CHAPTER 2

History of Tenure and Academic Freedom in the USA

While the concept of tenure is rather new in the academic world, providing faculty protection from loss of employment dates back to the days of the Holy Roman Empire and its Emperor, Frederick I Barbarossa, King of Germany (1155–1190). Throughout the Middle Ages, European university "masters" enjoyed safeguards that were put in place by territorial monarchs and, with the Great Western Schism of 1378, these masters experienced the initial stages of a university without any linkage to the Papacy. With the rise of the non-religiously affiliated university also came issues of faculty self-governance and job security.

Centuries later, higher education began to establish itself in the New World during a historical period referred to as the Colonial Period. The universities of this period were greatly influenced by the structure of their European counterparts and, when the American Federal Government began its westward expansion, universities began to develop in the newly acquired territories. As these newly developed institutions came into being, faculty became increasingly interested in issues related to their job protection; an interest which ultimately lead to the formation of the American Association of University Professors.

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Development of the European Higher Education System and Its Influence on American Higher Education

The history of tenure can be traced back to the *studium generale*, the universities of the middle ages. Those who taught in these institutions were known as "masters" (the common term for those teaching in higher education during this time). The subjects taught by these individuals did not include the traditional subjects of arts, canon law, medicine, and theology as these subjects were taught in the *universitas facultatum*. Rather, in these settings the primary subject of arts was taught along with at least one of the other higher faculties of theology, medicine, or law.[1] Students who attended the *studium generale* came from across the catchment of the region (i.e., students from Italy would attend the University of Bologna and students from France would attend the University of Paris). After completing their studies, these students were thought to have great promise and were often considered for the distinct privilege of teaching in these institutions.

To assure that the scholars who taught in the *studium generale* were able to move freely throughout the empire, Emperor Fredrick I Barbarossa of Germany and the Holy Roman Empire provided the masters a form of job security with his decree known as *Authentica Habita*. This decree guaranteed that any scholar traveling within the Holy Roman Empire would receive safe passage during his journey. If any unlawful injury were to befall masters during their travels, they then would be reimbursed for the loss of their wages by the person committing the unlawful act.[2]

As Barbarossa's *Authentica Habita* became more widely known throughout Europe, rulers of the surrounding nations, as well as the Roman Papacy, began to offer similar protection to scholars within their lands. However, the influence of the Roman Papacy, especially with the link between the Catholic Church and the Cathedral School of which the *studium generale* originated,[3] began to use their vast financial influence to support academies that focused on the development of the clergy.[4] In hopes of enticing scholars to educate students at these clerical academies, the popes permitted a master to continue to receive the benefit of longevity of employment even while he was traveling to other regions across the empire.[5] Along with the assurance provided to scholars by the Roman Church, monarchs awarded additional benefits (e.g., freedom from paying local tolls and duties, provisions so that scholars would

receive good housing at a fair price, etc.…) to the masters in hopes of enticing them to stay within their regional *studium generale*.[6]

However, the masters at a regional *studium generale* not only sought the rewards of lengthened employment, they also desired immunity from the outside influence of regional tribunals and the right to govern themselves from within. Issues such as these by medieval scholars led to the formation of education guilds. As these guilds gained in strength, additional issues were addressed. These issues included: (1) the right to elect their own officers, (2) the ability to be legally represented as a single legal entity, and (3) the freedom to develop a set of codified rules and policies that each member was accountable to follow.[7] However, one ability that medieval universities, and in essence the guilds to which the masters belonged, did not possess was the ability to award the *licentia docendi* (a licensure credential awarded to a "to be" master permitting him to lecture to students). This power, for those in the field to name others to their field, was a right reserved solely for the Chancellor of the Cathedral, an individual who was the appointed head of the institution and to whom the masters had to swear an oath of allegiance.[8]

Along with the turn of the thirteenth century came changes within the *universitas facultatum*. Masters at the *universitas facultatum* began to question the criteria used to award the *licentia docendi*. By the early twelve hundreds, the *licentia docendi* became a priority issue among the masters in the medieval university. To the masters within the faculty of the arts, the concept of an outside agent awarding this credential endangered the quality of students entering their guild.[9] By foregoing the input of the guild on the admittance of students to the university, the masters contended that the quality of their instruction was being weakened by the Church. Likewise, the masters expressed concern that because the awarding of licensure and, in essence, the ability to revoke licensure rested with an external agent, masters could be displaced even though they had successfully completed guild instruction.[10]

The struggle which ensued (the issuance of the *licentia docendi* being beyond the control of the guild as well as the requirement that guild masters swear an allegiance to the Chancellor of the Cathedral) between the guilds and the external forces threatened the existence of the medieval university. These issues caused the guilds to be concerned that their scholars might migrate to a different region and form new universities.[11] Along with this perceived threat of relocation, the guild masters sent numerous appeals to the Roman hierarchy urging them to

enlist changes within the governance of universities, suggesting that the determination of awarding the *licentia docendi* should be in the hands of the guild masters. Responding to the concern made by the guild masters on the issuance of the *licentia docendi*, Pope Gregory IX issued the *Parens Scientiarum* (a form of charter issued by a pope) in 1231 granting the right of licensure to the guild masters at the University of Paris where he had studied theology.[12] Furthermore, Pope Gregory's charter removed the requirement that masters had to swear allegiance to the Chancellor of the Cathedral. In its place, the Pope stated that masters were required to take an oath of allegiance to their university instead of the Chancellor.[13]

Although there were examples of employment protection in the medieval university, job security guarantees within either the *studium generale* or the *universitas facultatum* were not a facet of position, but that of papal or monarch decree.[14] However, to receive the decree of a governmental body (either a governing monarch or the Catholic Church) a master had to meet certain conditional thresholds. These thresholds ranged from university to university, but commonly focused on the areas of advancement of degrees and the acquisition of guild specific *licentia docendi*.[15]

Traditions within *universitas facultatum* began to change during the thirteenth century as the Holy Roman Empire saw the development of sovereign states outside of their realm as well as the rise of Christian denominations other than that of Catholicism. With these changes the previous separation between the *studium generale* and the *universitas facultatum* began to disappear as the *studium generale* began to change from a single trade school to that of a *universitas facultatum*, providing instruction in canon law, medicine, and theology as well as the inclusion of the social sciences and the arts into the curriculum which was spurred by the start of the Renaissance.[16] This change in higher education structure gave rise to the *universitas magistrorum,* an educational design that separated masters into four *facultates* (law, medicine, philosophy, and theology) and permitted these instructors the autonomy to determine the content of their lectures.[17] As this new educational design gained popularity, it soon became the de facto pattern for the establishment of new universities throughout Europe.[18]

Throughout the fourteenth century, there was limited growth of universities throughout Europe. The major universities at the time were located in the cities of Oxford, Paris, and Bologna, and although other cities had universities during this timeframe, they did not have

the same prestige as those in these three cities. Then, in 1386, Germany established its first university in Heidelberg. Researchers have identified that the establishment of this university (the University of Heidelberg) was in response to the Great Western Schism caused when Pope Gregory XI returned the Papacy from Avignon to Rome in 1378.[19]

This Schism occurred when, in 1309, the newly appointed Pope Clement V (appointed in 1305), a Frenchmen, decided to move the papacy from Rome to Avignon, France.[20] For the next 68 years, a time known as the Avignon Papacy, the papacy remained in Avignon.[21] However, in 1377, Catherine of Sienna contacted then Pope Gregory XI stressing that, with the threat of a Muslim invasion in Eastern Europe and with the financial tolls coming from the 100 Year War between England and France, restoring the papacy to Rome and launching a Crusade against the Muslim nation Pope Gregory XI could unite Christians and stop the Muslim invasion.[22] The Pope agreed and the papacy returned to Rome.

Upon Pope Gregory XI's death in 1378, Bartolomeo Prignano (who would become Pope Urban VI), Archbishop of Bari, was named the papal successor. However, almost immediately, the legitimacy of Pope Urban VI's election was questioned by the French and Spanish Cardinals and, a few months after his inauguration, the only Cardinals that remained in Rome were those from Italy.[23] The defecting Cardinals claimed that the election of Urban VI had been negatively influenced by the Roman crowd that had gathered during the conclave demanding a Roman pope and that those incidents supposedly influenced the election process.[24] In response to these claims, on August 9, 1378, the College of Cardinals, who had originally elected Urban VI as their pope, denounced Urban VI'S election and within several months appointed Robert of Geneva as Pope Clement VII.[25] The election of this second pope now meant that there were two claiming leadership over Catholicism. This second election, which provided for two sitting popes, had come to be known as the Great Western Schism, and, according to religious scholars, led to the weakening of the influence of the Catholic Church during the years from 1378 to 1417.[26] It was during this weakened position of the Papacy that Germany seized the opportunity to establish its first university—the University of Heidelberg.

Prior to the Great Western Schism, German students and masters traveled great distances to attend the *universitas magistrorums* in Paris or one of lesser status in Orleans. Rashdall cites that the reason students and

masters left Germany to study and teach was that German nobles feared an increase in the power and influence of the clergy and decided against establishing a *universitas magistrorum* that was commonly influenced by the papacy.[27] However, at the time of the Great Western Schism, the University of Paris, under the influence of the French Catholic Cardinals, did not accept anyone, either as an employee or student, who supported the Roman pope, which effectively locked out German students and masters who followed the Pope in Rome.[28]

The Roman popes during this time, however, were known to be interested in offering the necessary papal bulls or decrees to establish a *universitas magistrorum* in hopes of weakening the influence of French universities. This division within the Catholic Church and availability of papal decrees allowing for the creation of a *universitas magistrorum*, provided the impetus for Germany to move forward and establish its first university in Heidelberg (1386).[29] In its establishment, Elector Palatine Ruprecht (the founder of the University of Heidelberg) stated that the university would be ruled, disposed, and regulated in the same manner as that of the University of Paris.[30]

By the fifteenth century, the onetime broad lecture in canon law, medicine, theology, and the arts began to become a more specialized concentration within the *facultates* of the *universitas magistrorum*. Prior to the Protestant Reformation (1517), only students and masters of the Catholic faith were allowed to enroll in, or be employed by, the *universitas magistrorum*.[31] However, Sanz and Bergan note that along with the Protestant Reformation came the demise of papal supremacy as well as a weakened Roman influence over the *universitas magistrorum*.[32] This reduction in the role played by the Catholic Church in higher education led to a greater financial commitment and denominational preference of other Christian religions of the regional nobility for the institution. However, this form of logic, where a *universitas magistrorum* identified itself as the same Christian denomination as the territorial noble, established a belief system where only one form of religion could be prevalent within an institution while all other denominations were shunned.[33]

During the seventeenth and eighteenth centuries, European universities began to move away from their denominational views toward a more philosophical view that focused on human progress through knowledge and reason.[34] As philosophical reasoning began to replace theology in the curriculum, the concept of conducting research enhanced the self-directed motivation of improving one's self through the understanding

that knowledge was a social good.[35] This philosophical leaning, known as the European Enlightenment, brought with it the belief that if something was to be acquired through the process of research, then that research must be conducted without outside influence.[36] Germany was no exception to the influence of the Enlightenment in its universities. The approach supported by the German leaders promoted the belief that a university is a place where an individual should be able to have the freedom to accomplish his own educational development by selecting subjects to study (*Bildung*).[37]

As the Age of Enlightenment gave rise to the nineteenth century, the face of German education changed drastically when philosopher Wilhelm von Humboldt became the Minister of Education in Prussia from 1809 to 1810. Although he only held this position briefly, his impact was tremendous as it was under his leadership that three important reforms were initiated in German education. These reforms were: (1) all secondary school teachers must receive university-level training; (2) the establishment of the *Abitur*, an entrance exam used as an instrument to determine an individual's qualification for admission to a university; and (3) the need for freedom in teaching and learning.[38] His reforms gave rise to the introduction of three principles that guided German universities in the areas of academic freedom (*Lehrfreiheit*), the unity of teaching and research (*Einheit von Forschung und Lehre*), and self-governance (*Selbstverwaltung*) by professors.[39]

It was at this time that German universities evolved from the control of territorial governing agencies (i.e., territorial nobility and governing boards of trustees) to that of self-governance.[40] With the influence of Humboldt's principles (the place of the government in relation to university governance should be simplistic; the role of the government should be to protect *Lehrfreiheit* and appoint qualified faculty.[41]) began to gain acceptance throughout Germany and eventually spread throughout Europe. As the nineteenth century drew to a close, it was evident that Germany was moving away from the medieval design of a university as an avenue to pass on recognized knowledge to its students and onto an enlightened model whereby knowledge could be utilized toward a more faculty-driven belief and that the university was a place where students learned how that knowledge had been discovered.[42]

Humboldt's theories and principles spurred growth in academia throughout Germany bringing about advancements in science and university research. Seeing the impact of these advancements encouraged

Humboldt to strengthen his resolve for research. He later stated that all subjects should be held accountable to scrutiny under scientific research and discovery and that this discovery was an ongoing process, one that never ended.[43] His focus on individual growth and the ability of the professoriate to conduct unbiased scientific research provided the momentum for German universities to become the focal point for scientific advancement within the nation.[44] The scientific advancements made in nineteenth century Germany, which were spurred by university research, led to the strengthening of industry which, during the later part of the nineteenth century, was starting to surpass its surrounding European counterparts.[45] With its emphasis on scientific research and faculty security, the German universities of the nineteenth century became the model sought out by academics in the USA as their universities were starting to separate from religious orientations.

