement on that basis but for the dismissal of their colleague because of his creation of a "hostile learning environment." The court concurred disregarding the "marketplace of ideas" in favor of "fostering a collegial pedagogical environment."[85] So, too, in the TPUSA protest, the Sixth Circuit disregarded the institution express disclaimer that, as a matter of policy, it would ever sanction the expression of offensive ideas.[86]

The protection of students from a "hostile learning environment" is premised on a conception of the student as one who must be shielded not from individually directed verbal assault, but from exposure to ideas that might offend rather than being educated to engage critically with them. (This closely parallels the development of an institutional culture that casts a questioning of the evidence for a contested policy or decision as a sanctionable aggression.[87]) The result is to infantilize students and to render the faculty complicit in it: the former by telling them that if there are ideas they do not wish to hear they will be insulated from hearing them; the latter by telling them there are ideas they may not express for fear of giving offense.

All this was made clear in the Shockley controversy a half century ago. What calls for inquiry is why the question of offensive speech has recrudesced so powerfully today and to quite an opposite effect; and of what the contemporary institutional response contrary to the academy's response a half century ago holds for the future. The first has been explained in the conflation of two developments—one societal, the other specific to the university. Of the societal, it has been argued that the past fifty years has witnessed a lessening of expressive self-restraint abetted by an expanded capacity broadly to disseminate what one says via dense networks of social media no less in the academy than in society at large.[88] The sorts of speech freely bandied about in social media today simply did not figure on the scene fifty years ago when the AAUP began to retreat from the exercise of "appropriate restraint" in extramural utterance.

---

85 *See* text accompanying *supra* note 24.

86 *See* text accompanying *supra* notes 26 and 50.

87 Not our chemist alone. *See also e.g.,* Porter v. Bd. of Trs. of NC State Univ., 72 F.4th 573, 578 (4th Cir. 2023) (faculty member's questioning of the professional basis for a question in a student course survey, on "diversity," was held by the university's Office of Institutional Equity and Diversity to be "bullying"); and *DePiero v. Pennsylvania State University*, 711 F. Supp. 3d 410 (E.D. Pa. 2024), where a professor's asking the instructor in a training program mandated for the faculty for the evidence supporting her claim of "white privilege in writing" was said to be "bullying." The court granted summary judgment for the university on De Piero's claim of a hostile workplace environment under Title VII. He was not "bullied" within the meaning of that doctrine. Be that as it may, the criticism of what was used and said in mandatory training which triggered the institution's investigation, discussed in considerable detail in *DePiero v. Pennsylvania State University*, 2025 U.S. Dist. Lexis 20097 (E.D. Pa., Mar. 6, 2025), was in exercise of the freedom of intramural utterance.

88 Matthew Finkin, *supra* note 64.

The institutional circumstance centers on sentiments that have taken root within segments of the professoriate, sometimes in tandem. One is the sense that the model of a marketplace of ideas—or myth, as some would have it—has been refuted. Those so minded point to the widespread acceptance of conspiracy theories, bogus facts, and pseudo-science, not only in the population at large, but at the highest political circles as definitive evidence of market failure. Some have called for the vitalization of the concept of "unfitness" as a restraint on extramural utterance, to sanction speakers for voicing thoughts an "appropriately selected" faculty body finds unacceptable due to the want of factual grounding or moral odiousness.[89]

The other sentiment Edward Shils characterized a generation ago as "antinomianism," the adherents to which would have the university pursue values they embrace in pursuit of which academic freedom "counts for nothing."[90] A salient example is provided today by the efforts of the boycott, divestment, and sanctions (BDS) movement on campus, including members of the professoriate, to have the university boycott Israeli universities. Were their effort to succeed the freedom of colleagues to research and teach in Israel would be abridged[91]—a result that counts for nothing to these faculty members.

The contemporary combination of these ingredients confronts a university historically ill-equipped to deal with it. The draftsmen in 1915 considered repression stemming from conservative elites, especially donors, and from democratic majorities outside the university, especially legislatures, but they failed to consider even the possibility of suppression emanating from within, from students and colleagues. Not long thereafter Max Weber did:

> Where Toqueville feared that mass democracy would be the grounds on which the "tyranny" of public opinion grew, Weber saw the same threat to freedom coming not from outside the campus but from within its own institutions, run by the spineless leading the complacent.[92]

---

89 Michael Bérubé & Jennifer Ruth, It's Not Free Speech: Race, Democracy, and the Future of Academic Freedom (2022). How what is proposed would actually function is explored in Matthew Finkin, *An Account of the Deliberations of the Faculty Committee on Academic Freedom and Unacceptable Speech*, 51 Hofstra L. Rev. 477 (2023).

