Subject: Faculty Luncheon OUTSIDE Friday
Date: Thu, 30 Nov 2000 17:22:54 -0700
From: Roger Yohe <roger.yohe@emcmail.maricopa.edu>
Organization: Estrella Mountain Community College
To: DL-EMC-FAC <dl-emc-fac@emcmail.maricopa.edu>,
    Bryan Tippet <bryan.tippet@emcmail.maricopa.edu>

Since we are experiencing nice weather and Friday's forecast is favorable, we will be having our luncheon in the . Hope to see you all at 12:30.

Subject: December Faculty Luncheon "Academic Freedom"
Date: Tue, 21 Nov 2000 18:42:26 -0700
From: roger.yohe@emcmail.maricopa.edu
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Estrella Mountain Community College Faculty Luncheon Series
Friday, December 1, 2000
12:30 Luncheon, South Community Room
1:15 - 2:00 Discussion, Center for Teaching and Learning

ACADEMIC FREEDOM AND THE TEACHING OF CRITICAL THINKING
Join us for an exciting discussion on academic freedom. Please read the attached article "Tenure, Academic Freedom, and the Teaching of Critical Thinking" by Frank Stancato prior to our luncheon to set the stage for a engaging discussion with your peers.

Extra copies of this article will be available with faculty secretaries and in the Adjunct Faculty Office.

Please R.S.V.P. to me by Wednesday, November 29 by e-mail or 623.935.8070.

Record: 1
Title: TENURE, ACADEMIC FREEDOM AND THE TEACHING OF CRITICAL THINKING.
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TENURE, ACADEMIC FREEDOM AND THE TEACHING OF CRITICAL THINKING

The article examines the thesis that tenure and academic freedom are vitally needed for teachers who are competent in teaching the skills of critical thinking and the pursuit of truth within the context of the
academic content they are being paid to teach. Critical thinking is defined as making judgments about the truthfulness and worth of the statements or answers to problems. Tenure, on the other hand, refers to the structure that safeguards academic freedom by providing protection for teachers to study and teach content-related ideas that may lead to controversy without the fear of threats or sanctions. To examine the thesis the writer alludes to the coexistent nature of critical thinking and controversy. At the same time, the article provides support to indicate a fundamental positive relationship between controversy and student mastery of related subject matter. The article then looks forward by emphasizing the future importance of tenure and academic freedom to provide a culture of thinking so vital to our democratic principles and values. Finally, the article outlines a list of principles and strategies that allow classroom teachers to move forward and improve their school’s competence in teaching the skills of critical thought.

Tenure and academic freedom have been in the line of public fire for many years now. Tierney (1997, p. 18) defines tenure as the structure that provides protection for faculty to undertake investigations in a climate free of recrimination and penalty. More precisely, tenure aims to protect teachers from job loss as a result of public controversy that results from their attempt to pursue academic truth by being open to discuss sensitive and unpopular ideas. Academic freedom, on the other hand, refers to the freedom of the teacher to study and teach content related ideas that may lead to controversy without the fear of threats or sanctions. To be sure, academic tenure is the structure that safeguards academic freedom.

This article is intended to have two purposes. First, to provide a rationale in support of academic tenure for teachers who risk being controversial in their attempt to teach the skills of critical thinking and the pursuit of academic truth. And second, to outline from the professional literature a number of principles and strategies that provide classroom teachers with a guide to improve their schools' competence in teaching critical thinking and the learning of subject matter.

Critical Thinking and the Nature of Teaching

To understand the relationship between tenure and the teaching of critical thinking, there is a need to define both critical thinking and the act of teaching. According to Lee & Pallone (1966, p. 92), teaching is a joint search for truth between teacher and learner. Lee & Pallone (1966, p. 93) go on to say that teaching focuses on the students' need to seek truth, both within and outside of themselves. Correspondingly, Bauman (1977) believes that it is impossible to teach anyone to think the truth without teaching them to think critically. Critical thinking, on the other hand, has been defined as a process for determining the value of an idea (Fitzpatrick 1993, p. 42). Others see critical thinking as a process of thinking without a single solution (see for example Kataoka-Yahiro 1994, p. 352). To put this article into context, critical thinking is defined as making judgments about the truthfulness and worth of statements and ideas. Clearly, the foregoing definitions appear to suggest a coexistent and reciprocal relationship between critical thinking and the teacher's role in pursuing academic truth.

According to Paul (1990, p. xv), all of us students and teachers alike, are capable of believing things that are false or things that are true without knowing them to be so. Without scrupulous care, teachers may pass on to students their own moral blindness and closemindedness. Elsewhere, Paul (1990, p. 30) points out that open-mindedness, although proper, is not a "natural" disposition of the human mind. In the pursuit of truth, however; openness to contradiction and opposing points of view are the hallmarks of the critical thinking classroom. Indeed, Paul (1990, p. xv) goes on to say that in teaching critical thinking we need others to help us probe our own thinking in the pursuit of truth and new knowledge.

Critical Thinking, Controversy and Tenure

For Scriven (1985) teaching critical thinking is coping with controversy. Bernstein (1995, p. 22) goes a step further when he says, "controversy is fundamental to critical thinking and new knowledge".
Conversely, Noll (1987) believes that the lack of controversy signifies the presence of complacency and the absence of realistic alternatives to existing circumstances. While making no attempt to address the immediate effects of critical thinking and controversy on the learning of specific subject matter, the above writers would apparently agree on the positive effects that critical thinking and controversy have on learning.

Other writers have provided support for the positive effects that critical thinking and controversy have on the learning of subject matter. For example, Johnson & Johnson (1993) believe that controversy tends to result in greater mastery of subject matter being studied, as well as, greater ability to generalize principles learned to a wide variety of situations. At the same time, Paul & Elder (1996), Lipman (1985), and Shanklin & Rhodes (1989), report a positive relationship between critical thinking and student understanding of subject matter. Perhaps it may be appropriate to state then that controversy fostered by critical thinking enhances the student's knowledge and learning of subject matter.

In 1985, Scriven (1985) maintained that most teachers would be reluctant to facilitate critical thinking by providing a fair presentation on a controversial topic like "The Legalization of Marijuana". According to him, the resulting controversy would likely lead to teacher sanctions and possible dismissal. Without academic freedom, current teachers may be equally reluctant to provide fair presentations on controversial topics like "Gay Rights", "Evolution" or "Abortion". More to the point, Scriven (1985) believes that an additional lesson may be learned here when students realize that the school is corrupt and does not value the pursuit of academic truth by way of a fair examination of sensitive and unpopular views.

Because of the coexistent nature of critical thinking and controversy, it goes without saying that controversy is likely to follow the teacher who attempts to pursue truth by way of a fair-minded examination of sensitive and unpopular views. Furthermore, the resulting controversy might well put the teacher's position in jeopardy without the protection of tenure or something similar to it. For the sake of being precise, it is important to note that this article defends the practice of tenure to protect teachers from controversy that arises from critical thinking and the pursuit of truth. No attempt is made here to defend the practice of tenure to protect teachers from controversy that arises from teacher bias and attempts to teach what is not known to be true as though it were true. Indeed, controversy that arises from the teacher's attempt to indoctrinate students might well be grounds for teacher sanctions and possible dismissal.

**Democratic Principles, Tenure and the Teaching of Critical Thinking**

Much of the belief and support of academic freedom and tenure would appear to be related to the importance our schools and universities place on the principles of democracy and our commitment to teach students to think for themselves by learning how to think not what to think. Curriculum specialists will most likely agree that a necessary part of the curriculum is taught when students acquire the skills of critical thinking generated by a fair examination of both accepted and controversial ideas in the pursuit of truth and academic knowledge. By showing confidence in the students' ability to think for themselves, we not only show confidence in democratic values but we also strengthen the capacity of our society to make sound decisions in the future. Correspondingly, the Supreme Court views academic freedom and the pursuit of truth by teachers and students as a vital link to our future existence as a nation when they say:

To impose any straitjacket upon the intellectual leaders of our colleges and universities would imperil the future of our nation. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die (Sweezey vs. New Hampshire, 1957).

It seems obvious that in a democratic society we ought to hold on to the structure of academic tenure until we have another viable safeguard for the academy's core belief. Yet, according to Perley (1995), these are
very hostile times for all of us who work in the academy. He questions why our friends and enemies need to attack so viciously a vital component of our society that has served us with excellence throughout our history. Certainly, the problem of unproductive personnel is a problem that all organizations face. According to Tierney (1997, p. 21), we ought not to focus on a false problem -- tenure -- and seek to change it when no evidence exists that organizations without tenure are any more productive than schools and universities. Added to that is the observation that in a democracy, American higher education became the best in the world at a time when tenure existed. What would we lose if tenure were eliminated? On this point, Perley (1995, p. 45-46) is very succinct when he says:

The answer is simple -- the very best educational system in the world. A system where it is possible to raise the difficult and controversial question and not worry about being fired for the asking. A system that has produced minds that are not mere mimickers of their mentors. A system where individuals have obligations not only to their chairs or to their administration, but to their disciplines and profession. In short, we would lose the very features that permit us to look at the outrageous and see beauty ... that survival means we have to be more compliant and accepting of judgments made by others.

Rather than maintain an evaluation system that looks backward, Perley (1995) feels that we need to create a culture that looks forward and tries to outline how individuals and organizations want to perform. Discussions about tenure or faculty productivity framed as if faculty are obstacles, deadwood, or laggards is unhelpful. Conversely, dialogues that frame our work as a way to help faculty improve and develop enables us to create definable goals about how the individuals and units might mutually be supportive of one another. It is in this spirit that the writer has outlined from the literature a number of principles and strategies that will enable teachers to look forward and improve their schools' competence in the teaching of critical thought and the learning of subject matter.