The Rise of Higher Education in the USA

The beginning of higher education in the USA can be traced back to the British colonization of North America.[46] During this time in history, universities such as Harvard, William and Mary, and Yale, all of which had ties to various religious denominations, allowed masters to stay on staff as long as they shared the same religious beliefs as those of the university.[47] Furthermore, the professors of the colonial universities were individuals who had hoped to become clergymen; however, due to reasons of health, had chosen the profession of educator, one viewed as less demanding in those days than that of a clergyman.[48]

Higher Education in the Colonial Period

The foundations of higher education in the USA date back to 1636 when the General Court of the Massachusetts Bay Colony passed legislation that laid the groundwork for the founding of a new college which would later be named in honor of the college's first benefactor, Charlestown minister John Harvard, in 1639.[49] However, due to the General Court's questioning of the legality in the creation of a corporation (Harvard College) by another corporation (the Board of Overseers who had been established in 1642 by the General Court of the Massachusetts Bay Colony as the legal controlling entity of Harvard College), it was not until 1650 that, with the urging of Harvard's

president (Henry Dunster), that the General Court awarded a corporate charter to the college which supported the college's mission of educating the youth of the colony in the Puritan life of godliness.[50] With its charter now in place, the university formed a governing board to establish governance of the college and the creation of the institution's bylaws.

In the General Court's charter for Harvard, the college was created as a corporation composed of a president, treasurer, and five fellows (or tutors as faculty were called in those days) giving it the customary rights of a colonial corporation. These rights awarded by the charter placed the president and fellows of Harvard as the possessors of all the college's properties, the governing agent with the right to elect the college's officers, and awarded the corporation with the ability to establish the college's internal operating policies.[51] By including the tutors (the American equivalent of the European masters) of the college as fellows in the corporate charter, the General Court of the Massachusetts Bay Colony established that academics were self-governing and thus needed to be established as such in the college's policies.[52] However, due to the poor financial status of the college at the time, the original tutors of Harvard College left the institution shortly after their appointment as fellows to the corporation. The vacancies created by their departure allowed for their seats in the corporation to be filled by non-academics leaving the president of the college as the only academic member of the corporation.[53]

Similarly, in 1693 the College of William and Mary was established and became the second institution of higher education in the colonies. This college was constituted to educate and prepare young men for the clergy within the Colony of Virginia.[54] However, in its charter (issued by the King William III of England), William and Mary trustees (similar to the Overseers at Harvard) were appointed solely to establish the college and appoint its tutors. Once this task was completed, the trustees were instructed to transfer the properties of the college to the institution's president and tutors[55]; however, this did not occur. Instead, the trustees of the college, known as Visitors and Governors, viewed their appointments as having an unidentified term of longevity with the authority to remove the president and the college's tutors as they saw fit.

Governance of the College of William and Mary went well until 1768 when the Board of Visitors and Governors terminated half of the teaching faculty for reasons based on the ability of the faculty to marry at will and/or the faculty's ability to pursue positions as pastors elsewhere.[56] In

response to the Board of Visitors' actions, the president of the college (James Horrocks), along with the institution's tutors, demonstrated against the termination of their colleagues and declared that the tutors and president of the college did not serve at the leisure of the college's governing board and that with the creation of the college's charter the institution was an incorporated entity and self-governing.[57] The principle behind the dispute over the governance of the College of William and Mary was based on the Board of Visitors and Governors' interpretation of the charter that the tutors and president of the college were ministers of the Crown and, as such, were governed by the ministers of the King of England. However, the agents of the college contended that since the King had awarded a charter to the college stating that the Board of Visitors and Governors was to be comprised of the president and five fellows, they contended that they had the same rights as a corporation, something a minister of the King did not possess.[58]

In response to the declaration of incorporation by the tutors and president, two of the terminated faculty members were reappointed to the college.[59] Then, in 1779, the Board of Visitors and Governors sided against academic freedom when they awarded themselves authority over the teaching methodologies used within the classroom, as well as authorizing themselves with the ability to identify which areas of learning would be offered in the college.[60] In its decision regarding these areas of learning, the Board of Visitors and Governors, on a recommendation from Thomas Jefferson, chose to dispose of the college's grammar school by declaring that a grammar school belonged in the public-school system, not within a college.[61]

This move on the part of the Board of Visitors led directly to an issue regarding the terms of employment at the College of William and Mary when, in 1780, the Reverend John Bracken (Master of the College's Grammar School and Professor of Humanity) was removed from his positions at the college. Following his termination, Reverend Bracken filed suit against the college claiming that the Board of Visitors did not have the authority to eliminate any tutor, nor did they have the authority to determine the subject matter taught within the college. Bracken's attorney, John Taylor, claimed that, because the college had been awarded a charter during its inception, it was established as a corporation giving it all the rights and responsibilities as such an entity which included the hiring and termination of academics.[62] In addition, Taylor claimed that within the college's charter the transferring of all rights to

property and governance were to be awarded to the faculty and president of the college; however, the Board of Visitors and Governors failed to follow these guidelines and attempted to retain the powers awarded to the agents of the college, thus exceeding their own powers.[63] Bracken's attorney issued a writ of mandamus against the college's Board of Visitors and Governors directing them to restore his position at the college.

The attorney for the College of William and Mary, John Marshall (later to become the fourth Chief Justice of the US Supreme Court), responded to the claims made by Bracken and his attorney claiming that the fundamental issue raised by the plaintiff was with the issuance of the college's 1779 reform and not with the authority of the charter itself (originally issued in 1693), although the interpretation of the charter differed between the defendants and the plaintiff.[64] In Marshall's presentation of the facts of the case, he claimed that within the college's charter, the Board of Visitors and Governors was given broad powers over the university. With these powers the Board was directed to appoint the college president and the tutors of the college and was given the authority to identify the subjects to be taught at the college, namely divinity, philosophy, and languages. Marshall further claimed that since there had been no mention of a grammar school in the college's charter, and recognizing that the removal of the grammar school was under the jurisdiction of the board, that the grammar school's removal was then lawful. Finally, the Board's attorney claimed that because the grammar school's removal was lawful, the position for Reverend Bracken had been eliminated and therefore the plaintiff's claims were unjustified and unwarranted against the Board of Visitors and Governors for the College of William and Mary.[65]

The resolution of this case (*Bracken v Board of Visitors and Governors of the College of William and Mary*) occurred in 1790 when the Court of Appeals of Virginia sided with the Board of Visitors and Governors. In its verdict, the Court identified that, within the legal system, there were two types of corporations: one being a civil corporation; the other being a charitable corporation. The Court further stated that if a corporation fell under the realm of civil identification, it was not subject to its founder or board, but to the general law of the land.[66] Furthermore, if a corporation was designated as a charitable corporation, it was subject to its founder and the board appointed by the entities' founder.[67] Therefore, because the College of William and Mary was identified as a charitable

organization, the Court ruled on behalf of the College's governing board. This case established the initial determination of the power possessed by a college's governing board with regards to its ability to terminate faculty.

In the eighteenth century, the founding of additional colleges and universities within the American Colonies followed their predecessors with the formation of lay boards for the governance of the schools.[68] During this Colonial Period, the establishment of a college was commonly initiated by the formation of a lay board comprised of local community leaders and clergy from the local parish.[69] These lay boards were tasked with the establishment of the college, the hiring of the college's president and tutors, and the identification of the subject matter to be taught within the classrooms of the institution. Once these tasks were completed, the lay board was to relinquish its control to the president and fellows of the college (as seen in the College of William and Mary's Charter). However, as previously mentioned, the lay boards rarely relinquished the power they had been temporarily awarded and commonly ended up becoming the ruling board of the institution.[70] According to Wayland, many of the members of these lay boards were appointed to a college's governing board as a way to demonstrate to the surrounding community the college's financial stability and level of political importance.[71] However, since many of the members of these governing boards did not receive training in the operation of a college or university, by today's standards, they would be considered unfit to deal with matters of education.[72]

Terms of Faculty Employment

It was not until the eighteenth century that the topic "term of employment" was discussed within the American collegiate setting. With the establishment of the first colleges in the Colonies, the term of employment for faculty had not been considered in their founding charters. This lack of inclusion in the college charters regarding faculty employment gave many scholars the impression that their employment term was unlimited and never ending.[73] However, as with the Board of Visitors and Governors for the College of William and Mary, college lay boards viewed their authority as being all encompassing giving them the right to remove college presidents and tutors (faculty) of the college as they saw fit. This difference of opinion between the tutors and the lay boards

of colleges regarding the issue of employment led to a clash between the tutors and their college's lay boards.[74] The result of this conflict was the creation of a contractual system for faculty employment.

The initial venture into limiting the term of faculty employment through the implementation of a contract in American higher education occurred in 1700 when Harvard College's president, Increase Mather, proposed a limit of 7 years of employment for college tutors.[75] Although his proposal was not adopted, the question of term of employment remained a topic for discussion. Then, in 1716, the Corporation for Harvard College passed the Triennial Act, an act which limited all tutor appointments to 3-year terms with an option for renewal.[76] The impetus behind the Corporation's decision to include a term of employment for faculty was based on the fact that, although the Corporation could dismiss a tutor as defined within the college's charter, there was no formal way for the board to remove a tutor without cause. Because members of the board made their case that the Corporation needed such authority, it was deemed necessary for them to possess such power so employment decisions could be made and viewed as being final and without question.[77]

Although previous provisions were made to address the terms of employment for incoming tutors, no wording had been added to the charter to address the issue of existing faculty who had been grandfathered into the new employment system at Harvard College. Without specific wording in the college charter mandating a retirement pension for tutors employed by Harvard College prior to the passage of the Triennial Act, these individuals were able to work at the college for an unspecified amount of time. Therefore, according to Metzger, the reason for the Corporation of Harvard College including a retirement pension in its charter was to prevent termed appointments from being lengthened out of sympathy toward the aging educator or neglect/oversight of the institution.[78]

Additional language regarding faculty employment was added to the Harvard's Charter by the Corporation in 1760 when the Corporation defined a specific amount of time (maximum of 8 years) that a tutor could spend within a specific academic rank.[79] However, consistency in terms of employment within the confines of Harvard College was not experienced as the college implemented, with finances provided by its benefactors, the position of endowed chairs at the institution. Those faculty appointed to an endowed chair position (called professorship), unlike their academic brethren, did not suffer the limitation of defined

term employment.[80] This inconsistency in employment standards among the faculty led to discord between the masters and governing boards of Harvard College. In contrast to the term limitations imposed on college masters by the Board of Overseers, the unspecified employment status of an endowed chair was seen as self-defeating because of the inconsistency in employment standards between the two groups and was viewed as a deterrent for qualified applicants in applying for a tutor's position at Harvard College.[81]

During the mid-eighteenth century, professional rank faculty, or individuals hired as full-time tutors at a university, had a form of employment security where they were allowed to continue in their jobs provided they exhibited good behavior.[82] Although the term "tenure" was not used during this time, contractual agreements between faculty members and college trustee boards were introduced at the three major universities in eighteenth-century America—Harvard, Yale, and William and Mary. These agreements introduced the concept of faculty retention based on duration of time served in the profession rather than collegial consensus.[83] However, a written contractual agreement between a faculty member and a college trustee board was rare and only provided a time frame for employment of the faculty member; it did not provide any form of job security.[84] Additionally, during the eighteenth century the common practice for college governing boards when hiring a faculty member was to offer the individual a 1-year contract that automatically renewed at the end of the year.[85] According to White, the view of the university in using this approach was to free faculty from the obligation of applying for reappointment at periodic intervals, allowing them to focus on the responsibilities of their positions.[86]

As American colleges entered the nineteenth century, the manner in which faculty were appointed to their positions changed markedly. With the development of additional colleges in the country, tutors were being replaced by professorships which were granted unlimited term appointments. It was also during this time that the theory of "up or out" came to the forefront within the American higher education system. According to Metzger, the term "up or out," which originated at Harvard, was in reference to the requirement of a tutor to advance to the next academic rank or be dismissed from service.[87]

In the nineteenth century at colleges and universities across the nation, the tutor system was being replaced with professorships that consisted of various levels of employment. This change in status from tutor to

professorial rank introduced a new hierarchy in American colleges. The ranks developed, from lowest to highest were: instructor, assistant professor, associate professor, and professor.[88] Within this hierarchical system, one that developed from the system utilized at Harvard University during the mid-eighteenth century as a way to solicit financial support from college benefactors,[89] tutors were now viewed as the lowest form of educator, below that of an instructor, and their years teaching as a tutor were not even recognized as an apprenticeship.[90] This type of hierarchy created a two-class system where a non-promoted tutor could be reappointed after a 3-year term; however, the tutor wouldn't receive the benefit of job security that was awarded to his academically ranked colleagues.[91]

The Rise of the Concept of Tenure in American Universities

As the eighteenth century ended and the nineteenth century dawned, three events took place that would lead to the development of the current concept of tenure in the USA. These events were: (1) The German influence on American academics; (2) the involvement of the federal government in higher education through the passage of the Morrill Act of 1862[92]; and (3) a series of court cases known as the "Economic" cases.[93] These court cases take on a level of significance within higher education as it was because of the issues they addressed which gave rise to the formation of an association (American Association of University Professors) designed to protect the rights of higher education faculty.