90 Edward Shils, *Do We Still Need Academic Freedom?*, 62 Am. Scholar 187, 209 (1993). Antinomianism is a complicated religious doctrine with an equally complicated history. *See* Tim Cooper, *Antinomianism, in* Cambridge Dictionary of Christian Theology 734 (Ian MacFarland et. al., eds., 7th ed. 2011); Dov Schwartz, *Antinomianism, in* 2 Encyclopedia Judaica 199 (Dov Schwartz et al., eds., 2d ed. 2007). Alexandre Papas, *Antinomianism, in* Encyclopedia of Islam (Kate Fleet et. al., eds., 3d ed. 2013) (online. But for purposes here it can be simplified as a belief that some individuals or groups who have attained a certain state of knowledge, or salvation, are no longer bound by the moral constraints applicable to others.

91 The position taken by the AAUP a generation ago. *On Academic Boycotts*, 92 Academe 39 (2006). The AAUP's backtracking is described in the references *infra* note 93.

92 John Patrick Diggins, Max Weber: Politics and the Spirit of Tragedy 142 (1996). In 1920, Weber was shouted down by fascist students while attempting to give a public lecture at the University of Munich. A student witness recalled that the whistles and cat-calls went on for an hour. When the university's Rector threatened to turn off the lights hoping to restore silence a student shouted, "So much the better, then we can beat up the Jews in darkness." The witness recalled "The lights

Ralph Fuchs, a steadfast opponent of loyalty oaths at a time when a not insignificant cohort of the professoriate was supportive of or indifferent to it, acknowledged the conundrum. The "core of the matter" of academic freedom, he wrote, is the freedom of the faculty member "against control of thoughts or utterance from *either within* or without the employing institution."[93]

VI. NORMATIVE DECAY AND THE FUTURE UNIVERSITY

When the foregoing has posited "professional norms" in contrast to constitutional law, these have been found primarily in the policy documents and investigative reports of the AAUP. The 1940 *Statement* has surely exceeded the expectations of the bargaining partners to become the national norm—now near universally accepted by reference or in text, if sometimes observed only in the breach—with a single agency that sits to interpret it, enforced primarily by the weight of opinion within the profession as buttressed from time to time by judicial decision.[94] The result is a commonly accepted uniform standard, truly a remarkable achievement.

Why this came about might be explicable in economic terms. It would be awkward, to say the least, were each faculty member to have to bargain over the degree of expressive freedom he or she would have; a general policy governing the faculty as a whole is a practical necessity. But a common norm transcends that need: It assures applicants and incumbents a known playing field among the universe institutions that might attract them; reciprocally, institutional acceptance signals applicants and incumbents that they need have no reservations on that account.

Unfortunately, this system of private ordering is on the cusp of collapse. The AAUP has now cast its lot in with antinomianism; not that academic freedom "counts for nothing," but that it is to be discounted where other ideological or organizational ends are to be served, bolstering the boycott of Israeli universities as a means of advancing human rights; insisting that faculty manifest fidelity to diversity, equity, and inclusion (DEI) as a condition of appointment in order to respond to the "needs of a diverse global public"[95]; and, after a half century's meticulous care to wall the norm setting and applying functions off from the membership's activist agenda,[96] now to put the former into service for the latter. The AAUP has merged into the American Federation of Teachers, a step it had

---

went off, the hall cleared out. The organized terror of Hatreds had won." *Id*. at 139–40.

93 Ralph Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History, in* ACADEMIC FREEDOM: THE SCHOLARS PLACE IN MODERN SOCIETY 1, 3 (Hans Baade & Robinson Everett eds., 1964) (emphasis added).

94 The more notable of which are set out *supra* note 29.

95 Matthew Finkin, *The Collapse of AAUP Credibility and Why It Matters*, https://insights.telosinstitute.net/p/the-collapse-of-aaup-credibility; Tom Ginsburg, *Can Academic Freedom Survive the AAUP?*, CHRON. F HIGHER EDUC., Feb. 18, 202) and Garrett Shanley, *A Firestorm Against the AAUP: What's the Best Way to Defend Academic Freedom?*, CHRON. HIGHER EDUC., Dec. 6, 2024.

