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FACULTY HANDBOOK AS CONTRACT

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Colleges and universities, like other employers, typically have in place policies that govern the employment relationship with their faculty. These faculty policies may be aggregated in a faculty handbook, published separately on the institution's *website, or, in the case of public institutions, adopted through legislative enactment. It is often unclear, however, whether such policy commitments are contractually binding. Although most U.S. states recognize that employee handbook provisions may be enforceable when not followed, the law in this area can be confusing and often turns on the specific facts of the case at hand.*

Using the lens of college and university faculty termination policies, this Article seeks to make sense of the law governing the enforceability of employee handbooks. Faculty contracts, which unlike other employment relationships tend not to be at will, uniquely illustrate why unilateral contract doctrine is unsuited to determining the enforceability of handbook policies. This Article supports an approach to enforcing faculty termination policies that is less strictly grounded in contract doctrine, one that would treat policies as contractually enforceable but afford colleges and universities the flexibility needed to amend their handbook policies—so long as modifications are reasonable in light of academic custom, made with reasonable advance notice, and adopted consistent with principles of shared governance.

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INTRODUCTION

Colleges and universities, like other employers, typically have in place policies that govern the employment relationship with their faculty. Many such policies—policies against employee misconduct or policies on accommodations for persons with disabilities—are comparable to what employees might encounter outside of academia. Most higher education institutions also have in place policies that are more unique to academia, such as policies establishing shared governance bodies, affirming academic freedom as a core value,[1] or outlining procedures on the granting and revocation of faculty tenure.[2] These faculty policies may be aggregated in a faculty handbook, published separately on the institution's web site, or, in the case of public institutions, adopted through legislative enactment. It is often unclear, however, whether college or university commitments that have been adopted and published in such policy documents—referred to here for ease of reference as "faculty handbooks"—are contractually binding. The enforceability of faculty handbook policies is also central to establishing a faculty

1 Academic freedom and shared governance as unique features of the faculty employment relationship are discussed in Section II.C.

2 For a recent analysis of policies on academic freedom and faculty termination in faculty handbooks and collective bargaining agreements, see HANS-JOERG TIEDE, AM. ASS'N OF UNIV. PROFESSORS, POLICIES ON ACADEMIC FREEDOM, DISMISSAL FOR CAUSE, FINANCIAL EXIGENCY, AND PROGRAM DISCONTINUANCE (2020), https://www.aaup.org/file/PoliciesonAcademicFreedom.pdf [https://perma.cc/44JC-T2QL].

member's property interest in continued employment for purposes of bringing a constitutional claim against a public employer.[3]

The security of college and university faculty employment is more tenuous than it used to be. Although this is particularly true for untenured faculty, tenured faculty are not immune from employment insecurity. Tenure is not a lifetime guarantee of employment,[4] and recent state measures aimed at weakening tenure have raised questions regarding the future of tenure in higher education. For example, Wisconsin stripped tenure protections from its state statutes in 2015, vesting in the university system's regents authority over tenure policies, and broadening the grounds on which tenure could be revoked.[5] In 2021,

3 In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that faculty at public colleges and universities who have a property interest in continued employment are entitled to procedural due process—a hearing and statement of grounds for termination—upon termination of their contracts. In 1972, when *Roth* and *Perry* were decided, the cases were especially significant in that they qualified the prevailing doctrine of employment at will. Bernard H. Moss, *Due Process and Probationary Faculty:* Roth *and* Perry *in Retrospect*, 8 UCLA ALASKA L. REV. 167, 167–68 (1979). Relying on *Roth*'s statement to the effect that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," 408 U.S. at 577, many (probably most) courts today find that a faculty member's procedural due process claim hinges on applicable contract law. *See, e.g.*, Jones v. Univ. of Cent. Okla., 13 F.3d 361, 365 (10th Cir. 1993) (holding that a faculty member's "legitimate claim of entitlement" to continued employment is determined "solely through the application of state contract and employment law" and remanding the case to determine whether the university's alleged informal, unwritten tenure policy is enforceable as an implied contract under Oklahoma law); Spuler v. Pickar, 958 F.2d 103, 107 (5th Cir. 1992) (reviewing a property interest claim guided by Texas law, which does not recognize contract rights in employment manuals); *cf.* Cornwell v. Univ. of Fla., 307 So. 2d 203 (Fla. Dist. Ct. App. 1975) (determining faculty member's property interest in continued employment without reference to applicable state contract law).

4 Most college and university policies on faculty termination are consistent with American Association of University Professors (AAUP) guidelines, which identify the following circumstances that may justify the dismissal of tenured faculty: adequate cause, bona fide discontinuation of an academic program for educational reasons, or financial exigency. TIEDE, *supra* note 2, at 6–10. Where a college or university follows its handbook procedures, and the decision to terminate a tenured faculty member is made in good faith, courts tend to uphold the institutional decision. *See, e.g.*, Logan v. Bennington Coll. Corp., 72 F.3d 1017, 1025 (2d Cir. 1995) (holding that tenured professor failed to present evidence that he was discharged without cause); Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 432–33 (Pa. 2001) (upholding the university's determination that faculty member should forfeit his tenure for serious misconduct); *cf.* Am. Ass'n of Univ. Professors, Bloomfield Cnty. Chapter v. Bloomfield Coll., 322 A.2d 846, 856 (N.J. Super. Ct. Ch. Div. 1974) (stating that the college failed to show that its dismissal of tenured faculty "was in good faith related to a condition of financial exigency within the institution"). Judicial deference to decisions made pursuant to faculty handbook procedures is addressed *infra* Section II.C.1.

5 Ben Trachtenberg, *The People v. Their Universities: How Popular Discontent Is Reshaping Higher Education Law*, 108 KY. L.J. 47, 67 (2020). Trachtenberg attributed the Wisconsin legislation to a trend observable more broadly in Republican-controlled state legislatures, a trend fueled by

the University System of Georgia's Board of Regents approved changes to the system's post-tenure review policy, requiring tenured faculty to undergo a performance review every five years, mandating a "performance improvement plan" in response to unfavorable reviews, and requiring universities to "take appropriate remedial action" if the faculty member has made insufficient progress on the improvement plan.[6] Florida's new post-tenure review policy appears to go further to politicize the post-tenure review process,[7] and even more extreme bills have been proposed in other states.[8] Financial constraints precipitated by the COVID-19 pandemic prompted a number of institutions, including

public dissatisfaction with colleges and universities. He predicted the trend would likely persist and even accelerate. *Id.* at 52.

6 UNIV. SYS. OF GA., POST-TENURE REVIEW POLICY § 8.3.5.4 (2023), https://www.usg.edu/policymanual/section8/C245/#p8.3.5_evaluation_of_personnel [https://perma.cc/7R2E-JASW]; *see also* Colleen Flaherty, *Tenure Changes Ahead*, INSIDE HIGHER ED (Oct. 12, 2021), https://www.insidehighered.com/news/2021/10/13/georgia-board-set-vote-controversial-tenure-changes [https://perma.cc/84E5-9L9R].

7 In April 2022, Florida adopted a law establishing a post-tenure review procedure for faculty at public institutions under the oversight of the State University System of Florida's Board of Governors. Colleen Flaherty, *Florida Passes Posttenure-Review Law*, INSIDE HIGHER ED (Apr. 19, 2022), https://www.insidehighered.com/quicktakes/2022/04/20/florida-passes-posttenure-review-law [https://perma.cc/KD4S-ALCG]. The regulation implementing the law requires post-tenure review to be conducted by administrators (namely the department chair, dean, and chief academic officer, "[w]ith guidance and oversight from the university president") and includes "non-compliance with state law, Board of Governors' regulations, and university regulations and policies" in the mandatory review criteria. STATE UNIV. SYS. OF FLORIDA, BD. OF GOVERNORS REGUL. 10.003 (2022), https://www.flbog.edu/wp-content/uploads/2022/11/Regulation-10.003.pdf [https://perma.cc/M3B2-KT8Q].

8 *See, e.g.*, Mark J. Drozdowski, *Tenure Under Attack Nationwide*, BEST COLLS. (Dec. 8, 2021), https://www.bestcolleges.com/news/analysis/2021/12/07/tenure-under-attack-nationwide [https://perma.cc/23NZ-G6PE] (discussing past bills introduced by legislators in Iowa and South Carolina to abolish tenure in public colleges and universities); John K. Wilson, *A Bill to Destroy Tenure and Academic Freedom in North Dakota*, ACADEME BLOG (Jan. 26, 2023), https://academeblog.org/2023/01/26/a-bill-to-destroy-tenure-and-academic-freedom-in-north-dakota [https://perma.cc/3JMR-HUUH] (describing proposed legislation, the Tenure with Responsibilities Act, that would create a "pilot program" at two North Dakota state colleges aimed at facilitating the firing of tenured faculty). In April 2023, the Texas Senate passed a bill to ban tenure in public universities. The Senate bill failed; the Texas House proposal that was eventually signed into law preserves tenure but empowers state lawmakers to make changes to tenure in the future. Kate McGee, *An Effort to Ban Faculty Tenure in Public Universities Has Failed in the Texas Legislature*, TEX. TRIB. (May 27, 2023), https://www.texastribune.org/2023/05/27/texas-university-faculty-tenure-ban-fails [https://perma.cc/7NEG-Q9GB].

the University of Akron[9] and the University of Kansas systems,[10] to abrogate tenure.

Perhaps even more significant than these recent, politicized events is the shift in the makeup of higher education faculty that has occurred in the United States—from a majority of faculty on the tenure track, with a small minority of non-tenure-track faculty in 1970, to the reverse situation today, with tenured and tenure-track faculty in the minority.[11] This shift has diminished the practical significance of tenure and weakened shared governance in colleges and universities.

These recent developments—state laws and regulations aimed at weakening tenure, the financial strain on institutions brought on by the COVID-19 pandemic, and fact that only a minority of college and university faculty are currently on the tenure track—have highlighted the importance of having in place reasonable and enforceable policies governing faculty termination. But the law on the enforceability of faculty handbook provisions (and other institutional policies), like the law on employee handbooks generally,[12] can be confusing and often turns on the specific facts of the case at hand.

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9 In 2020, the University of Akron laid off almost one hundred tenured and nontenured full-time faculty, invoking force majeure under its collective bargaining agreement with the faculty union. Lilah Burke, *Arbitrator Sides with U of Akron on Faculty Layoffs*, INSIDE HIGHER ED (Sept. 20, 2020), https://www.insidehighered.com/quicktakes/2020/09/21arbitrator-sides-u-akron-faculty-layoffs [https://perma.cc/RY49-3GEX].

10 In January 2021, the Kansas Board of Regents voted to significantly weaken tenure at public institutions, giving administrators the power to annul tenure for a two-year period until the end of 2022. Emma Pettit, *Kansas Regents Make It Easier to Dismiss Tenured Professors*, CHRON. HIGHER EDUC. (Jan. 21, 2021), https://www.chronicle.com/article/kansas-regents-allow-sped-up-dismissals-of-tenured-faculty-members [https://archive.is/vOax2].

11 Karen Halverson Cross, *Deregulation and the 'Gig Academy,'* 67 WAYNE L. REV. 151, 155 (2022). As of fall 2021, about 57% of *full-time* instructional staff at colleges and universities in the United States were tenure-line faculty. *Number of Full-Time Instructional Staff, by Level of Institution and Faculty and Tenure Status: 2021*, NAT'L CTR. FOR EDUC. STAT, https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/5/51?rid=5&cid=165&cidv=20%7C30 [https://perma.cc/BK7X-A58B]. However, during the same period, full-time instructors made up only 56% of all instructional staff; the remaining 44% were part-time instructors. NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., REPORT ON THE CONDITION OF EDUCATION 2023, at 31 (2023), https://nces.ed.gov/pubs2023/2023144rev.pdf [https://perma.cc/GB7N-LANC]. So only 32% of all college and university instructors (57% of the 56% who were teaching full-time) were tenured or tenure-track faculty.

12 Although the employment relationship between faculty and higher education institutions is distinguishable from other employment relationships in important ways, see *infra* Part II, cases addressing the enforceability of faculty handbook provisions tend to follow employee handbook precedent from outside of higher education. *See, e.g.*, Goodkind v. Univ. of Minn., 417 N.W.2d 636, 639 (Minn. 1988) (en banc) (applying *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983)); Storti v. Univ. of Wash. (*Storti II*), 330 P.3d 159, 162–63 (Wash. 2014) (en banc) (citing Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984)); Zuelsdorf v. Univ. of Alaska, 794 P.2d 932, 934 (Alaska 1990) (following *Jones v. Central Peninsula General Hospital*, 779 P.2d

Using the lens of college and university faculty termination policies, this Article seeks to make sense of the law governing the enforceability of employee handbooks. Employing case examples from the higher education context, specifically faculty termination cases, this Article identifies distinct features of the employment relationship between faculty and higher education institutions. Unlike other employment relationships, faculty contracts, which tend not to be at will, uniquely illustrate why unilateral contract doctrine is unsuited to determining the enforceability of handbook policies.[13] This Article supports an approach to enforcing handbook commitments that is less strictly grounded in contract doctrine. In the higher education context, such an approach would treat handbook commitments as contractually enforceable but afford colleges and universities flexibility to amend handbook policies so long as modifications are reasonable in light of academic custom, made with reasonable advance notice, and adopted consistent with principles of shared governance. Part I of this Article summarizes the differing approaches U.S. courts have taken to enforcing employment handbook policies. Part II addresses the distinct features of faculty contracts and makes the case for why adopting the approach of *Toussaint v. Blue Cross & Blue Shield of Michigan*[14] and *Bankey v. Storer Broadcasting Co.* (*In re Certified Question*)[15] makes sense in the context of enforcing college and university policies governing faculty termination.