The German Influence

Up until the late 1800s, the mission of American universities was similar to that of the early European universities—to produce clergymen for the church with little emphasis placed on collegial research or continued learning for faculty. However, during the nineteenth century, American students who wanted to study fields other than religion began traveling to Germany to receive their education from the leading non-sectarian universities of the time. According to White, upon graduating from these institutions, students had not only gained valuable knowledge that would enable them to fill academic positions in the USA when they returned home, but also were introduced to the philosophical distinctions between

colleges and universities underway in Europe, especially in Germany (the European distinction between colleges and universities was that colleges attracted fewer students than a university, offered fewer choices of subjects for students, and focused on teaching rather than research while a university focused less on teaching and placed an emphasis on scholarly research and graduate studies[94]). This change of thought in the roles of a university and college contributed to the rise of men to administrative positions who had received their formal educational training at German universities[95] where the focus was on graduate studies and utilized seminars and lectures to present specialized topics of instruction to advanced students who were seeking graduate degrees.[96]

A second area of German influence on American higher education was the principles of *Lernfreiheit* (a student's right to determine an individual course of study)[97] and *Lehrfreiheit* (faculty granted the freedom to teach or communicate ideas or facts without being targeted for repression, job loss, or imprisonment).[98] Although these concepts provided a form of freedom in higher education, *Lehrfreiheit,* a term that first appeared in 1850 when Prussia adopted its Constitution with Title II, Article 20 stating that "Science and its teachings shall be free,"[99] was the one that had influence on academic freedom in America.

With the Prussian Constitution of 1850 in place, as well as the unification of the Prussian territories into one state (Germany), German universities experienced the freedom of self-governance without the influence of public opinion.[100] However, the universities were now considered part of the state, much like the country's military forces and, as such, were subject to state control of the institutional budget, appointment of professors, and the general establishment of subjects offered within the university. Although the Prussian/German Government maintained control over various areas of institutional governance, the faculty members of the universities were given the power to appoint academic officials, appoint lecturers, and nominate individuals for the coveted role of professor.[101] Furthermore, although the German concept of *Lehrfreiheit* did not prescribe unconditional employment for faculty, it did institute the belief of freedom of speech within the classroom, as well as establishing a professional environment that promoted research and instruction as the responsibilities of a faculty member without fear of recrimination.[102]

Upon the introduction of *lehrfreiheit* in the USA by returning academics, it also was seen as an approach to provide academic professionals the freedom to research and present their findings without

the fear of retribution from the administration.[103] The understanding of this term was influential in establishing the preliminary beliefs of tenure and employment options as it was implemented in the American higher education system. Implementation of this concept led to an approach for academic freedom and the protection of faculty employment.

In addition to their concern for academic freedom and employment protection, these returning academics found that employment methodologies to which they were accustomed in Germany while doing graduate studies were in conflict with American universities where university administrators were adopting a form of term employment based on a 1-year contracts with every appointment being vacated at the end of the academic year. American administrators in public institutions claimed that the use of this form of 1-year term employment was justified because their yearly budgets were based on the allocation of funds received from the state in which they were located or from their benefactors and were subject to change each year. Therefore, a 1-year term of employment for faculty did not commit the institution to a term that might not be funded the following year.[104]

Because of their lack of scholarship, these existing American educators were viewed as low-status teachers by their administrators, served at the will of their college presidents and were treated as scholars in the same sense as their European counterparts.[105] During this time in history, state and/or federal funding of education did not exist for all practical purposes and many institutions of higher education (state-supported and private) relied heavily on individual philanthropy to keep the universities operating.[106] These donors knew that their contributions were a significant reason for the university remaining financially solvent and felt that they had the authority to remove professors or prohibit the university from hiring specific individuals who differed in religious or political beliefs from the individual donor or that of the institution.[107] Furthermore, faculty members holding lower academic ranks were commonly awarded varying term contracts while faculty members holding higher ranks received indefinite appointments for term employment.[108] However, as Metzger points out, typically governing boards that terminated a faculty member at the end of his 1-year contract did not do so out of necessity, but out of desire.[109] Nonetheless, even though faculty served at the discretion of the donors and/or institutional administration, a de facto tenure system did exist as faculty members were typically non-renewed only for interfering with the religious teachings of

the university.[110] However, as advances in science and technology were made, colleges sprang up with little or no regard for the individual professor's political or religious beliefs. These new colleges altered the higher education scene in the USA as they provided students an alternative to the religious-oriented institutions of the past and posed no belief requirements for student admission or faculty employment.[111]

As American higher education faculty continued to gain status and security in the nineteenth century, two employment-related questions were prevalent. These questions were: (1) if a professor had been awarded indefinite employment, could he still be discharged for reasons outside the realm of incompetence or misconduct; and (2) what, if any, safeguards were present to protect a professor from unreasonable discharge? The answer to these questions came from two presidents from prestigious institutions. The first was William Harper, President of the University of Chicago who provided an answer to these questions when, during the late nineteenth century, he stated that a pre-dismissal trial was unwarranted for faculty who were non-renewed and that non-renewed faculty should leave their positions if the university administration found that the professor demonstrated characteristics deemed immoral and/or incompetent.[112] Similarly, President Nicholas Butler of Columbia University concurred and added that the university had the right to dismiss a faculty member without bringing charges against the individual.[113]

Administrative actions such as these provided little, if any, protection for faculty from wrongful termination. Furthermore, such claims by college presidents were grounded in legal rulings awarding governing boards the authority to dismiss faculty for any sign of misconduct. Therefore, with the absence of a minister of education similar to that in Germany to rule on such issues, academic matters in the USA were handled by each individual university and thus there was no form of consistency from one institution to the next.[114]

An example of an early court case that dealt with the permanency of faculty employment and the authority of a governing board as it relates to faculty job security is found in the *Board of Regents of the Kansas State Agricultural College v. B. F. Mudge* (1878). In this case, Professor Mudge became the chair of Natural Sciences at Kansas State Agricultural College in 1865. During his tenure at the college, a question in back pay was raised by the professor which inevitably led to his discharge in 1873. Mudge filed suit against the college stating that he was not given a 3-month notice of dismissal as defined in the college's bylaws.

The case was eventually heard by the Supreme Court of Kansas which ruled that the governing board of the college had the right to employ a faculty member, a teacher, or even a president for any period of time. However, even though the board had those powers, the right to discharge, as identified within the college bylaws, was to occur only when there was an indication of misconduct. The Court further explained that, even though a governing board's authority was vast, it must follow the bylaws of the institution. Therefore, in the verdict of the Court, Mudge was awarded 3 months back pay upon his dismissal.[115]

However, the ability of a governing board to remove an employee after identifying that the employee was no longer working toward the same values and standards of the university came under scrutiny when the Supreme Court of Arizona ruled on the case of William Stowe Devol. Devol, employed by the University of Arizona as a professor of agriculture, brought suit against the university when he was terminated from his position without being awarded a 3-month notice of dismissal as defined by the faculty contract.[116] In the ruling issued by the Supreme Court of Arizona, the Court identified that the governing board of the University of Arizona had the authority to remove any employee or officer from their employment if they deemed such an action as being necessary. However, the Court further defined that the board had no authority to enter into a contract where employment could only be terminated after a fixed amount of time and that any agreement made for such a term for dismissal was not recognized by the law.[117] Therefore, the Court ruled that the board was not required to provide a termination notice or offer a promise of a specified employment term.[118]

The Involvement of the Federal Government and the Rise of Tenure

With the dominance of the church in higher education during the seventeenth and eighteenth centuries, the mission of American universities was devoted to the moral and intellectual development of its students.[119] However, in 1862 the Federal Government enacted three laws that spurred the westward expansion of the country and, in turn, established the creation of state universities. The first of these laws was passed on May 15, 1862, when President Lincoln signed the Department of Agriculture Organic Act establishing the US Department of Agriculture.[120] This new federal agency had, as its mission, the acquisition

of any and all information concerning agriculture through the use of education and scientific research.[121] Furthermore, given that, in 1862, the USA was a country in transition from an agricultural-based economy to one based on industry, the passage of this Act signaled that the country would continue to maintain its agricultural roots, but that these roots would be enhanced by the latest scientific advances and education to assure that those engaged in agriculture had the benefit of the latest technological developments to enhance their crops and livestock.

Then, 5 days after signing the Organic Act, on May 20, 1862, President Lincoln signed into law the Homestead Act. This Act marked the first time that the Federal Government officially encouraged the westward expansion of the country by providing settlers the opportunity to acquire 160 acres of public land for a $10 filing fee.[122] However, this Act also included a provision whereby those who agreed to reside on their recently acquired property for at least 5 years would be given the opportunity to purchase their land from the government for $1.25 per acre after only residing on the property for 6 months.[123] Although this Act was signed into law during the Civil War, the effect of this Act on inexpensive land was felt 3 years later when the War ended as it gave veterans and their families an opportunity to move west and put behind them the devastation, physical and emotional, left at the end of the fighting.[124]

The last of the three laws that impacted the country's westward expansion was the Morrill Act, signed into law on July 2, 1862, by President Lincoln. This Act provided each Union state 30,000 acres of public land for each federal senator and representative the state had in Congress to be allocated for the development of state universities whose missions were to focus on the advancement of agriculture and the mechanical arts, a direct response to the Industrial Revolution that was sweeping the country.[125] The Act was seen as a boon to advancing industry and agriculture as prior to its passage, there were only four states that had agricultural colleges; however, just 10 years later, 1872, 26 additional states had introduced state agricultural colleges bringing the total to 63 the number of universities throughout thirty states that were established under the Morrill Act,[126] making it one of the most significant and influential pieces of federal legislation to impact American higher education up to that time. Additionally, this Act linked the Organic Act (technology and scientific advancement of agriculture) and the Homestead Act (available land for inexpensive settlement) with establishing state universities and acknowledging the expansion of the west and the Industrial Revolution.

Background of the Morrill Act of 1862 and Federal Involvement in Education

The history of the Morrill Act of 1862 can be traced to the eighteenth century when the newly formed Continental Congress passed the first of a series of land-grant acts designed to help in the development of the western territory of the newly formed USA. During the Revolutionary War there were debates between colonial representatives on how to support the war effort financially. These representatives recognized that there were no provisions in the Articles of Confederation for funding the war associated with the separation from England by the colonies, and acknowledged the inability of Congress to tax the citizenry or to establish any programs to support the war efforts.[127]

A debate ensued among the representatives to determine an approach to increase the nation's revenue and decrease its looming financial shortfall. During this debate, the representatives came to realize that western lands (at that time, lands that had a western boundary at the Mississippi River) could be incorporated into the newly independent nation leading the Continental Congress to pass the Land Ordinance of 1785.[128] This Ordinance, passed in 1785, laid the foundation for the Homestead Act and Morrill Act of 1862 by setting guidelines for the establishment and surveying of the western territory.[129] These guidelines served to instruct surveyors working for the government to develop the land into townships (land that is six square miles with 36 parcels contained therein) and lots (36 parcels per township with each lot being one mile square). In addition to the specifics identified for the parceling of land, the Ordinance also provided direction and implementation of education within the township such that each township reserved one lot (lot number 16) of the 36 for the development and construction of a public school.[130] This inclusion for the establishment of public schools in the western expansion serves as an indication of the Colonials' view toward education and the mission for the development of the western territories. The pervasive view for education in these territories was not only for those settling the land, but also was viewed as essential to civilize the indigenous natives. Furthermore, by placing emphasis on education in designating which numbered lot was to be set aside for a public school, the passage of this Ordinance also set a precedent for the federal funding for education.[131]

Then, in 1787 with the adoption of The Northwest Ordinance, the federal government became further involved in the support of education

when it was deemed legal for public land to be sold for the support of and founding of a public school.[132] Although vague in many of its policies, this Ordinance was significant in its support for education and the creation of states by standardizing a geographical baseline that ran from the western territory to the Ohio River. In addition, support for education was mentioned in Article III of the Ordinance where it stated that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[133] While the Ordinance only provided encouragement for education, it marked the first significant effort of the Continental Congress to address the importance of education across the nation.[134] However, even though there was no direct statement of action for education within the Ordinance, its mention was indicative of the Congress's desire to provide provisions within land contracts for financial resources to be dedicated to education at all educational levels.[135]

During the nineteenth century, a majority of Americans continued to remain on the eastern coast of the USA, not taking advantage of the opportunity provided to them through the Land Ordinance of 1785. However, as word got back east that individuals were becoming wealthy because of the California Gold Rush (1848–1855), individuals and families began taking the government's offer to move westward. This westward migration took on added importance as these groups benefitted from the provisions afforded them by the Land Ordinance of 1785 and began to populate the west coast of the country.[136] While the east and west coasts experienced an increase in population, the area between the two coasts, the Midwest, remained a sparsely populated region of the country. Agricultural economics also contributed to the sparse population in the Midwest during the 1830s and 1840s as the cost of corn, wheat, and cotton had increased significantly allowing for larger Southern farms to take control of the market and force out their smaller Midwest competitors.[137]

In the 1850s, the federal government, on several occasions, attempted to pass legislation to permit the development of railroads to connect the western and eastern coasts which, in turn, would serve to open the Midwest to commerce and population. However, the Southern States, who supported the use of slavery for the maintenance of their farms, opposed the idealism of mid-western expansion fearing a reduction in the number of slaves willing to work in the southern farmlands when they could obtain agricultural employment in non-slave Midwestern

territories and states.[138] Furthermore, the Southern States feared that if the federal government promoted westward expansion by the issuance of drastically reduced, or even free land, the government would eventually need to raise money through other means including increased taxation or the inclusion of tariffs on trade to pay for the giveaways.[139] Although the Land Ordinance of 1785 and the Northwest Ordinance of 1787 laid the groundwork for the establishment of states from western territorial claims, it was not until the passage of the Homestead Act of 1862 that Americans began to benefit from the provisions allotted them for the development of homesteads in the Midwest.[140]

Government policies that promoted the western expansion of the country changed drastically with the start of the Civil War (April 12, 1861). The onetime separation between the east and west coast was overcome when the federal government authorized funding for a transcontinental railroad which permitted travel and communication to occur across the country.[141] With the onetime opponents of westward expansion, the Southern States, no longer in the Union, the Northern-controlled Congress passed the Homestead Act of 1862. The significance of this Act was that with its passage federal lands acquired through treaties between the US Government and Native Americans (i.e., Agreement with the Rogue River 1853 and the Quinault River Treaty of 1855) or the purchasing of territorial land from foreign powers (i.e., Louisiana Purchase in 1803 and the Gadsden Purchase of 1853) were now available for settlers looking to establish homesteads in the west.[142] Farmers who earlier had been displaced by the larger Southern plantations were now able to look westward for land that could be acquired for no upfront cost, or for a minimal fee of $1.25 per acre (up to 160 acres) if the settler decided to purchase the land after a 6-month grace period rather than waiting the required 5-year period of continuous residence to receive the land for free as stated in the Act.[143] Likewise, many new immigrants took advantage of the Act's provisions and as they left their homelands and headed westward to the New World to establish a home for themselves and their families with the promise of economic prosperity and the financial provisions made available through the Homestead Act.