96 *From* Sanford Kadish et al., *The Manifest Unwisdom of the AAUP as a Collective Bargaining Agency: A Dissenting View*, 58 AAUP BULL. 57 (1978) to *Report of Committee A 1983–84*, 70 ACADEME 21a (1984).

resisted since its founding[97]; and the current President has been clear about the course the refashioned AAUP will chart, that it

> cannot exist primarily to write reports and statements and conduct research on higher ed … These are important, *but they must be used as tools toward the goal of aggressively organizing academic workers of all types across the country*.[98]

The AAUP's credibility, the confidence it earned by a consistent adherence to principle and by scrupulous care in working it out, was the glue that held the system of private ordering together. The collapse of credibility frees institutions of that normative constraint, soft law, to be sure, but, historically, surprisingly effective. It gives them free play in policy and action subject only to judicial intervention. This portends a Balkanization of the meaning of academic freedom in practice as well as in university policy, leaving only the First Amendment in play, for public institutions, absent judicial reliance on professional norms as a matter of contract. On that some recent cases may be instructive.

A case of extramural utterance—*Lee v. Yale University*.[99] Bandy Lee was a volunteer assistant clinical professor of psychiatry at the Yale School of Medicine; she also taught in the Law School. The facts are laid out by the district court. Alan Dershowitz, a professor of law at Harvard, known for his representation of defendants in cases much in the public eye, including advising Donald Trump, referred to his, Dershowitz's, "perfect sex life" echoing a turn of phrase Trump had used. Lee was asked on social media for her thoughts about what he had said and she replied,

> "Alan Dershowitz's employing the odd use of 'perfect' … might be dismissed as ordinary influence in most contexts." She added that "given the severity and spread of 'shared psychosis' among just about all of Trump's followers, a different scenario is more likely," and that scenario was "that he has wholly taken on Trump's symptoms by contagion."[100]

Dershowitz protested to the School of Medicine claiming Lee's message to be in violation of psychiatric ethics. Dr. Lee was discharged. She sued for a violation of academic freedom, of extramural political utterances in breach of contract by virtue of a statement of policy acknowledged in Yale's Faculty Handbook:

> Yale University is committed to the free expression of ideas by members of the University community, including expression of political views; and to the freedom of students and faculty to engage in scholarship related to political life and discourse. The Woodward Report … reinforces these

---

97 Tiede, *supra* note 11 at 188–90.

98 Rotua Lumbantobing et al., *Do Much More to Meet This Moment: An Interview with United Faculty for the Common Good*, https://www.nplusonemag.com/online-only/online-only/do-much-more-to-meet-this-moment/ (remarks of Todd Wolfson) (italics added). *See also* Ryan Quinn, *The AAUP's New President is Not Staying Neutral*, https://www.insidehighered.com/news/faculty-issues/academic-freedom/024/10/30/aaups-new-president-not-staying-neutral.

99 2023 WL 4072948 (2d Cir., June 20, 2023) (not reported in F.4th).

100 Lee v. Yale Univ., 624 F. Supp. 3d 120, 127 (D. Conn. 2022).

> commitments, and reminds us that within the diversity of the Yale community there coexist many points of view.[101]

The trial court dismissed the complaint because the policy relied on was only a "general statement of principles" "insufficiently definite to create the contract."[102] The Second Circuit affirmed: The policies relied on "reduce merely to generalized support for academic freedom"; they are insufficiently "definite" to manifest an intention to be contractually binding.[103]

The court proceeded either indifferent to or in willful ignorance of the body of contract law the courts have built on institutional adoption of policies that do no more than recite a commitment to academic freedom: Rarely does an academic freedom policy proclaim itself expressly to hold contractual status.[104] It has long been enough to simply assure the institution's observance of academic freedom without more.[105] Yet the body of judicial authority to that effort was ignored.[106] Nor did the court acknowledge the historically deep weight of law that holds a party contracting with respect to a trade or profession to be bound by the generally recognized customs and usages of the trade or profession without a word more being said.[107] The decision leaves the Yale faculty and others similarly situated

---

101 *Id*. at 131. The Woodward Report was widely circulated and relied on by the Yale administration and faculty. Of Yale, it said,

> We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.

Id.

102 *Lee*, *supra* note 100, at 131.

103 *Lee*, *supra* note 101 (slip. op. at 35).

104 New York University had adopted the 1940 *Statement* verbatim as its academic freedom and tenure policy, but expressly disclaimed it to be a contract. Bradley v. NYU, 124 N.Y.S.2d 238 (Sup. Ct. 1953) *aff'd.* 127 N.Y.S.2d 845 (App. Div. 1953), mem. 120 N.E.2d 828 (N.Y. 1954). After NYU was censured by the AAUP, a condition for removal of censure was the excision of the disclaimer which the University did. *Report of Committee A, 1959–1960*, 46 AAUP Bull. 222, 27 (1960). It was never suggested that a positive declaration of contractual obligation was required.