1. Students must be encouraged to enter empathetically into the arguments for both sides of an issue to ensure the strongest possible case for each side. (Johnson & Johnson 1993, p. 43)

2. Provide role switching exercises to see if students can pass the entry test for critical thinking about an issue. The test requires each person to be able to give the whole range of arguments for the side they oppose in a way that is entirely acceptable by those who support the position. (Scriven 1985, p. 12)

3. Brief students in advance to be respectful of others' feelings by reminding them of the personal nature of the issue under discussion. (Cohen 1993, p. 241)

4. Following a debate ask the class to sit down and write a few minutes about why they believe as they do. Ask them to discuss the influences in their lives that they feel helped them arrive at their current position. (Wade 1995, p. 24)

5. Students should be encouraged to evaluate the behavior and politics about what they read. The teacher might ask "Why did this government say they took this action?" "Was the reason consistent with their behavior and action?" (Paul 1990, p. 333)

6. To increase students' intellectual skills students can examine texts for questionable assumptions and the potential effects of such errors on conclusions. (Litwin & Haas 1983, p. 46)

7. At every opportunity students should be given the opportunity to advance ideas of their own and give reasons to support them as well as opportunities to hear objections from other students. (Paul 1984, p. 7)

8. When the class is discovering an issue about which people disagree, the teacher can encourage students to check a variety of sources supporting different points of view. (Paul 1990, p. 333)
9. Students should be able to specify the assumptions that underlie a particular statement where the truth of the statement is contingent on the assumption "Is Cairo in Egypt?", "Yes, assuming that the Cairo you are talking about is the capital of Egypt". (Lipman 1985, p. 20)

10. Students should be able to probe loose questions by asking questions like "How do you know that? What is the evidence? And if this is true does it follow that other matters are true?" (Glaser 1985, p. 24)

11. When discussing an issue, the teacher can ask students to ask themselves metacognitive questions like "What is the evidence?" "What would someone who disagrees with me say?" (Paul 1990, p. 324)

12. When evaluating an article, students are invited to ask questions identifying ambiguous language, questionable assumptions and major reasoning problems. (Keeley & Browne 1986, p. 386)

Summary

This article has provided a rationale in support of academic tenure for teachers who risk controversy in their attempt to teach the skills of critical thinking and the pursuit of academic truth. Tenure was defined as the structure that provides protection for faculty to undertake investigations in a climate free of recrimination and penalty. Critical thinking, on the other hand, was defined as making judgments about the truthfulness and worth of statements or ideas.

The writer has alluded to the coexistent nature of critical thinking and controversy, at the same time, support has been provided to indicate a fundamental positive relationship between controversy and student-learning of related subject matter content.

Because of the coexistent nature of critical thinking and controversy, the article logically assumed that controversy would likely follow the teacher who attempts to teach critical thought by providing a fair-minded examination of sensitive and unpopular views. It was further pointed out that the resulting controversy might well put the teacher's position in jeopardy without academic tenure or something similar to it.

Further support for academic tenure has been provided by emphasizing the importance of our democratic principles and the commitment to teach students in our schools and universities to think for themselves. Finally, the article looked forward by outlining a number of principles and strategies that enable teachers to create a culture of thinking in our educational classrooms.

References


Forum, 65, 24-27.


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IN DEFENSE OF ACADEMIC TENURE

Richard B. McKenzie

Abstract: Academic tenure is often criticized on the grounds that it protects incompetent or slothful professors and defended on the grounds that it encourages free expression by professors. From the perspective of this article, tenure is a labor market response, grounded in supply and demand forces, to the particular institutional features of colleges and universities. As opposed to protecting professors from external political and religious forces, tenure is seen here as a means by which professors seek partial contractual protection from internal political forces and the vagaries of academic democracies.

*Journal of Economic Literature Classification: D23, I120, J23*

Academic tenure has become, understandably, the holy grail of newly employed assistant professors in colleges and universities in the United States. Without tenure, faculty members must, as a general rule, be dismissed after seven years of service, which means they must seek other academic employment or retreat from academic life. With tenure, professors have the equivalent of lifetime employment. Rarely are they fired by their academies, even when they become incompetent to teach and/or conduct research [NAZARIO, 1989].

Professors do not have, of course, complete protection from dismissal, and the potential for being fired may not be reflected fully in the number of actual firings [NAZARIO, 1989]. However, professor firings are for causes generally unrelated to their professional competence, a fact that has caused critics to charge that professors are unduly protected by the remaining vestiges of the tenure system. Given that most students and close observers of academic life can easily recall cases of gross incompetence on the part of faculty members, tenure has come under increasing attack from several prominent quarters.

Journalists have often been hostile critics of the academic tenure system, especially now that (given the dictates of the Age Discrimination Act in the United States) retirement for professors can no longer be mandated. Even able faculty members [two of the most widely read are SOWELL [1993] and ANDERSON [1992]] have been hostile critics of tenure. SOWELL scoffs at the system, reckoning that "it would be hard to conceive of an institutional arrangement with more potential for irresponsibility" [SOWELL, 1993; p. 276].

Why does tenure exist at all? This article seeks to answer that question. To put the contribution of this article in proper context, several of the arguments presented will be familiar to institutional economists. However, in contrast to conventional arguments, it is argued here that tenure survives in modern academic settings not merely because it provides faculty members with protection from political and religious forces outside of universities which would stifle independent and creative thought, and not because faculty members control the terms of their employment contracts. The point of departure in this article is a conventional one in standard microeconomic theory: Tenure survives primarily because it represents a mutually beneficial trade between professors and their universities. However, we add that the tenure arrangement gives professors some (but not total) employment protection from the ebbs and flows -- the ravages and vagaries -- of institutional politics inside universities, while universities gain by paying lower wages and less fringe benefits than they might otherwise pay for the caliber of professors they hire.

In this article, universities are seen as extensively (but not totally) labor-managed firms in which workers (professors) determine, in important ways, the nature of the educational services provided, who provides them, and how one another's work is to be evaluated. While CARMICHAEL [1988] has recognized that universities have reasons to "supply" tenure as a part of the employment contract, no one has recognized the institutional-based "demand" for tenure on the part of faculty. Tenure is a means by which professors
can protect themselves, at least partially, from the uncertainties that inevitably emerge when management decisions are made by a continually changing group of workers (professors) who may shift their political alignments. In short, tenure is a form of job protection professors have from their colleagues and the special problems created with an academic democracy.

The Conventional Wisdom of Tenure

If tenure has, on balance, grossly perverse consequences, as so many critics charge, why has it survived for hundreds of years? Tenured faculty members and tenure's critics are inclined to argue that tenure serves a useful educational purpose by promoting politically independent and original thinking. Originally, tenure was conceived to protect faculty members' livelihood from assaults by politically and religiously powerful people outside universities who might disagree with the professors' controversial research findings and teachings and who might put pressure on university administrations to fire or discipline professors. EPSTEIN and MACLANE [1991; p. 87] have argued that tenure is designed to fortify the public's confidence has in academic research, thereby representing a "response" to a wide range of external pressures on universities.

Today, critics of tenure point out that outsiders no longer pose serious threats to faculty members' continued employment, mainly because of legislated or judicial protections. As opposed to promoting independent and creative or just controversial thinking and teaching, critics charge that tenure promotes stagnant or uninspired thinking and lazy and incompetent teaching [aigner, 1993]. Alternately, the academic employment system in universities has been established and maintained by faculty members who promote their economic and professional interests -- if not "self-indulgence" [Sowell, 1993; p. 277] -- at the expense of financial supporters, students, taxpayers, and contributors. Hence, tenure can be abolished or severely circumscribed, and the interests of the non-faculty constituencies of universities can be better served with little added cost. At any rate, outside political threats to faculty probably do not constitute an important reason for expecting tenure to arise and survive in modern academic settings today.

Clearly, tenure has costs that must be borne by the various constituencies of universities. Professors do, at times (if not often), exploit tenure by shirking their duties in the classroom, in their research, and in their service to their universities. However, tenure is not the only contract provision that has costs, and some others are under the control of faculty members. Health insurance (as well as a host of other fringe benefits) imposes presumably unnecessary costs (because of misuse or overuse of health care resources) on faculty members directly and students indirectly. Nonetheless, health insurance costs continue to be covered by universities because the benefits matter too, not just the costs. Health insurance survives as a fringe benefit because it represents, on balance, a mutually beneficial trade for the various constituencies of universities. Universities (which can buy group insurance policies more cheaply than individual faculty members) are able to lower their wage bills by more than enough to cover the insurance costs because they provide health insurance. By the same token, professors obtain a fringe benefit that is worth more than the value of the foregone wages.

Tenure, like health insurance, is a voluntarily negotiated contract provision that has survived all the problems that critics have identified (and few dispute). Moreover, tenure is widely advertised and promoted by universities as a favorable employment feature. The fact that it remains a contract provision prized by faculty suggests that, on balance, tenure is very likely to benefit -- on balance -- both sides of the employment contract, the universities as well as the professors and students. To understand the reasons for tenure, the nature of academic jobs and how they compare with jobs in other industries must be recognized. Such a line of analysis can begin by recognizing that academic labor markets are tolerably, if not highly, competitive, with thousands of employers and hundreds of thousands of professors, and wages and fringe benefits respond tolerably well to the market conditions. If, in fact, tenure were not a mutually beneficial trade between employers and employees, universities -- who are constantly in search of more highly
qualified students, faculty at lower costs, and higher recognition of their programs -- would be expected to alter the employment contract, modify the tenure provision, increase other forms of payment, and lower overall university costs.

The Nature of Academic Employment

In response to sales, supervisors in fast food restaurants can determine not only how many hamburgers to cook but how many employees are needed to flip hamburgers (and assemble the different types of hamburgers). They can judge the performance of workers, partially because they, too, have experience doing the jobs, but also because the tasks are relatively simple and the employees' behavior is easy to observe and relate to an overriding goal of the firm, securing profit. Where work is relatively more or less simple, routine, and easily evaluated, we would expect it to be defined by and evaluated within an authoritarian/hierarchical governance structure, as is generally true in the fast-food industry. Following the logic of ALCHIAN and DEMSETZ [1972], workers in such market environments would be inclined to see supervisors as people who increase the income of stockholders and workers mainly by reducing the extent to which workers shirk their agreed upon duties.

Academic work is substantially different, partially because many forms of the work are highly sophisticated, because its pursuit cannot be observed directly and easily (given the reliance on thinking), and because it involves a search for new knowledge which, when found, is transmitted to professional and student audiences. Supervisors (boards of directors, presidents, and deans) may be highly trained in a discipline and one or two subdisciplines, but they are often called upon to employ workers/professors who know far more than the supervisors about the faculty members' assigned areas of research and teaching. Academic supervisors may know in broad terms what a "degree" should be and how "majors" should be constituted at any given time. However, they must rely ultimately and extensively (but not necessarily completely) on their workers/professors to define their own specific research and classroom curriculums and to change the content of degrees and majors as knowledge in each field evolves. Academic administrators and officials employ people to conduct research and explore uncharted avenues of knowledge that the officials themselves cannot conduct or explore because they lack knowledge of assigned fields, have no time, or are not so inclined to do so.