Prior to passage of the Morrill Act, the US Government had taken active measures to populate the western territories but had offered few incentives to would-be settlers as seen in the provisions of the Land Ordinance of 1785 and the Northwest Ordinance of 1787. While these Ordinances mentioned education (land for public school—Ordinance of

1785; encouragement for education—Ordinance of 1787), they focused on land development and westward expansion with no mention of funding for schools, colleges, or universities. Then, with the passage of the Homestead Act, settlers of the western territories were provided financial incentives to acquire land for settlement, but still, financial support for education in the western territories was missing. This previous lack of financial support for education all changed with the passage of the Morrill Act of 1862, which, at that time, made the USA the first nation in the world to commit federal funding for the support of higher education.[144]

In the 1850s there were numerous debates over federal support for colleges and universities in the nation. The first of these debates about federal support for higher education occurred in Illinois when, in 1850, Professor Jonathan Baldwin Turner promoted a new type of university that would help prepare industrial workers in the advancements of science and technology. Turner, who received his formal training in classical studies at Yale College, accepted a position at Illinois College (1833–1847) upon his graduation.[145] While at Illinois College, Turner became an abolitionist and spoke out against slavery in his classroom. After being forced out of the college because of his views on slavery, he led the movement for an industrial education designed for the education of the working classes.[146] Turner's focus was on providing a liberal education to the vast majority of the country's citizens, namely farmers and employees of manufacturers, rather than the elitist 1% of the nation.[147] To gain support for his view, he encouraged farmers to pressure their federal representatives to assure that each state received an appropriation of public land designated for the development of a university that focused on industrial education.[148] In 1853 Turner's model for educating the working class passed the Illinois legislature who then sent a set of policies calling for the Federal Government to provide financial support ($500,000 per state) to all states for the state development of an industrial college.[149] However, no action was taken on this proposal as Congress allowed the recommendation to die.

Although the recommendations of the Illinois Legislature died at the federal level in 1853, the topic of Federal support of an agriculturally based state university was kept alive when Representative Justin Morrill (later Senator) of Vermont introduced similar legislation into Congress. Morrill, a self-educated man who regretted his lack of opportunity to attend college as a young man, became well versed in agriculture and

manufacturing through his life experiences as an experimental farmer and blacksmith. His dream was to have America provide educational opportunities for children from working class families.

Morrill's first attempt at legislation to provide federal support for higher education (1857) called for Congress to provide each state with public land for the development of a state-supported agricultural college. Using the data from the federal census of 1850, Morrill's proposal called for each state to receive 20,000 acres of land for each congressional representative and senator.[150] One disadvantage to his proposal, however, as seen by western representatives, was that because the eastern states were more populated than the rest of the country and had little or no public land to sell for the development of a state agricultural college; they feared that their lands would be sold so eastern states could raise money for the development of these universities.[151]

Following the standard procedure for such a proposal being introduced into Congress (directed to the House Committee on Public Lands—a committee controlled by the Southern states who were also opposed to such a proposal) and sensing that such a proposal would be denied by the Committee, Morrill requested that his proposal be directed to a committee of his peers for review in an effort to receive a more favorable examination than what he feared from the House Committee.[152] When his request was denied, Morrill called for parliamentary rules that forced his proposal to receive a floor vote bypassing the House Committee on Public Lands. This move proved successful; however, the legislation only narrowly passed both houses of Congress.[153] Although the legislation passed both chambers of Congress, when it arrived on President Buchanan's desk, he vetoed it arguing that it was unconstitutional and would award the federal government unnecessary powers that would interfere with constitutionally guaranteed state rights.[154] Buchanan further explained that if the land-grant bill were to pass, the viability of exiting colleges and universities would be threatened. With the passage of the bill so close in both chambers, Buchanan's veto was sustained.

Although Morrill's first land-grant bill was vetoed by President Buchanan, he did not allow his dream for a federally supported state agriculture universities to die. Realizing that his proposal had received widespread support from the American people, he urged voters to influence their representatives and senators to support his bill the next time it came up for a vote in Congress.[155] Therefore, shortly after Lincoln

became President in 1861, Morrill presented a modified version of his land-grant bill. The first modification called for 30,000 acres of public land (10,000 more acres than his original proposal) to be awarded to states for each representative and senator they had in Congress, based on the 1860 census rather than the 1850 national census of the first bill.[156] The third difference between the original bill and the modified bill was made because, at the time, the country was fighting the Civil War. Therefore, to address the needs of the military and to garner additional support for his legislation, he added that each land-grant institution must include military science and tactics within its curriculum.[157] Even though the Southern states had seceded from the Union, Morrill's land-grant bill still met opposition, this time from the western delegates who feared that if his bill became law, the more heavily populated eastern states would receive a greater benefit from the sale of western lands than they would.[158]

As Morrill awaited the decision from the House Committee on Public Lands, which came as a recommendation for non-passage, he asked Senator Benjamin Wade of Ohio to present the bill to the Senate's Committee on Public Lands. The Senate Committee approved Morrill's bill and moved it forward to the entire Senate where, on June 10, 1862, it passed by a vote of 32 to 9. With Morrill's land-grant bill clearing the Senate, it then went back to the House of Representatives where it was presented before the entire House without the recommendation of the Committee on Public Lands. With the full House voting, the bill passed on June 17, 1862, by a vote of 90 to 25.[159] Finally, after a 5-year battle between Congress and two presidents, the Morrill Act became law on July 2, 1862, with President Lincoln's signature.

Twenty-five years later, in 1887, a supplement to the Morrill Act of 1862 was created when Congress passed the Hatch Act. This Act enabled the federal government to provide federal matching grant funding, in the amount of $15,000, for each state to establish agricultural experimental stations in connection with the state's land-grant institution.[160] In addition, the funds awarded to each state land-grant institution through this bill were determined by the use of a formula based on the number of small farms found within the state. To receive these funds, states had to match the amount they received from the federal government.[161]

At the end of the Civil War (1865), and with advancements in science and technology, American educators began to realize that the standardized curriculum being taught in colleges and universities was outdated

and irrelevant for educating the next generation of students.[162] In addition, after the War ended, colleges and universities began to see an increase in the enrollment of African-American students. Prior to 1865, few African-Americans were given the opportunity to attend college; however, with the end of the slavery and the Civil War, several private colleges were established with the sole purpose of providing the children of freed slaves a college education.[163] However, the ability of African-Americans to attend the land-grant universities created by the Morrill Act of 1862, especially those in the southern states, was not evident after the Civil War as many of the former Confederate States enacted laws that legally separated the races. In an attempt to address this issue in higher education, Congress passed the Second Morrill Act on August 30, 1890.[164] This new Act specified that for states to receive the federal funds awarded by the Morrill Act of 1862, each state had to either show that race was not a criterion for admissions or that the state maintained separate colleges for different races so that there would be an equitable division of the federal funds.[165] With this law in place, sixteen black land-grant colleges were established throughout the South and became known as the 1890 Land-Grant Institutions.[166]

The Rise of the Concept of Tenure in American Universities

From the late nineteenth to early twentieth century, the higher education system in the USA was expanding as a handful of new privately funded universities were being established through large donations made by wealthy donors.[167] These contributions enabled, and were used to attract, faculty to continue their research at these universities and to further the industrial expansion of the West. Likewise, to provide incentives for attracting new faculty, universities used their funds to offer contractual agreements to individual faculty members so they could receive a leave of absence, known as a sabbatical, every seventh year of employment at the institution. With this incentive, universities and their donors encouraged faculty members to conduct research within their field of expertise and thereby have the university receive acclaim for the innovations they created.[168]

During the late nineteenth and early twentieth century, faculty made advancements in technology that benefited their universities through acquired patents and publications that were credited to the university;

however, no provisions were made to guarantee faculty employment after their research was completed. If their services were no longer required by the university, the faculty member had no claim to the research he/she conducted because, as viewed by the university administration, board of trustees and donors, the work had been done on university time and perhaps with the benefit of a paid sabbatical. This lack of job security led to increased tensions between faculty and administration as faculty began to feel as though they were disposable commodities with little or no employment security whose jobs would be terminated when their research was concluded.

As university faculty began to question administrative policies, they began to express their opinions on various issues which inevitably led to disagreements between them and the college's board of trustees and/or administration. These confrontations were attributed to several faculty members who challenged their termination through the court system. An example of a professor who challenged the status quo of the time regarding industrial monopolies, free trade, and the diminishment of the gold standard in the USA is the case of Richard Ely.[169]

In 1894, Ely, a University of Wisconsin economist, came under fire for his views on labor strikes and the right for laborers to boycott their workplace because of the perceived unfair and unsafe environment in which they were forced to work.[170] His views drew the attention of local journalists and several state legislators who called for his dismissal from the university. Although there was no set form of academic tenure in place at this time, the University of Wisconsin, as well as the Wisconsin Board of Regents, stood behind Ely and protected his academic freedom and safeguarded his employment at the university.

Such support for university faculty job security, however, was not common within higher education as is seen in the case of Edward Ross, a Stanford University professor, who was terminated from his appointment due to his controversial views on immigrant labor, train monopolies, and his attacks on the economic policies of Stanford's founder, Leland Stanford.[171] Ross's actions drew the attention of Mrs. Stanford who used her influence to force his termination from the university.[172] Following Ross's forced resignation on June 5, 1900, another Stanford professor, George Elliott Howard, spoke out against Ross's discharge from the university.[173] Howard's statements and actions also drew the ire of Mrs. Stanford and the university administration and he also was dismissed from his position at the university.[174] These two incidents at Stanford

University where administration and moneyed interests impacted faculty employment signaled the beginning of issues that would continue to surface across American academia pertaining to the rights of faculty to speak out and the impact such actions placed on their employment.

The Formation of the American Association of University Professors and a Definition of Tenure

From the beginnings of higher education in the USA dating back to the 1700s up to the twentieth century, the university's administration and financial supporters governed universities with a firm hand and tightly controlled the research agenda of their faculties.[175] However, industrial and business leaders during the Industrial Period of the United States (1820s to 1870s) looked to universities as places that were free from canonistic influences and where the pursuit of industrial and technical knowledge could be embraced, not dampened by differences in religious beliefs.[176] It was as industrial leaders began to recognize the value of higher education that Arthur Lovejoy, a philosophy professor at Johns Hopkins University, became aware of the lack of job security provided to faculty across the nation. As he began to develop a response to what he perceived as a lack of job security in higher education, he contacted eighteen colleagues at his university and persuaded them to co-sign a letter which he sent to peers of equal rank at nine other leading universities across the nation.[177] The purpose of this letter was to establish a society where academic professors could organize and develop approaches to protect their rights and the rights of their colleagues from university administration and college trustee boards and thwart occurrences similar to those that took place at Stanford.[178]

On January 1 and 2, 1915, the professors from these leading universities held their first organized meeting at the Chemists' Club in New York City. Out of this meeting was born the American Association of University Professors (AAUP) with John Dewey selected as the organization's first president.[179] A second result of this meeting was the development of a set of regulations that defined professional academic tenure and provided guidelines for its attainment.[180] This newly formed AAUP also identified university governing boards being heavily influenced by financial donors as an area of concern because these donors, who were primarily the industrial leaders of the time, propagated self-driven interests

that limited the flexibility of university faculty members to conduct unrestricted research because they were bound to the special interests of the financial donor. The association viewed academic tenure as a way not only to provide a safeguard for faculty employment, but also an avenue for educators to conduct research outside the directives from the private sector. From this initial meeting in New York City, the AAUP became the professional organization to represent faculty rights in higher education.