I. EMPLOYER POLICIES—OR "HANDBOOKS"—AS A SOURCE OF ENFORCEABLE OBLIGATION

Although the caselaw on the enforceability of faculty handbook policies tends to follow the more general precedent on employee

783 (Alaska 1989), and *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980)); Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651, 660 (Iowa 2008) (following *Toussaint*, 292 N.W.2d 880); Stanton v. Tulane Univ. of La., 777 So. 2d 1242, 1250 (La. Ct. App. 2001) (discussing *Mix v. University of New Orleans*, 609 So. 2d 958, 964 (La. Ct. App. 1992), a case involving a nonfaculty employee).

13 Other scholars have similarly observed how unilateral contract doctrine is ill-suited to enforcing handbook policies. *See* Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897 (2023); *see also* RESTATEMENT OF EMP. L. § 2.05 cmt. b (AM. L. INST. 2015); *id.* § 2.06; Bryce Yoder, *How Reasonable Is "Reasonable"? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1523 (2008); Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 342 n.112 (1991) (citing the scholarship of Peter Linzer, David Farber and John Matheson, and a student note for the idea that unilateral contract law is a "less than ideal analytical tool" for enforcing employee handbook commitments).

14 292 N.W.2d 880, 892–95 (Mich. 1980).

15 443 N.W.2d 112, 119–20 (Mich. 1989).

handbooks,[16] handbook cases involving college and university faculty raise different considerations, as discussed in Part II. This Part outlines three distinct approaches courts have taken to analyzing the contractual enforceability of commitments employers make through the issuance of a handbook or similar policy document. This Part also illustrates each approach using examples taken from the faculty handbook context. To a significant degree, the caselaw on employee handbook enforcement defies categorization, partly because the decisions often hinge on the specific facts of cases, but also because the application of contract doctrine in this context can be "a conceptually awkward fit"[17] with the facts, as discussed below.

A. *Traditional At-Will Approach*

The at-will doctrine—the presumption in U.S. law that employment contracts of indefinite duration are terminable at will—is credited to a book published in 1877. As Theodore St. Antoine described it, the at-will presumption "sprang full-blown . . . from the busy and perhaps careless pen of American treatise writer Horace G. Wood."[18] Although the at-will rule was criticized at the time for its departure from prevailing precedent, the rule was quickly embraced by U.S. courts for its fit with the economy's needs at a time of rapid industrialization.[19] The rule gave employers the latitude to dismiss their employees for "good cause, for no cause or even for cause morally wrong."[20]

There are numerous exceptions to the at-will doctrine. It does not apply to employment contracts that specify a term; an employer who terminates an employee before the term has ended must have cause for doing so.[21] Collective bargaining agreements tend to contract around the at-will presumption by expressly requiring termination of employees to be for cause.[22] As discussed below, tenure is a recognized exception to the

16 *See supra* note 12.

17 RESTATEMENT OF EMP. L. § 2.05 cmt. b.

18 Theodore J. St. Antoine, *The Twilight of Employment at Will? An Update*, ANN. LAB. & EMP. L. INST. 1, 2 (1987) (citing HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272–73 (1877)), http://repository.law.umich.edu/articles/1426 [https://perma.cc/96BA-9YPD].

19 St. Antoine, *supra* note 18.

20 *Id.* at 2 (quoting Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884)).

21 RESTATEMENT OF EMP. L. § 2.03. The Restatement defines cause as a material breach of the employee's obligations, misconduct, or permanent inability to perform due to disability. *Id.* § 2.04.

22 Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3; St. Antoine, *supra* note 18, at 3–4 (stating that eighty percent of collective bargaining agreements "expressly prohibit discharge or discipline" unless for cause); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of*

at-will doctrine especially relevant to higher education.[23] Notably, federal and state legislatures have not left the employment relationship to the whims of the market, but have regulated the employment relationship, for example, to prohibit discrimination on the basis of protected categories like race or sex.[24] Similarly, courts have developed common law exceptions to the at-will doctrine. The most common exceptions are based on violations of public policy; the implied covenant of good faith and fair dealing; and implied-in-fact contracts (the "handbook" exception) based on employer policies governing termination, whether published and disseminated to employees in a handbook or otherwise.[25]

Most courts today recognize that employer termination policies may be enforceable, regardless of whether the employment relationship is at will. Nonetheless, a minority of states still embrace the idea that employer policy statements contained in handbooks do not affect the at-will nature of the employment relationship.[26] Refusing to enforce handbook policies often hinges on specific facts (such as the presence of disclaimer language in the handbook), and the list of at-will jurisdictions has changed over time, but the following states are generally recognized as being at-will jurisdictions: Delaware, Florida, Louisiana, Georgia, Missouri, and North Carolina.[27]

Stanton v. Tulane University illustrates how courts in at-will jurisdictions have applied the doctrine in the context of a faculty handbook.[28] The plaintiff, a tenure-track professor at Tulane, sued the university for breach of and tortious interference with an "alleged employment contract" after he was notified his employment would be terminated four years into a tenure-track appointment.[29] The trial court granted Tulane's motion for summary judgment and the appellate court affirmed, holding that Tulane's faculty handbook was not a contract: "Louisiana jurisprudence clearly and unequivocally upholds the principle

Individual Contract, 28 COMP. LAB. L. & POL'Y J. 313, 319 tbl.2 (2007) (stating that, as of 1995, ninety-seven percent of collective bargaining agreements required just cause or specific offenses for termination).

23 *See infra* Section II.A.

24 Muhl, *supra* note 22, at 3.

25 For discussion of these exceptions, see Dau-Schmidt & Haley, *supra* note 22, at 338–47; and Muhl, *supra* note 22, at 4–10.

26 RESTATEMENT OF EMP. L. § 2.05 reporters' note to cmt. a; Dau-Schmidt & Haley, *supra* note 22, at 344; Muhl, *supra* note 22, at 4, exhibit 1.

27 RESTATEMENT OF EMP. L. § 2.05 reporters' note to cmt. a (AM. L. INST. 2015); Muhl, *supra* note 22, at 4 exhibit 1.

28 777 So. 2d 1242 (La. Ct. App. 2001).

29 *Id.* at 1244.

that this sort of employment handbook is not a contract such as would eliminate application of the employment at will doctrine."[30]

Yet the *Stanton* decision, like other employee handbook decisions, turned on the specific facts of the case. In support of its holding, the *Stanton* opinion emphasized language in the handbook indicating that it was only a "general guide" and "subject to amendment."[31] More significantly, there is no indication in the *Stanton* opinion that the university had actually departed from its handbook policies—Stanton received one year's notice of his termination, the administration's decision was consistent with the recommendation of the faculty promotions and tenure committee, and Stanton had the opportunity to appeal the decision.[32] In other words, it appears the university complied with its policies on review of tenure-track faculty. As discussed below, courts tend to defer to college and university tenure determinations made consistently with institutional policies.[33]

In contrast, courts in at-will jurisdictions may enforce handbook policies when revocation of the policy would deprive an employee of a vested property interest. *Fairbanks v. Tulane University* involved a claim by the child of a faculty member for tuition waivers that had previously been granted to family members of faculty with five or more years of service pursuant to Tulane's handbook policy.[34] When the plaintiff sought a tuition waiver to attend Tulane's MBA program, the university refused on the grounds that the faculty handbook had been amended to disallow tuition waivers for students enrolled in graduate programs.[35] Plaintiff later sued to recover the tuition and fees he paid to Tulane to obtain his MBA. Like in *Stanton*, the trial court granted summary judgment to Tulane on the grounds that the policies in Tulane's faculty handbook were not enforceable.[36] But the appellate court reversed and remanded, suggesting there was an issue of fact over whether the plaintiff

30 *Id.* at 1251. The suggestion that the plaintiff's contract was at will is a misnomer, since the facts state he had a renewable one-year contract with Tulane. *Id.* at 1245. As even at-will jurisdictions recognize, ending a fixed-term appointment before the term is up requires cause. *See supra* note 21 and accompanying text. Thus, what actually was at issue in *Stanton* was whether the university was obligated to renew the plaintiff's annual contract or grant him tenure.

31 *Stanton*, 777 So. 2d at 1247. The effect of handbook disclaimers is discussed *infra* Section II.C.

32 *Stanton*, 777 So. 2d at 1246–47.

33 *See infra* Section II.C.1.

34 731 So. 2d 983 (La. Ct. App. 1999).

35 *Id.* at 984.

36 *Id.* at 985.

had acquired a "vested property interest" in the tuition waiver program when his father died.[37]

Moreover, even at-will jurisdictions have enforced handbook policies where the employment agreement expressly cross-references and incorporates the handbook.[38] Courts in at-will jurisdictions similarly have recognized that faculty members with tenure may not be terminated at will.[39] Finally, in *Daniels v. Board of Curators of Lincoln University*, a Missouri court recognized that, although an employment relationship may otherwise be at will, an academic institution's past practices can give rise to reasonable expectations that termination would only occur after following faculty handbook procedures.[40]

In summary, although a minority of jurisdictions still follow the at-will doctrine and generally refuse to treat handbook policies as binding, the determination of whether a given policy is enforceable in at-will jurisdictions may still hinge on the specific facts of the case. In *Oyefodun v. Dillard University*, a non-tenure-track instructor challenged his termination without prior notice on grounds that Dillard did not follow its faculty handbook procedure.[41] Applying Louisiana law, the court held that the plaintiff's reliance on the handbook did not necessarily defeat his claim: "[C]ourts have not expressed a *per se* rule against employment manuals being contracts; they instead prefer to analyze the manuals on a case by case basis."[42] In other words, law alone is not definitive; the enforceability of handbook provisions depends on context, which is one

37 *Id.* at 989–91. The issue of vested rights as a limit on faculty handbook modification is addressed further *infra* Section II.C.3.

38 *See, e.g.*, Trought v. Richardson, 338 S.E.2d 617 (N.C. Ct. App. 1986) (holding that an allegation that provisions in an employee manual were expressly agreed to was sufficient to raise an issue of fact as to whether the manual was binding).

39 *See* Munker v. Bd. of Supervisors of La. State Univ. Sys., 255 So. 3d 718, 725–26 (La. Ct. App. 2018) (holding that tenured faculty member was not an at-will employee and that there was an issue of material fact over whether plaintiff resigned or was terminated without cause); Smith v. Bd. of Supervisors for the Univ. of La. Sys., No. 13-5505, 2015 WL 10663156, at *10–12 (E.D. La. Dec. 11, 2015) (holding that tenured faculty member had a right to continued employment and that there was an issue of material fact over whether university had cause to terminate his contract).

40 51 S.W.3d 1, 9 (Mo. Ct. App. 2001). The plaintiff in *Daniels* brought suit when he was terminated as vice-president of student affairs at Lincoln University; although he held a tenured faculty position, only his administrative appointment was at issue. The jury found for the plaintiff on his procedural due process claim against the university, which was affirmed on appeal. Although his administrative appointment was at will, the court upheld the jury's determination that the university's "custom, practice and usage" made the faculty handbook's termination procedures applicable to the plaintiff's administrative appointment. *Id.* Citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), the court held that the plaintiff had a reasonable expectation that he would not be terminated from his position unfairly or without a hearing. *Daniels*, 51 S.W.3d at 10.

41 No. Civ.A. 03-0115, 2003 WL 21634305 (E.D. La. June 26, 2003).

42 *Id.* at *3 (quoting Wallace v. Shreve Mem'l Libr., 79 F.3d 427, 431 (5th Cir. 1996)).

reason why the law in this area so often defies categorization. In any event, the vast majority of courts treat handbook commitments as enforceable, even when those commitments would limit the at-will doctrine. The next Section addresses the majority approach to enforcing handbook policies, involving the application of unilateral contract principles to employee handbook policies.

B. *Unilateral Contract and Promissory Estoppel Approaches*

Stephen Befort credits *Toussaint v. Blue Cross & Blue Shield of Michigan*[43] with first upholding the enforceability of handbook policies protecting employees against at-will termination.[44] The decision is widely cited and influential,[45] and provides the analytical framework for the Restatement of Employment Law's approach to handbook enforcement.[46] The *Toussaint* opinion is well-known for its reasoning—the novel idea that enforcing handbook policies should be grounded in policy considerations relating to the employment relationship. But *Toussaint*'s reasoning can be contrasted with that of later case law, which has tended to characterize an employer's handbook commitments as an offer to enter into a unilateral contract.[47]

A unilateral contract is one in which the party making an offer does not receive a promise in exchange.[48] To give a typical example, if a pet owner posts a notice offering a monetary reward for the return of her lost pet, a neighbor trying to find and return the pet after reading the notice would not be contractually bound to do so, since the promise of a reward (the offer) was not made in exchange for a commitment to perform but was made only for the act itself. Since parties tend to enter into contracts seeking a commitment from the other party, contracts generally are interpreted as bilateral, involving an exchange of promises.[49] Karl Llewellyn famously observed that unilateral contracts are given undue

43 292 N.W.2d 880 (Mich. 1980).

44 Befort, *supra* note 13, at 337.

45 Shepard's reports that *Toussaint* has been cited in over one thousand judicial decisions, hundreds of law review articles, and dozens of treatises.

46 *See infra* Section I.C.

47 *See* Befort, *supra* note 13, at 345 (noting that the "vast majority" of handbook decisions have been decided on the basis of unilateral contract or promissory estoppel theories); Arnow-Richman & Verkerke, *supra* note 13, at 920 (describing unilateral contract theory as the "coin of the realm" for courts deciding the enforceability of handbook policies).

48 RESTATEMENT OF CONTS. § 12 (AM. L. INST. 1932) (defining a "unilateral" contract as "one in which no promisor receives a promise as consideration for his promise"), *quoted in* Arnow-Richman & Verkerke, *supra* note 13, at 923 n.149.