Professors, on the other hand, frequently undertake esoteric research projects, the benefits of which are uncertain, cannot be captured in salable products, and have no value in the market where the professor works. In this regard, much academic research involves the production of the classic public (as distinguished from private) good, which compounds the problems of evaluating the contributions of individual professors. Moreover, the value of some research may not be known for a long time. Indeed, its value may change with the passage of time, perhaps even falling to zero or a negative value.

Academe is a type of business that tends to be worker managed and controlled, at least in many significant ways. This aspect of the academic marketplace solves many decision-making problems but introduces other serious problems of unstable, if not volatile and uncertain, decisions over time and circumstances from which professors will seek contractual protection. Worker-professors are called upon extensively to determine what their firms (universities) produce (what research will be done, what courses are required, and what will be the contents of the various courses, even who will be taught), who is hired to teach identified courses and undertake related research, how workers are evaluated, and when they are fired. Because they are limited in just how much they can know about any field, supervisors in academic environments have seriously circumscribed control over those environments, which implies a high degree of worker (collective) involvement in management decisions, for example, hiring, evaluating, and firing workers.

Historically, worker involvement in academic management has been restricted and guided by the rules of
academic democracy, with many decisions being made by consensus or explicit votes. Delegation of decision-making authority, especially in large college and university settings, mutes the importance of residual claimancy [see MCCORMICK and MEINERS, 1988]. The professors themselves become, to a significant degree, the residual claimants on the value of their research. Given the public goods nature of much of their research, the residual to be claimed is more likely to be that of reputation benefits within their disciplines rather than financial rewards (given that much research does not result in products that can be sold).

The diligence with which professors will actively and effectively participate in the democratic-managerial process will be affected, of course, by the size of their academic units [OLSON, 1965]. In a small department (or university) setting, the professors may participate with due diligence and effectiveness. Their own work on managerial matters will, with a high probability, materially affect the professors' own welfare. However, in a large department (or university) setting, the decision-making authority might be spread so thinly over so many professors that no one professor can count on his or her managerial activities counting for very much in the decision-making process. Following the logic of collective action, as developed by OLSON [1965], an increase in the number of professors within relevant academic units can reduce, beyond some point, the incentive of individual professors to participate with due diligence in the managerial-democratic-political process, a consequence that can compound the instability problems of democratic decision-making with elements of risk and uncertainty. Free riding on the part of other faculty/decision makers can be construed by each individual faculty as a potential threat to his or her future income stream against which contractual protection is deemed desirable.

The argument can be stated without using the examples of fast food and academe, but those examples enable us to deduce a managerial principle of sorts: the simpler it is to accomplish a job, the more likely it is that managerial control will be delegated to a supervisor. The more sophisticated, esoteric, and varied the job to be done, the more likely managerial control will be relegated to the workers themselves and the more democratic the decision-making will be (with, of course, some expected growth in shirking, following ALCCHIAN and DEMSETZ [1972]). If tenure did not exist, we cannot say, based only on the arguments developed here, that tenure would necessarily be created. However, it can be inferred that where universities make use of the principles of academic democracy, or to the extent that they do, there would be, as we will see, supply and demand-based pressures for some variant of the tenure system to emerge.

Of course, not all academic environments share the same goals or face the same market and internal organizational constraints. Some universities view pushing back the frontiers of knowledge as central to their mission, while others are intent on transmitting the received and accepted wisdom of the times, if not the ages. Some universities are concerned mainly with promoting the pursuit of usable (private goods) knowledge, that which has a reasonable probability of being turned into salable products, while other universities are interested in promoting research the benefits of which are truly public, if any value at all can be ascertained.

In short, in some universities, the assumed and assigned tasks of professors are fairly stable over time, the value of what is done is broadly acknowledged, and the basis for evaluating their efforts remains similarly stable. Other universities exhibit opposite characteristics; that is, the assigned tasks of professors are ever-changing, the value of their efforts is not well defined (if known at all), and the basis for evaluating the efforts of the professors is as changeable as the nature of what they do. We would expect the stable academic environments to be inclined to rely extensively on authoritarian control and the ever-changing academic environments to be inclined to rely more extensively on labor management and academic democracy. (The same, of course, could be said of many non-academic firms.)

**Why Tenure?**
Contract provisions will tend to reflect how willing employers and employees are to adjust to particular conditions of employment. Workers in restaurants are sometimes paid in part with discounted or "free" food that can be provided by employers at modest cost (or at a cost lower than the cost that might have to be incurred to prevent theft). Similarly, as will be seen, the conditions of academic employment suggest several reasons why tenure will likely be one of many prominent (although not absolutely necessary) contract provisions that will, in effect, be supplied by employers and demanded by professors.

The Supply of Tenure

CARMICHAEL [1988] reasons that tenure exists in academic environments primarily because worker-professors are called upon to select new members. CARMICHAEL compares the employment methods used in baseball and universities. In baseball, the owners through their agents determine who plays what position on the team. Baseball is, in this sense, "owner managed." In academe, the incumbent worker-professors select the team members and determine which positions they play. Academe is, to this degree, "labor managed." In baseball, the owners' positions are improved when they select "better players." On the other hand, in academe, without tenure, the position of the incumbent decision-makers could be undermined by their selection of "better professors," those who could teach better and undertake more and higher quality research for publication in higher-ranking journals. "Loosely, tenure is necessary," CARMICHAEL concludes, "because without it incumbents would never be willing to hire people who turn out to be better than themselves" [CARMICHAEL, 1988, p. 454]. CARMICHAEL's argument does not lead to the conclusions that all weak professors will vote against "better" candidates in the absence of tenure, only that tenure, to the extent that it provides a measure of job protection, tempers faculty incentives to vote against "better" candidates.

Thus, tenure can be construed as a practical means employed by university administrators and board members to induce faculty members to honestly judge the potential of new recruits. In effect, university officials and board members strike a bargain (with varying degrees of credibility) with their worker-professor-decision-makers: If you select new recruits who are better than you are, you will not be fired (or, at least, will have a measure of contractual protection against being fired). CARMICHAEL claims his model rules out as "infeasible" the "first-best practice of firing the weakest incumbents, either to replace them on an ongoing basis or to save money in times of financial crisis, even though they may readily be identifiable and clearly overpaid" [CARMICHAEL, 1998, p. 471]. Pursuit of the "first-best" practice would actually encourage professors to select inferior recruits.

In short, tenure imposes costs on college and universities in the form of overpayment and indulgence of some undefined number of professors and their methods. At the same time, those costs can be seen as unfortunate (but maybe necessary) consequences of doing the business of academe with less than perfect people who may seek to protect their own private interests at the expense of the goals of the broader academic community.

As noted earlier, not all academic settings are alike. Some colleges and universities do not need to rely heavily on the management knowledge and skills of worker-professors, because they are in the business of providing a well-defined and stable education with more concrete measures of faculty performance. They do not need to have tenure or worry about the consequences of making tenure less secure, because in such academic settings new recruits can be evaluated by higher officials and the decisions of the faculty usually are tightly constrained by the decisions or veto power of higher administrators.

The Demand for Tenure

CARMICHAEL's model explains why administrators would want to supply tenure, but it does not explain why faculty would demand tenure. After all, with decision-making authority and without tenure, faculty
could, presumably, protect their jobs simply by failing to select recruits who are better than themselves. Therein lies an important additional explanation for tenure that CARMICHAEL has not considered: Tenure is designed to protect worker-professors from their colleagues, acting alone or in a political coalition, in a labor-managed work environment operating under the rules of academic democracy.

Academic work is often full of strife, and the reasons are embedded in the nature of the work and the way work is evaluated and rewarded. Except in unusual cases, it is difficult, if not impossible, to assess the absolute value of much of the work of academics, at least in the short run. Teaching and research quality is normally assessed in relative terms, and raises (which are largely influenced by exogenous factors, for example, state budget decisions) typically are allocated based on relative performance. As a consequence, a faculty member can improve his/her relative raise (or "slice" of the department's income pie) in two ways: first, by additional production (more articles published or higher student evaluation scores), and, second, by predation (thwarting the productive efforts of colleagues), a point developed at length by MCKENZIE [1979]. Some professors will have a comparative advantage in production, which necessarily implies that others will have a comparative advantage in predation. Once predation becomes a way of life within a decision-making unit, competing factions can be expected to seek to extend their influence and defenses by forming coalitions among incumbents and then attempting to increase the sizes of their coalitions by evaluating recruits not so much for their academic qualifications but for their likely political allegiances and effectiveness.

Tenure is a means of putting some (minimum) limits on political infighting. It increases the costs predatory faculty members must incur to be successful in having more productive colleagues dismissed. More importantly, academic decisions on the worth of colleagues and their work often are made by the rules of consensus or democracy among existing incumbents. However, five problems emerge from reliance on internal democratic decision-making.

First, and perhaps most importantly, academic democracy is a process that gives individuals the right to vote and to change their individual and collective votes at will, for whatever reason -- good or bad, productive or counter-productive -- the individuals deem valid. To that extent, rules of academic democracy undermine the concept of a tolerably firm contractual relationship between the worker/professor and the university. Professors who are hired to do one thing (either teach, research, or engage in some implied fixed combination of those activities) may be judged for annual raises and retention by a totally different standard, given the changing views (which might be little more than whims, given the size of the decision-making group and the incentive structure) of the voters/professors.

Second, even with constant standards of judgment, public-choice economics has long recognized the prospect that collective decisions, especially in small groups of voters, can exhibit apparent inconsistencies. ARROW [1963] has shown that every faculty member may exhibit normal transitive preferences but collective decisions can be intransitive and unstable, ever-changing as majorities shift, even within a constant group of voters. In short, relying on labor-management decisions, even in a relatively stable group of decision-makers, harbors the inherent prospect of instability in evaluative decisions (what public-choice economists have begun calling the "paradox of voting" or the problem of "cyclical majorities"). Faculty members would want some protection from the oscillating changes in their status that can occur over time each time there is a shift in the way decisions are structured.

Third, within the labor-managed academic environment, decision instability is made even more problematic because the cast of decision-makers is forever changing with new hires, firings (to the extent there are any), and retirements -- a fact that adds to the instability and unpredictability of political coalitions within academic decision-making units.

Fourth, within units, individual professors can change their assessment of the value of different disciplines,
research methods, and courses; and the changes in their assessments, when coupled with the changing cast of decision-makers, can compound over time the instability and unpredictability of unit decisions.