105 A tour of the horizon four decades ago concluded that

> The better judicial decisions recognize that by employment an institution undertakes certain commitments to the faculty member that transcend the four corners of a terse letter of appointment or notice of tenure. In essence, by appointment the institution commits itself not only to observe the stated duration of the appointment, but to abide by the institution's rules *and customary practice*.
>
> Matthew Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. 1119, 1146 (1980) (references omitted) (italics added).

106 *See* the references compiled *supra* note 29.

107 J.H. Balfour Browne, The Law of Usages and Customs § 39, at 51 (1st Am. ed. 1881) (references omitted):

> The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract, if there be no words therein expressly controlling or excluding the ordinary operation of the usage, and parol evidence thereof may consequently be brought in aid of the written instrument.

with no contractual protection for extramural utterance.[108]

In a case of intramural utterance—*Shaughnessy v. Duke University*[109]—Michael Shaughnessy was a clinical assistant professor of anesthesiology of five years' standing in the Duke University Medical School when a resident in the department committed suicide. Some in the department were disturbed by the chairman's handling of the matter and urged a more sympathetic, supportive role, but their pleas were ignored. Dr. Shaughnessy protested to the chairman for what he saw as hostility to those with depression. The chairman terminated Dr. Shaughnessy's appointment. Shaughnessy sued for a violation of academic freedom as a contractual obligation, for his exercise of intramural speech.

Duke's Faculty Handbook provided that Duke "makes specific processes for academic freedom" as set out in a policy appended to the Handbook. The appended policy tracks the three-part assurances of the 1940 *Statement* as well as a modified appropriate restraint clause on the espousal of "an unpopular cause." However, under North Carolina law, "A university's policies "cannot be the basis of a breach of contract claim unless the … policy provision is a specific, enforceable promise that is incorporated into the terms of a contract" between the university and its employee."[110] The court held that under state law the presence of an academic freedom policy in the Faculty Handbook, even when referenced in the letter of appointment, failed to rise to a contractual commitment because the policy itself evidenced no contractual intent. The court declined to take notice of the headnote to the academic freedom policy:

> This document embodies an agreement between the president and the faculty as to policies and procedures with respect to academic freedom, academic tenure, and certain matters of due process.

If this decision proves persuasive, absent extraordinary regulatory exactitude, there is no contractual protection for intramural utterance in North Carolina.

In a glance at tenure—*Monaco v. New York University*[111]—New York University adopted the text of the 1940 *Statement* verbatim as its policy on academic freedom and tenure.[112] The 1940 *Statement* precedes its provisions for "academic freedom" and "tenure" with a separate rationale for each headed, "The Case For." The case for tenure rested on the need to protect academic freedom and to assure "a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability."[113]

---

108 The Yale Medical School viewed Dr. Lee's posting as disciplinary speech in violation of the "Goldwater Rule" prohibiting psychiatrists from diagnosing of public figures. Dr. Lee maintained hers to be political comment, not psychiatric diagnosis. Because of the court's disposition that issue was not reached.

109 2020 WL 4227545 (D.N.C.., July 23, 2020) (not reported in F. Supp. 3d).

110 *Id*. slip op. at 5 (references omitted).

111 164 N.Y.S.3d 87 (App. Div. 2022).

112 *See supra* note 104.

113 AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents and

After several years of faculty opposition, the administration of NYU's Medical School adopted a policy that capped the salaries of basic science faculty members below their existing levels and required them to make up the difference out of research grants on pain of reduction in pay. Some affected faculty sued for breach of contract, as an abridgement of tenure. The New York courts agreed that the policy's operative text on tenure—that just cause is required to dismiss—was contractual but not the rationale on which it rests, which the court termed a mere "preamble."[114] As a result, it held that tenure had no contractual component of "economic security." The court was aware that, by this logic, the salaries of the tenured faculty of NYU, not only the medical faculty, could be reduced to zero.[115] If the rationale for tenure is of no value in deciding what tenure is, neither would the rationale for academic freedom in deciding what that is. In the event, the contractual protection of the profession's understanding of the economic security afforded by tenure has been eviscerated in New York.

* * *

These decisions, if expressive of the modern temper, take a radical historical turn. A hundred years ago, whether academic freedom should be institutionally embraced was hotly debated.[116] Fifty years ago the dust had settled: Professional norms were well established; institutions embraced them by adoption in policy; the courts acknowledged legal enforcement by the fact of adoption alone. Today, at least to these courts, if an institution wishes to be bound to observe academic freedom it must make its acceptance extraordinarily emphatic.