49 Arnow-Richman & Verkerke, *supra* note 13, at 922.

emphasis in law school teaching and should be relegated to the sidelines as "an interesting and often instructive curiosity."[50] However, in the 1980s, courts began applying unilateral contract doctrine to enforce employee handbook termination policies as an exception to the at-will doctrine.[51] Rachel Arnow-Richman and J.H. Verkerke observe that the use of unilateral contract doctrine to enforce handbook termination policies has precedent in early decisions involving employer breaches of promises to pay future compensation (such as a commission, bonus, or retirement benefit) after an employee performs and satisfies the preconditions for the benefit.[52] These early "vested benefit" cases are relatively straightforward, since they present an especially compelling case for enforcement[53] and are not in direct tension with the at-will doctrine. The employee termination cases raise more challenging issues.

Pine River State Bank v. Mettille[54] is cited as an early example of the unilateral contract approach to enforcing termination policies in employee handbooks.[55] In *Pine River*, a bank summarily fired one of its loan officers without following the progressive discipline procedure set forth in the bank's employee handbook.[56] A jury awarded the loan officer damages for breach of contract and the bank appealed, arguing that the employment relationship was at will.[57] The Supreme Court of Minnesota affirmed the damages award, holding that the progressive discipline policy in Pine River's handbook was contractually enforceable.[58] The court characterized the handbook language that the bank disseminated to its employees as an offer for a unilateral contract.[59] By continuing to perform his duties as a loan officer "despite his freedom to quit," the plaintiff accepted the bank's offer and provided the necessary consideration to make the handbook language an enforceable part of his employment contract.[60] When applying the elements of the unilateral contract test to the facts, the *Pine River* court presumed that most of these

50 K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 YALE L.J. 1, 36 (1938), *discussed in* Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 551 (1983); Arnow-Richman & Verkerke, *supra* note 13, at 925–26.

51 Befort, *supra* note 13, at 340–43; Pettit, *supra* note 50, at 559–62; Arnow-Richman & Verkerke, *supra* note 13, at 918–21.

52 Arnow-Richman & Verkerke, *supra* note 13, at 914–15.

53 *Id.* at 915; Pettit, *supra* note 50, at 564 (noting that resort to unilateral contract doctrine is not even necessary for enforcement of such a promise).

54 333 N.W.2d 622 (Minn. 1983).

55 Befort, *supra* note 13, at 340; Arnow-Richman & Verkerke, *supra* note 13, at 919.

56 *Pine River*, 333 N.W.2d at 625.

57 *Id.*

58 *Id.* at 631.

59 *Id.* at 627.

60 *Id.* at 630.

elements had been satisfied.[61] The court did not inquire into whether, by remaining at his job, the plaintiff had actually intended to accept his employer's "offer" or whether he was even aware of the handbook policy before he was fired.

As discussed below, faculty contracts tend not to be at will.[62] Nonetheless, courts may still resort to unilateral contract doctrine when analyzing the enforceability of faculty handbook policies. *Arneson v. Board of Trustees, McKendree College* illustrates this approach.[63] Arneson, a tenure-track professor at McKendree College, alleged that the college breached his contract when it failed to provide twelve months advance notice of the nonrenewal of his appointment, as required by the faculty manual.[64] Although the contract at issue in *Arneson* involved a fixed-term appointment, the court analyzed the enforceability of the college's faculty manual by applying the unilateral contract formation test from *Duldulao v. Saint Mary of Nazareth Hospital Center*, a case involving an at-will contract that followed the reasoning of *Pine River*.[65] The *Arneson* court held that the advance notice provisions in the faculty manual were an enforceable part of Arneson's employment contract.[66]

Although most courts have employed unilateral contract doctrine to enforce handbook policies, some have used promissory estoppel.[67] The reasoning is similar to that of unilateral contract doctrine but more flexible in that enforcement is premised on an employee's implicit reliance on (as opposed to acceptance of) a handbook policy. *O'Neill v. New York University* illustrates how a court employed reliance principles to enforce faculty handbook policies against retaliation.[68] The plaintiff in *O'Neill* was a tenure-track professor at New York University (NYU) who was terminated after reporting research misconduct.[69] Because the plaintiff's faculty appointment was for a fixed term and he was terminated before the term had ended, the court determined that he could only be

61 Befort, *supra* note 13, at 343.

62 *See infra* Section II.A.

63 569 N.E.2d 252, 256–57 (Ill. App. Ct. 1991).

64 *Id.* at 254–55.

65 *Id.* at 256–57 (citing Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (Ill. 1987)).

66 *Id.* at 257. For additional examples, see *Storti II*, 330 P.3d 159, 162–65 (Wash. 2014), which held that the faculty handbook was enforceable as a unilateral contract, but ultimately upheld the modification at issue as retroactively applicable; and *Goodkind v. University of Minnesota*, 417 N.W.2d 636, 639 (Minn. 1988), which held that a statement in the faculty handbook was insufficiently definite to amount to an offer to enter a unilateral contract.

67 Pettit, *supra* note 50, at 338–39; Befort, *supra* note 13, at 343–45.

68 944 N.Y.S.2d 503 (App. Div. 2012).

69 *Id.* at 505–07.

terminated for cause.[70] But the court also went on to consider whether NYU's faculty handbook policies against retaliation for reporting misconduct were enforceable. Citing *Weiner v. McGraw-Hill, Inc.*,[71] a leading New York decision recognizing an implied contract exception to the at-will doctrine,[72] the *O'Neill* court inferred the plaintiff's reliance on NYU's policies as a basis for enforcing them.[73]

Utilizing unilateral contract doctrine as a tool for enforcing faculty handbook commitments has its limitations. Courts may interpret policy statements in a handbook as being insufficiently definite to amount to a binding promise. *Goodkind v. University of Minnesota* involved the enforceability of a dental school policy governing the hiring of department chairpersons.[74] The Supreme Court of Minnesota refused to treat the policy as an offer to enter a unilateral contract with the plaintiff, distinguishing *Pine River* on grounds that the policy at issue was a "general statement" not directly related to terms and conditions of the plaintiff's employment.[75]

Even where courts might otherwise recognize a faculty handbook policy to be contractually enforceable as a unilateral contract, the presence of a disclaimer or other qualifying language in the handbook may defeat enforcement. For example, in *Storti v. University of Washington*, the Supreme Court of Washington found a faculty salary policy to be an offer to enter into a unilateral contract, but still held that the university could modify the policy on the basis of handbook language giving the university discretion to "reevaluate" the policy.[76] Courts that have employed unilateral contract doctrine to enforce handbook policies have also generally found that a clear disclaimer—handbook language stating that nothing in the document should be interpreted as a contract—operates to prevent the policy from being treated as an offer to enter into a unilateral contract.[77] In contrast, at least some courts in jurisdictions adopting a promissory estoppel analysis have taken a more context-specific approach, finding a disclaimer not to be dispositive but instead considering whether reliance on a handbook policy was reasonable in light of the disclaimer and other factors.[78]

70 *Id.* at 511.

71 443 N.E.2d 441 (N.Y. 1982).

72 St. Antoine, *supra* note 18, at 9–10.

73 *O'Neill*, 944 N.Y.S.2d at 512–13.

74 417 N.W.2d 636 (Minn. 1988).

75 *Id.* at 639.

76 330 P.3d 159, 164–65 (Wash. 2014).

77 Stephen F. Befort, *Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again*, 21 EMP. RTS. & EMP. POL'Y J. 307, 313–14 (2017).

78 *Id.* at 314.

Finally, unilateral contract and promissory estoppel analyses of handbook policies are premised on the employee's acceptance of or change of position in reliance on the policy at issue. In the promissory estoppel context, courts have at times refused to enforce handbook promises where no actual reliance on the policy could be demonstrated.[79] But as a practical matter, courts often infer knowledge of or reliance on the part of an employee for policy reasons and because of the difficulty of proving actual reliance.[80] As Mark Pettit observes, most courts do not raise the issue of reliance on or knowledge of the handbook policy at issue, or if they do, courts may "say that some showing of knowledge (or reliance) is required, and go on to find that knowledge or reliance."[81]

More fundamentally, as the previous paragraph suggests, standard contract doctrine is an ill-fitting tool for enforcing handbook promises. Courts have applied standard contract law requirements of offer and acceptance, consideration, and/or reliance in cursory or unconvincing ways when determining the enforceability of handbook policies. The Restatement of Employment Law characterizes the tendency of courts to infer employee reliance on or acceptance of handbook policies as a "conceptually awkward fit," since employees are rarely aware of handbook statements at the time of employment or when workplace policies are modified.[82] As discussed below, faculty contracts vividly illustrate the unsuitability of standard contract doctrine for enforcing handbook policies.[83]

These difficulties are only compounded in cases involving handbook policy modifications. Handbook modifications raise especially difficult policy considerations. On the one hand, it may be overly burdensome or impracticable to require employers to obtain express employee agreement to workplace policies each time they are modified.[84] But on the other hand, allowing employers to modify workplace policies at will may lead to harshness or injustice when those policies have generated reasonable expectations of job security among employees, for example, as

79 Befort, *supra* note 13, at 344–45 (first citing Karnes v. Doctors Hosp., 555 N.E.2d 280 (Ohio 1990); and then citing Stewart v. Chevron Chem. Co., 762 P.2d 1143 (Wash. 1988)).

80 *Id.* at 345 (observing that most courts presume reliance).

81 Pettit, *supra* note 50, at 327–28 (discussing *Dangott v. ASG Industries, Inc.*, 558 P.2d 379 (Okla. 1976), a decision acknowledging the employee's lack of awareness of the handbook policy but concluding publication of the policy was "equivalent of constructive knowledge," *id.* at 383).

82 RESTATEMENT OF EMP. L. § 2.05 cmt. b (AM. L. INST. 2015).

83 *See infra* Section II.A.

84 *See* RESTATEMENT OF EMP. L. § 2.06 cmt. e (describing such an approach as "unworkable" for large employers, leading to "inconsistent treatment among similarly situated employees"); Arnow-Richman & Verkerke, *supra* note 13, at 936 (noting the need for corporate flexibility to respond to changing market conditions and the practical difficulty of administering different policies for employees depending on their date of hire).

a response to a handbook policy to terminate employment only for cause.[85] Courts have taken differing positions on whether employers may freely modify their handbook policies. In *Asmus v. Pacific Bell*, the California Supreme Court upheld an employer's ability to terminate its job training and reassignment policy.[86] The *Asmus* court relied on the legal fiction that employees' staying at their jobs amounted to acceptance of the employer's offer to enter into a "modified unilateral contract."[87] The *Asmus* opinion also articulated a rule on "unilateral contract termination" that purported to be based on California contract principles, but instead appears to have been invented by the court.[88] In *Demasse v. ITT Corp.*, the Arizona Supreme Court took the opposite position on modification, holding an employer's seniority layoff policy could not be terminated simply by issuing a modified handbook.[89] Having concluded that the employees had accepted the handbook policy as a unilateral contract, the court held that the handbook policy could not be modified without the acceptance of the offer and consideration from the employees.[90] Responding to concerns that its holding would prevent employers from updating their workplace policies, the court noted that employers could avoid adopting binding policies by including disclaimers in their handbooks.[91] By analyzing handbook modification through the lens of unilateral contract doctrine, both decisions are flawed: *Asmus*, because it failed to state a coherent doctrinal rationale for its decision; and *Demasse*, because it dodged difficult questions surrounding handbook modification, instead inviting employers to expressly disclaim that their handbook policies are contractually binding.

85 *See* Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 12 (2006) (suggesting employers should be estopped from unilaterally modifying workplace policies assuring job security, since they instill employee loyalty grounded in "reasonable employee expectations about how they will be treated in the future").

86 999 P.2d 71 (Cal. 2000).

87 *Id.* at 78.

88 *Id.* (stating that, as a "general rule governing the proper termination of unilateral contracts," once an employer provides reasonable notice, no additional consideration is required); *cf.* Arnow-Richman & Verkerke, *supra* note 13, at 938 (pointing out the absence of any general rule governing the termination of unilateral contracts).

89 984 P.2d 1138 (Ariz. 1999).

90 *Id.* at 1143–44.

91 *Id.* at 1148. Arnow-Richman and Verkerke characterize *Demasse* as a "missed opportunity" to clarify that unilateral contract doctrine is unsuited to analyzing employment contracts. *See* Arnow-Richman & Verkerke, *supra* note 13, at 941.

In another famous observation about contract law,[92] Llewellyn stated that "[c]overt tools are never reliable tools."[93] Llewellyn made this statement in response to the judicial reluctance to invalidate contracts on grounds of public policy, instead adopting strained interpretations of contract language or strained applications of the consideration requirement to reach the same end.[94] The result of such tactics, Llewellyn concluded, is "unnecessary confusion and unpredictability" and "evil persisting that calls for remedy."[95] In the employee handbook context, commentators have similarly called for a less doctrinal, more policy-oriented approach. As Pettit observed, the rationale for enforcing handbook policies, which are issued by an employer *as organization* to a *class* of employees, is group reliance: "The justification for holding the employer liable to the employee without knowledge [of or reliance on the policy at issue] seems ultimately to depend on the promise principle as supplemented by notions of equity and administrative convenience."[96] Arnow-Richman and Verkerke criticize the judicial tendency to analyze handbook policies using a unilateral contract framework: "The depth and richness of employment's hyper-relational features confound the simplistic reward paradigm of unilateral contracts. To force the square peg of unilateral theory into the round hole of employment relationships, courts deploy nonsensical legal fictions and erroneous doctrinal reasoning."[97] A flexible approach to employee handbook enforcement grounded in general estoppel principles is better suited to the nature of employment relationships, which tend to be ongoing and involve groups as opposed to individual employees.

Utilizing standard contract doctrine to analyze the enforceability of handbook policies is problematic for numerous reasons. The next Section discusses how the *Toussaint*/*Bankey* approach to handbook policy enforcement squarely confronts the challenge of balancing the interests of employer and employee. As discussed in Part II, this approach is particularly well suited to the higher education context. That said, relatively few courts have gone so far as to "fully dispense with the requirements of the contractual framework" when analyzing the

92 For the first famous Llewellyn observation, see *supra* note 50 and accompanying text.

93 K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (reviewing OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)).