Fifth, the many coalitions (especially the larger they become) themselves are inherently unstable primarily because individual faculty members have a stake in taking a greater share of the coalition gains, in spite of the fact that the total coalition gains may be reduced by the efforts of individual faculty members [OLSON, 1965].

A much-offered argument in defense of tenure is that it protects academic workers from attacks by outside political and religious forces that might seek to squelch unpopular research findings and teachings. Closer scrutiny of the situation will reveal that few on the outside understand what professors do in their research or their classes because it is so esoteric and because few professors go public with their ideas. Note, then, that many professors who never expect to confront hostility from outside political forces still demand tenure protection. The analysis developed here suggests what such professors are really seeking is protection from the potential for changes -- not necessarily the reality of change -- in internal political forces and dynamics.

Professors have understandable reasons for demanding tenure. One widely recognized reason is that the esoteric nature of their work may diminish the market value of their skills because the narrow focus of their work may not translate into alternative job opportunities in the market place. Another less widely acknowledged reason is that there are political problems inherent within all democratic processes, and professors want, in effect, to be protected from the process and from their colleagues. If their work is intensely specialized, they want some assurance of job security in spite of changing assessments by ever-changing majorities. Universities can be seen as willing to provide tenure because they must delegate decision-making power to those who have the requisite knowledge and information of different disciplines if they want faculty members to specialize their efforts. Universities also realize, given the nature of academic democracy and the threats it poses, that faculty members have inherent reasons for demanding tenure, and these make it possible to recoup the cost of tenure by reducing professorial wages to less than what they would have to be if the professors did not share a need for job security.

Of course, this line of analysis leads to a number of deductions:

- If the work of professors were less specialized, more generally demanded in a variety of alternative job opportunities in and out of academe, professors would be less inclined to demand tenure.
- As a group of decision-makers or a discipline becomes more stable, we would expect faculty to consider tenure less important and to be less willing to forego wages and other fringe benefits to obtain tenure.
- If there is a close to even split on democratic decisions related to employment, merit raises, and even tenure, faculty members will assign more value to tenure, given that an evenly split vote may change with slight shifts in the composition of the decision-makers.
- The further below market are the wages of faculty during the probation period and the further above market are wages after tenure, the more valuable unbreakable tenure is to faculty members.
- As the diversity within a decision-making unit increases (the more disciplines included with more divergent views on how analyses should be organized and pursued), the demand for tenure will increase.
- Should universities become more constrained in their capacities to fund established faculty positions, tenure may be perceived as even more valuable. Financial exigencies can translate into the loss of faculty positions (with non-tenured positions becoming prime targets), so it should not be surprising that faculty will seek with greater diligence to redistribute remaining positions and rents. It also means universities will probably have to spend considerable resources seeking to instill academic values -- not the least of which will be the pursuit of honest dealings and academic excellence -- and
this emphasis may cause faculty members to shun the incentive inherent in the political process (especially in large group settings), that is, the tendency to pursue strictly private objectives at the expense of larger university goals.

Why Not Tenure in Firms?

The quick answer to that question is that businesses, unlike universities, typically are not labor managed. (Those that are like universities should be expected to use some form of formal or informal tenure.) As noted, in businesses, goals are usually well-defined. Perhaps more importantly, success can usually be identified with relative ease by using an agreed-upon measure of success, that is, profit (or the expected profit stream captured in the market prices of traded securities). The owners, who are residual claimants, have an interest in maintaining the firm's focus on profits. Moreover, people who work for businesses tend to have a stake in the type of honest dealing discussed by CARMICHAEL, given that their decisions on "better" recruits can increase the firm's profits and the incomes and job security of all parties.

Admittedly, real-world firms do not always adhere to the process as described. Real-world firms use, to a greater or lesser degree, participatory forms of management (and for some firms profit is not always the sole or highest priority goal.) The point is, however, that in firms there is not as great a need for tenure as exists within academe; employees in businesses do not have the incentive to demand tenure that professors have, primarily because these employees do not experience the problems inherent in democratic management that derive from imprecise and shifting goals and from esoteric and ill-defined research projects. Tenure is seldom found in firms, for the simple reason that in business employers and employees cannot make mutually beneficial trades (similar to those made in tenure arrangements).

Tenure Tournaments and Supply

and Demand Forces

The oft-repeated theme of this analysis is that a faculty member's performance can be judged only in relative terms, and this, combined with the fact that professors' relative abilities are difficult to observe directly, especially in the short term, makes tenure a valuable feature in the employment contracts of faculty members. In order to induce promising faculty members to accurately assess their abilities and to confess their limits, universities have established what amount to tournaments, that is, research and teaching competitions among new faculty members [see LAZEAR and Rosen, 1981]. The competitors know that only some among them will be promoted and retained. Since standards for tenure differ from one university to another, universities offer prospective faculty members an opportunity to, in effect, self-select and go to a university where they think they are likely to make the tenure grade. The prospects of being denied tenure will cause many (but certainly not all) weak faculty candidates to avoid universities that have tough tenure standards, given the probability that they would have to accept wages well below market during the probation period. Thus, the tenure tournaments can reduce to some extent the costs universities incur in gathering information and making decisions, because they force recruits to be somewhat more honest in their dealings and to self-select.

Competition for the limited number of "prized positions" often will drive new faculty members to exert a level of effort and produce a level of output that exceeds the value of their current compensation. To induce prospective faculty to exert the amount of effort necessary to be ability-revealing, universities must offer a "prize" that potential recruits consider worth the effort. That is, the recruits must expect the future (discounted) reward to compensate them for the extra effort they expend in the tournament and for the risk associated with not "winning." One approach universities can use to encourage recruits to exert a reasonable level of effort in the competition is to offer to those who win the prospect of substantially greater compensation in the future (at least enough to repay the costs of assumed risk and of interest lost on
delayed compensation).

In the absence of tenure (or some similar device), universities would find it more difficult to make a credible commitment that prospective recruits, who make the necessary competitive investment during the probationary period by accepting below-market wages for above-market effort, will receive an income stream that compensates them for all costs, including the required risks. We have stressed the instability inherent in academic democracies that, by its nature, reduces the credibility of virtually every commitment universities might want to make. Tenure is a practical means many (but not necessarily all) universities can use to provide a reasonable level of job security -- to make a credible commitment -- that is, to overcome institutional instabilities and thereby enable them to pick the 'best' professors for continued employment.

After tenure is awarded, the effort expended by some faculty members should be expected to decline, while, at the same time, their pay rises. In the midst of the tournament, the new faculty members will exert unduly high amounts of effort, simply because of the prospect of being rewarded in the future by higher pay and greater job security. If we did not expect new faculty members to anticipate relaxing somewhat after attaining tenure and enjoy, to a degree, being 'overpaid,' we could not expect the tenure tournament to be effective as a means to an end, which is disclosure of the limits of new faculty members' true abilities.

The Abolition of Tenure

If tenure were solely a means of protecting professors from external political and religious forces, its abolition might have few negative consequences, but as argued here, there are good reasons to believe that the discontinuance of tenure policies would give rise to problems unrecognized by tenure's critics, not the least of which would be higher faculty pay. However, protection from external forces is probably the least worthwhile benefit associated with tenure. Hence, without changes in the condition of employment, the abolition of tenure would probably have more serious and perverse consequences than most of its critics imagine. The foregoing analysis suggests that if tenure were abolished across the board, it would tend to:

- Increase the pay of new, untenured faculty both during and after their normal probation period;
- Reduce the willingness of incumbent faculty members to choose superior recruits;
- Reduce the inclination of new faculty members to reveal the true limits of their abilities, because less intense competition would provide less of an incentive to be seen as a superior recruit (indeed, there would be an incentive to be seen as inferior);
- Reduce the willingness of faculty members to undertake long-term, risky research and teaching projects and, at the same time, increase their willingness to undertake teaching and research projects that maintain and enhance their marketability (so their skills would tend to become less specialized and more general);
- Reduce departmental infighting, given that there would be less job protection for those who engaged in predatory behavior, and there would be less reason for faculty members to endure the consequences of others' predation, given the greater tendency to develop their less specialized and more market-oriented professional skills; and
- Decrease university administrations' reliance on faculty for management decisions, given that research and teaching would tend to become more routine or standardized and less esoteric and risky.

Concluding Comments

Tenure is a contract provision that faculty members prize, universities provide, and just about everyone else criticizes. Nonetheless, tenure survives, mainly because faculty members aggressively demand it (even those who believe strongly in the value of markets) and because universities voluntarily negotiate it. Tenure's long-term survival and the competitiveness of university labor markets suggest that the trade is mutually beneficial. This article has sought to explain why and how tenure can be mutually beneficial.
The critics of tenure may be right -- for some college and university settings, which have been identified in this paper. Tenure has good and bad features, costs and benefits, and the costs may often outweigh the benefits in certain academic circumstances. However, the nature of academic work in many of the nation's universities requires considerable reliance on labor-management decisions, a condition that suggests tenure survives for a very good reason: the problems tenure creates are far less costly than the decision-making problems tenure solves. Therein lies the extent of the defense of tenure marshaled here.

Clearly, some universities might want to abolish tenure, especially when and where faculty members no longer narrowly specialize in esoteric, difficult-to-evaluate research and teaching in areas that are tolerably stable. Other colleges and universities will see a net loss in removing tenure. Clearly, an across-the-board move to abolish tenure would deny a striking characteristic of academic employment settings: substantial differences exist in what faculty members are called upon to research and teach. Similarly, maintaining tenure without regard to what faculty members do would probably be as inefficient as total abolition.

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Reflections on tenure. (Special Issue: The Academy Under Siege) James E. Perley.

Abstract: Higher education, particularly the issue of the significance of academic tenure, has been under increasing attack in recent years. Among the changes that have been recommended to address the problem of tenure and its supposed ramifications, some suggest moves that would affect the vital aspects of academic life, including tenure and collegial governance. However, a closer look at these suggested changes reveals that some, if not most, are being recommended merely to boost the bottom line and to create a fracture within what is a delicate balanced partnership in the field of higher education.

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When I assumed the presidency of the AAUP in June of 1994, I began to collect and file articles and reports appearing after that date which deal with significant issues of interest to higher education. No folder has grown more or has had more frequent entries than the one labelled "Tenure-Attacks On". The folder now contains not only news articles, but summaries of interviews I have participated in and responses to speeches I have given on the issue of tenure.

As a biologist, my first impulse on encountering criticism is always to analyze the arguments given as objectively as possible and to try to apply logic in formulating appropriate responses that address the perceived problem. But meaningful responses to the attacks on tenure have turned out to be difficult, if not impossible to give, because the real issue turns out not to be tenure but what tenure protects, an academic world which has its own vital procedures and structures.

