

ACADEMIC FREEDOM AT AMERICAN UNIVERSITIES

*Constitutional Rights, Professional Norms,
and Contractual Duties*

PHILIP LEE

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American Universities

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Academic Freedom at American Universities

For my wonderful family—Sue, PJ, Phoebe, and Phylicia.
With you, I am whole.

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Introduction

Prior to 1915, university professors who offended powerful administrators, trustees, or politicians could simply be fired without notice or hearing.¹ These faculty members, regardless of the strength of their work or the length of their service, had no recourse to enforce their professorial academic freedom rights. This started to change in 1915.

The American Association of University Professors (AAUP), whose “role and functions are analogous to the American Bar Association for the legal profession and the American Medical Association for the profession of medicine,”² first established the foundation for professorial academic freedom in its 1915 Declaration of Academic Freedom and Academic Tenure. Since 1915, the AAUP has also investigated alleged professorial academic freedom violations on university campuses around the country, further defining the concept. Because of its investigatory and policymaking roles, the AAUP has been referred to as “the single most influential and important defender of professional tenure and academic freedom.”³

Without relying on legal precedent, because legal principles regarding academic freedom had yet to be developed, the AAUP created its own concepts of what academic freedom should mean. Its conception was based on its real-world experiences investigating cases. Prior to the publication of the 1915 declaration in December, the AAUP investigated five early cases of alleged academic freedom violations starting in the spring of that year. These five cases informed how the authors of the declaration conceived of academic freedom. All of these cases focused on faculty dismissals without notice or other procedural protections. The authors of the declaration, in response, emphasized a number of quasi-legal procedural safeguards for university faculty members. The same emphasis on procedural protection can be seen in the investigative case reports and policy statements leading up to the 1940

Statement of Principles on Academic Freedom and Tenure. During this time, the AAUP was the main avenue of redress for faculty members terminated for espousing controversial views or otherwise offending non-academic stakeholders.

Starting in the 1950s, courts would define academic freedom as protection for higher education institutions based on First Amendment principles. Courts would later rely on constitutional principles to protect individual professors from infringement of their free speech rights in performing their academic work and speaking their minds. However, some courts would later refuse to recognize that professors had any academic freedom rights separate than what the First Amendment provides to all citizens. For example, in *Urofsky v. Gilmore*,⁴ six professors employed by various public colleges and universities in Virginia challenged a law restricting state employees from accessing sexually explicit material on computers owned or leased by the state. The professors claimed, in part, that such a restriction was in violation of their First Amendment academic freedom rights to conduct their scholarly research. The Fourth Circuit upheld the law and noted that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, *the right inheres in the University, not in individual professors*, and is not violated by the terms of the act.”⁵ In other words, this particular court held that academic freedom protects the institution as a whole, but not the individual professors. To the extent that courts have protected professor speech through First Amendment principles, their analysis has generally been rooted in public employee free speech analysis and has not taken into account the unique context of American higher education.

This book aims to refute the view that academic freedom only protects colleges and universities, and not individual professors. It further contests the view that public employee free speech principles are adequate to protect professor speech. Using AAUP primary source documents, court opinions, legal filings, historical texts, and other primary and secondary source materials, I will trace the development of academic freedom from the early 1900s to the present day. I do so in order to show the evolution of the professional and legal definitions of the term to provide a uniquely American context of what academic freedom should mean in this society.

This project is prescriptive. I argue that the dominant constitutional analysis of academic freedom remains inadequate to protect the full range of academic freedom interests that have emerged over time. Specifically, constitutionally based academic freedom is limited by 1) the state action doctrine; 2) the constraints of public employee free speech principles; and 3) the judicial interpretations that grant this freedom to universities only, leaving professors without this protection when their interests collide with their universities’. Thus, constitutionally based academic freedom is inadequate to