94 *Id.* at 702.

95 *Id.* at 703.

96 Pettit, *supra* note 50, at 583.

97 Arnow-Richman & Verkerke, *supra* note 13, at 968; *see also* Yoder, *supra* note 13, at 1527 (arguing that, given the inherently open-ended nature of employment relationships and the deliberate incompleteness of employment agreements, applying contract doctrine to regulate employment relationships is not appropriate).

enforceability of handbook promises, as *Toussaint* did.[98] The unilateral contract-based approach still predominates.

C. Toussaint/Bankey *Approach*

Charles Toussaint worked as a middle manager at Blue Cross and Blue Shield of Michigan (Blue Cross). When he was hired, a Blue Cross officer informed Toussaint he would be employed "as long as [he] did [his] job."[99] The officer also gave Toussaint a policy manual, which outlined disciplinary procedures and stated a company policy of terminating employees only for just cause.[100] Several years later, Blue Cross fired Toussaint without following its handbook procedures and Toussaint sued for breach of contract.[101] A jury awarded him damages, but the award was reversed on appeal.[102] The Michigan Supreme Court consolidated Toussaint's appeal with that of Ebling, another manager who similarly convinced a jury his employer had breached its promise to discharge him only for cause.[103] The court affirmed Toussaint's and Ebling's jury awards, holding first that an employment provision not to discharge an employee except for cause is contractually binding even if the employment is for an indefinite term, and second that the provision can either be expressly stated, or it can arise from an employee's "legitimate expectations grounded in an employer's policy statements."[104]

The decision in *Toussaint* is not premised on a characterization of the policy as an offer that was accepted, exchanged for consideration, or concretely relied upon. Instead, the court considered the workplace impact of adopting such a policy. As the opinion emphasizes, there are numerous benefits employers gain from sharing these kinds of policies with its workforce.[105] These benefits include promoting compliance with company policies, identifying procedures for resolving workplace disputes, minimizing incentives for employees to unionize, boosting employee morale, and promoting a positive corporate public image.[106] Based on an employer's interest in fostering legitimate expectations among employees that its workplace policies will be followed, *Toussaint*

98 Arnow-Richman & Verkerke, *supra* note 13, at 921.

99 Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 (Mich. 1980).

100 *Id.*

101 *Id.* at 902–03.

102 *Id.* at 883.

103 *Id.*

104 *Id.* at 885.

105 *Id.* at 892.

106 Befort, *supra* note 13, at 337–38.

holds that handbook policy commitments are contractually enforceable, regardless of whether an employee negotiated for a given policy or was even aware of the policy's existence:

> We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee . . . and although no reference was made to the policy statement in pre-employment interviews and the employment does not learn of its existence until after his hiring.[107]

Quoting *Wood v. Lucy, Lady Duff-Gordon*,[108] the opinion characterizes employee handbook commitments as being "instinct with an obligation."[109] Note the difference between *promissory* estoppel as it is traditionally applied and the more generalized estoppel rationale of *Toussaint*.[110]

In support of its holding, the *Toussaint* opinion cites one of the Michigan Supreme Court's previous decisions involving vested benefits.[111] But notably, the opinion also quotes at length from *Perry v. Sindermann*[112] for the idea that judicial enforcement of employer policies and practices has occurred outside of the vested benefits context.[113] Decided eight years before *Toussaint*, *Perry* is a procedural due process case involving the nonrenewal of an untenured professor's contract at a public junior college.[114] The U.S. Supreme Court upheld the professor's claim of entitlement to continued employment in spite of the fact that the college had no formal tenure system. As the Supreme Court stated in *Perry* (and as the Michigan court quoted in *Toussaint*):

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding . . . . Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. . . .

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107 *Toussaint*, 292 N.W.2d at 892.

108 118 N.E. 214, 214 (N.Y. 1917).

109 *Toussaint*, 292 N.W.2d at 892.

110 *See also* RESTATEMENT OF EMP. L. § 2.05 reporters' note to cmt. b (AM. L. INST. 2015) (citing other case law enforcing handbook provisions on generalized estoppel grounds).

111 *Toussaint*, 292 N.W.2d at 893 (citing Cain v. Allen Elec. & Equip. Co., 78 N.W.2d 296, 297 (Mich. 1956)). For a discussion of vested benefits cases, see *supra* notes 51–52 and accompanying text.

112 408 U.S. 593 (1972); *see also supra* note 3.

113 *Toussaint*, 292 N.W.2d at 893–94.

114 *Perry*, 408 U.S. at 594–95.

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure.[115]

Significantly, *Toussaint*'s rationale for enforcing Blue Cross's handbook policy is influenced by constitutional due process jurisprudence. The implications of this influence for faculty handbooks are further addressed in Section II.B.

As referenced in the language from *Toussaint* quoted above, statements of employer policy can give rise to legitimate expectations of job security in spite of the fact that employers may unilaterally modify these policies. The Michigan Supreme Court directly addressed the issue of handbook modification in *Bankey v. Storer Broadcasting Co. (In re Certified Question)*.[116] The question certified to the court in *Bankey* was whether an employer may unilaterally modify its discharge-for-cause policy, even if the handbook lacks an express reservation of the right to make changes.[117] After surveying the law on employee handbook modification in other states, the Michigan Supreme Court rejected the application of unilateral contract doctrine to handbook modifications, instead applying the approach of *Toussaint*.[118] As the opinion observes, written personnel policies are enforceable, not because they have been "offered and accepted as a unilateral contract," but because of the benefits employers derive from them.[119] *Bankey* answers the certified question regarding handbook modification in the affirmative, again emphasizing differences between handbook policies and more traditional contracts:

> It is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved. . . . [A] 'policy' is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation.[120]

In support of its position on modification, the opinion also cites the practical need for workplace policies to be "adaptable and responsive to change."[121]

115 *Id.* at 601–02, *quoted in Toussaint*, 292 N.W.2d at 894.

116 443 N.W.2d 112 (Mich. 1989).

117 *Id.* at 113.

118 *Id.* at 119.

119 *Id.*

120 *Id.* at 120.

121 *Id.*

Nonetheless, *Bankey* also articulates limits on an employer's flexibility to change its policies, stating that an employer is not free to make policy changes in bad faith, and revocation of a discharge-for-cause policy is effective only when the employer provides reasonable advance notice of the change to affected employees.[122] In a footnote, *Bankey* refers to an additional limitation. Citing cases involving pensions, death benefits, and severance pay, the opinion states that it might answer the certified question differently if an employer modified its policies so as to adversely affect an employee's benefits that had already "accrued or 'vested.'"[123] The question of how this vested rights exception should be applied in the context of faculty handbook policy modification is addressed in Section II.C.

The Restatement of Employment Law endorses the reasoning of *Toussaint* as further developed by *Bankey*.[124] Section 2.05 states that policy statements in employee handbooks are binding on the employer "until modified or revoked," as provided in section 2.06.[125] Section 2.06 in turn sets similar limits on handbook modification as are set forth in *Toussaint* and *Bankey*. Employers are free to modify commitments made in their handbook policies, so long as they provide reasonable advance notice of the changes to affected employees, *unless* the change would "adversely affect vested or accrued employee rights."[126]

It should be noted that the *Toussaint*/*Bankey* approach—particularly as interpreted in the Restatement of Employment Law—could result in harsh outcomes for employees. The Restatement has been criticized as pro-employer, and one can detect this orientation in some of the comments and illustrations to sections 2.05 and 2.06, the sections dealing with binding policy statements and employee handbook modification, respectively.[127] The comments and illustrations to section

122 *Id.*

123 *Id.* at 121 n.17.

124 *See* RESTATEMENT OF EMP. L. § 2.05 reporters' note to cmt. b (AM. L. INST. 2015) (adopting "essentially the analytical framework of the Michigan high court in *Toussaint*" and citing *Bankey*).

125 *Id.* § 2.05.

126 *Id.* § 2.06.

127 *See, e.g.*, Robert A. Hillman, *Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L. REV. 1341, 1358 (2015) ("It is fair to say that the Restatement and Chapter 2 were not received favorably by some academic critics . . . ."); Matthew W. Finkin, Lea VanderVelde, William Corbett & Stephen F. Befort, *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 119–33 (2009) (listing specific critiques of the proposed Restatement sections on binding policy statements (now section 2.05) and employee handbook modification (now section 2.06)); Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place*, 13 EMP. RTS. & EMP. POL'Y J. 143, 144 (2009) (describing

2.05 suggest that a prominent disclaimer in a handbook "may indicate that it is a hortatory pronouncement," as opposed to a binding statement.[128] The comments also analogize statements in an employee handbook to rules of practice governing the day-to-day decisions of administrative agencies, suggesting that the statements should be enforceable in the same way an agency's operational rules would be: binding until the agency modifies or revokes them.[129] As Matthew Finkin has observed, the import of this comment is that an employer's workplace policies would be freely modifiable, without regard to employees' reasonable expectations or reliance on them.[130] Finally, section 2.06 carves out an exception to policy modification where it would undermine "vested or accrued employee rights."[131] But the comments define vested rights narrowly, and in any event such rights would not encompass handbook policies that limit an employer's ability to terminate employment.[132] That said, interpreting faculty handbook policies in a contextual manner, with full recognition of the relevance of past practices and academic custom, would mitigate much of the potential harshness of the approach as it applies to handbook modifications. Section II.C.2 discusses how courts have invoked academic custom to mitigate the effect of disclaimers and constrain employer discretion to modify policies.

Courts have been reluctant to depart from standard contract doctrine when addressing the enforceability of employee handbook policies, particularly in the at-will employment context.[133] Indeed, the Michigan Supreme Court itself eventually pulled back from the breadth of its reasoning as expressed in the *Toussaint* decision.[134] The court's

Chapter 2 of the Restatement as presenting "a narrow picture of worker contract rights, one centered on the at-will default and deferential to management interests").

128 RESTATEMENT OF EMP. L. § 2.05 cmt. c. An illustration to the same section concludes, due to a prominent disclaimer on the handbook's first page, that a handbook policy calling for a progressive discipline procedure before termination may not be a binding commitment. *Id.* § 2.05 cmt. c, illus. 2.

129 *Id.* § 2.05 cmt. b.

130 *See* Finkin, *supra* note 85.

131 RESTATEMENT OF EMP. L. § 2.06.

132 The comments limit the vested rights exception to express commitments made outside of the handbook policy context, or policy-based entitlements such as earned commissions, bonuses, or vested retirement benefits. *Id.* § 2.06 cmt. b; *id.* § 3.04 cmt. b; *id.* § 3.04 cmt. b, illus. 2 & 3; *see also* Finkin, VanderVelde, Corbett & Befort, *supra* note 127, at 128 (describing how the vested rights exception has been invoked in the context of a fully-earned benefit like accrued vacation pay, but "has no real meaning with respect to . . . policy statements" that purport to limit the at-will presumption).

133 *See supra* note 97 and accompanying text.

134 *See* Arnow-Richman & Verkerke, *supra* note 13, at 954–55 (discussing *Rowe v. Montgomery Ward & Co.*, 73 N.W.2d 268 (Mich. 1991), in which the Michigan Supreme Court retreated from the "legitimate expectations" reasoning behind *Toussaint*).

more recent employee handbook decisions reflect concern about eroding the at-will doctrine and require clear evidence of an employer's policy of just-cause termination to overcome the strong presumption of at-will employment.[135] But as discussed in Section II.A, most *faculty* contracts are not terminable at will. Perhaps for this reason, at least some courts have followed *Toussaint* in the context of enforcing handbook policies governing faculty termination. Federal decisions applying Michigan law have continued to cite *Toussaint*'s analytical approach, although not necessarily finding that handbook policies gave rise to legitimate expectations of job security.[136] Additionally, several other state supreme courts addressing the enforceability of faculty handbook policies have followed the reasoning of *Toussaint* where the faculty contracts at issue were for a term and expressly incorporated handbook policies. In *Kern v. Palmer College of Chiropractic*, an assistant professor was discharged from his position for what appears to have been an arbitrary basis and against the recommendation of a faculty committee.[137] The professor sued the college for violating its faculty handbook, which stated that faculty could only be terminated on specific grounds.[138] The lower court granted summary judgment to the college, but the Supreme Court of Iowa reversed, holding that the specific grounds for termination in the faculty handbook applied:

> Where, as here, the parties have adopted a specific standard for the determination of "good cause," we believe the *Toussaint* rule strikes an appropriate balance between the employer's strong interest in making employment decisions, and the employee's substantial interest in the employment security and stability offered by contracts which may not be terminated at will, but only for specified "good cause."[139]

Presumably because the professor's appointment was for a term, the parties in *Kern* did not dispute whether Palmer College could only

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135 *Rowe*, 73 N.W.2d at 275; Lytle v. Malady, 579 N.W.2d 906, 914–15 (Mich. 1998); *see also* Arnow-Richman & Verkerke, *supra* note 13, at 957 (discussing the application of the "at-will super-presumption" in *Rowe*).

136 Sanders v. Kettering Univ., 411 F. App'x 771, 771 (6th Cir. 2010) (finding that plaintiff raised a jury question under *Toussaint* as to whether the university had adequate cause to terminate his faculty appointment); Mayeaux v. Siena Heights Coll., No. 98-1197, 1999 WL 397943 (6th Cir. June 3, 1999) (holding that untenured professor did not have "legitimate expectations" of contract renewal under *Toussaint* when professor was given notice of contract nonrenewal consistent with AAUP standards); Hodge v. Grand Valley State Univ., No. 198961, 1997 WL 33331040 (Mich. Ct. App. Nov. 18, 1997) (finding that a professor failed to establish he had "legitimate expectations" of a salary increase under *Toussaint*).

137 757 N.W.2d 651, 657 (Iowa 2008).