Just when a reasoned response to one claim is framed, the focus shifts subtly and a new dimension of the attack is revealed. I have reached the conclusion that the fight against the critics of tenure can better be understood by those in sociology than in biology, and that the most meaningful responses we can frame have to be grounded in principle and in the longstanding traditions of the academy.

First the attacks. What have been the claims? The earliest articles in my folder deal with "dead-wood". The assumption of many of these articles is that there is dead-wood in almost every department of every institution of higher education in the country. There is an unspoken understanding in my collection of articles that it is impossible to do
anything about such non-functional faculty members and that the institutional structure protecting them is tenure.

It is hard to be in favor of "deadwood," so the framing of the attack immediately puts the responder on the defensive. Of course, no faculty member would express a desire to keep those on a faculty who had lost interest in performing their duties with distinction. In looking at the faculty members I have known in both large public institutions and in small private ones over a thirty year career, however, I would have difficulty identifying many faculty members who needed to be removed from their positions for incompetence. A Provost from a large private university and a participant with me on a Pew panel charged with examining the future of higher education, confirmed my sense of the general quality of faculty work when he argued that we needed to institute faculty evaluation schemes, not because we would identify many faculty who needed help (he estimated that fewer than one per-cent of faculty would be identified in such screening as unproductive), but because such schemes were being demanded by the public who had lost confidence in the professoriate.

On thinking about the claim that tenure protects "dead-wood," it soon became clear to me that the appropriate response, if there are such non-productive faculty members, would be help to restore them to the state of excellence they possessed at the time of tenuring, assuming that they had once demonstrated excellence or would not have been tenured in the first place. When I made the suggestion that opportunities such as sabbatical leaves might be made available to weak faculty members so they could become reinvigorated, the suggestion has been dismissed as too costly. When I offered the suggestion that funds be increased for faculty development, or that a special fund be established to support the research of faculty who have found it increasingly difficult to obtain grants given the cutbacks we have seen at the federal level, I was told that buildings had priority on campus, in part because donors could more easily be found for buildings than for academic functions. And there was no answer when I had suggested that dead-wood might exist because administrators often found it awkward and seemingly dangerous to charge faculty members with incompetence and to allow such a case to be made before a committee of faculty peers.

When the argument about "dead-wood" is satisfied, the topic quickly shifts to the uncapping of mandatory retirement. The arguments here are best represented by comments made by the Chair of the Governor's Task Force on Educational Reform in Oklahoma. In responding to comments I made about tenure, he said that he could live with tenure if faculty members, at the time of hiring, agreed to a "twenty-years- and-out" clause in their contracts. At no time in his comments did he discuss the quality of faculty work; he was solely concerned with cost and simply saw faculty members at the end of their careers as too expensive. Without evidence, he had come to the conclusion that the uncapping of mandatory retirement had caused
great numbers of faculty members to stay on until they were carried out feet first, with yellowed sheets of stale lecture notes grasped in their hands. Even in an article appearing in The Chronicle of Higher Education this summer (August 8, 1997) dealing with the issue, the writer stated that not many faculty members were staying on after normal retirement age, but then proceeded to write an extended argument about the perils of such possibilities. Nowhere is there an apparent awareness of the reality that faculty members are not changing their retirement plans because of their new ability to stay in their positions for unlimited time.

Then there is the argument that tenure has caused a situation to develop that prevents young faculty members from being employed in full time positions. It is true that more and more young academics are relegated to serving in part-time and adjunct positions, but the reason does not lie in the intransigence of full time faculty members. It lies in the conversion of full time positions to part time and adjunct positions when tenured faculty members do decide to retire. And those conversion decisions have most certainly not been made by tenured faculty members; they have been made by administrators more concerned about the bottom line than about the careers of those hired in exploitive positions often without benefits, or about the highest possible quality education for students.

Then there are the arguments that academic freedom can be separated from tenure. These suggestions first appeared in the writing of C. Peter McGrath on the back page of The Chronicle of Higher Education on February 28, 1997. McGrath, a former university president and now president of the National Association of State Universities and Land Grant Colleges makes the case, in the pages of the most widely read weekly publication serving higher education, that the first amendment protects faculty members and that we do not need tenure to protect our ability to speak out. Is it really preferable to rely on legal remedies to determine the limits of free speech rather than on standards of academic freedom traditionally in place in the academy? Certainly the process of adjudicating the right to speak will prove costly, and it will undoubtedly be the legal part of our profession that will prosper. But my hunch is that it will be administrators who will have the unlimited financial support of boards of trustees required to pursue legal answers to difficult questions. My guess is that, like the valiant faculty members at Adelphi University, similar financial support will not be available to faculty members who wish to pursue questions about the limits of their speech.

The call to provide "alternatives to tenure" has been taken up by Richard Chait, writing from his position as tenured professor at Harvard. He argues that some faculty members might be willing to sell their tenure for higher salaries. One wonders what the right to speak up in faculty meetings is worth, or the ability to be critical of decisions made by boards of trustees, or the right to be critical of presidential possibilities brought to the faculty by consultants hired to
do searches, once done by faculty members working together with boards of trustees. I guess the market place will determine those prices. Then, like in the greater society in which we live, the bottom line will truly have replaced structures like academic freedom and tenure that have served the greater societal good in the profession we serve.

The latest moves on tenure involve the development of plans called "post-tenure review." Seemingly unaware of the fact that most faculty members are reviewed annually and that these reviews help determine salary increases, the new proposals would require extensive additional evaluations of faculty work. The difficulty with many of these proposals, aside from the bureaucracy that will be required to carry them out and the expense required to make them real, lies in the details. These proposals often seek to avoid the use of peer review and to avert due process protection for those charged with being non-functional. They emphasize the punitive, offering no developmental help to those identified as being in need of such help.

Not a day goes by without feeling the need to respond to another assault. Even as I write these words, for example, the Republican acting Governor of Massachusetts, Paul Cellucci, in an interview with the Boston Globe says he has never believed in tenure. He adds that he feels that people should be in front of the classroom because they are good, not because they are protected by some tenure or seniority. Perhaps he should make that case to Jocelyn Elders who was threatened with the loss of the tenured position she temporarily left in an Arkansas Medical School while she served our country as Surgeon General for positions she took on such forbidden topics as masturbation and the use of condoms.

Like reading the work of Kafka and realizing all is not what it seems, the more I see and hear the arguments against tenure, the more convinced I am that the issue being considered is not tenure but really revolves around questions of power and control.

The attacks on tenure are not occurring in a vacuum. Changes have swept through our industrial sector, resulting in stark and harsh new approaches to employment. The acceptance by society, including the academic profession, of downsizing (right-sizing), outsourcing, and engaging part-time employees without benefits has occurred without protest - at least until the strike of the UPS workers. And it is no great surprise to realize that those practices have become widespread in the academic world.

Faculty members are now seen merely as employees, rather than partners in the academic enterprise. A measure of that attitude is seen in the willingness of Boards of Trustees to include students as voting members on Boards that have no faculty representatives. It is seen in the comments of a Texas legislator who argued that seeking faculty opinion on post-tenure review policies before adoption by the
legislature was akin to "letting the fox in the chicken-coop". It is seen in the action of the President and Board of Francis Marion University in South Carolina when it abolished the elected faculty Senate and set up a governance structure involving faculty members of its choice.

The notion of the need for change in managerial style in higher education has many friends. Studies have been funded by the PEW Foundation that have described "new pathways". The American Association of Higher Education has published a series of positions papers advocating alternative academic career possibilities for academics. Elizabeth Coleman, the president of Bennington College, has been held up as the new heroine of these changes because she was a pivotal figure in the firing of a third of the faculty at her institution, many with tenure.

These new conceptions of work in the academic world fall on fertile ears in the chambers of Boards of Trustees, for many of those who serve there are from the world of business where the new management styles flourish. And given the political preference of many who serve on such Boards (the University of Akron Board of Trustees in Ohio, appointed by Governor Voinovich, has fourteen members - thirteen of them Republican), it is not at all surprising they see a need for change in our world as they have seen it in their own.

The result? In the last year we have seen tension and conflict in higher education where none existed before. Disagreement and division are more and more common. But more hopeful, we have also seen a new awareness of principle as faculty members become aware of the changes that are being contemplated.

The Board of Trustees of the University of Minnesota, using the advice of consultants, including Richard Chait, decided without consultation with the faculty to examine the alternatives to tenure. Over the summer they worked in confidentiality on their new approach to administrative management of the faculty and unveiled their new plans shortly after the beginning of the 1996 academic school year. Their goals were to "reshape the tenure code with the overarching goal of reshaping it to fit current and future needs". They expressed the wish to "provide the University decision makers with the flexibility to respond to the institution's changing circumstances". When the final plans were unveiled, the extreme nature of the proposed changes quickly became evident. The new standards would have allowed the firing of tenured faculty if they failed to "demonstrate a proper attitude of industry and cooperation with others within and without the University community". Dismissal could occur if there were violation of "commonly held standards of conduct" and these standards were undefined. In addition, the entire grievance system would have been changed to one chaired by an attorney, described as not belonging to the faculty.

The real reasons for these proposed changes were revealed in an
article in the Minnesota alumni magazine. In that article, one of the members of the Board of Regents, Jean Keffeler, who has resigned in the wake of the uproar caused by the proposals, is quoted as saying "If you can't cut your costs because they emanate to a large degree from non-removable expenses - namely tenured faculty with no mandatory retirement provision - then it's a short walk from there to the conclusion that you can't renew the institution".

Fortunately for the profession, the faculty at Minnesota rose up as one to declare the new standards unacceptable. The very narrow numerical loss of the proposal to organize collectively to fight the changes was a historic victory for the maintenance of the standards that have not only served the profession, but have helped Minnesota maintain its reputation as one of the flagship academic institutions in this country.

Now that we can see the attacks on tenure for what they really are, it is possible to begin to formulate ways to deal with them. In my judgment, the only way to successfully protect the profession we serve is to rise up in defense of the standards that have served us so well over the decades. These include the absolute necessity of tenure tied intimately to the exercise of academic freedom. They include the maintenance of the standards of collegiality once accepted not only by faculty members but also by bodies representing boards of trustees and administrators. They include the notion that the academic enterprise is a partnership and that faculty members are an important part of that partnership.