As part of the work at this first meeting of the AAUP, a committee was formed to draft a statement describing the rights and freedoms shared by all faculty members in safeguarding their freedom of expression in the classroom. This committee, known as the Committee of Fifteen (also known as Committee A), produced what has become known as the AAUP's *1915 Declaration of Principles of Academic Freedom and Tenure*. In addition to the committee describing freedom of expression issues in their document, they also developed a rationale for tenure stating that, due to the lack of financial compensation for faculty, tenure should be viewed as a substitute for the wealth that was achievable outside of academia.[181] The Committee's recommendations went further when they suggested that faculty appointments be made by faculty and chairpersons following three specific elements: (1) clear employment contracts; (2) formal academic tenure; and (3) clearly stated grounds for dismissal.[182] Finally, their declaration provided a linkage between academic freedom and tenure noting that these issues reside somewhere between logic and practical concerns.[183] These two concepts (academic freedom and tenure) reflected the pressures of the time being placed on those in higher education for providing improved status and safeguards for faculty self-defense against unjustified termination.[184]

Since the creation of this Declaration of Principles of Academic Freedom and Tenure, the terms academic freedom and tenure clearly have been intertwined.[185] However, leading scholars of the time feared that the granting of tenure, which provided faculty job security, would force them to tolerate unproductive colleagues imposed on them by overzealous administrators, as well as a reduction in the number of qualified applicants for faculty vacancies at universities across the nation.[186] However, to alleviate the issues raised by these scholars, the AAUP emphasized that institutions of higher education follow the recommendations from the Committee of Fifteen and include a 10-year probationary period during which time a newly appointed faculty member could

be terminated for lack of collegial performance.[187] In this probationary period, the newly appointed professor had to achieve academic tenure based on the institution's and/or state's standards or he/she could be terminated without cause.[188] In its attempt to further stress the importance the AAUP placed on the recommendations of the Committee of Fifteen, the association empowered the Committee to investigate allegations of fraudulent tenure practices by universities and other infractions against the policies established by the organization.

The first of these investigations conducted by Committee A occurred in April 1915. This inquiry was prompted by Lovejoy who, while traveling to New York from Johns Hopkins University, read that seventeen faculty members had resigned from the University of Utah in protest to the practices of the college administration and the manner in which the administration had unjustly terminated several faculty members from the university. Lovejoy, with the approval of AAUP president John Dewey, spent 4 days on the campus of the University of Utah investigating the allegations presented.[189] In his examination of the policies in existence at the University of Utah, Lovejoy uncovered that several faculty members had been terminated by the university administration for their expressing their disapproval of the Governor of Utah, William Spry, in a graduation speech that they had written.[190] In addition, Lovejoy also uncovered that all appointments at the University were for a 1-year term and that there were no set standards in any of the University's documents that described the policies and procedures for termination of faculty.[191] According to Lovejoy, grounds for dismissal were solely based on the whim of the University President and its board of trustees.[192] Although the recommendation of Lovejoy and the AAUP to reinstate the dismissed professors was ignored by the University president and board of trustees, this inquiry was a landmark in that it was the first time that the AAUP investigated what it considered to be the unwarranted termination of faculty members at a university.

A few years later, concerns continued to exist within higher education about academic freedom and academic tenure. In 1925, these concerns led an organization comprised of presidents and chancellors from American universities (the American Council on Education—ACE) to invite representatives from the AAUP and other educational organizations to a meeting for the purpose of discussing the principles of academic tenure and freedom.[193] During this conference, discussions were

held on the principles of academic tenure and academic freedom and how these issues were to be applied within universities. The outcome of this meeting was a joint statement from the ACE and the AAUP which included the following: (1) an endorsement by college presidents that supported academic tenure as being essential to safeguarding the academic freedom of faculty members; and (2) the first attempt to develop codified rules for tenure-related disputes by the ACE and AAUP.[194]

Then, in 1940 the AAUP released a follow-up to their 1915 Declaration when they issued their Statement of Principles on Academic Freedom and Tenure. Within this Statement, the AAUP identified the inconsistency of policies on the termination process of faculty. The remedy they suggested to rectify this inconsistency was to state that no professor could be dismissed without adequate cause, except for extraordinary reasons related to financial emergencies. Furthermore, in this Statement the AAUP recommended reducing the probationary period to acquire tenure from 10 to 7 years. A key element of this Statement was that the AAUP identified that if a tenure-track faculty member did not receive tenure by the end of the identified probationary period, he/she could be terminated without cause if a peer review demonstrated a lack of professional progress in scholarship.[195] They also recommended that if tenure decisions were not made prior to the end of the probationary period, the faculty member would be granted tenure.[196]

Finally, this 1940 Statement of the AAUP supported the notion that faculty members should have the freedom to discuss topics within their classroom; however, they must exercise when discussing controversial issues with no relation to the subject they were teaching. Discretion also was advised for faculty who chose to write and/or speak on issues that might put them at odds with their university administration and to avoid conflict if at all possible. These pronouncements by the AAUP were considered important as they addressed the issue of academic freedom by stating that all faculty members have the freedom to discuss course-related topics within their classroom without fear of reprimand from their college's administration. However, with the start of World War II, little progress was made on the implementation of the principles addressed in the Statement and the role of the AAUP during the war was diminished as America's citizens postponed higher education to serve their country.

The Growth of Tenure as a Faculty Incentive Amid First Amendment Pressures

In the early twentieth century, higher education was not as well established as a means of career preparation as it is today. Students who attended college during this era were typically from the elite of the country.[197] The typical citizen of the late nineteenth and early twentieth century either did not have the money to attend college or did not see the advantage of pursuing higher education.[198] This pattern of advanced education being available only to a select few changed with the end of World War II as soldiers began returning home from the War without any opportunities for employment available to them.[199]

It was near the end of World War II that President Franklin D. Roosevelt and Congress were faced with economic issues related to returning to a non-war economy. These issues included: (1) the elimination of wartime production of goods, (2) determining how the country could adjust to meet the ever-growing demand of goods during peacetime, and (3) considering the role of the federal government in boosting the post-war economy.[200] Additionally, the federal government expressed concern about how the nation was going to meet the employment needs of servicemen returning home from the War.[201] In its attempt to address these issues, Congress passed the Servicemen's Readjustment Act (1944), also known as the G.I. Bill of Rights. The promise of this Act was to assist veterans in attending college without individual cost.[202] With the passage of this bill aiding returning service men and women, colleges and universities across the nation grew in size to accommodate the increased number of students. However, even though the GI Bill brought about an increased demand for higher education, university administrators failed to see a need for additional faculty despite the fact that there was an increased demand for the number of courses offered at their institutions.[203] Colleges and universities responded to this issue by offering their existing faculty various benefits including tenure. The lure of tenure was also used by administrators when they realized the need to attract new faculty to their institutions (Table 2.1, demonstrates how the number of students surpassed the number of faculty, located on page).[204]

With the War over and former servicemen attending institutions of higher education in increasing numbers, the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure faced its first test in

Table 2.1 Expansion of Universities and Colleges between 1939 and 1969

Year	*Number of institutions*	*Number of faculty*	*Number of students*	*Faculty/Student ratio*
1939	1708	146,929	1,494,203	1:10.17
1949	1851	246,722	2,659,021	1:10.78
1959	2008	380,554	3,639,847	1:9.56
1969	2525	450,000	8,004,660	1:17.79

Source Data adapted from US Department of Education, "*Digest of Education Statistics: 1995*," 175

the late 1940s and early 1950s in a time that has become known in US History as the McCarthy era. It was during this time that Senator Joseph McCarthy (R-WI) accused many academics of contributing to the Communist Party.[205] His premise was that the support academics were providing to the Communist Party allowed Soviet espionage efforts to develop within the USA.[206] McCarthy demanded that the accused identify the political party they supported and answer questions concerning their loyalty to the USA.[207] This overt political intrusion into the personal political life of academics threatened to jeopardize scholarly dialogue in higher education. However, because academic tenure was in place at many of the nation's institutions, a shield was provided for faculty which prohibited university administrators from dismissing those who refused to cooperate with McCarthy.[208]

In 1953, as a response to these actions by McCarthy, the AAUP leadership released a statement that placed restrictions on faculty members who actively participated in the Communist Party.[209] This statement, fueled by the drive of McCarthyism and the fear of Soviet intrusion into the nation's political infrastructure, made it clear to institutions of higher education that if a faculty member had an affiliation with the Communist Party, he/she could be terminated from his/her appointment.[210] However, this statement was in direct conflict with the First Amendment of the Constitution of the USA which assures a citizen's right to freedom of speech and association.[211]

Because of the AAUP's position on this issue, faculty support for the AAUP began to diminish. Evidence of this decline can be seen in a 1956 statement by the association which indicated that college administration was able to legitimately question faculty members about their political affiliations and determine their level of competency based on

their affiliations.[212] However, not all faculty members were able to escape McCarthy's inquisition. Unfortunately, many, if not all, non-tenured instructors who refused to cooperate with McCarthy were terminated from their positions and did not receive any support from their professional association.[213]

In the years following the McCarthy era (late 1950s through the 1960s), the USA came under duress again as the rights of African-Americans were brought to the forefront of political debate.[214] This point in time, known as the Civil Rights Movement, witnessed events that were led by university faculty as they supported the desegregation of student bodies on college campuses across the nation. Although tenure provided faculty employment, they were not provided any safeguards for their actions outside of the classroom.[215] Many instructors who supported and who had taken an active role in the Civil Rights Movement were jailed for their involvement in protests on their campuses. Even though their right to freedom of speech and association was in question, tenure provided these individuals a modicum of protection to retain their jobs even after being incarcerated.[216]

An example of tenure as job security during this period can be seen in the protests of Russell Barrett in the early 1960s. Barrett was a tenured professor at the University of Mississippi during the Civil Rights Movement when the US Supreme Court ruled for the admission of its first black student, James Meredith. At that time (1962), university officials, as well as the state's governor, tried to block Meredith's admission to the university based solely on his ethnicity. Barrett, not supporting the actions of the university and state governor, launched several protests against the blocking of Meredith's admission.[217] Although the university did not condone his protests, Barrett encountered little administrative recrimination, a fact that has been credited to his tenure status at that time.[218]

With the protections tenure provided to faculty in the 1960s and early 1970s, many faculty felt they were able to voice their expressions concerning the issues of the time (i.e., Civil Rights Movement and Vietnam War) without retribution from university administrators.[219] In spite of the fact that tenure was in place at universities and colleges across the nation during the mid- to late 1960s, university officials still challenged the legality of faculty retaining employment based solely on the tenure system. Evidence of the challenges faculty faced regarding tenure and/or their employment can be seen in the increased number of litigation

Table 2.2 Total number of US Supreme Court Cases 1930–1969

Decade	*Number of Court Cases*
1930–1939	54
1940–1949	94
1950–1959	69
1960–1969	146

Source Data adapted from US Supreme Court, "Dates of Early Supreme Court Decisions and Arguments."

cases during this period; a number that increased dramatically from previous decades.[220] As seen in Table 2.2, the increase in legal cases tried by the Supreme Court increased significantly as well during the 1960s, partially due to the fact that tenure was linked to the passage of the Civil Rights Act of 1964 (Title VII)[B].[221] This piece of legislation was designed to address employment discrimination issues, claims of breaching contracts of employment, racial segregation, and violations of due process and freedom of speech, thereby providing federal legislation to guarantee job security for faculty in higher education.[222]

As the 1960s ended and the decade of the 1970s began, the issue of a faculty member's job security was once again addressed by the US Supreme Court when it ruled on the legality of continuous employment granted to faculty through tenure. The landmark case for this issue was *Perry v. Sindermann* (1972) in which Sindermann, a faculty member for ten years within the University System of Texas, was working on 1-year renewable contracts.[223] In 1969, the System's Board of Regents decided not to renew his contract based on allegations of insubordination. Upon receiving his notice of non-renewal, Sindermann sued the Regents stating that their decision was based on his public criticism of the System's policies and procedures. His case wound its way through the courts until it reached the US Supreme Court which ruled that: (1) although there was a lack of a contractual or tenure right, the plaintiff's claims could not be dismissed; (2) a teacher employed for multiple years at an institution should be permitted to show that, while no explicit tenure system existed, a de facto tenure system was in place (as he had received continuous renewal for the nine previous years); (3) proof of such a system would not guarantee re-employment, but provide the plaintiff with the opportunity to receive a hearing; and (4) at such a hearing the grounds

for his non-renewal of contract should be provided to him.[224] Therefore, because of the de facto state of tenure that had been awarded to him by the US Supreme Court, Sindermann was given the right to due process and essentially awarded the right to retain his position at the college. This tenure case, which dates back over 40 years, suggests that the re-examination of tenure during this time period was prompted not only by the politicization of elements within universities themselves, but also by external pressures from society such as the reduction of external funding, society's perception of education, and the Civil Rights Movement to name but three.[225]

Table 2.3 Percent of full-time instructional staff with tenure: 1980–2010

Academic year and type of institution	*Tenured*		
	Total	*Male*	*Female*
1980–1981			
Public institutions	68	72.8	54
4-year	62.7	71.1	47.5
PhD granting	64.5	71.3	42.8
Other 4-year	61.3	70.9	50.2
2-year	75.2	79.3	67.5
1990–1991			
Public institutions	62.9	67.8	45.3
4-year	61.7	68.6	43.9
PhD granting	65.2	71.6	43.6
Other 4-year	59.4	66.3	44
2-year	57.3	60.9	51.9
1999–2000			
Public institutions	55.9	62	45.6
4-year	53.2	60.3	39.3
PhD granting	50.4	58	34.5
Other 4-year	54.7	61.2	43.2
2-year	67.7	70.6	64.5
2009–2010			
Public institutions	50.6	56.3	42.9
4-year	47.9	54.6	38
PhD granting	45.7	52.9	34.1
Other 4-year	51.2	55.5	46.1
2-year	64.1	67.2	61.4

Source Data adapted from National Study of Postsecondary Faculty and can be found in US Department of Education Digest of Education Statistics (1997—Table 240) and Digest of Education Statistics (2010—Table 274)

From the 1950s to the 1990s, the number of tenure or tenure-track professors employed at universities far surpassed those of non-tenure-track instructors. A recent trend, however, as seen in Table 2.3 (located on the next page), is that universities are hiring faculty on single- or multi-year contracts which may or may not include guarantees of constitutional protection rather than providing faculty an opportunity to gain the security of employment associated with tenure.[226] There are several reasons associated with this change in employment practices on the part of universities. One of the reasons given for the weakening of the traditional concept of academic tenure is that faculties lack a unified voice across the nation as well as within their own institutions[227] and many faculty members now are concerned only about what they are receiving in security and wages; not what happens to their colleagues.[228] A second reason for the apparent demise of the tenure system is that it is viewed as placing a hardship on universities that are forced, because of tenure, to keep unproductive faculty who have little regard for the students they teach and who do not participate in university service-related areas.[229] Because of these feelings toward tenure, universities have begun to follow a trend of filling vacant faculty with non-tenure-track faculty.[230] If this trend continues, the question is raised as to what changes in the current approach to employment security will be needed if tenure is to survive.