138 *Id.* at 654. The stated grounds for termination included "willful failure" to perform assigned duties or "willful performance of duty below accepted standards." *Id.*

139 *Id.* at 660.

terminate the professor for cause; rather, the issue in dispute was whether cause for termination existed.[140] *Kern* held that there was a material issue of fact as to whether the college had cause for termination and that the grounds for cause were as defined in the faculty handbook.[141]

Similarly, in *Zuelsdorf v. University of Alaska*, the Supreme Court of Alaska relied on *Toussaint* to enforce the university's handbook policy requiring advance notice of faculty nonretention.[142] The plaintiffs were assistant professors who claimed that they were not given adequate notice of their nonretention as required by the faculty handbook version in effect at the time of their appointment. Citing budgetary constraints but waiting until after the notice deadline had passed, the university unilaterally amended its policies and gave plaintiffs twelve (instead of the previously required fifteen) months of advance notice that their contracts would not be renewed.[143] After filing unsuccessful grievances, the plaintiffs sued for breach of contract.[144] Quoting at length from *Toussaint*, the Supreme Court of Alaska held that the faculty handbook policy requiring advance notice of nonretention was contractually enforceable, and the university could not modify its policies so as to deprive plaintiffs of their "vested contract rights."[145]

Similarly, the highest courts of other states have cited the rationale behind *Toussaint* in affirming the ability of colleges and universities to modify existing faculty handbook policies. In *Moore v. Utah Technical College*, it was the plaintiff, a college instructor, who sought to enforce a modification to a faculty handbook that entitled faculty facing termination to certain procedural due process rights.[146] While holding, under the circumstances, that the modification could not reasonably be interpreted as applying to the college's agreement with plaintiff, the Supreme Court of Utah also acknowledged in dictum that the college's policies and procedures were part of the plaintiff's employment agreement, and the college had the ability to modify those policies and procedures.[147] In support of its dictum on faculty handbook modification, the *Moore* court cited one of its precedents that had relied on *Toussaint*.[148] Similarly, in *Knowles v. Unity College*, the Supreme Judicial

140 *Id.* at 658.

141 *Id.* at 661.

142 794 P.2d 932, 934 (Alaska 1990).

143 *Id.* at 933–34.

144 *Id.* at 933.

145 *Id.* at 934–35. The issue of vested rights is addressed *infra* Section II.C.3.

146 Moore v. Utah Tech. Coll., 727 P.2d 634, 635–36 (Utah 1986).

147 *Id.* at 642.

148 *Id.* The precedent, *Piacitelli v. Southern Utah State College*, quoted *Toussaint* for the idea that "an employer's policy manual may give rise to employee contractual rights even where it 'can

Court of Maine held that a private college's decision to cancel its tenure policy did not make the college contractually liable to one of its untenured faculty.[149] The defendant, Unity College, terminated its tenure policy for financial reasons.[150] The plaintiff was a faculty member at the college who was untenured at the time but later claimed he was entitled to tenure protection under the canceled policy when his appointment was not renewed.[151] Although the court found insufficient evidence to support plaintiff's claim of a contractual right to reappointment, it acknowledged that other circumstances might have given rise to a valid claim of breach of an implied contract.[152] Although *Knowles* did not cite *Toussaint*, the opinion's equitable approach to handbook modification is similar to *Toussaint*. And like *Toussaint*, the *Knowles* opinion cites *Perry v. Sindermann*.[153]

Finally, *Toussaint* shares interesting parallels with *Drans v. Providence College*, a faculty handbook modification decision that predates *Toussaint* but similarly relied on *Perry*.[154] *Drans* addressed whether a professor's right to tenure at Providence College restricted the college from adopting a mandatory retirement policy.[155] The trial court analyzed the issue through the lens of standard contract doctrine and held that the professor had agreed to be bound by the new policy when he signed an acknowledgement relating to his appointment for the 1970–71 academic year.[156] The Supreme Court of Rhode Island disagreed with the trial court's analysis. According to the supreme court, the professor's acceptance of his faculty appointment was insufficient to manifest assent to the college's mandatory retirement policy. Whether the handbook modification was enforceable against the professor depended instead on the parties' reasonable expectations regarding university policies in light of academic custom.[157] Citing *Perry* and quoting statements from the

be unilaterally amended by the employer.'" 636 P.2d 1063, 1066 n.5 (Utah 1981) (quoting Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 892 (Mich. 1980)).

149 429 A.2d 220, 222 (Me. 1981).

150 *Id.* at 220–21.

151 *Id.* at 221.

152 *Id.* at 222–23. The court stated that it was not suggesting that a party in plaintiff's position could not obtain a right to contract renewal based on an implied contract, but only that the lower court "did not err in finding insufficient evidence of an official tenure policy or of an implied tenure right." *Id.*

153 *Id.* at 222.

154 383 A.2d 1033, 1040 (R.I. 1978).

155 *Id.* at 1034–35. Congress later banned mandatory retirement policies with the passage of amendments to the Age Discrimination in Employment Act. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified as amended at 29 U.S.C. §§ 621–634).

156 *Drans*, 383 A.2d at 1037.

157 *Id.* at 1039–40.

American Association of University Professors (AAUP) and the Association of American Law Schools on mandatory retirement policies, the court remanded the case to determine whether "reasonable expectations within the academic community" regarding the policy required adjusting it to provide a reasonable transition provision for the tenured professor.[158] Like *Toussaint*, *Drans* relied on *Perry* in adopting an approach to faculty handbook modification that balances flexibility in handbook modification against the parties' reasonable expectations.[159] The decision also illustrates how invoking academic custom can mitigate the potentially harsh effects of a flexible approach to faculty handbook modification, a topic that is addressed in greater detail in Section II.C.

II. WHY THE *TOUSSAINT*/*BANKEY* APPROACH MAKES SENSE IN THE HIGHER EDUCATION CONTEXT

Faculty handbooks—or more precisely, college and university policies affecting the faculty employment relationship[160]—raise issues distinct from those in other employment contexts. In contrast to the typical at-will employment relationship, faculty appointments tend to be for a fixed term. Additionally, faculty employment contracts are often interpreted consistent with academic custom, as reflected in handbook policies on shared governance, academic freedom, the granting and revocation of tenure, and policies requiring advance notice of the nonretention of nontenured faculty. On these topics in particular, faculty handbook policies tend to follow norms of the AAUP and may even expressly incorporate AAUP policies on shared governance, academic freedom, and tenure.[161] Finally, higher education institutions have a public character; even private colleges and universities tend to receive public support and have a stated mission to serve the public interest.

This Part addresses these unique features of the faculty employment relationship and explains why they lend additional support for the *Toussaint*/*Bankey* approach to enforcing faculty handbook termination policies. The Part first addresses the fact that most faculty appointments

158 *Id.* at 1040–41.

159 *Id.* at 1039–40.

160 *See supra* notes 1–2 and accompanying text.

161 For example, a recent study of faculty policies at four-year colleges and universities with a tenure system found that only three percent of institutions lacked a published academic freedom policy; of institutions with a published policy on academic freedom, seventy-three percent of those policies were based directly on the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure*. TIEDE, *supra* note 2, at 4. The percentages of higher education institutions that have an academic freedom policy and that base their policy on the 1940 *Statement* have only increased in recent decades. *Id.*

are for a fixed term, which sets them apart from the norm of at-will employment. It next connects *Toussaint*'s departure from standard contract doctrine with procedural due process jurisprudence and suggests a public law approach to enforcing handbook policies is appropriate even for private higher education institutions, given their public nature. Finally, this Part explains how courts have invoked academic custom—an institution's past practices as well as norms of academic freedom and shared governance—to mitigate the potential harshness of the *Toussaint*/*Bankey* approach when determining the enforceability and interpretation of faculty handbook modifications.

A. *Fixed-Term Appointments*

Much of the case law and scholarship on the enforceability of employee handbooks is premised on an at-will contractual relationship. But faculty contracts tend *not* to be strictly at-will employment relationships. Even adjunct faculty typically are appointed for an academic term—a summer, semester, or year. Of all full-time faculty at U.S. colleges and universities in fall 2021, 58% were either tenured or on the tenure track and 35% were non-tenure-track faculty on term contracts (multiyear, annual, or shorter term). Only 6% of full-time faculty at higher education institutions during this period were on "indefinite" contracts, a category that includes at-will contracts.[162]

When an employment contract clearly specifies a fixed term, termination of the employee before the end of the term must be for cause.[163] Although at times judicial decisions have characterized non-tenure-track and untenured faculty contracts as being at will, what these decisions imply, rather, is that the college or university may exercise its discretion to renew or not renew the faculty appointment. In other words, the decision whether to renew such a contract may be at will, but terminating employment during the stated term must be for cause. To give an example, *Stanton v. Tulane University* suggested that the plaintiff's employment relationship was "at will," even though he was employed as a tenure-track professor.[164] This characterization is somewhat misleading; it would be more precise to characterize the *renewal* of the plaintiff's faculty appointment as being at will, in the sense

162 *Full-Time Instructional Staff, by Level of Institution and Faculty and Tenure Status: 2021*, *supra* note 11. These data do not include part-time faculty.

163 *See supra* note 21 and accompanying text.

164 777 So. 2d 1242, 1250 (La. Ct. App. 2001) ("The contention that a handbook creates a contract between an otherwise 'at will' employee and his employer is neither novel nor . . . meritorious."). *Stanton* is discussed *supra* notes 28–32 and accompanying text.

that the decision was at the discretion of the university. In fact, courts have held that termination of an untenured faculty member's appointment before the end of the stated term must be for cause,[165] even though an institution's decision whether to renew such an appointment may be discretionary.[166]

As discussed in Section I.B, unilateral contract and related standard contract doctrines are unsuited to analyzing the enforceability of employee handbook policies. The faculty employment setting, where appointments tend to be fixed term, highlights why application of standard contract doctrines cannot adequately address whether handbook policies should be enforceable (and, if so, whether an employer can modify these policies without providing additional consideration for or receiving assent to the modification). The unilateral contract decisions discussed in Section I.B are premised on the notion that an employee, after receiving an "offer" (the handbook policy commitment), accepts it by remaining in the at-will position, thereby furnishing consideration for and manifesting acceptance to the employer's commitment.[167] However, college or university faculty who are under contract to work for a semester or year are not "accepting" a promise contained in a faculty handbook by continuing to remain at their job. Since the faculty member is already bound to complete their fixed-term appointment, remaining at one's job after a faculty handbook policy is promulgated could not be plausibly interpreted as constituting consideration given in exchange for the policy commitment, nor could it manifest assent to the "offer." Of course, a faculty employment agreement might expressly incorporate the institutional policies in place at the time of the appointment, but in such a scenario, employing unilateral contract analysis would not be necessary to enforce the policies, nor would unilateral contract doctrine adequately

165 *See* Schalow v. Loyola Univ., 646 So. 2d 502, 504 (La. Ct. App. 1994) (tenure-track faculty member's contract was for successive one-year terms, which could not be terminated during a one-year term except for "cause"); O'Neill v. N.Y. Univ., 944 N.Y.S.2d 503, 511 (App. Div. 2012) (research faculty member hired on a one-year, renewable contract was not employed at will); Arneson v. Bd. of Trustees, McKendree Coll., 569 N.E. 2d 252, 256 (Ill. App. Ct. 1991) ("[P]laintiff could not be considered an 'at will' employee because he was employed for a definite term . . . ."); Mayeaux v. Siena Heights Coll., No. 98-1197, 1999 WL 397943, at *4 (6th Cir. June 3, 1999) (AAUP standards require cause for terminating faculty before the end of a contract term but not for failing to reappoint faculty thereafter).

166 *See* Baker v. Lafayette Coll., 504 A.2d 247, 256 (Pa. Super. Ct. 1986) (faculty member on a two-year term contract "had no contractual *right* to reappointment"); DeSimone v. Skidmore Coll., 553 N.Y.S.2d 240, 243 (App. Div. 1990) (renewal of a three-year faculty appointment held to be at the discretion of the Provost, consistent with the college's faculty handbook); Ferrari v. Iona Coll., 943 N.Y.S.2d 526 (App. Div. 2012) (one-year tenure-track appointment may be terminated at the end of the term by giving written notice of nonrenewal).

167 *See supra* notes 56–61 and accompanying text (discussing the unilateral contract analysis in *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983)).

address situations where a handbook policy is modified in the middle of an appointment term.[168]

Nonetheless, courts analyzing the enforceability of faculty handbook policies sometimes invoke judicial precedents that are based on unilateral contract doctrine. In *Arneson v. Board of Trustees*, the court quoted the unilateral contract test from the Illinois Supreme Court's *Duldulao* decision—requiring a policy statement clear enough to constitute an offer, and the employee's acceptance of the "offer," by commencing or continuing to work after learning of the policy.[169] Although *Arneson* held that the college's faculty handbook policies were incorporated into the parties' employment contract,[170] in reaching this holding, the opinion does not clearly apply the *Duldulao* test to the facts. The opinion is silent on whether the college's policy statement amounted to an offer or whether plaintiff, a tenure-track faculty member, "accepted" the college's faculty termination policies by remaining on the job. Indeed, such a finding would make no sense in the context of *Arneson*, since the plaintiff was already contractually obligated to complete his one-year faculty appointment. Instead of determining whether the plaintiff "accepted" the college's policy "offer," the court found that the policy was contractually binding once the college "caused its faculty to rely" on its handbook policies.[171]

As *Arneson* illustrates, application of unilateral contract doctrine to the enforcement of handbook policies is especially strained when applied to fixed-term faculty contracts. By departing from standard contract analysis and adopting a policy-oriented approach to handbook policy enforcement, the *Toussaint*/*Bankey* approach avoids the difficulties associated with forcing the facts of faculty handbook cases into the

168 Nor would standard promissory estoppel analysis provide an adequate fit for enforcing faculty handbook commitments, since promissory estoppel requires showing that a promise induced "action or forbearance" in reliance on the promise. RESTATEMENT (SECOND) OF CONTS. § 90(1) (AM. L. INST. 1981). Remaining in a fixed-term faculty appointment could not be plausibly interpreted to constitute action or forbearance in reliance on a handbook policy, since the faculty member would already be contractually bound to remain at their job during the term.