Part of the reason that the assaults on the structures undergirding the academy have progressed as far as they have is that we, as faculty members, are absorbed in our disciplines and have forgotten the obligation we owe to the profession as a whole. We have abandoned our involvement in governance, considering it best left to others. And in the vacuum that is created, new entrants in the administrative ranks - often people with training in management and not in academics - have developed and begun to implement their business-like approaches to running the enterprise. We have allowed conversion of full time tenure track positions to part-time positions, positions which exploit those holding them.

Only when we reclaim our rightful roles as partners, fully granting to others primacy in areas of the academy where they have primary responsibility, will we begin to hold off the assaults we have begun to see develop. We need to say in the loudest possible voice that, while academic institutions need to be run in a business-like manner, they serve very special and unique societal needs. And we need to help the lay public, administrators, and members of Boards of Trustees understand that we are proud members of a profession devoted to the education of all our students and to the advancement of knowledge.

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Is tenure necessary to protect academic freedom?
(Tenure Matters: Rethinking Faculty Roles and Rewards)
Erwin Chemerinsky.


THE ROLE OF TENURE IN PROTECTING ACADEMIC FREEDOM

The institution of tenure is under serious attack. New schools, such as the soon-to-open Florida Gulf Coast University, are being created without the possibility of tenure for faculty members.(1) Some universities, such as Vermont's Bennington College, have abolished tenure.(2) In fact, it is estimated that nationally, about 20 percent of all independent four-year colleges no longer offer their faculty tenure.(3)

In addition, there are efforts in many places to significantly weaken the traditional protections accorded to tenured faculty members. A national debate over tenure was triggered by a proposal by the regents of the University of Minnesota to allow the university to fire tenured faculty members whose departments are eliminated and to permit the university to cut the salaries of tenured faculty members for reasons other than a financial emergency.(4) At the University of Southern California, tenured faculty members in the Basic Sciences Department of the Medical School sued when the university decreased their salaries by 25 percent.(5)

Apart from all of these individual events, criticism of tenure is increasingly common by political officials and in the popular press. Attacks on tenure are prompted by a desire to increase the accountability of faculty members and to enhance the quality of their performance. Tenure is challenged as protecting the lazy faculty member who no longer engages in scholarship or effective teaching. The perception is that, safeguarded by a job for life, faculty members are insulated from scrutiny and pressure for enhanced performance.

Moreover, tenure is an anomaly; other than federal judges, who have their positions for life unless they are impeached, tenure is virtually unheard of in the American workplace. It is not surprising that politicians and the public question why academics should have a form of job security that is available to almost no one else.
Perhaps most important, the attack on tenure is a reflection of the lack of a recent systematic threat to academic freedom. During and soon after the McCarthy era, it was easy to explain the need for tenure to safeguard the ability of professors to speak and write in politically unpopular ways. Likewise, during the Vietnam War, tenure was understood as necessary to protect faculty members from reprisals for their political activities. But now those threats seem remote, and the need for tenure appears more abstract. A reflection of this is that a recent survey by the Higher Education Research Institute at UCLA found that 43 percent of all faculty members younger than age 45 believe that tenure is an outmoded concept, compared with about 30 percent of faculty members older than age 55.(6)

All of these attacks on tenure raise a basic question: is tenure necessary to protect academic freedom? Few would deny that it is imperative that faculty members be protected from adverse employment actions because of the content of their teaching, writing, or political activities. Protecting faculty members' freedom in these areas is both instrumentally and intrinsically desirable.

From an instrumental perspective, academic freedom ideally leads to better and more creative teaching and scholarship. Without the assurance of academic freedom, many faculty members might be chilled from taking novel or unpopular positions. Potentially important ideas might not be advanced, and intellectual debate and advancement would suffer. The late Chief Justice Earl Warren wrote,

The essentiality of freedom in the community of American universities is almost self-evident.... To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.(7)

From an intrinsic perspective, tenure safeguards the freedom of faculty members to speak, write, and associate however they choose. Justice Thurgood Marshall observed that "the First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression."(8) Freedom of speech is regarded in our society as an essential liberty, basic to autonomy. Professor Baker said that

to engage voluntarily in speech is to engage in self-definition or expression. A Vietnam war protester may explain that when she chants "Stop This War Now" at a demonstration, she does so without any expectation that her speech will affect continuance of the war,... rather, she participates and chants in order to define herself publicly in opposition to the war. The war protester provides a dramatic
illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.(9)

Thus, academic freedom is highly valued.(10) It is not surprising that the Supreme Court has declared that "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."(11)

Tenure is a key mechanism for protecting academic freedom. Once a faculty member receives tenure, he or she cannot be subjected to adverse employment actions, such as firing, without proof of cause.(12) The American Association of University Professors, in a famous 1940 Statement of Principles on Academic Freedom and Tenure, declared,

Tenure is a means to certain ends, specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.(13)

Tenure has an obvious role in protecting academic freedom.(14) By limiting the ability of the university to fire or otherwise take adverse actions against faculty members, tenure provides protection for faculty members to teach and write as they choose. As Professors Brown and Kurland explained, "A system that makes it difficult to penalize a speaker does indeed underwrite the speaker's freedom."(15) A tenured faculty member can take a position, in the classroom or in scholarship or in the public arena, knowing that it is unpopular without worrying that it will lead to reprisals.

Often overlooked is that tenure offers both procedural and substantive protections. Procedurally, tenure means that a faculty member has continuing employment unless the university initiates an action against the faculty member and succeeds in proving "cause" for termination. The university must begin the proceedings to terminate a tenured faculty member and must bear the significant burden of proving the justification for its proposed action.

Substantively, tenure means that the only specific, narrowly defined circumstances will constitute cause sufficient for termination or other adverse employment actions. Although the definition of cause varies by university, in general, there must be serious violations of the law or of principles of academic honesty to meet the standard.

The focus of this article is on whether alternatives to tenure can succeed in protecting academic freedom. My conclusion is that no alternative yet described is likely to succeed in providing both the procedural and the substantive protections accorded by tenure. In
general, the inadequacy of alternatives is evidenced by their motivation. Those who seek alternatives to tenure do so because of a desire to weaken the current protections accorded to faculty members. Although the motivation behind these reforms is the laudable desire to increase accountability for faculty members, by definition, this entails a lessening of the safeguards embodied in the concept of tenure. Thus, any alternative to tenure is likely to mean a substantial decrease in the protection afforded faculty members and consequently of academic freedom. The better approach is to devise ways to improve performance and accountability within the tenure system.

However, those who challenge tenure argue that alternatives might succeed in adequately protecting academic freedom, even if less so than the institution of tenure. Two primary alternatives have been advanced. One possibility is to protect faculty members from adverse actions that are in retaliation for the content of their teaching, writing, or political activity. The Supreme Court, in a series of cases, has provided protection for the First Amendment rights of government employees and limited the power to punish them for their speech activities. Some argue that academic freedom can be adequately safeguarded by applying these principles to faculty members.

Another alternative is to provide faculty members with long-term contracts, such as for five or seven years, and to create a grievance procedure that would need to be followed before a faculty member could be terminated. This approach would seek to provide job security in the form of contractual protections and procedural safeguards in the nature of grievance hearings and decisions by faculty panels.

I believe that neither of these alternatives is likely to succeed in protecting academic freedom. Neither provides the substantive protections that tenure accords in that neither limits the situations in which adverse actions can be taken to those that constitute cause. In addition, neither provides the procedural protection of tenure requiring that the university initiate proceedings and prove cause. The second section of this article discusses the former proposal of applying First Amendment protections accorded government employees to faculty members, and the third section analyzes the latter suggestion for replacing tenure with long-term contracts and grievance hearings.

WOULD FIRST AMENDMENT PROTECTIONS BE AN ADEQUATE SUBSTITUTE FOR TENURE?

Those who seek to weaken tenure generally do not argue against the concept of academic freedom or advocate the elimination of all protections for faculty members' speech. Rather, the argument is often made that academic freedom can be adequately protected by applying First Amendment principles. The claim is simple: tenure is valued because it protects the academic freedom of faculty members to speak and write without fear of reprisal. Therefore, tenure can be replaced by protections that limit the ability of a university to act against a faculty
member because of his or her speech.

An analogy is often drawn to a series of decisions in which the Supreme Court has protected the free speech rights of government employees. Stated generally, the Court has held that the First Amendment prevents the government from acting against its employees because of their speech. The argument is that the application of these precedents to faculty members would suffice to safeguard academic freedom. In evaluating the desirability of this alternative, I first review the law concerning the First Amendment protections for government employees and then explain why this standard is insufficient to protect academic freedom.

THE LAW CONCERNING FIRST AMENDMENT PROTECTIONS FOR GOVERNMENT EMPLOYEES

The Supreme Court has held that the government may not punish the speech of public employees if it concerns matters of public concern, unless the state can prove that the needs of the government outweigh the speech rights of the employee. In other words, speech by public employees is clearly less protected than other speech; First Amendment protection does not exist unless the expression is about public concern, and even then the employee can be disciplined or fired if the government can show, on balance, that the efficient operation of the office justified the action. It should be noted that these protections apply only for government employees, not for employees in the private sector. The Constitution applies only to government conduct, not to private action.

Pickering v. Board of Education is an important case in holding that speech by government employees is protected by the First Amendment. (18) A teacher was fired for sending a letter to a local newspaper that was critical of the way school officials had raised money for the schools. The Supreme Court held that the firing violated the First Amendment. Justice Marshall, writing for the Court, said that its task was to balance the free speech rights of government employees with the government's need for efficient operation. Justice Marshall wrote,

The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon 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. (19)

The Court emphasized that there was no indication that Pickering's statements in any way interfered with the teacher's ability to perform or the operation of the school district. The Court also stressed that the
speech concerned a matter of public concern: the operation of the school district. Indeed, the Court said that a teacher is likely to have unique and important insights as to the adequacy of educational funding. Although there were some factual inaccuracies in the statement, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish a basis for his dismissal from public employment."(20)

In Mt. Healthy City School District Board of Education v. Doyle,(21) the Court articulated a test to be used in applying Pickering. An untenured teacher was not rehired after several speech-related incidents, including arguing with another teacher, making an obscene gesture to students, and informing a local radio station about the principal's memorandum on teacher dress and appearance. The Court reiterated that speech by public employees is protected by the First Amendment. The Court said, however, that a public employee who otherwise would have been fired does not deserve special protection because of the speech.