Even so, the deeper significance of these cases may lie less in what they held—the reasoning being so patently threadbare[117]—than in what they say to the willingness of the administrations of otherwise reputable universities to advance arguments so blatantly antithetical to the common understanding of academic freedom—and of tenure as well—in an effort to free themselves of those obligations.[118]

Reports 3 (2008).

114 The court quotes the following from a case concerning a retirement plan: a "recital paragraph in a document is not determinative of the rights and obligations of the parties." Anderson v. Weinroth, 840 N.Y.S.2d 210, 219 (App. Div. 2007). The court omits the clause immediately following: "nor does it prevent the introduction of parol evidence to explain the parties' intent." *Id*.

115 The point was made in a brief *amicus curiae* to the court set out in. Matthew Finkin, *Tenure in New York*, 70 Buffalo L. Rev. 1891, 1910 (2022) and confirmed in deposition testimony by the university's president. *Id*. at 1910.

116 Academic Freedom, III The Reference Shelf No. 6 (Julia Johnsen ed., 1925). The Reference Shelf series published materials needed for "good debate" in matters of public policy.

117 Writing for a unanimous Supreme Court of Massachusetts, Judge Scott Kafker handily dispatched the NYU decision when the Tufts Medical School's identical policy was challenged as an abridgement of tenure. Wortis v. Trs. of Tufts Coll., 228 N.E.3d 1163 (Mass. 2024). Even so, the Association of American Universities, the organization representing the most well respected research universities in the nation, filed an *amicus* endorsing the New York decision.

118 In *Kilborn v. Amiridis*, __ F.4th ___, 7th Cir. No. 23-3196, Mar. 12, 2025, the Court of Appeals held a professor of law in the University of Illinois at Chicago had a First Amendment right to select the terms in which he phrased an examination question that offended some students and for which he was sanctioned without regard to pedagogical purpose or value; the matter was remanded for trial on the issue of disruption. The University of Illinois was reported to have spent over

The aspiration animating the effort and the consequences extend beyond legal accountability alone.

For the present, it seems doubtful, but by no means certain that universities will suppress freedom of teaching and research when objected to as offensive; but non-disciplinary speech has been more contested terrain. The loss of protection there leaves the faculties of private institutions naked and of public institutions covered only by the fig leaf *Pickering* supplies, that is, to the extent the law allows disharmony, disruption, or loss of efficiency as a ground of sanction, the instructor in the public university confronts an unascertainable, near capricious restraint on extramural (and intramural) speech. A professor of geology, housed in an urban university with liberal students and alumni, who resolutely condemns same sex marriage could be at risk.[119] A professor of geology, housed in a rural university with a fundamentalist Christian student body and a similarly minded alumni base, who resolutely advocates for same sex marriage would be at equal risk.[120] The result is to leave the profession twisting in the shifting winds of political and social excitements.[121]

In making the case for academic freedom, the 1940 *Statement* echoes the stress the 1915 *Declaration* placed on the conditions needed to attract persons of ability to the academic life: persons not only of promise in their disciplines, but those who in addition to disciplinary achievement might also be drawn to address issues of public moment not excluding those most in contention, those that might arouse the strongest passions. This is scarcely an unusual combination of traits among academics. In order to attract persons of that character the university should afford conditions conducive to the exercise of both disciplinary and non-disciplinary speech subject only to applicable standards of care and ethics. Were *Pickering* to replace those norms in non-disciplinary speech one has to contemplate what sort of person would be attracted to academic life; what the lesson is that students will have learned in that environment; and, what the implications are for the society those students will inhabit.

---

a million dollars in defense of its right to suppress freedom of teaching. Lauren Berg, *7th Cir. Reviews Suit by Law Professor Disciplined over Exam*, Law 360 (Mar. 12, 2025).

119 *Cf*. MacRae v. Mattos, 106 F.4th 122, 139 (1st Cir. 2024) (where a high school teacher's stridently negative "social media posts directed at the LGBTQ population had made staff and students very upset," the element of the prospect of disruption was sufficient to deny constitutional protection was satisfied).

120 Amy Harmon, *Idaho Lawmakers Seek Reversal on Same-Sex Marriage*, N.Y. Times, Jan. 27, 2025, at A13 ("In 2006, Idaho voters passed an amendment to the State Constitution limiting marriage to between men and women.")

121 On the transitory nature of controversy, see Edward Thorndike, The Teaching of Controversial Subjects 1–2 (1937). When one reads the letter on premarital sex that resulted in Professor Koch's discharge at the University of Illinois sixty years ago, one could have little doubt that it could raise no eyebrows today.