preserve the free exchange of ideas that universities are supposed to epitomize. As an alternative to an exclusively First Amendment foundation for this freedom, I will argue for a contract law-based conception specifically for professors. Contract law allows courts to protect the rights of professors at both public and private universities. It also allows for the recognition of professional norms and academic custom in interpreting the rights and duties of professors and their universities—thereby acknowledging the rich historical legacy to preserve academic freedom in this country. Finally, contract law also allows courts to structure remedies that take into account the specific campus contexts that give rise to various disputes. Therefore, in order to create more consistency in the law and an alignment between institutional and professorial protections at both public and private universities, I argue that while constitutional law is still the proper mechanism for defending institutional rights from government interference, contract law should be the primary mechanism for protecting professorial academic freedom. While professors at state institutions would have additional First Amendment protections against their employers, for reasons I detail in this book, I contend that these protections are insufficient. Thus, developing a rich body of contract law on this subject would greatly enhance professorial academic freedom across the country.

This book proceeds in six chapters. Chapter 1 details the crisis of academic freedom in modern universities and the founding of the AAUP. Chapter 2 discusses the early investigations of the AAUP which led to the organization's first policy statement in 1915 and the organization's struggle to defend the ideals contained therein. Chapter 3 focuses on the development of the seminal AAUP policy statement published in 1940 and the challenge of the McCarthy era in the 1940s and 1950s along with the increasing role of the courts in defining academic freedom during this time. Chapter 4 analyzes modern constitutional conceptions of academic freedom. Chapter 5 then describes the limitations of constitutionally based academic freedom to protect professors in engaging in their scholarly work. Finally, given these limitations, chapter 6 focuses on contract law as a better foundation for professorial academic freedom and concludes with a case study of the Ward Churchill termination at the University of Colorado at Boulder analyzed using a contract-based framework.

NOTES

1. I use the terms "university" and "college" interchangeably throughout this book.
2. American Association of University Professors, *What It Is—What It Does*, 35 Bull. of the Am. Ass'n of Univ. Professors 358, 358 (1949). Philo A. Hutcheson argues that by December 1970, the AAUP changed its conception of itself in that it disavowed its original comparison to the American Bar Association and American Medical Association. See Philo A. Hutche-

son, A Professional Professoriate: Unionization, Bureaucratization, and the AAUP 126 (2000). I will discuss this conceptual evolution as it relates to collective bargaining later in the book.

3. Christopher J. Lucas, *American Higher Education* 206 (2d ed. 2006).

4. 216 F.3d 401 (4th Cir. 2000).

5. *Id.* at 410 (emphasis added). Note that Chief Judge Harvie J. Wilkinson's concurring opinion in this case disagrees with the reasoning of the majority opinion and warns about the dangers to academic freedom that it poses.

Contents

| | |
|---|-----|
| Acknowledgments | ix |
| Introduction | xi |
| 1 The Crisis of Academic Freedom in the Modern University and the Founding of the AAUP | 1 |
| 2 The AAUP's First Policy Declaration in 1915 and Its Struggle to Defend Academic Freedom | 23 |
| 3 The AAUP's Seminal 1940 Statement and Judicially Defined Academic Freedom During the McCarthy Era | 45 |
| 4 Modern Constitutional Conceptions of Academic Freedom | 71 |
| 5 The Limitations of Constitutionally Based Professorial Freedom | 99 |
| 6 Contract Law as an Alternative Foundation for Professorial Freedom | 121 |
| Conclusion | 145 |
| Bibliography | 147 |
| Index | 159 |
| About the Author | 163 |

Chapter One

The Crisis of Academic Freedom in the Modern University and the Founding of the AAUP

In this chapter, I detail the infamous case of Edward A. Ross, who was a faculty member dismissed from Stanford University in 1900 for offending the sole trustee of the school, and how this was illustrative of the academic freedom violations that were common in the early 1900s. The origins of the AAUP are imbedded in this context. Indeed, the first five investigations by the nascent AAUP served to elucidate the principles of academic freedom that this organization would advocate for in the coming years. These principles arose from disputes within the university concerning trustees and administrators who disagreed with the views of individual faculty members.