Summary

Beginning in the seventeenth century, American higher education was dominated by religious institutions whose foremost purpose was to provide religious education to the moneyed elite males of the country in the hopes that these individuals would someday become clergy. These institutions were founded and controlled by donors who exercised their influence in the selection of faculty and administration of the university. However, students who had no desire for a religious education found that the only avenue available to them in higher education was to pursue their studies in Europe, or more specifically in Germany.

As the USA began its westward expansion, and with advances being made in technology, agriculture, and science during the mid- to late nineteenth century, the federal government began to take an active role in providing opportunities for citizens to gain land and to move away from traditional canonic education and toward advanced studies in agriculture and the technology of the time. This involvement of the

federal government was seen by the passage of several acts—the two most significant of these acts being the Morrill Act of 1862 and the Hatch Act of 1887. These two acts not only provided funding for the creation of the nation's first state universities across the country, but also provided a means for research in the areas of agriculture and technology.

With the passage of these two acts, the federal government offered states supplemental funding to establish non-secular institutions of higher education. Those scholars who had gone to Europe to gain advanced degrees in the classical, non-religious tradition now were returning to the USA and finding positions in state-supported secular institutions. However, with these scholars came the concept of *Lehrfreiheit*, a German approach to teaching that these scholars had experienced during their studies while attending a German university.

Through the late nineteenth and early twentieth centuries, tension grew between university administrators and their faculty as the teaching staffs began to assert not only their rights to teach as they saw fit, but also to exercise their First Amendment rights on various social and political issues. The result of this heightened involvement led to several court cases regarding faculty employment security. Following several questionable terminations that were prompted by faculty members exercising their constitutional rights a group of faculty founded an organization designed to protect the rights of faculty. This organization, the American Association of University Professors (AAUP), defined the concepts of secure, continuous employment without fear of wrongful termination and academic freedom for university faculty across the nation.

Although the organization was silent for much of the 1940s due to the USA involvement in World War II, the merits of its continuous employment security proposition were tested shortly after the war concluded as the fear of Communism in all forms of American life was rampant. This issue was not alone in its challenge to faculty employment security. Each succeeding decade has had its own cause or causes for which some faculty have taken a stand and for which the employment security of those faculty have been tested. This involvement by university faculty in social and political causes has led to an increasing number of faculty terminations being challenged in the courts. These challenges will be examined in greater depth in the following chapter.

Finally, after World War II, university administrators found the promise of tenure as a successful incentive to retain existing faculty as well as to recruit new faculty. However, in recent years as higher education

administrators observe faculty more concerned with their own personal issues and less concerned about issues they deem as unrelated to their own personal good, there appears to be a growing trend among higher education institutions to hire faculty in non-tenure-track positions. This approach to employment only serves to amplify the issues related to job security and strengthen the need for a careful examination of the court cases and the guarantees of the First and Fourteenth Amendments to the US Constitution.

Notes

1. Hastings Rashdall, "The Universities of Europe in the Middle Ages: Volume 1, Salerno, Bologna, Paris," (Cambridge: Cambridge University Press, 2010) (Rashdall 2010a).
2. Nuria Sanz and Sjur Bergan, ed, "The Heritage of European Universities," Volume 548, (Council of Europe, 2006) (Sanz and Bergan 2006).
   In 1155 Emperor Fredrick Barbarossa wrote the Authentica Habita which provided a set of rules, guidelines, and privileges for the medieval university. The Authentica Habita was the first attempt of providing written guidelines for universities.
3. Robert Rait, "Life in the Medieval University," Cambridge: Cambridge University Press (1918) (Rait 1918).
4. Metzger, supra, 3.
5. Rashdall, supra, 56.
6. Metzger, supra, 3.
7. Rait, supra, 58.
8. Charles Haskins, "The Rise of Universities," Ithaca: New York: Cornell University Press (1957) (Haskins 1957).
   The licentia docendi was also used as a way to determine if a student met certain qualifications enabling them to enter the guild as a student. This was a way for the guild to regulate who would receive their lectures.
9. Metzger, supra, 3.
10. Id.
11. Bergan, supra, 57.
12. Rashdall, supra, 56.
13. Haskins, supra, 63.
14. Metzger, supra, 3.
15. Walter Rüegg, "A History of the University in Europe: Volume 4, Universities Since 1945," (Cambridge: Cambridge University Press, 2010) (Rüegg 2010).
16. Rashdall, supra, 56.

17. Nuria Sanz and Sjur Bergan, ed, "The Heritage of European Universities, Volume 548," (Council of Europe, 2006) (Sanz and Bergan 2006).
18. Id.
19. Davide Cantoni and Noam Yuchtman (2010), "Medieval Universities, Legal Institutions, and the Commercial Revolution," http://www.people.fas.harvard.edu/~cantoni/universitiesdraft_20100608.pdf (Cantoni and Yuchtman 2010).
20. Sophia Menache, "Clement V: Volume 36 of Cambridge Studies in Medieval Life and Thought," (Cambridge: Cambridge University Press, 2003) (Menache 2003).
21. Frank Flinn, "Encyclopedia of Catholicism," (New York: New York, Infobase Publishing, 2010) (Flinn 2010).
22. Giuliana Cavallini, "Catherine Of Siena," (New York: New York, Continuum International Publishing Group, 2005) (Cavallini 2005).
23. Joëlle Rollo-Koster and Thomas Izbicki, "A Companion to the Great Western Schism (1378–1417)," (Boston: MA, Brill Publishing, 2009) (Rollo-Koster and Izbicki 2009).
24. Walter Ullmann, "A Short History of the Papacy in the Middle Ages," (London: England, Routledge Publishing, 2003) (Ullmann 2003).
25. Clinton Locke, "The Age of the Great Western Schism," (New York, The Christian Literature Co., 1896) (Locke 1896).
26. Id.
27. Rashdall, supra, 56.
28. Cantoni and Yuchtman, supra, 74.
29. Hastings Rashdall, "The Universities of Europe in the Middle Ages: Volume 2, Italy, Spain, France, Germany, and Scotland," (Cambridge: Cambridge University Press, 2010) (Rashdall 2010b).
30. "The Foundation of the University of Heidelberg," trans. E. F. Henderson (London and New York, 1892).
31. Metzger, supra, 3.
    Metzger also mentioned that along with the Protestant Reformation came a new form of university that did not require the funding of the Catholic Church. Furthermore, in the universitas magistrorum the professoriate was introduced as being secular in nature.
32. Sanz and Bergan, supra, 72.
33. Metzger, supra, 3.
34. Joel Mokyr, "The European Enlightenment, the Industrial Revolution, and Modern Economic growth," (Max Weber Lecture, European University, March 27, 2007), http://faculty.wcas.northwestern.edu/~jmokyr/Florence-Weber.PDF (Mokyr 2007).
35. Metzger, supra, 3.
36. Haskins, supra, 63.

37. Wilhelm Humboldt (1810), "On the Internal and External Organization of Institutions of Higher Education in Berlin," http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3642 (Humboldt 1810).
38. Wilhelm Humboldt (1854), "The Sphere and Duties of Government," trans. by Joseph Coulthard, London: GB, John Chapman, http://files.libertyfund.org/files/589/Humboldt_0053_EBk_v6.0.pdf (Humboldt 1854).
39. Id.
40. Abraham Flexner, "Universities: American, English, German," New Brunswick and London, Transaction Publishers (1994) (Flexner 1994).
41. Rüegg, supra, 70.
42. Id.
43. Humboldt, supra, 92.
44. Walter Rüegg, "A History of the University in Europe. Vol. 3: Universities in the Nineteenth and Early Twentieth Centuries," (Cambridge: Cambridge University Press, 2004) (Rüegg 2004).
45. Toni Pierenkemper & Richard Tilly, "The German Economy During the nineteenth century," (London and New York: Berghahn Books, 2004) (Pierenkemper and Tilly 2004).
46. College of William and Mary, "Journal of the President and Masters of William and Mary College, May 4, 1768," William and Mary Quarterly (vol. 5, 1897).
    In 1693, King William III of England awarded a charter to provincial dignitaries in England's Virginia colony. This charter enabled the board to establish the College of William and Mary. The first example of a simplistic form of tenure was demonstrated in 1768 when the Board of Visitor's terminated half of the masters at the college and, in response, the president of the college and the masters proclaimed that they were a corporate entity and didn't answer to the board.
47. College of William and Mary, "The History of the College of William and Mary from its Foundation, 1693, to 1870," (Baltimore: John Murphy and Co., 1870) https://digitalarchive.wm.edu/bitstream/handle/10288/13574/historyofcollege1870coll.pdf?sequence=1.
    The universities at the time were secular in nature and prepared students for the clergy. An example of this can be seen with eighteenth-century faculty at the College of William and Mary. Faculty members at the college were required to take an oath of allegiance to both the crown and the Church of England.
48. Andrew Fleming West, "The Changing Conception of "The Faculty" in American Universities," San Francisco (1906).
49. Rudolph, supra, 51.

Although the General Court of the Massachusetts Bay colony passed legislation in 1636 that called for the creation of a college, it wasn't until 1638 that Harvard College was officially formed.

50. Edwin Duryea & Donald Williams, "The Academic Corporation: A History of College and University Governing Boards," (London: GB, Taylor & Francis, 2000) (Duryea and Williams 2000).
    Harvard College received its name after its benefactor, John Harvard, died in 1638. In 1642 the General Court of the Massachusetts Bay Colony established the Board of Overseers, which was comprised of six magistrates and six ministers from surrounding churches. Likewise, the General Court of the Massachusetts Bay Colony questioned the legality of the Board of Overseers being able to establish a corporation out of the college.
51. General Court of the Massachusetts Bay Colony (1650), "Harvard Charter of 1650," http://hul.harvard.edu/huarc/charter.html.
    The five fellows of the college were the five current masters of the college. At the time of the awarding of the 1650 charter, there were only five instructors employed at the college. The charter also permitted for the retainment of the Board of Overseers; however, the role of the Board of Overseers was to function as a second governing board for the college and not as the sole governing agent.
52. Metzger, supra, 3.
53. Id.
54. College of William and Mary, supra, 102.
55. King William III and Queen Mary II of England (1693), "The Charter of the College of William and Mary, in Virginia," http://scrc.swem.wm.edu/wiki/images/a/a9/AndrosCopyCharter.jpg.
    The charter further defined that the president and the masters of the college would be a corporate entity from the moment of the college's inception.
56. Metzger, supra, 3.
57. College of William and Mary, supra, 101.
58. Id.
59. Metzger, supra, 3.
60. J. W. Bridge, "The Rev. John Bracken v. The Visitors of William And Mary College: A Post-Revolutionary Problem in Visitatorial Jurisdiction," 20 Wm. & Mary L. Rev. 415 (1979), http://scholarship.law.wm.edu/wmlr/vol20/iss3/2.
61. Id.
62. Id.
63. Bracken v. Visitors of Wm. & Mary College, 7 Va. (3 Call) 573, 579 (1790).
64. Id.

65. Bridge, supra, 115.
66. Bracken v. Visitors of Wm. & Mary College, 7 Va. (3 Call) 573, 579 (1790).
67. Bracken v. Visitors of Wm. & Mary College, 7 Va. (3 Call) 573, 579 (1790).
68. Lionel Stanley Lewis, "When Power Corrupts: Academic Governing Boards in the Shadow of the Adelphi Case," (Piscataway: New Jersey, Transaction Publishers 2000).
69. John Thelin, "A History of American Higher Education," Baltimore and London: Johns Hopkins University Press (2004) (Thelin 2004).
70. Rudolph, supra, 51.
71. Francis Wayland, "Thoughts on the Present Collegiate System in the United States," (Boston: US, Gould, Kendall & Lincoln 1842) (Wayland 1842).
72. Rudolph, supra, 51.
73. Metzger, supra, 3.
74. Lewis, supra, 123.
75. Metzger, supra, 3.
76. Josiah Quincy, "The History of Harvard University: Volume 1," (Cambridge: J. Owen, 1840) (Quincy 1840).
77. Metzger, supra, 3.
78. Id.
79. Josiah Quincy, "The History of Harvard University: Volume 2," (Boston: Crosby, Nichols, Lee & Co., 1860) (Quincy 1860).
80. Samuel Eliot Morison, "Three Centuries of Harvard, 1636–1936," (Boston: Harvard University Press 2001) (Morison 2001).
81. Quincy, supra, 134.
82. Amacher and Meiners, supra, at 7.
    During the eighteenth century, professional educators had a basic form of tenure which provided them job security as long as they supported the religious beliefs of the university/college. This agreement was in the form of a gentlemen's agreement. An example of this job security can be seen in Harvard Universities' appointment of professors with indefinite terms. However, at the beginning of the nineteenth century, this type of agreement was weakened when universities placed in their charters that faculty members held their positions at the leisure of the governing boards.
83. Loope, supra, 11.
84. Lawrence White, "Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members," 44 St. Louis L.J. 51 (Winter 2000), http://www.lexisnexis.com.proxy.lib.ilstu.edu/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T9769416595&for

mat=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T9769416598&cisb=22_T9769416597&treeMax=true&treeWidth=0&csi=139118&docNo=5.