Thus, the Court said that a public employee challenging an adverse employment action must initially meet the burden of showing that "his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it other words, that it was a 'motivating factor'" for the government's action.(22) If this is done, the burden shifts to the government to show by a "preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected conduct."(23)

In Connick v. Meyers,(24) the Court added an additional requirement to the Pickering/Mt. Healthy approach. An assistant district attorney, angry over a transfer to a different section in the office, circulated a memorandum soliciting the views of other attorneys in the office concerning the transfer policy, the level of morale, and the need for the establishment of a grievance committee. When the attorney was fired, she sued, alleging a violation of the First Amendment.

The Supreme Court ruled against the attorney, emphasizing that the speech was not protected by the First Amendment because it did not involve comment on matters of public concern. The Court, in an opinion by Justice White, said,

The repeated emphasis in Pickering on the right of a public employee as a citizen, in commenting upon matters of public concern, was not accidental.... [When] employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.(25)

The Court said that "whether an employee's speech addresses a matter
of public concern must be determined by the content, form, and context of a given statement."(26) Although Meyer's statements related to the performance of supervisors and policy in a public office, the Court said that it did not concern matters of public concern, especially because she was not seeking to inform the public.

However, the Court also has expressly ruled that private statements that are not made publicly are protected by the First Amendment so long as they involve matters of public concern. In Givhan v. Western Line Consolidated School District, the Court unanimously held that the school district violated the First Amendment to fire a teacher because of her speech that privately communicated grievances about racially discriminatory policies.(27) The Court said that no First Amendment freedom "is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."(28)

In Rankin v. McPherson, the Court applied Connick and found that a public employee's statement was protected by the First Amendment when she declared, after hearing of an assassination attempt directed at President Ronald Reagan, "If they go for him again, I hope they get him."(29) The Court held that the firing of the employee because of the statement violated the First Amendment because it concerned a matter of public concern. The Court, in an opinion by Justice Marshall, said that

the statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.(30)

The Court said that if a statement is of public concern, then a court must balance the employee's First Amendment rights with the state's interest in the "effective functioning of the public employer's enterprise."(31) The Court found that the speech was protected by the First Amendment because there was no evidence that it interfered with the efficient functioning of the office.

The specific content of the employee's speech is obviously crucial in applying this test. Often, of course, there will be a dispute between the employer and employee over exactly what was said. How is this dispute to be resolved? The Court addressed this issue in Waters v. Churchill.(32) A nurse was disciplined and ultimately fired from a public hospital for her speech, but there was a dispute between her and the employer over what she actually said.

Justice O'Connor, writing for a plurality of four, said that the trier of fact should accept the employer's account of what was said so long as it is reasonable to do so. Justice O'Connor said that there is no
violation of the First Amendment when a government employer reasonably believes that speech does not involve matters of public concern. The plurality said that a court should side with the employer so long as the employer acted reasonably in obtaining information about what was said and so long as the employer's belief is reasonable.

Justice Scalia wrote an opinion concurring in the judgment, joined by two other justices, and said that the employee was protected by the First Amendment only if she could prove that the firing was in retaliation for constitutionally protected speech. (33) Scalia objected to the plurality's requirement that employers use reasonable procedures to ascertain what was said.

Justice Stevens dissented, in an opinion joined by Justice Blackmun, and argued that the content of the speech was a question of fact that should be tried like any other factual issue. (34) Justice Stevens said that the issue is not whether the employer followed reasonable procedures or even whether the employer had a reasonable belief. The question is whether the speech is protected by the First Amendment, and that can be ascertained only by first deciding what was said.

Thus, a three-step analysis can be derived from the cases: (1) the employee must prove that an adverse employment action was motivated by the employee's speech; if the employee does this, the burden shifts to the employer to prove by a preponderance of the evidence that the same action would have been taken anyway; (2) the speech must be deemed to be a matter of public concern; and (3) the Court must balance the employee's speech rights against the employer's interest in the efficient functioning of the office. Phrased another way, the employee can prevail only if he or she convinces the Court that speech was the basis for the adverse employment action, if the Court concludes that the speech concerned matters of public concern, and if the Court decides that, on balance, the speech interests outweigh the government's interests in regulating the expression for the sake of the efficiency of the office.

THE FIRST AMENDMENT IS NOT AN ADEQUATE SUBSTITUTE FOR TENURE

For many reasons, it would be undesirable to replace tenure with the protections that are accorded government employees. At the outset, it should be noted that faculty members employed by public colleges and universities already have the First Amendment safeguards described above. A faculty member at a government institution now has both the protections of tenure and those of the Constitution. Abolishing tenure would not substitute new protections for these individuals but only decrease the current safeguards of academic freedom.

Procedurally, a First Amendment approach would be far inferior from a faculty member's perspective when compared with tenure. Under the
First Amendment approach, the burden would be on the faculty member to initiate an action claiming that the university acted improperly in retaliation for speech activity. In contrast, under the tenure system, the university has the burden of starting the proceedings to terminate a tenured faculty member. At the very least, the need to bring formal proceedings is a disincentive for the university to act. The easier it is for the university to terminate a faculty member, the more likely it is to act in retaliation for unpopular teaching or writing.

More important, a First Amendment approach puts the burden on the faculty member to show that the university's motive was a reprisal for speech activities. In many cases, this can be an insurmountable obstacle for the faculty member. Proving motive is often elusive, and many faculty members may be discouraged from even initiating proceedings because of doubts about meeting this burden. When the faculty member protests the university's action, showing an improper motive for the adverse employment action may not be possible, even in some cases when the university's action actually was in retaliation for speech. In contrast, under the tenure system, the university must prove cause for termination. There is no burden on the faculty member to demonstrate improper purposes on the part of the university; the only issue is whether the university can prove just cause for termination.

From a substantive perspective, a First Amendment approach provides much less protection than the current tenure system. Now a tenured faculty member can be terminated only if there is proof of a limited number of circumstances that constitute cause. But under a First Amendment approach, the university is not restricted to just these narrow situations for taking an adverse action. Under the First Amendment approach, the university can act for any reason so long as it is not in retaliation for speech. This distinction is crucial: tenure means that a very narrow set of circumstances will be sufficient for terminating a faculty member; a First Amendment approach means that a virtually limitless set of circumstances will be sufficient for terminating a faculty member so long as the action is not a reprisal for the content of teaching or writing. For example, under the First Amendment approach, a university might try to fire a tenured faculty member for insubordination if he or she disobeys an order from a senior administrator. Under the tenure system, only in the most extreme cases could this be cause for termination.

Moreover, the First Amendment approach that is used to protect government employees would not even provide adequate safeguards for faculty members against reprisals for speech activities. If the government employee precedents were applied to faculty members, then only speech about matters of public concern would be protected. (35) Currently, all speech by tenured faculty members - whether or not of public concern - is protected from being the basis for reprisals unless it meets the narrow standard for cause. Moreover, the
requirement that the speech be of public concern can be questioned because the First Amendment generally has no such limitation. In Connick, for example, the Court found that the employee's speech was not of public concern, even though it pertained to the functioning of an important public office.

Even more important, under current law, the government may act against an employee because of his or her speech if it demonstrates that, on balance, the expression interfered with the efficient functioning of the office. Under this approach, a faculty member could be terminated if the university demonstrated that the speech was disruptive and that, on balance, the university's interests outweighed the faculty member's interests in academic freedom. This is far less protection than faculty members have under the tenure system. Now a faculty member can be terminated only under the restrictive standards found in the definition of cause. But under the First Amendment approach, the university would just have to demonstrate that, on balance, its action was justified.

This simple balancing test - weighing speech interests against the government's interest in administrative efficiency - can be questioned as failing to place sufficient weights on the free speech side of the scale. The balance would seem to be specific to each case as to whether the university's interest in that instance outweighed the faculty member's speech interests. But the proper balance should be more general, weighing the overall effect on academic freedom of allowing the termination for the speech against the university's interests.

At the very least, a balancing test as used in Pickering and its progeny would leave faculty members uncertain as to when their speech would be protected and when it could be the basis for adverse employment actions. The high degree of protection embodied in tenure would be lost. Many faculty members might be chilled by this uncertainty, and academic freedom would be seriously compromised.

Thus, protecting faculty member's speech through a First Amendment approach would provide neither the procedural nor the substantive safeguards accorded by tenure. The First Amendment approach seems far inferior as a way of ensuring academic freedom.

CAN ACADEMIC FREEDOM BE ADEQUATELY PROTECTED THROUGH LONG-TERM CONTRACTS AND GRIEVANCE PROCEDURES?

An alternative possibility for safeguarding academic freedom would be to provide faculty members with long-term contracts, such as for five or seven years, and require that the university succeed in grievance proceedings to terminate a faculty member. In a recent article, Professor J. Peter Byrne has advocated this approach? In fairness to Byrne, he does not propose that this replace the institution
of tenure. Rather, he argues for this as an alternative in those universities that do not have a tenure system. However, Byrne concludes that these "measures would fully protect the familiar terrain of academic freedom."(37)

It is this conclusion that I wish to challenge. I focus on Byrne's proposal, in part, because it is representative of this approach and, in part, because it is a particularly well-conceived version of this approach.

THE ALTERNATIVE DESCRIBED

Byrne's proposal seeks to protect academic freedom through the combination of a number of devices. He suggests that faculty contracts should make explicit the protection of academic freedom. He says that "an institution that wants to respect academic freedom should bind itself to do so through an explicit promise that it will not violate the academic freedom of the faculty."(38) In fact, Byrne offers a model definition for faculty contracts. He offers the following proposed language:

Academic freedom includes the following rights and duties:

1) Faculty members have the right to pursue chosen research topics and to present their professional views without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies of their scholarship, but subject to fair professional evaluation by peers and appropriate institutional officers.

2) Faculty members have the right to teach without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies or their work, subject to their duties to satisfy reasonable educational objectives and to respect the dignity of their students.

3) Faculty members may exercise the rights of citizens to speak on matters of public concern and to organize with others for political ends without the imposition or threat of institutional penalty, subject to their academic duty to clarify the distinction between advocacy and scholarship.