THE CRISIS OF ACADEMIC FREEDOM IN THE EARLY 1900s AND THE ORIGINS OF THE AAUP

The Ross Case at Stanford University in 1900: A Sign of the Times

Edward A. Ross was an academic provocateur. Soon after his arrival at Stanford University in 1893, this prominent but controversial sociologist publically supported presidential candidate William Jennings Bryan and advocated for free silver instead of international bimetallism—two positions that would cause Ross to incur the wrath of Stanford's sole trustee, Jane Lathrop Stanford, who disagreed with his views.¹ Additionally, while a professor at Stanford University in 1900, Ross spoke out against the importation of Asian labor and private ownership of railroads. In a speech he gave before

union workers in San Francisco on May 7, 1900,² Ross recommended the following drastic action to prevent Asian immigration: "Should the worst come to the worst it would be better for us to train our guns on every vessel bringing [Asians] to our shores rather than to permit them to land."³ In another speech before the Unitarian Church of Oakland, California, in April 1900, he asserted his strong views favoring public ownership of municipal utilities, including railroads.⁴ Since the Stanford family's massive wealth was founded on Chinese labor building privately owned railroads on the West Coast, Ross's anti-Asian labor and public ownership views deeply offended Mrs. Stanford.⁵

Stanford University's founding grant provided that the former Governor of California and U.S. Senator Leland Stanford, and his wife, Jane, would have complete control over the university; if one of them died, the other was to exercise singular authority.⁶ Mrs. Stanford, hence, took command of the university as sole trustee after her husband died in 1893.⁷ Walter P. Metzger notes that this transition "converted this unusual oligarchy into a still more unusual matriarchate."⁸ Mrs. Stanford was to remain in control for twelve years.⁹ Laurence R. Veysey observes, "As long as Mrs. Stanford lived, she could take away what she had given or she could change the character of the institution in some eccentric fashion."¹⁰ Like an authoritarian parent, she made decisions that she thought were in the best interest of the institution—both morally and academically—and she ruled with an iron hand.

Mrs. Stanford thought forcing Ross to leave was in the university's best interest. The university's first president, David Starr Jordan, however, was a supporter of Ross; indeed, Jordan was the one who recruited Ross to join the Stanford economics department—at the time, Ross was also being courted by Cornell, Indiana, and Northwestern.¹¹ It took Jordan three attempts for Ross finally to take the offer.¹² As Mrs. Stanford was becoming increasingly disturbed by Ross's public statements, Jordan attempted to come up with a compromise in which Ross would take a one-year sabbatical, from 1898 to 1899, and be reassigned to the sociology department when he returned.¹³ When Ross returned, as previously noted, he continued to voice his anti-Asian labor and pro-public ownership views.

In November 1900, Ross was forced to resign.¹⁴ In a public statement issued after his resignation, Ross explained what happened to him:

At Stanford University the professors are appointed from year to year, and receive their reappointment in early May. I did not get mine then, but thought nothing of it until, on May 18th, Dr. Jordan told me that, quite unexpectedly to him, Mrs. Stanford had shown herself greatly displeased with me, and had refused to reappoint me. He had heard from her just after my address on coolie immigration. He had no criticism for me, and was profoundly distressed at the idea of dismissing a scientist for utterances within the scientist's own field.¹⁵

Two days after Ross resigned, George Howard, head of Stanford's history department, spoke out against the university's actions in front of his French Revolution class.¹⁶ Howard recalled, "It was . . . as earnest a protest against interference with academic freedom as I was capable of making."¹⁷ Further, in a statement to the press, he wrote:

The summary dismissal of Dr. Ross for daring in a frank but thoroughly scientific spirit to speak the simple truth on social questions is an act which will cause the deepest grief and profoundest indignation on the part of every friend of intellectual freedom in the United States. . . . It is a blow aimed directly at academic freedom, and it is, therefore, a deep humiliation to Stanford University and to the cause of American education.¹⁸