169 *Arneson*, 569 N.E.2d at 256–57. *Arneson* is discussed *supra* notes 63–66 and accompanying text.

170 *Arneson*, 569 N.E.2d at 257.

171 *Id.* For an analogous example, see *Storti II*, 330 P.3d 159, 163–64 (Wash. 2014). The Washington Supreme Court applied unilateral contract analysis to find that the faculty handbook policy at issue was an offer that the plaintiffs had accepted by working in their faculty positions. *Id.* In the end, however, the court held that the university did not breach the handbook policy. *Id.* at 165. Since the contracts between the university and faculty plaintiffs were for a renewable, fixed term, it would have made more sense to analyze the enforceability of the handbook policy by determining whether it had been incorporated into the parties' bilateral employment agreement; indeed, this was the approach taken by the lower court in a related case, *see* Nye v. Univ. of Wash., 260 P.3d 1000, 1004 (Wash. Ct. App. 2011).

unilateral contract doctrinal mold. Additionally, as discussed, judicial concerns about eroding the traditionally strong presumption of at-will employment tend not to arise in the context of faculty contracts.[172] The next Section discusses *Toussaint*'s reliance on *Perry*, a constitutional law decision involving a public university professor's claimed entitlement to continued employment.

B. Toussaint*'s Reliance on Public Law*

Toussaint held that policy commitments in an employee handbook may be enforceable, regardless of whether the policy commitment at issue was formally accepted or given in exchange for consideration. The *Toussaint* court held that policy statements were contractually binding, so long as they generated "legitimate expectations" among employees that they would be honored.[173] In support of its decision, the court quoted at length from *Perry v. Sindermann*, a procedural due process decision involving the termination of an untenured faculty member from his position at a public junior college. *Perry* was quoted for the idea that even an untenured faculty member might demonstrate from his employment circumstances a "legitimate claim of entitlement" to job security.[174] There are clear parallels between "legitimate expectations" of job security as grounds for a contract in *Toussaint* and "legitimate claim of entitlement" as the basis for a constitutionally protected property interest in *Perry*.[175] *Toussaint*, of course, involved a corporate, at-will employment relationship, not a public contract. But employing an approach to enforcing handbook policies that has parallels in public law is fitting, both because of the nature of employment relationships and the fact that, in the higher education context, the line between public and private institutions has tended to blur.[176]

As discussed, scholars have observed that employment contracts tend to be long-term, relational agreements with incomplete terms.[177]

172 *See supra* note 135 and accompanying text.

173 Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980); *see also supra* notes 107–09 and accompanying text.

174 *Toussaint*, 292 N.W.2d at 894 (quoting Perry v. Sindermann, 408 U.S. 593, 602 (1972)); *see also supra* note 115 and accompanying text.

175 *Toussaint*, 292 N.W.2d at 894–95; *Perry*, 408 U.S. at 602.

176 A case comment on *Perry* and its companion Supreme Court decision, *Board of Regents v. Roth*, 408 U.S. 564 (1972), contends that these constitutional law decisions also stand for the idea that the existence of an implied contractual right to job security qualifies the at-will doctrine. *See* J. Peter Shapiro & James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 335–36 (1974).

177 *See supra* note 97 and accompanying text.

And as Pettit noted, employee handbook commitments are promises made between organizations and groups of employees.[178] These complex and ongoing commitments call for a pragmatic but equitable approach to contract interpretation and enforcement. In other words, standard contract doctrine does not adequately address these complex employment relationships.

Additionally, standard contract doctrine is premised on bargaining between equals. However, employment relationships are not equal. Employees tend to be subordinate to employers and subject to their discipline. Political philosopher Elizabeth Anderson contends that, due to the prevalence of at-will employment, the U.S. workplace typically functions like an authoritarian regime: "Employers' authority over workers, outside of collective bargaining and a few other contexts, . . . is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal. The state has established the constitution of the government of the workplace: it is a form of private government."[179]

Anderson takes issue with the tendency in popular discourse to characterize the workplace as part of a classic arm's-length labor market in the mode of Adam Smith; instead, in the employment context, "employers purchase command over people."[180] It is the state that has enabled this power imbalance by establishing a legal framework in which workers give up their rights and bargaining power to employers.[181] Anderson calls for adopting a constitution-like set of worker protections, a "bill of rights against employers."[182] As for handbook policies and procedures that protect workers, she acknowledges such policies can be beneficial but are not sufficient.[183] The point is that employment relationships are far from classic market transactions and should be regulated accordingly. For these reasons, especially outside of the faculty context where employment at will is the norm, standard contract doctrine does not adequately address the enforcement of handbook policies.

Within the higher education context, *Toussaint*'s reliance on *Perry*, a procedural due process decision, is apposite to faculty contracts because of the public nature of colleges and universities, even private ones. Scholars have maintained that private higher education institutions have a public character and should be considered state actors for purposes of

178 *See supra* note 96 and accompanying text.

179 ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 54 (2017).

180 *Id.* at 57.

181 *Id.* at 56–57.

182 *Id.* at 68.

183 *Id.* (referring to handbook policies as reflecting "a worldwide 'blurring of boundaries' among business, nonprofit, and state organizations").

constitutional law.[184] Many private higher education institutions cannot be easily categorized as either public or private, but instead fall on a continuum.[185] Writing in 1970, Robert O'Neil identified several reasons why private institutions should be treated as state actors: the significant federal and state financial support private institutions receive;[186] the fact that these institutions are subject to significant regulation;[187] the public function these institutions serve;[188] and the fact that even private colleges and universities are delegated governmental powers.[189] O'Neil's stated reasons for characterizing private institutions as public remain true today, perhaps even more so.

Because private colleges and universities tend to have public characteristics, courts must determine the level of state involvement in an institution before making a finding on whether an ostensibly private college or university is a state actor subject to constitutional requirements.[190] These determinations are technical and difficult, sometimes leading to unexpected results.[191] In *State v. Schmid*, the New Jersey Supreme Court held Princeton University to be subject to New Jersey's constitution.[192] In prohibiting the university from interfering with plaintiff's right to distribute political leaflets on the campus commons, the court relied on Princeton's policies, which acknowledged that free inquiry and free expression were "indispensable to the achievement" of its educational mission.[193] The blurring between public and private institutions is also seen in the conduct of private colleges and

184 Robert M. O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155, 171 (1970); *see also* Philip Lee, *A Contract Theory of Academic Freedom*, 59 ST. LOUIS U. L.J. 461, 496–511 (2015) (questioning the notion that academic freedom should be protected in public but not private institutions and illustrating how the public-private distinction in higher education tends to be unclear).

185 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 46 (5th ed. 2013) ("Due to varying patterns of government assistance and involvement, a continuum exists, ranging from the obvious public institution . . . to the obvious private institution . . . ."); Lee, *supra* note 184, at 504; O'Neil, *supra* note 184, at 171. O'Neil gives the examples of Howard University, a private, historically Black university whose operating budget comes mostly from public sources and is often referenced in official documents as a federal government agency; and Tulane University, originally established as a public institution but that since became mostly private in its governance and funding. *Id.* at 171–72.

186 O'Neil, *supra* note 184, at 173–76.

187 *Id.* at 180–81.

188 *Id.* at 176–77.

189 *Id.* at 169.

190 KAPLIN & LEE, *supra* note 185, at 48.

191 Lee, *supra* note 184, at 502.

192 423 A.2d 615, 633 (N.J. 1980); *see also* Lee, *supra* note 184, at 502–05 (discussing *Schmid* and other decisions).

193 *Schmid*, 423 A.2d at 630.

universities, particularly when it comes to the First Amendment. Although they may not be constitutionally required to do so, private higher education institutions (like Princeton) often espouse free speech norms that are comparable to the constitutional requirements of public institutions.[194]

Finally, as discussed in the next Section, when evaluating a college or university's decision to terminate a faculty member, courts tend to defer to the institution making the decision, so long as the decision was made in a nonarbitrary manner and consistent with established procedures.[195] Notably, this deference is accorded *regardless* of whether the institution making the decision is public or private. For example, procedural rules in California[196] and New York[197] provide special processes for challenging the internal decisions of administrative officers or bodies, including officers or bodies at colleges and universities. Challenges under these administrative review procedures are subject to a deferential standard of review[198] and procedural rules designed to provide a quick and expeditious review process.[199] Courts in California and New York have used these procedures to review the decisions of private as well as public colleges and universities. *Pomona College v. Superior Court* held that California's section 1094.5 was the correct procedure for challenging Pomona's decision to deny tenure to one of its faculty members.[200] Although Pomona is a private college, the court reasoned

194 *See, e.g.*, NW. UNIV., DEMONSTRATION POLICY 1 (2020), https://policies.northwestern.edu/docs/demonstration-policy-final.pdf [https://perma.cc/3PA5-AVCV] (welcoming "the expression of ideas" and encouraging "freedom of speech, freedom of inquiry, freedom of dissent, and freedom to demonstrate in a peaceful fashion"); YALE UNIV., YALE COLLEGE UNDERGRADUATE REGULATIONS 2023–2024, at 89 (2023), https://catalog.yale.edu/pdf/2023-24-undergrad-regulations.pdf [https://perma.cc/WT3Z-JU3H] ("We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run . . . ."); *Schmid*, 423 A.2d at 630 (quoting Princeton's university regulations).

195 *See infra* notes 240–47 and accompanying text.

196 CAL. CIV. PROC. CODE § 1094.5 (West 2023).

197 N.Y. C.P.L.R. 7801–06 (McKinney 2023).

198 *See* Pomona Coll. v. Superior Court, 53 Cal. Rptr. 2d 662, 670 (Ct. App. 1996) (scope of judicial review under section 1094.5(b) involves determining whether the college has acted within its powers, provided a fair trial, and not abused its discretion); Gray v. Canisius Coll. of Buffalo, 430 N.Y.S.2d 163, 165–66 (App. Div. 1980) (inquiry under CPLR 7803 is whether the university acted "within its jurisdiction, not arbitrarily but in the exercise of honest discretion based upon facts within its knowledge that justify the exercise of discretion").

199 *See, e.g.*, *Pomona Coll.*, 53 Cal. Rptr. 2d at 667 (section 1094.5 proceedings involve judicial review, as opposed to a jury trial); Gertler v. Goodgold, 487 N.Y.S.2d 565, 570 (App. Div. 1985) (Article 78 provides for a four-month limitation period); Romer v. Board of Trustees of Hobart & William Smith Colls., 842 F. Supp. 703 (W.D.N.Y. 1994) (plaintiff's claim not timely under Article 78).

200 53 Cal. Rptr. 2d 662, 668 (Ct. App. 1996); *see also* Pollock v. Univ. of S. Cal., 6 Cal. Rptr. 3d 122, 127–28 (Ct. App. 2003) (following *Pomona College*).

that the section 1094.5 procedure had been routinely applied in other cases to review similar decisions at public institutions,[201] and that considerations of academic freedom required courts not to "substitute their judgment for that of the college" when reviewing faculty promotion and tenure decisions.[202] Similarly, in *Maas v. Cornell University*, the Court of Appeals of New York held that New York's Article 78 was the appropriate avenue for challenging Cornell's decision to sanction plaintiff, a tenured professor, for violating the university's sexual misconduct policies.[203] Analogously, courts have held that the administrative doctrine of exhaustion of remedies applies to handbook grievance or appeal procedures that may be invoked in the context of a faculty termination decision. In *Neiman v. Yale University*, a faculty member's breach of contract challenge to the university's decision to deny her tenure was dismissed on grounds that plaintiff had failed to exhaust the internal grievance procedure available to her, as set forth in Yale's faculty handbook.[204] The Supreme Court of Connecticut cited other jurisdictions that had applied the exhaustion of remedies doctrine to faculty handbook grievance procedures[205] and reasoned that academic institutions are "best suited to be the original forum" for grievances involving the denial of tenure.[206] As *Neiman* illustrates, courts have invoked the exhaustion of remedies doctrine in cases involving private as well as public institutional defendants.[207]

To conclude, cases like *Pomona*, *Maas*, and *Neiman* show how courts tend not to differentiate between public and private institutions when according administrative deference to the decisions and internal procedures of higher education institutions. This institutional deference can be seen in the corporate employment context as well.[208] However, such deference is especially pronounced in the higher education context,

201 *Pomona Coll.*, 53 Cal. Rptr. 2d at 666.

202 *Id.* at 667 (quoting Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980)).

203 721 N.E.2d 966, 969 (N.Y. 1999) ("Courts retain a 'restricted role' in dealing with and reviewing controversies involving colleges and universities." (quoting Gertler v. Goodgold, 487 N.Y.S.2d 565, 570 (App. Div. 1985))). *But see infra* notes 253–57 and accompanying text (discussing successful challenges to college and university decisions involving faculty under Article 78 and section 1094.5).

204 851 A.2d 1165, 1171–73 (Conn. 2004).

205 *Id.* at 1171–72.

206 *Id.* at 1172.

207 *See, e.g.*, Berkowitz v. President & Fellows of Harvard Coll., 789 N.E.2d 575, 584–86 (Mass. App. Ct. 2003) (applying exhaustion of remedies doctrine to deny plaintiff's allegation that Harvard violated its tenure procedures); Muth v. Bd. of Regents of Sw. Mo. State Univ., 887 S.W.2d 744, 748–50 (Mo. Ct. App. 1994) (denying challenge of tenure denial at a public university due to plaintiff's failure to exhaust the university's internal faculty grievance procedure).