4) Faculty members have the right to express views on educational policies and institutional priorities of their schools without the imposition or threat of institutional penalty, subject to duties to respect colleagues and to protect the school from external misunderstandings.(39)

Byrne proposes that "an institution provide a fair internal-appeals mechanism to challenge adverse personnel decisions on the ground that they violate the faculty member's academic freedom."(40) He suggests a grievance system in which the majority of the appeals panel should be professors and in which the hearing procedure should "make
extensive use of the familiar legal devices of the prima facia case and shifting burdens of proof."(41) In addition, Byrne recognizes the importance of long-term contracts as part of any alternative to tenure.(42)

Although Byrne concludes that this alternative could suffice in protecting academic freedom, he also acknowledges that this could vary depending on the institution. He notes that

the benefits to academic freedom that will accrue by replacing tenure with the described procedures will vary depending on the mission of a particular school, and the administrative costs of adopting the procedures could be high, particularly the extensive procedures required for not renewing a contract. The administrative costs will not be as high, of course, as they would be in any individual case of dismissing a tenured professor.(43)

THE INADEQUACY OF BYRNE'S PROPOSAL

Byrne's proposal provides neither the substantive nor the procedural protections contained in the current tenure system. From a substantive perspective, Byrne's approach would accord faculty members much less protection than that provided by tenure. Each part of his statement of academic freedom gives the university substantial discretion to be able to dismiss the controversial teacher or scholar. The first part of his definition, as quoted above, says that faculty members have the freedom to engage in their chosen research "but subject to fair professional evaluation by peers and appropriate institutional officers." This language would seemingly open the door for university officials to exercise control over faculty members' research. This permits university administrators to exercise control over faculty members' research and provides no limits on the permissible grounds for evaluation other than the very vague word fair.

The second part of the definition protects the right of faculty members to teach without the imposition or threat of institutional penalty, "subject to their duties to satisfy reasonable educational objectives and to respect the dignity of their students." The latter phrase is obviously vague and certainly provides less protection than the current definition of cause. Conceivably, any unusual method of teaching or discussion of any controversial viewpoint could be seen as showing insufficient respect for the "dignity of the students."

More seriously, the third part of Byrne's statement only provides protection for speech on "matters of public concern" and protects faculty members' speech only if they obey the "distinction between advocacy and scholarship." As expressed above, there is no reason why the protection of speech should be limited to matters of public concern. Furthermore, a distinction between advocacy and scholarship, even if it exists, is incredibly difficult to define and apply. Undoubtedly, universities would attempt to use this language to
terminate faculty members taking unpopular positions, claiming that the writings were "advocacy" and not "scholarship." In many fields, faculty members take and defend positions in their scholarship. This is most likely to be dismissed as advocacy when the viewpoint is unpopular or the reader disagrees with the author.

The fourth part of Byrne's definition protects the right of the faculty member to criticize the university, "subject to duties to respect colleagues and to protect the school from external misunderstandings." The latter phrase is very troubling. Universities could use it to discipline faculty members who are perceived as embarrassing the university in the eyes of the public. Faculty members who take unpopular positions, especially those who criticize the university's administration, can be easily disciplined under this standard for failing "to protect the school from external misunderstandings." A faculty member who publicly criticized the university and embarrassed it might be terminated for failing to adequately prevent "external misunderstandings." At the very least, the vague language of the rule likely would chill faculty members from engaging in public criticism of their university and risking punishment under this rule.

Comparing Byrne's proposal as a whole to tenure, it provides far less substantive protection. Under tenure, the university may terminate a faculty member only under the few circumstances that constitute cause. Under Byrne's approach, the university could terminate a faculty member under any circumstances, except for those delineated under his statement of academic freedom. Even these are far less protective than tenure because, as explained above, each has vague language that could be exploited by the university.

From a procedural perspective as well, Byrne's proposal is inferior to the current tenure system. Five-year contracts are no substitute for a lifetime position. Knowing that their employment is uncertain, some faculty members are much less likely to take positions that are unpopular or that might anger university officials. At the very least, in the last year or two of a contract, a faculty member facing a renewal decision might behave much differently than one who has a lifetime position.

Byrne recognizes that his approach provides less in the way of procedural protection than the tenure system. He writes that "under the described procedures, the school would need to be prepared only to prove that it did not act for forbidden motives. Not only would the institution's range of action be broader, its burden of proof would be lighter, and procedural hurdles lower."(44) The result inevitably would be that faculty members would feel less protected and academic freedom would suffer.

CONCLUSION
In this article, I have argued that the strongest alternatives to tenure would be inadequate in safeguarding academic freedom. I have not focused on the benefits of these alternatives in terms of increasing the accountability and performance of faculty members. Nor have I considered whether these benefits might be gained through other mechanisms within the tenure system. Rather, my focus has been limited to arguing that it would be a serious mistake to see the alternatives to tenure as adequate in protecting academic freedom for faculty members. The reality is that a university that seeks to abolish tenure and replace it with an alternative is doing so precisely to provide less job security for faculty members. Inevitably, this will have a detrimental effect on academic freedom.

NOTES


3. Id. at 62.


5. The suit is pending in Los Angeles County Superior Court as of May 1997.

6. Fischer, supra note 2, at 62.


12. An important question is what types of adverse employment actions, short of dismissal, constitute a violation of tenure. For example, cutting a person's salary by 90 percent surely has the same effect as firing the individual. Protecting the existence of a person's job means little if the person could be effectively fired by eliminating
his or her salary. The difficult question, and one beyond the scope of this article, is the point at which an adverse employment action is inconsistent with tenure. In evaluating the importance of tenure for academic freedom, this article focuses primarily on dismissals from employment. Obviously, if alternatives to tenure are adequate in providing protection from termination, they are likely to be sufficient as to less extreme adverse employment actions.


15. Id. at 329.


18. 391 U.S. 563 (1968). See also Perry v. Sinderman, 408 U.S. 593, 597 (1973) (holding that the First Amendment limits the ability of the government to fire or discipline employees because of their speech activities).

19. Id. at 568.

20. Id. at 574.


22. Id. at 287.

23. Id. This is the same approach the Court uses with regard to proof of discriminatory intent under the Fourteenth Amendment. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).


25. Id. at 143.
26. Id. at 147-48.


28. Id. at 415.


30. Id. at 386-87.

31. Id. at 388.


33. Id. at 1893 (Scalia, J., concurring in the judgment).

34. Id. at 1898 (Stevens, J., dissenting).


36. Byrne, "Academic Freedom Without Tenure?"

37. Id. at 13.

38. Id. at 4.

39. Id. at 6.

40. Id. at 7.

41. Id. at 8.

42. Id. at 11. Indeed, Byrne notes that "it is not surprising that most alternatives to tenure embrace long-term contracts." Id.

43. Id. at 14.

44. Id. at 15.
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1940 Statement of Principles on Academic Freedom and Tenure  
With 1970 Interpretive Comments

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969. The governing bodies of the associations, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher (The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties) or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.[11] (Bold-faced numbers in brackets refer to Interpretive Comments which follow.)

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

ACADEMIC FREEDOM

a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.[12] Limitations of academic freedom because of religious or other aims of the institution
should be clearly stated in writing at the time of the appointment.[3]
c. College and university teachers are citizens, members of a learned profession, and officers of an
educational institution. When they speak or write as 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.[4]

ACADEMIC TENURE

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

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

1. The precise terms and conditions of every appointment should be stated in writing and be in the
possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank, [5] the probationary
period should not exceed seven years, including within this period full-time service in all institutions
of higher education; but subject to the proviso that when, after a term of probationary service of more
than three years in one or more institutions, a teacher is called to another institution it may be agreed
in writing that the new appointment is for a probationary period of not more than four years, even
though thereby the person's total probationary period in the academic profession is extended beyond
the normal maximum of seven years. [6] Notice should be given at least one year prior to the
expiration of the probationary period if the teacher is not to be continued in service after the
expiration of that period. [7]
3. During the probationary period a teacher should have the academic freedom that all other members
of the faculty have. [8]
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous
to the expiration of a term appointment, should, if possible, be considered by both a faculty
committee and the governing board of the institution. In all cases where the facts are in dispute, the
accused teacher should be informed before the hearing in writing of the charges and should have the
opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The
teacher should be permitted to be accompanied by an advisor of his or her own choosing who may
act as counsel. There should be a full stenographic record of the hearing available to the parties
concerned. In the hearing of charges of incompetence the testimony should include that of teachers
and other scholars, either from the teacher's own or from other institutions. Teachers on continuous
appointment who are dismissed for reasons not involving moral turpitude should receive their
salaries for at least a year from the date of notification of dismissal whether or not they are continued
in their duties at the institution. [9]
5. Termination of a continuous appointment because of financial exigency should be demonstrably
bona fide.

1940 INTERPRETATIONS

At the conference of representatives of the American Association of University Professors and of the
Association of American Colleges on November 7-8, 1940, the following interpretations of the 1940
Statement of Principles on Academic Freedom and Tenure were agreed upon:

1. That its operation should not be retroactive.
2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.
3. If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) 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 (a)(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.

1970 INTERPRETIVE COMMENTS

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration the following "Interpretive Comments." These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 Statement of Principles on Academic Freedom and Tenure have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 Statement, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 Statement is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 Statement; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in Keyishian v. Board of Regents 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 Statement on which interpretive comment is made.
1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the Statement on Professional Ethics, adopted in 1966 as Association policy. (A revision, adopted in 1987, was published in Academe: Bulletin of the AAUP 73 [July-August 1987]: 49.)

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and we do not now endorse such a departure.

4. This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 Statement immediately following its endorsement which reads as follows:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) 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 (a)(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.

Paragraph (c) of the 1940 Statement should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances" (AAUP Bulletin 51 [1965]: 29), which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the Statement on Professional Ethics also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of other obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary as well as to the tenured teacher, but also to all others, such as part-time faculty
and teaching assistants, who exercise teaching responsibilities. Back to Text

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of the teacher's specific title. (For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," AAUP Bulletin 52 [1966]: 280-82.) Back to Text

6. In calling for an agreement "in writing" on the amount of credit for a faculty member's prior service at other institutions, the Statement furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. (For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," AAUP Bulletin64 [1978]: 274-75.) Back to Text

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 Statement with respect to the termination of services of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the Standards for Notice of Nonreappointment, endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.
2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
3. At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the Statement on Recruitment and Resignation of Faculty Members, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961. Back to Text

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the Recommended Institutional Regulations on Academic Freedom and Tenure, prepared by the American Association of University Professors. Back to Text

9. A further specification of the academic due process to which the teacher is entitled under this paragraph
is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 *Statement* is silent.

The 1958 *Statement* provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.\[Back to Text]
Faculty Luncheon
Friday, December 1

“Academic Freedom and the Teaching of Critical Thinking”

I. Academic Freedom Defined

II. Academic Freedom in Context

III. “…dialogues that frame our work as a way to help faculty improve and develop enables us to create definable goals about how the individuals and units might mutually be supportive of one another.”