Howard was subsequently fired after he refused to apologize for his public statements.¹⁹ Indeed, thirty-seven of forty-eight senior faculty members pledged their loyalty to Ross.²⁰ Seven Stanford professors resigned in protest, including Frank A. Fetter, professor of economics; Arthur O. Lovejoy, associate professor of philosophy; Morton A. Aldrich, associate professor of economics; William Henry Hudson, professor of English; Henry B. Lathrop, professor of rhetoric; Charles N. Little, professor of mathematics; and David E. Spencer, associate professor of mathematics.²¹

On December 28, 1900, Edward R. A. Seligman, a prominent economist, spoke out against Stanford's treatment of Ross at the annual meeting of the American Economic Association (AEA).²² Seligman presented to an audience of around forty economists and read excerpts of Jordan's letters to show that Ross was being unfairly treated. The AEA members who heard this presentation decided to create a committee to investigate the Ross case. Walter P. Metzger observes, "With this decision, the first professional inquiry into an academic-freedom case was conceived and brought into being—the predecessor, if not directly the parent, of the proceedings of Committee A of the AAUP."²³ The economists acted on their own without sponsorship or support from the AEA. These scholars' decision to act independently of the AEA seemed to be driven by the strategic need to avoid resistance from some members of the profession and informally marshal broad-based support.²⁴ The decision to go without the AEA's imprimatur may also have been motivated by the desire to avoid involvement of absent members.²⁵ Whatever the reasons, as Metzger argues, this was a tactical mistake.²⁶ The informal nature of the investigatory committee made its actions appear unofficial and partisan. Furthermore, the committee's investigation was hampered because the group had no formal means of obtaining the information it needed from Stanford University officials—all it could do was write requests and queries and hope they would be responded to.²⁷ The committee, subsequently, had great difficulty in discovering evidence regard-

ing the reasons for Ross's termination. The target of its queries—President Jordan—proffered incomplete, and even evasive, responses.²⁸

Regardless of the difficulty in obtaining information, the committee of economists issued its findings in a report dated February 20, 1901. Relying on correspondence between Jordan and Ross and inferences drawn from a chronology of the events, the committee found that there was evidence that demonstrated:

- a. That Mrs. Stanford's objections were due, in part at all events, to [Ross's] former attitude on the silver question, and to his utterances on coolie immigration and on municipal ownership; and
- b. That while the dissatisfaction of Mrs. Stanford due to his former attitude on the silver question antedated his utterances on coolie immigration and municipal ownership, her dissatisfaction was greatly increased by these utterances.²⁹

Further, the committee noted the significance of Jordan's non-responsiveness to its inquiries:

We are aware that, owing to the failure of President Jordan to give definite replies to all our questions, there may be important facts with which we are unacquainted. On the other hand, we cannot but feel that a refusal to furnish specific information in a case of such importance—in which it is charged that the freedom of speech is at stake—is itself a fact of significance, which, to say the least, is much to be regretted.³⁰

The committee's findings did not lead to a reversal of Mrs. Stanford's decision. Stanford did not admit wrongdoing and Ross was not rehired—he left for the University of Nebraska and later became a professor at the University of Wisconsin at Madison.³¹ The main significance of this committee and its findings, however, was that university professors were, for the first time, asserting a collective concern and advocacy for the safeguarding of professorial academic freedom in the aftermath of an unjust termination.

During this time, Ross's treatment by Stanford was not an isolated event. University administrators regularly dismissed faculty members for having controversial points of view.³² Christopher J. Lucas notes, "Over and over again the same pattern repeated itself: an academic publicly urged reforms or criticized the existing social order and was then summarily dismissed for his trouble."³³ These widespread faculty terminations were forcing professors to organize in order to articulate, embrace, and publicize the importance of academic freedom at American universities. The challenge to their professional identity was captured in a single question: Could academic freedom exist in a world where trustees or administrators of an American university, or even local politicians, were permitted to squelch the professional views of

faculty members they disagreed with? In 1915, scholars across the country, from different areas of expertise, organized in order to collectively respond that academic freedom was meaningless in such a world and, thus, needed to be protected.³⁴