During the seventeenth and eighteenth centuries, governance was the responsibility of the governing boards. These boards would appoint instructors, commonly referred to as masters, to instruct the students at the university. These appointments provided no job security and were commonly for a year at a time.

85. Amacher and Meiners, supra, at 7.
Prior to the AAUP's 1915 Declaration of Principles of Academic Freedom and Tenure, tenure was not a formal policy and faculty appointments were typically on a year-to-year basis.
86. White, supra, 139.
With the turn of the nineteenth century came the establishment of faculty appointments by "durante vita" (the life of the incumbent). Although this type of appointment did provide a form of tenure, faculty members could still be dismissed by an institution's governing board for the slightest reason.
87. Metzger, supra, 3.
The "out" of "up or out" was in reference to the limit of time that was allowed for a master to spend in temporary service, whereas the "up" was made possible by the creation of academic ranks at a university or college.
88. Rudolph, supra, 51.
The hierarchy of academic ranks came to be in 1891 at the University of Chicago as the university president, William Harper, established a system where a scholar could advance within the institution. Along with each advancement came a term appointment which ranged from 1-year terms to permanent employment.
89. Metzger, supra, 3.
90. Christopher Lucas, "American Higher Education: A History," New York: Palgrave Macmillan (2006) (Lucas 2006)
91. Metzger, supra, 3.
92. Morrill Act of 1862 7 U.S.C., § 301
The Morrill Act was originally established so that universities could be created in each state to educate students in agriculture, home economics, mechanical arts, and other professions that were deemed important for that time. The Morrill Act provided public lands to states so that each state could establish a land-grant college with the purpose of providing the most current scientific and technologically advanced concepts of the time to incoming, and existing, students in each state.
93. White, supra, 139.
The best known "economic" case is that of Edward Ross. Ross was a professor at Stanford University who had been dismissed from his

position due to his views on train monopolies and organized unions. His dismissal was influenced by a trustee of the university, Jane Lathrop Stanford.

94. Id.
95. Abraham Flexner, "Universities: American, English, German," New York: Oxford University Press (1930) (Flexner 1930).
96. Walter Metzger, "Academic Freedom in the Age of the University," New York: Columbia University Press (1961) (Metzger 1961).
97. According to Rudolph in "The American College & University: A History," the university student has the freedom in selecting what courses to take, the freedom to learn, the ability to move from one university to another, and to live his life as he sees fit. This freedom was less prominent in the American university when compared to the freedoms associated with Lehrfreiheit.
98. According to Rudolph in "The American College & University: A History," a professor that possess Lehrfreiheit has complete freedom of inquiry and teaching, as well as the freedom to present his research findings.
99. Prussia Constitution of January 31, 1850, title II, art. 20.
100. Metzger, supra, 151.
101. Id.
102. Prussia Constitution of January 31, supra, 154.
103. Rudolph, supra, 51.
104. Metzger, supra, 3.
105. Moore, supra, 12.
German universities developed during the Middle Ages as self-managing guilds which provided their guidance, or instruction, through long-standing traditions of mentor led instruction. To become a member of one of the established German guilds, an individual had to meet certain qualifications that were controlled by guild masters. The US version was much different in that American universities were controlled by external governing boards.
106. John Thelin, supra, 124.
Philanthropy in the early to mid-nineteenth century was closely linked to religion. College funding was supported by individuals in two ways: (1) devout donors to the English Church, who focused on missionary work, provided money to universities so that programs could be designed to bring Christianity to the American Indians and (2) university officials gained access to wills and bequests by defining that an individual's charitable contribution could be defined to include the education of colonial students so that these individuals could become missionary teachers to the Indians.
107. Rudolph, supra, 51.

Endowments allowed universities to plan for expansion, develop new departments, create advanced curriculum for new sciences and technology, and develop professional schools. The downside to benefactions was that it allowed benefactors to be placed on governing boards and effect the direction that the university would pursue in all areas of operation.

108. E. D. Sanders, "Definiteness of Appointment and Tenure," Science, 39 (June 19, 1914), http://www.jstor.org/stable/1639169?seq=6 (Sanders 1941).
109. Metzger, supra, 3.
110. Henry Dunster. "Papers of Henry Dunster and the Dunster and Glover families, 1638–1874: Memorandum of Henry Dunster, 1653 December," Boston: Harvard University Archives, http://oasis.lib.harvard.edu/oasis/deliver/deepLink?_collection=oasis&uniqueId=hua23004.
    Rev. Jeremiah Chaplin, "Life of Henry Dunster: First President of Harvard College," (Boston: James R. OsGood and Company, 1872).
    The termination of an educator based on their religious beliefs can be seen in Harvard College's first president, Henry Dunster. During the seventeenth century, the Massachusetts Bay Colony was comprised of Puritans. The Puritan religion required that children be baptized after birth. Dunster disagreed with this belief and refused to allow his own child to be baptized in 1651. During the same year, he also interfered with the baptism of another infant. Church officials from Boston and the surrounding area called for Dunster to resign as president from Harvard College. Dunster resigned from Harvard in 1654.
111. Amacher and Meiners, supra, at 7.
    The nineteenth century brought new alternatives to existing religiously based universities. Students were now able to attend an institution that either had a religious focus or one that didn't have a canonical approach to education.
112. William Harper, "The President's Report: Administration," (Chicago: University of Chicago Decennial Publications (1), 1903) http://ia600305.us.archive.org/9/items/presidentsreport00univ/presidentsreport00univ.pdf (Harper 1903).
113. Nicholas Butler, "Scholarship and Service: The Policies and Ideals of a National University in a Modern Democracy," (New York: Charles Scribner's Sons, 1921), http://archive.org/stream/scholarshipands00butlgoog#page/n8/mode/2up (Butler 1921)
114. Metzger, supra, 151.
115. Board of Regents of the Kansas State Agricultural College v. B. F. Mudge, 21 Kansas Reports 223 (1878).

116. West Publishing Company, "The Pacific Reporter, Volume 56," (St. Paul: West Publishing Co., 1899).
117. Devol v. Board of Regents for the University of Arizona, 6 Ariz. 259, 56 Pac. 737 (1899).
118. Id.
119. Peterson, supra, 13.
120. Department of Agriculture Organic Act of 1862, ch. 72, 12 Stat. 387.
121. Id.
122. Homestead Act of 1862.
123. Id.
124. Dennis Johnson, "The Laws that Shaped America: Fifteen Acts of Congress and Their Lasting Impact," (New York: Routledge, 2009) (Johnson 2009).
125. Morrill Act of 1862 7 U.S.C., § 301.
126. U.S. Library of Congress. "Primary Documents in American History: Morrill Act of 1862," http://www.loc.gov/rr/program/bib/ourdocs/Morrill.html.
127. US Continental Congress, "Articles of Confederation," (1777, ratified 1781), http://memory.loc.gov/cgi-bin/ampage.
128. David Carleton, "Landmark Congressional Laws on Education," Chicago: Greenwood Publishing Group, (2002) (Carleton 2002).
129. US Continental Congress, "Land Ordinance of 1785," http://www.in.gov/history/2478.htm.
130. Id.
131. Carleton, supra, 183.
132. US Continental Congress, "Northwest Ordinance of 1787," http://memory.loc.gov/cgi-bin/ampage.
133. Id.
134. Harold Hyman, "American Singularity: The 1787 Northwest Ordinance, The 1862 Homestead And Morrill Acts, and the 1944 G.I. Bill," (Athens: University of Georgia Press, 2008) (Hyman 2008).
135. Carleton, supra, 183.
136. Jason Porterfield, "The Homestead Act of 1862: A Primary Source History of the Settlement of the American Heartland in the Late nineteenth century," (New York: The Rosen Publishing Group, 2005) (Porterfield 2005).
137. The National Archives, "The Homestead Act of 1862," http://www.archives.gov/education/lessons/homestead-act/.
138. Johnson, supra, 179.
139. Christy Steele, "Pioneer Life in the American West," (York: Gareth Stevens Publishing, 2005) (Steele 2005).

140. Howard Ottoson, "Land Use Policy in the United States," (Washington, D.C.: Beard Books, 2001) (Ottoson 2001).
141. Gillian Houghton, "The Transcontinental Railroad: A Primary Source History of America's First Coast-To-Coast Railroad," (New York: The Rosen Publishing Group, 2002) (Houghton 2002).
142. Steele, supra, 194.
143. Homestead Act of 1862
144. Hyman, supra, 189.
145. Mary Turner Carriel, "The Life of Jonathan Baldwin Turner," (Champaign: University of Illinois Press, 1911), https://archive.org/details/cu31924030583300 (Carriel 1911).
146. Id.
147. Coy F. Cross II, "Justin Smith Morrill: Father of the Land-Grant Colleges," (East Lansing: MSU Press, 1999). (Cross II 1999)
148. J.B. Turner, "Industrial Universities for the People," (Jacksonville: Morgan Journal Book and Job Office, 1853) (Turner 1853).
149. Edmund James, "The Origin of the Land Grant Act of 1862," (Champaign: University of Illinois Press, 1910) (James 1910).
150. Carleton, supra, 183.
151. Johnson, supra, 179.
152. Carleton, supra, 183.
153. According to Carleton in "Landmark Congressional Laws on Education," Morrill's proposal passed the House of Representatives with a vote of 105–100 and the Senate with a vote of 25–22.
154. James Buchanan to the House of Representatives of the USA (February 24, 1859) in James Richardson, "James Buchanan: A Compilation of the Messages and Papers of the Presidents," (Whitefish: Kessinger Publishing, 2004).
155. Coy F. Cross II, "Justin Smith Morrill: Father of the Land-Grant Colleges," (East Lansing: MSU Press, 1999).
156. Carleton, supra, 183.
157. Morrill Act of 1862 7 U.S.C., § 301.
158. Johnson, supra, 179.
159. Carleton, supra, 183.
160. Hatch Act 1887
    The purpose of the experiment stations was to establish a facility where research could be conducted so that solutions to food and agricultural problems could be found.
161. Id.
162. Arthur Cohen, "The Shaping of American Higher Education" San Francisco: Jossey-Bass (1998) (Arthur Cohen 1998).

Industrialization was a significant factor in the University Transformation Era. Farming was directly affected by this era as new farming equipment was used to enhance yields and impact exporting of goods. Likewise, the use of railroads during the industrialization period opened westward expansion, allowing for colonization of the westward lands in the USA.

163. Id.
Prior to the Civil War, there were only three universities established to educate African American students. These institutions were: (1) Cheyney University of Pennsylvania (1837), (2) Lincoln University (1854), and (3) Wilberforce University (1856). However, following the first 5 years after the Civil War 22 institutions (e.g. Clark College (combined with Atlanta College to form Clark Atlanta University)—1865, Howard University—1867, and Morgan State University (originally Centenary Biblical Institute)—1867 of higher learning were established to provide a higher education to children of recently freed slaves.
164. Rudolph, supra, 51.
165. Morrill Act of 1890.
166. U.S. Department of Agriculture. "1890 Land-Grant Institutions Grants Programs."
167. Loope, supra, 11.
Although significant donations from benefactors enabled newly formed universities to step outside of the secular emphasis utilized in higher education at that time, the influence of these benefactors on governing boards and university officials initiated the necessity for safeguards to be implemented which would provide a shield to protect a faculty member's ability to conduct research and provide instruction without fear of reprimand from university administration.
168. Cohen, supra, 217.
Sabbatical leaves were introduced at Harvard University in 1880 as a way to attract researchers to the university. The practice of utilizing sabbatical leave and federal funding for research was predominant during the first two decades of the twentieth century.
169. University of Wisconsin, "Richard Theodore Ely Papers, 1812–1963," http://digicoll.library.wisc.edu/cgi/f/findaid/findaid-idx?c=wiarchives;cc=wiarchives;q1=richard%20t.%20ely;rgn=main;view=text;didno=uw-whs-wis000mk#uw-whs-wis000mk.p1.
Stanley Rolnick, "Exceptional Decision: The Trial of Professor Richard T. Ely by the Board of Regents of the University of Wisconsin, 1894," http://libinfo.uark.edu/aas/titles.asp?letter=E.
Professor Ely had shown great interest in social reforms and reflected his thoughts on socialism in his writings during the early 1890s. In 1894

Professor Ely drew the attention of the Wisconsin State Superintendent of Public Instruction, Oliver E. Wells. Wells, who did not support Ely's views on social reform, launched an attack against the professor by referring to Professor Ely's theories as having utopian style beliefs and that Ely's doctrine was malicious in nature. Furthermore, Wells accused Ely of demanding the unionization of the employees at a local printing house for which he had printing work done. These accusations eventually led to a hearing before the Wisconsin Board of Regents on August 23, 1894, during which the Wisconsin Board of Regents discredited all claims against Ely.