208 *See, e.g.*, *Berkowitz*, 789 N.E.2d at 585 (discussing a case that applied the exhaustion of remedies doctrine to corporate employer internal grievance procedures).

since considerations of academic freedom make courts particularly reluctant to second-guess the judgments of colleges and universities.[209] The *Toussaint*/*Bankey* approach to enforcing handbook policies is preferable to reliance on standard contract doctrine, both because of the nature of employment relationships in general and the public character of higher education institutions specifically. The next Section addresses the significance of academic custom when interpreting and enforcing faculty handbook modifications.

C. *Relevance of Past Practices, Academic Freedom, and Shared Governance*

As discussed in Section I.C, the *Toussaint*/*Bankey* approach to enforcing employee handbook policies may have harsh consequences, particularly as the approach is codified in the commentary and illustrations to the Restatement of Employment Law. Disclaimer language in a handbook could be read to vitiate any expectation of job security otherwise invited through an employer's promulgation of job security policies.[210] Similarly, treating handbook policies like the operative rules of an administrative agency—binding until modified—potentially gives an employer free rein to eliminate workplace policies, even those on which employees have reasonably relied.[211] However, courts interpreting and applying faculty handbook policies do not do so in a vacuum. The relevance of context—including a college's or university's past practices as well as the expectations generated through industry norms of academic freedom and shared governance—should have a moderating effect on the interpretation of handbook disclaimers and constrain the discretion of higher education institutions when modifying its existing policies.

An institution's past practices and the professional norms commonly observed in higher education are referred to in this Article as "academic custom." This Section first addresses two especially significant, professional norms that are unique to higher education—academic freedom and shared governance—and then discusses how courts have taken academic custom into consideration when interpreting and

209 *See, e.g.*, *Neiman*, 851 A.2d at 1172 ("[T]he decision of whom to grant tenure is an integral part of academic freedom."); Pomona Coll. v. Superior Court, 53 Cal. Rptr. 2d 662, 668 (acknowledging the "'four essential freedoms' of a university" quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))). Judicial deference to academic decisions is discussed further *infra* Section II.C.1.

210 RESTATEMENT OF EMP. L. § 2.05 cmt. c, illus. 2 (AM. L. INST. 2015).

211 *Id.* § 2.05 cmt. b.

applying faculty termination policies to actual cases. Finally, it analyzes whether tenure should be treated as a vested right in the context of faculty handbook modification.

1. Academic Freedom and Shared Governance

As courts and higher education institutions in the United States have long recognized, academic freedom protects the independent research, teaching, and other academic work of college and university faculty. The AAUP's *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (1915 Declaration)[212] is considered the "seminal statement" of academic freedom in the United States.[213] The 1915 Declaration emphasizes the essential independence of academic work from outside influence as well as the dignity of academia as a profession.[214] University faculty are principally responsible, not to their employers, but to the public and to the profession; in this sense, a faculty member's employment relationship is analogous to that of a federal judge.[215] Academic freedom, therefore, is freedom from judicial, political, or administrative interference in the professional autonomy of academics to pursue their work—specifically research, teaching, and public service.[216]

The Supreme Court first found academic freedom to be constitutionally protected in the 1950s, in several decisions responding to government efforts to root out Communist sympathizers during the McCarthy era.[217] In *Sweezy v. New Hampshire*, an economics professor was held in contempt for refusing to answer questions regarding his

212 AM. ASS'N OF UNIV. PROFESSORS, *1915 Declaration of Principles on Academic Freedom and Academic Tenure* [hereinafter 1915 Declaration], *in* POLICY DOCUMENTS AND REPORTS 3 (Hans-Joerg Tiede ed., 11th ed. 2015).

213 Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 954 (2009); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988) (referring to the 1915 Declaration as "the standard creed of the American academic profession").

214 1915 Declaration, *supra* note 212, at 6.

215 *Id.*

216 *See also* Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J.L. & PUB. POL'Y 263, 270 (referring to the AAUP's advocacy for freedom "from powerful vested interests that may seek to influence academic agendas and results").

217 *See* Metzger, *supra* note 213, at 1285; Areen, *supra* note 213, at 969–72 (discussing *Adler v. Board of Education*, 342 U.S. 485 (1952); *Wieman v. Updegraff*, 344 U.S. 183 (1952); and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

membership in the Communist Party.[218] The Supreme Court set aside the contempt order on the grounds that the order and interrogation violated due process.[219] The Court also observed that the New Hampshire government had invaded the professor's liberties of academic freedom and political expression, noting that academic freedom is so essential to the functioning of universities as to be "almost self-evident."[220] Justice Frankfurter's concurrence focused more directly on how the state's actions had intruded on academic freedom, and emphasized the significance of academic freedom to free universities and democratic society.[221] In doing so, Justice Frankfurter quoted a group of South African scholars on the "four essential freedoms" of a university:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[222]

This quote has been referenced in many judicial opinions addressing academic freedom.[223] But later case law has complicated the question of whether academic freedom constitutionally protects faculty workplace speech.[224] There is also disagreement among scholars over whether, as a constitutional matter, academic freedom protects *individual* faculty members as opposed to academic *institutions*.[225]

Regardless of these complexities surrounding the *constitutional* principle, academic freedom has been long established and widely

218 354 U.S. 234, 238–45.

219 *Id.* at 255.

220 *Id.* at 250.

221 *Id.* at 261–63 (Frankfurter, J., concurring).

222 *Id.* at 263 (quoting CONF. OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 11–12 (1957)).

223 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). A search for the phrase "four essential freedoms of a university" in LEXIS's all cases database on July 12, 2023, pulled sixty-six cases.

224 Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that the First Amendment only protects speech addressing a matter of public concern); Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that the First Amendment does not protect speech made pursuant to a public employee's official duties); *see also* Areen, *supra* note 213, at 974–76 (discussing *Connick* and *Garcetti*).

225 Lee, *supra* note 184, at 493–95 (discussing the scholarly debate); Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-*Grutter *World*, 51 SANTA CLARA L. REV. 217, 217–19 (2011) (discussing the same). The Fourth Circuit has held that only institutional academic freedom is constitutionally protected. Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) ("[T]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University . . . .").

accepted in higher education as a *professional* norm protecting college and university faculty.[226] The AAUP's *1940 Statement of Principles of Academic Freedom and Tenure* (1940 Statement),[227] a restatement of the declaration that the AAUP first published in 1915, has been endorsed by over 250 scholarly and educational organizations—from the Academy of Management to the Law and Society Association—and has been incorporated into many college and university faculty policies.[228] The 1940 Statement pronounces the elements of academic freedom as including full freedom for faculty in their research and publication of research results, freedom in the classroom when discussing the assigned subject matter, and freedom from censorship or discipline when speaking or writing as citizens.[229] The 1940 Statement also sets forth the principle that tenured faculty should only be terminated for adequate cause (except in the case of retirement or financial exigency)[230] and with the participation of faculty peers.[231] The AAUP has developed additional statements that provide detailed guidance for institutions, including guidelines on the termination of tenured appointments in the event of financial exigency or academic program discontinuance;[232] procedures for nonrenewal of faculty appointments without tenure;[233] procedures for faculty dismissal;[234] and standards for notice of nonretention of untenured faculty.[235] These guidelines demonstrate best practices for colleges and universities and are often incorporated into faculty handbook policies. Section II.C.2 discusses how courts invoke these guidelines as evidence of academic custom.

One consequence of institutional academic freedom is that courts tend to accord substantial deference to the decisions of colleges and

226 Lieberwitz, *supra* note 216, at 267–69; Goldberg & Sarabyn, *supra* note 225, at 219 n.7; *see also supra* note 217 and accompanying text. For a discussion of the distinction between professional and constitutional conceptions of academic freedom, see Metzger, *supra* note 213.

227 AM. ASS'N OF UNIV. PROFESSORS, *Statement of Principles on Academic Freedom and Tenure* [hereinafter 1940 Statement], *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212 at 13.

228 *Endorsers of the 1940 Statement*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/endorsers-1940-statement [https://perma.cc/3V9Q-EB6V].

229 1940 Statement, *supra* note 227, at 14.

230 *Id.* at 15.

231 *Id.* at 16.

232 AM. ASS'N OF UNIV. PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS AND REPORTS 79, *supra* note 212, at 79, 81–83.

233 AM. ASS'N OF UNIV. PROFESSORS, *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212, at 94.

234 AM. ASS'N OF UNIV. PROFESSORS, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212, at 91.

235 AM. ASS'N OF UNIV. PROFESSORS, *Standards for Notice of Nonreappointment* [hereinafter Notice Standards], *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212, at 99.

universities. In *Regents of University of Michigan v. Ewing*,[236] a case involving a student challenge to his academic dismissal from a medical school program, the Supreme Court set a high bar for setting aside academic decisions. Unless the decision had departed so substantially from "accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment," the decision would stand.[237] *Ewing*'s rationale for according a high degree of deference to the university's decision was grounded in institutional academic freedom. The opinion referred to "[c]onsiderations of profound importance" counseling judicial restraint and referred to the Court's "responsibility to safeguard . . . academic freedom."[238] Notably, however, the *Ewing* opinion refers to deference to decisions of the *academy*, or the faculty as a body, as opposed to administrative decisions.[239]

Consistent with *Ewing*, other courts generally have been reluctant to interfere with the judgments of colleges and universities regarding faculty termination decisions, particularly decisions to deny or revoke faculty tenure or deny appointment renewal, if the decision is made consistently with handbook procedures.[240] Courts usually uphold these decisions, unless an institution fails to follow its existing procedures or terminates a faculty member for what appears to be an arbitrary or bad faith reason.[241] Additionally, as discussed, procedures in place in New York and California for the review of administrative decisions have been applied to faculty termination decisions made by colleges and universities pursuant to handbook procedures.[242]

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236 474 U.S. 214 (1985).

237 *Id.* at 225.

238 *Id.* at 225–26.

239 *See* Areen, *supra* note 213, at 979 (citing *Ewing*, 474 U.S. at 226 n.12).

240 Univ. of Balt. v. Iz, 716 A.2d 1107, 1117 (Md. Ct. Spec. App. 1998) ("[U]niversities have a strong need for, and traditionally have enjoyed a wide discretion in, exercising what is largely a subjective judgment in deciding to whom to grant tenure." (quoting Lovelace v. Se. Mass. Univ., 793 F.2d 419, 422 (1st Cir. 1986))); Baker v. Lafayette Coll., 504 A.2d 247, 257 (Pa. Super. Ct. 1986) (explaining that the college acted within its discretion in not renewing plaintiff's appointment); DeSimone v. Skidmore Coll., 553 N.Y.S.2d 240, 243 (App. Div. 1990) (explaining that the determination not to renew plaintiff's appointment was "a matter of professional educational judgment, which is subject only to limited judicial scrutiny"); *cf.* Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001) (upholding university's decision to terminate tenured professor due to misconduct but concluding that "generally applicable principles of contract law will suffice to insulate the institution's internal, private decisions from judicial review"). *But see* McAdams v. Marquette Univ., 914 N.W.2d 708, 717, 721 (Wis. 2018) (reversing university's suspension of a tenured professor for posting politically motivated criticism of a colleague on his blog and according no deference to the university's decision).

241 For examples of cases illustrating these exceptions, see *infra* note 248.

242 *See supra* notes 196–203 and accompanying text.

Berkowitz v. President & Fellows of Harvard College illustrates this judicial reluctance to second-guess the academic judgment of higher education institutions.[243] *Berkowitz* involved Harvard's decision to deny tenure to an associate professor in its department of government. After a university committee dismissed the professor's internal grievance on grounds that it was "clearly without merit," he sued the university, alleging that the committee reviewing his tenure dossier had been biased and lacked specialists in his specific field.[244] Citing precedent from the Supreme Judicial Court of Massachusetts, the *Berkowitz* court held that, "in the absence of a violation of a reasonable expectation created by the contract, or arbitrary and capricious conduct by the university, courts are not to intrude into university decision-making."[245] Applying this standard to the facts, the court found, based on the applicable handbook language, that the plaintiff had no reasonable basis for expecting his tenure committee to include specialists in his narrow field: "[T]he question of who is or is not a specialist is an area that courts are particularly ill-suited to judge . . . ."[246] Nor did the makeup of the tenure committee violate the handbook requirement to ensure tenure candidates were "judged strictly on their merits."[247]

On the other hand, judicial deference has not prevented courts from considering well-founded claims of arbitrary decision-making or breach of contract when institutions fail to adhere to established handbook procedures.[248] In *Chan v. Miami University*, the plaintiff, a tenured professor of history, was sanctioned with dismissal for violating the university's Title IX policy.[249] The professor alleged that the university

243 789 N.E.2d 575 (Mass. App. Ct. 2003).

244 *Id.* at 578–79.

245 *Id.* at 581 (citations omitted) (citing Schaer v. Brandeis Univ., 735 N.E.2d 373, 378 (Mass. 2000)).

246 *Id.* at 583.

247 *Id.*

248 *See, e.g.*, Ferrer v. Trs. of the Univ. of Pa., 825 A.2d 591, 614 (Pa. 2002) (upholding jury award for breach of contract when administration disregarded university procedure for investigating alleged research misconduct); Ohio Dominican Coll. v. Krone, 560 N.E.2d 1340, 1344–45 (Ohio Ct. App. 1990) (holding that unilaterally setting unrealistic conditions for continued employment amounts to a breach of contract with tenured professor); Barry v. Trs. of Emmanuel Coll., No. 16-cv-12473, 2019 WL 499774, at *7 (D. Mass. Feb. 8, 2019) (holding that there was a genuine issue of material fact over whether inclusion of "academic adversaries" in plaintiff's tenure review violated her reasonable expectations of an unbiased process); Dye v. Thomas More Univ., Inc., No. 19-CV-087, 2021 WL 4006123, at *19 (E.D. Ky. Sept. 2, 2021) (holding that university breached its contract with plaintiff when president overruled the decision of a faculty committee, in violation of handbook procedures); Hong v. Temple Univ., No. 98-4899, 2000 WL 694764, at *4 (E.D. Pa. May 30, 2000) (distinguishing *Baker v. Lafayette College*, 504 A.2d 247, in which university failed to give assistant professor advance notice of nonretention as required by the handbook).