The Founding of the AAUP in 1915

Concerned with the threat to academic freedom that the case of Ross and others represented, the founders of the AAUP sought to safeguard university professors' professional freedom to speak their minds and engage in their work—however unpopular their views may be—without fear of reprisal. The first meeting took place in January 1915 in New York City,³⁵ with representatives from Columbia, Cornell, Johns Hopkins, Princeton, and Harvard present.³⁶ The charter members of the AAUP were 867 professors at sixty institutions.³⁷ The AAUP Constitution provided:

[The AAUP's] objects shall be to facilitate a more effective cooperation among teachers and investigators in universities and colleges and in professional schools of similar grade for the promotion of the interests of higher education and research, and in general to increase the usefulness and advance the standards and ideals of the profession.³⁸

Membership in this professional organization was voluntary. By April 1916, the AAUP had 1,362 members from seventy-five schools; by January 1922, it had 4,046 members representing 183 institutions.³⁹

Committee A Called to Action

Committee A was the AAUP entity charged with investigating violations of academic freedom at universities across the country. It was the first AAUP committee to be organized—therefore, designated by the letter “A.”⁴⁰ In the AAUP's first forty years, Committee A was instrumental to the organization's mission. Indeed, Walter P. Metzger notes:

In 1956, an objective observer would have had to conclude that the AAUP was Committee A, to all practical and apparent purposes. Only Committee A had used the weapons that had been proved both acceptable and efficacious: exposure through investigation, shaming by explicit naming, the promulgation of codes that are negotiated into compacts with administrators.⁴¹

Committee A's struggle to develop principles and procedures was a trial by fire. In times of great crises, Committee A would be forced to define these concepts as it went, sometimes stumbling along the way, always trying to balance competing interests in order to maintain academic freedom for the betterment of society.

According to an early publication of the AAUP, “[Committee A] was appointed in January 1915. . . . It consists of fifteen members; but from time to time its sub-committees, for inquiry into specific cases of violation of academic freedom, are composed by selecting other persons ad hoc.”⁴² From its inception in 1915, Committee A received numerous requests for investigation into alleged academic freedom violations. In his first annual address as the AAUP’s newly installed president, John Dewey noted:

The general report of the committee of fifteen [i.e., Committee A] was, indeed, definitely contemplated in the plan of the year’s work. The investigations of particular cases were literally thrust upon us. To have failed to meet the demands would have been cowardly; it would have tended to destroy all confidence in the Association as anything more than a talking body.⁴³

Committee A, therefore, hit the ground running. This investigatory body, however, lacked the enforcement power of the courts. Metzger observes:

[T]he leaders of the Association, knowing all too well that they are lightly armed, do not wish to be literally regarded as ubiquitous academic cops. They realize that they lack in their investigations any real power of compulsion: they cannot gain access to a university by obtaining a writ to search the premises; they cannot compel disclosures by the use of subpoenas and contempt citations; they cannot arrest or arraign. When they find a president or dean who acts in an arbitrary manner, they cannot deprive him of his license; when they find a governing board that is about to take some pernicious action, they cannot restrain it with a court injunction. They carry two weapons only—the threat of adverse publicity and the moral authority of the Association—and both of these are uncertain arms, since they depend so much for their effectiveness on the susceptibility of the target.⁴⁴

Despite these limitations, demand for Committee A’s work was high since no other organization was fulfilling its investigatory role of targeting academic freedom violations.⁴⁵

The initial cases, which Committee A investigated in its first year of existence, arose from faculty terminations or suspensions at the University of Utah, the University of Colorado, Wesleyan University, the University of Pennsylvania, and the University of Montana. In his inaugural AAUP presidential address on December 31, 1915, John Dewey noted:

While a succession of incidents like those at Utah, Montana, Colorado and Pennsylvania was wholly unexpected (and, let it be hoped, never to be repeated), it may well be doubted whether any cut-and-dried, predetermined plan of “constructive” work would have been equally effective in shaking a multitude of things together and making an Association on paper into a working unity with a mind and movement of its own. Incidentally, the detailed information