170. Peterson, supra, 13.
171. Edward Alsworth Ross, "Seventy Years of It: An Autobiography," New York: ARNO Press (1977) (Edward Alsworth Ross 1977).
    During the presidential campaign of 1896, Professor Ross took the position of supporting the Democratic movement for an inflationary monetary policy, known as the Free Silver movement. In the summer of 1896, Professor Ross gave two public speeches focused on the benefits of the replacing the Gold Standard with the less volatile Free Silver Standard. Although no action was taken against Ross, Stanford University President, David Star Jordan, offered him a 1-year leave of absence as long as he submitted a letter of resignation to him; however, Ross refused to resign. Ross then came under attack in 1899 for his opposition to the use of Asian laborers to build railroads. Jane Lathrop Stanford, the university's benefactor, called for Ross's dismissal based on his progressive views on free silver and the use of migrant Asian workers.
172. American Sociological Association, "Edward Alsworth Ross," http://www.asanet.org/about/presidents/Edward_Ross.cfm.
173. Id.
174. Ross, supra, 226.
    After the dismissal/forced resignation of both Professor Ross and Professor Howard, several other Stanford faculty members resigned in protest to the university's actions.
175. Nelson, supra, 17.
    Due to legislative appropriations and the pressure associated with external funding from private benefactors, university administrators used various means, such as termination of employment, to control unruly faculty members.
176. Lucas, supra, 145.
    In the late nineteenth and early twentieth century, the nation moved from a religiously driven society to one that was secularized. The Carnegie Foundation, and its creator Andrew Carnegie, led the charge for universities to prepare their students to be the future leaders in

business and industry focusing on its financial support on universities that did not have a denominational affiliation.

177. Metzger, supra, 3.
178. Arthur Lovejoy, "Call: November 1914," Academe (May–June 1989).
179. American Association of University Professors, "Officers of the Association: 1915," http://www.jstor.org/stable/40216731.
180. American Association of University Professors, "General Report of the Committee on Academic Freedom and Academic Tenure: Presented at the Annual Meeting of the Association: December 31, 1915," http://www.jstor.org/stable/40216731.
181. Id.
182. American Association of College Professors, "1915 Declaration of Principles on Academic Freedom and Academic Tenure," http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm.
183. Id.
    The AAUP identified that if academic freedom was to be safeguarded in American universities had to have a clear understanding of the principles that bear upon such a freedom. Likewise, AAUP noted that if such a freedom was to be awarded to university faculty, then there had to be an adoption by the university that would limit any infringement of that freedom. Academic tenure was designed to be a system that would be a means to an end, in as much as it would provide the freedom to conduct unrestricted research and enable a faculty member to have the freedom to teach without fear of reprisal from university officials.
184. Nelson, supra, 17.
    The AAUP's 1915 Declaration of Principles of Academic Freedom and Tenure refers to how securing tenure brings with it a professional status to the person that has received it. Although the 1915 Declaration of Principles on Academic Freedom and Academic Tenure did not provide procedural guidelines for how to address dismissals of faculty, it did provide the basic outline for tenure and academic freedom and the rights that these principles provide to a faculty member.
185. American Association of College Professors, supra, 237.
186. Metzger, supra, 3.
187. Id.
188. Roger Geiger, "Perspectives on the History of Higher Education," Piscataway, NJ: Transaction Publishers (2008) (Roger Geiger 2008).
    From the AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure, the recommended probation period for newly hired faculty members was 10 years. From its inception in 1916, the American Federation of Teachers (the AFT provides union support to both K-12 and higher education teachers) promoted for a

3-year probation period for all newly hired teachers. Many universities throughout the country failed to implement this AAUP recommendation due to the fact that there was no agreement for a set probationary period between the two leading teacher unions at the time, the AAUP and the American Federation of Teachers (AFT).

189. Daniel Pollitt and Jordan Kurland, "Entering the Academic Freedom Arena Running: The AAUP's First Year," (Academe, vol. 84, no. 4: July–August 1998) http://www.aaup.org/NR/rdonlyres/6B49A63E-F3BE-4801-829B-BB362DF5EE5B/0/TheFirstYear.pdf (Pollitt and Jordan (1998).
190. Walter Metzger, "The First Investigation," (AAUP Bulletin: Autumn 1961) http://aaup.org/NR/rdonlyres/FB879711-F81B-4C07-990E-D119EE2D3200/0/TheFirstInvestigation.pdf.
191. Pollitt and Kurland, supra, 244.
192. Id.

    In 1915, Lovejoy was heading to New York City to see a play during his Easter vacation. While in Newark he happened to read in the editorial section of one of the New York newspapers about the resignation of seventeen faculty members at the University of Utah. After reading the editorial, Lovejoy learned that the seventeen members had resigned as a response to university officials terminating several faculty members without cause. After spending 4 days at the University of Utah, Lovejoy stated that the working conditions at the university were dismal.

193. American Association of University Professors, "American Council on Education," http://www.jstor.org/pss/40217376.

    The purpose of the ACE's Conference on Academic Freedom and Tenure, held on January 2, 1925, was to discuss the problem that had been evident in the ACE and AAUP's response to claims of infringement on academic freedom, tenure violations, and violations in the promotion of faculty to higher ranks. While at this conference, Professor Leuschner, who was one of the delegates that represented the AAUP at the ACE's Conference, explained the difficulties that the AAUP had encountered concerning the infringement on academic freedom and the issuing of tenure to faculty. He further defined on how many of the issues discussed at the ACE conference had been overcome at the University of California. Leuschner stated that the university's board of trustees, university president, and the faculty had been cooperating to overcome any issues focusing on academic tenure, academic freedom, and the promotion of the faculty.

194. White, supra, 139.
195. American Association of College Professors, supra, 25.
196. Id.

197. Cohen, supra, 217.
Families needed their children to help work the family farm. A majority of the jobs for youth during this time required no additional training and could be learned via imitation or apprenticeship.
198. Cohen, supra, 217.
199. U.S. Department of Veteran Affairs, "VA History in Brief," http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf.
Before World War II, college and homeownership for the majority of Americans was unattainable. Upon the passing of the Servicemen's Readjustment Act in 1944, millions of Americans who had served their country during the time of war were able to attend college instead of attempting to find employment during an economic downturn experienced after the war.
200. Franklin D. Roosevelt, "Statement on Signing the G.I. Bill," http://docs.fdrlibrary.marist.edu/odgist.html.
On June 22, 1944, Franklin D. Roosevelt stated on the signing of the GI Bill that "…the members of the armed forces have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and they are entitled to definite action to help take care of their special problems."
201. U.S. Department of Veteran Affairs, "VA History in Brief," http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf.
202. Servicemen's Readjustment Act of 1944, P.L. 78–346, 58 Stat. 284m.
The Servicemen's Readjustment Act of 1944 provided three key benefits to individuals who served in the US Armed Forces. Servicemen and women were provided the opportunity to: (1) receive up to 4 years of education or training. This package would include up to $500 a year for college tuition and would cover college fees, the cost of books and supplies, and provide a monthly stipend for living expenses; (2) veterans were guaranteed a federal loan for the purchase of a home, farm or business with no down payment (veterans were able to apply for a loan up to $2000, with 50% guaranteed by the federal government); and (3) veterans were guaranteed unemployment compensation (veterans who had served in the military for a minimum of 90 days were able to receive a weekly payment of $20 for a total of 52 weeks)
203. US Department of Education, "Digest of Education Statistics: 1995."
204. James Richardson, "Tenure in the New Millennium," National Forum 79, no. 1 (1999) http://findarticles.com/p/articles/mi_qa3651/is_/ai_n8845167.
205. Cohen, supra, 217.
The quest for finding disloyal civil servants who supported Communist beliefs began in 1947 when President Truman ordered that all

federal employees be investigated to determine if they had any affiliation with an organization that was believed to be disloyal to the country. Although not a case against an academic, Dennis v. USA (1951) was the first federal case brought before the US Supreme Court to accuse an individual for their supposed loyalty to the Communist Party. The law that enabled Congress to initiate investigations of American citizens to determine their political loyalties was the Alien Registration Act, 18 U.S.C. § 2385 (1940). This Act (also known as the Smith Act of 1940) stated that it was illegal to "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the USA or of any State by force or violence, or for anyone to organize any association which teaches, advises, or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association."

206. U.S. Congress. Senate. Committee on Government Operations. Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. 83rd Cong., 1st sess., 1953–1954.
207. Senator Joseph McCarthy, telegram to President Harry S. Truman (February 11, 1950), http://www.archives.gov/education/lessons/mccarthy-telegram.
    In the telegram from Senator Joseph McCarthy to President Truman, the Senator indicates that the spread of Communism has overrun the US Government, in particular the US State Department.
208. Loope, supra, 11. http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED382149.
    In the late 1940s and through the mid-1950s, Senator Joseph McCarthy (R-WI) accused many academics for contributing to espionage for the Soviet Union against the USA. Even though many of the accused were innocent of the charges, a number were still targeted by McCarthy supporters and university administrators. Tenure, and more so due process and freedom of speech, provided a safeguard for these individuals so that they could not be dismissed from employment without cause.
209. Adam Clymer, "A.A.U.P. States Academic Freedom Standards Review of Past Year's More Significant Cases," (The Harvard Crimson, June 14, 1956), http://www.thecrimson.com/article/1956/6/14/aaup-states-academic-freedom-standards-review.
    The AAUP released a statement that supported a faculty members' right to teach and stated that they could only be released from their duties if they were unfit to teach based on their incompetence, lack of integrity,

misuse of academic prestige, misconduct, or conscious participation to overthrow the government.

210. Association of American Universities, "The Rights and Responsibilities of Universities and Their Faculties," http://www.aau.edu/policy/academic_rights.aspx?id=7212.
In this statement the AAU states that "When the speech, writing, or other actions of a member of a faculty exceeds lawful limits, he is subject to the same penalties as other persons. In addition, he may lose his university status."
211. U.S. Constitution, amend. 1.
The First Amendment of the Constitution of the USA protects the right for freedom of expression and religion. Freedom of expression includes freedom of speech, press, assembly and the implied rights of association and belief.
212. Philo Hutcheson, "Academic Freedom and Tenure - Roots of Academic Freedom, Restrictions on Academic Freedom, Tenure," http://education.stateuniversity.com/pages/1724/Academic-Freedom-Tenure.html.
213. Loope, supra, 11.
214. "King Leads the March on Washington," History.com, (August 28, 1963) http://www.history.com/topics/martin-luther-king-jr/videos#martin-luther-king-jr-leads-the-march-on-washington.
"Malcolm X on Black Nationalist Movement," History.com (March 12, 1964), http://www.history.com/topics/malcolm-x/videos#malcolm-x.
215. Metzger, supra, 3.
Academic tenure is a continuity of service, as defined by the Committee on Academic Tenure in Higher Education in 1973, and has no legal norm within the court system. The rules governing tenure are defined in the faculty handbook or faculty contract. The courts view these institutional documents as a form of state sub-legislation. If a faculty member violates one of the university policies, he/she can be terminated. However, if a faculty member is discharged from service contrary of university policy, and assuming that due process was awarded, the faculty member can be reinstated due to the policies of the university which are viewed by the courts as a form of state law.
216. Loope, supra, 11.
217. Meredith v. Fair, 83 S.Ct. 10 (1962).
The US Supreme confirmed the lower court's decision in the requirement of the University of Mississippi admitting James Meredith to the College of Law. Meredith was the first African American admitted to the University of Mississippi.
218. Russell H. Barrett, "Integration at Ole Miss," Chicago, IL: Quadrangle Books (1965) (Barrett 1965).

219. Texton v. Hancock, 359 So.2d 895 (1978).
In the Court's decision, it stated that a faculty member who is tenured has no more legal right to protection provided by the First and Fourteenth Amendment then a non-tenured faculty member would have to those same rights. Likewise, a professor and a citizen of the US, tenured or not, cannot be penalized for exercising their constitutional freedoms.
220. U.S. Supreme Court, "Dates of Early Supreme Court Decisions and Arguments," http://www.supremecourt.gov/opinions/opinions.aspx.
221. Id.
The number of cases seen before the US Supreme Court increased significantly during the decade of 1960–1969.
222. Civil Rights Act of 1964, Subchapter VI of Chapter 21 of 42 U.S.C. § 2000e.
223. Perry v. Sindermann, 408 U.S. 593 (1972).
224. Id.
225. Id.
226. Nelson, supra, 17.
227. American Association of University Professors, "Tenure and Teaching-Intensive Appointments (2010)," http://www.aaup.org/AAUP/comm/rep/teachertenure.htm.
In the AAUP's report, which was submitted to the Committee on Contingency and the Profession, it is stated that a majority of faculty positions are identified as teaching-intensive; however, these positions have been created outside of the tenure system. An outcome of this, according to the AAUP, is the replacement of the professoriate with instructors who have debilitated relationships between themselves, their peers, and campus life and thus separate instructional groups within education, those that are tenured and those that aren't.
228. Richardson, supra, 259.
With the percentage of part-time faculty and contract-based full time faculty on the rise, tenured faculty fight to retain their prestigious position awarded to them through the title of tenured professor. Part-time and contract-based professors focus their attention on salary and benefits. This focus on employment status and financial compensation creates a separation between the categories of employment allowing faculty groups to be played off against one another.
229. Robin Wilson, "Contracts Replace the Tenure Track for a Growing Number of Professors," (Chronicle of Higher Education, June 12, 1998), http://chronicle.com/article/Contracts-Replace-the-Tenur/98954/ (Wilson 1998).

230. American Association of University Professors, "The Status of Non-Tenure-Track Faculty (1993)," http://www.aaup.org/AAUP/comm/rep/nontenuretrack.htm.

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