249 652 N.E.2d 644, 645 (Ohio 1995).

breached his contract by not following its handbook procedure for terminating appointments of tenured faculty.[250] The Supreme Court of Ohio agreed with plaintiff, stating that it was "simply not reasonable to assume or conclude" that the Title IX grievance procedure should replace the university's procedure for determining whether a tenured faculty member's conduct may be sanctioned with dismissal.[251] Even New York's deferential procedure for reviewing administrative decisions[252] does not shield institutions from arbitrary action or material departures from established procedures. *Gray v. Canisius College of Buffalo* illustrates the limits of deference New York courts give under CPLR Article 78.[253] In *Gray*, a tenured professor alleged she was dismissed, against the recommendation of a faculty committee, for filing a criminal charge against a colleague.[254] The court upheld plaintiff's Article 78 petition: "Clearly, the good faith pursuit of one's legal rights, without more, cannot constitute cause for dismissal and . . . dismissal on that ground alone simply would not have been within the college's discretion."[255] Similarly, courts may not accord deference to a college's or university's decision if the institution has allegedly discriminated against the faculty member[256] or otherwise violated public policy.[257]

250 *Id.* at 646–48.

251 *Id.* at 649. Relatively immaterial departures from handbook procedures are likely insufficient to overcome judicial deference, however. *See* Cuozzo v. State, 925 N.W.2d 752, 756 (N.D. 2019) (holding that "failure to conform to every technical detail of the termination procedure is not actionable" and substantial compliance with procedures is sufficient (quoting Stensrud v. Mayville State Coll., 368 N.W.2d 519, 522 (N.D. 1985))); Logan v. Bennington Coll. Corp., 72 F.3d 1017, 1023 (amendments to college's Title IX procedure were not sufficiently material to require faculty-wide consultation and approval).

252 *See supra* notes 197–99 and accompanying text.

253 430 N.Y.S.2d 163 (App. Div. 1980).

254 *Id.* at 164–65.

255 *Id.* at 167–68; *see also* O'Neill v. N.Y. Univ., 944 N.Y.S.2d 503, 514 (App. Div. 2012) (holding that untenured professor's allegations of arbitrary dismissal were sufficient under Article 78); Joshi v. Trs. of Columbia Univ., No. 17-CV-4112, 2018 WL 2417846, at *5 (S.D.N.Y. May 29, 2018) (denying dismissal of plaintiff's breach of contract claim based on allegations that he was dismissed in retaliation for reporting research misconduct in violation of university policy, and distinguishing *Maas*); Bennett v. Wells Coll., 641 N.Y.S.2d 929, 933 (App. Div. 1996) (holding that plaintiff was entitled to de novo tenure review when college failed to follow its internal procedure). *But cf.* Maas v. Cornell Univ., 721 N.E.2d 966, 969 (N.Y. 1999) (rejecting breach of contract claim that was a poorly supported attempt to avoid Article 78); Romer v. Bd. of Trs. of Hobart & William Smith Colls., 842 F. Supp. 703, 710 (W.D.N.Y. 1994) (holding the same).

256 *See* Berkowitz v. President & Fellows of Harvard Coll., 789 N.E.2d 575, 581 n.6 (Mass. App. Ct. 2003) (holding that court owes no deference to university when discrimination is alleged); Pomona Coll. v. Superior Ct., 53 Cal. Rptr. 2d 662, 667, n.4 (Ct. App. 1996) (noting that section 1094.5 does not apply when discrimination is alleged).

257 Runyon v. Bd. of Trs. of Cal. State Univ., 229 P.3d 985, 994–95 (Cal. 2010) (refusing to give preclusive effect to section 1094.5 proceeding when plaintiff alleged he was sanctioned in retaliation for whistleblowing).

Shared governance is a practice that, like academic freedom, is somewhat unique to higher education.[258] Although the board of trustees (or analogous body) retains ultimate authority over decision making in a college or university, with day-to-day operations delegated to the administration, there are also functions that, in the words of one university president, "are pretty clearly the province of the faculty."[259] In 1966, the AAUP, the American Council on Education (representing college and university presidents), and the Association of Governing Boards of Universities and Colleges (representing board members and senior administrators) issued the *Statement on Government of Colleges and Universities* (Joint Statement), spelling out those areas of shared governance that are within the province of faculty as opposed to trustees or administrators.[260] Faculty have "primary responsibility" for academic matters, such as research, curriculum, and instruction, and for faculty status—the granting of tenure, faculty appointments, reappointments, decisions not to reappoint, promotions, and dismissals.[261] The Joint Statement also calls for the participation of faculty in the selection of administrative leaders like presidents, provosts, and deans.[262]

Shared governance is interrelated with academic freedom—both principles developed to protect the autonomy of faculty work and promote the professionalism of academics.[263] In contrast with its

258 In contrast, in the corporate context shared governance is the exception and not the rule. *See* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 48 (2020) ("The realpolitik of the modern corporation is that, of all of its many stakeholders, shareholders and shareholders alone control the real levers of governance.") Hayden and Bodie invoke the example of Germany, with its long tradition of employee participation on corporate governing boards, to support their argument for shared governance as a "viable alternative to shareholder primacy." *Id.* at 13.

259 Michael H. Schill, *Shared Governance in American Research Universities*, *in* THE COLLEGE PRESIDENT HANDBOOK: A SUSTAINABLE AND PRACTICAL GUIDE FOR EMERGING LEADERS 53, 55 (James Soto Antony, Ana Mari Cauce, Lynn M. Gangone & Tara P. Nicola eds., 2022).

260 AM. ASS'N OF UNIV. PROFESSORS, *Statement on Government of Colleges and Universities* [hereinafter Joint Statement], *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212, at 117.

261 *Id.* at 120–21.

262 *Id.* at 119.

263 *See* AM. ASS'N OF UNIV. PROFESSORS, *On the Relationship of Faculty Governance to Academic Freedom*, *in* POLICY DOCUMENTS AND REPORTS, *supra* note 212, at 123, 123 ("[A] sound system of institutional government is a necessary condition for the . . . most productive exercise of essential faculty freedoms."); Larry G. Gerber, *"Inextricably Linked": Shared Governance and Academic Freedom*, ACADEME, May–June 2001, at 22, 23 ("A system of shared governance does not guarantee that violations of academic freedom will never occur. . . . But it is far more likely that academic values . . . will guide decisions about teaching and research when faculty members make those decisions . . . ."). In order to protect academic freedom from outside interference, the 1915 Declaration proposed that adjudicatory bodies made up of academics should be "called into action" before university faculty were disciplined or terminated from their positions. 1915 Declaration, *supra* note 212, at 11.

jurisprudence on academic freedom, the Supreme Court has made clear that college and university faculty do not have a constitutional right to participate in shared governance.[264] But the Supreme Court has also recognized the importance and widespread acceptance of shared governance as a practice in higher education.[265] In *Ewing*, the Supreme Court supported judicial deference to academic decisions by observing that academic freedom thrives "on autonomous decisionmaking by the *academy itself*" (as opposed to decision-making of the university).[266] In *NLRB v. Yeshiva University*, the Supreme Court's conclusion that private university faculty were ineligible for the protections of the National Labor Relations Act was premised on faculty participation in shared governance.[267] *Yeshiva* describes authority in the typical private university as being shared between central administration and "one or more collegial bodies."[268] In support of its conclusion that Yeshiva's faculty were managerial employees, the Court found they exercised "absolute" authority over academic matters.[269] Indeed, as a practical matter, shared governance is very widely (if not universally) practiced in colleges and universities.[270]

To summarize, courts defer to faculty termination decisions when they are made consistent with handbook policies. A lesson to glean from the above discussion of judicial deference is the importance of developing well-written institutional policies and promoting a robust system of shared governance to support the thoughtful development of these policies. Additionally, academic freedom and shared governance are widely established professional norms that promote significant policy (if

264 Minn. State Bd. for Cmty. Coll. v. Knight, 465 U.S. 271, 283 (1984). *Knight* upheld a state law giving a community college faculty union the exclusive right to represent faculty before the system board and campus-level administrators in "meet and confer" sessions. *Id.* at 273–74. In upholding the law, the Court stated that the plaintiffs, a group of nonunion faculty, had "no constitutional right to force the government to listen to their views." *Id.* at 283.

265 *Id.* at 288 (acknowledging the tradition of faculty participation in governance).

266 Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (emphasis added); *see also supra* note 239 and accompanying text.

267 444 U.S. 672, 683–90 (1980).

268 *Id.* at 680.

269 *Id.* at 686. As Risa Lieberwitz observed, however, there is a tension between the rationale behind *Yeshiva* (faculty are managerial employees) and the rationale behind shared governance as stated in the 1915 Declaration (promoting the independence of faculty from outside interference). Lieberwitz, *supra* note 216, at 285–86.

270 For example, a recent AAUP study found that 89.3% of four-year higher education institutions (and 97% of doctoral degree–granting institutions) have a faculty senate or faculty council. Hans-Joerg Tiede, *The 2021 AAUP Shared Governance Survey: Findings on Demographics of Senate Chairs and Governance Structures*, AM. ASS'N OF UNIV. PROFESSORS (2021), https://www.aaup.org/article/2021-aaup-shared-governance-survey-findings-demographics-senate-chairs-and-governance [https://perma.cc/ZV3F-YUYF].

not constitutional) interests recognized in numerous Supreme Court decisions. Finally, the broad acceptance of academic freedom and shared governance as norms incorporated into the policies of colleges and universities distinguishes higher education from other business sectors. The next Section discusses the significance of these norms, as well as past practices, in the context of interpreting and modifying college and university policies on faculty termination.

2. Academic Custom in Faculty Handbook Cases

One advantage of the *Toussaint*/*Bankey* approach is that it diminishes the significance of handbook disclaimers, in the sense that there is a frank acknowledgement that handbook policies can be modified even in the absence of a disclaimer. But to what degree does the approach give colleges and universities broad discretion to modify handbooks to take away from faculty significant policy commitments that protect against termination? The Restatement of Employment Law section 2.06 mentions two factors that constrain an employer's discretion to modify handbook policies: (1) the requirement for "reasonable advance notice" of handbook modifications and (2) an exception for modifications that would "adversely affect vested or accrued employee rights."[271] An additional constraining factor, specific to the higher education context, is the role of academic custom. This Section addresses how courts have applied academic custom in the context of interpreting and enforcing faculty handbook policies. In some ways, the use of academic custom to interpret faculty contracts is analogous to the use of trade usage, course of dealing, and course of performance to gap-fill or interpret sales contracts under the Uniform Commercial Code (UCC) Article 2. In other ways, the application of academic custom to faculty contracts raises distinct issues. This Section outlines four different themes illustrating how academic custom has been invoked in faculty handbook cases.

First, similar to how courts incorporate past practices and trade usages under the UCC, courts have utilized academic custom to fill in gaps and address ambiguity in faculty contracts. *Board of Regents of Kentucky State University v. Gale* illustrates how academic custom may be used to interpret a contract term. The plaintiff, a professor at Kentucky State University, sued for a declaratory judgment that his appointment as "endowed chair" came with tenure.[272] The court interpreted the term "endowed chair" in light of its understanding within the academic

271 RESTATEMENT OF EMP. L. § 2.06 (AM. L. INST. 2015).

272 898 S.W.2d 517, 520 (Ky. Ct. App. 1995).

community, concluding that such a position would be understood "to be occupied by a distinguished colleague for his life time."[273] *Howard University v. Best* illustrates how evidence of past practices may fill a gap in the contract.[274] The plaintiff in *Best* established, based on evidence of the university's past practices, that failure to provide timely notice of nonrenewal of her contract gave rise to a reasonable expectation of reappointment.[275] On the other hand, courts have refused to interpret academic custom as being sufficient to override the clear language of a college or university policy.[276] Academic custom is particularly relevant when: (1) neither the contract nor faculty handbook policies address an issue; (2) a handbook policy was never formally adopted;[277] or (3) the court finds that a disclaimer (or applicable law) renders a handbook policy unenforceable.[278] The question of whether failure to follow handbook policies, as informed by academic custom, gives rise to a breach of contract may raise issues of fact sufficient to defeat a motion to dismiss.[279]

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273 *Id.* at 521.

274 547 A.2d 144 (D.C. 1988).

275 *Id.* at 155–56; *see also* Daniels v. Bd. of Curators of Lincoln Univ., 51 S.W.3d 1, 9–10 (Mo. Ct. App. 2001) (holding that the university's "custom, practice and usage" showed faculty handbook procedures may apply to the termination of a professor's administrative appointment). *But cf.* Zuppi v. La. State Univ. & A&M Coll. Sys., No. 08-474, 2009 WL 10679396, at *18–19 (M.D. La. Sept. 3, 2009) (holding that American Association of Law Schools (AALS) bylaws relating to faculty tenure decisions were only guidelines and did not impose strict requirements). Although *Daniels* and *Zuppi* involved due process claims, whether a public employee has a property interest in continued employment often hinges on whether the employment contract between the parties was enforceable. *See supra* note 3.

276 *See* Krasik v. Duquesne Univ. of the Holy Ghost, 437 A.2d 1257, 1261 (Pa. Super. Ct. 1981) (holding that nothing in American Bar Association or AALS standards overrode the clear one-year term in law librarian's contract); Johnson v. Christian Bros. Coll., 565 S.W.2d 872, 875 (Tenn. 1978) (holding that AAUP *Standards for Notice of Nonreappointment* did not override clear handbook policy).

277 *See, e.g.*, Arneson v. Bd. of Trs, McKendree Coll., 569 N.E.2d 252, 850–51 (1991) (holding that college was estopped from arguing that the faculty manual was never formally adopted since senior administrators had "caused its faculty to rely on the manual['s]" policies by consistently following the manual).

278 *See, e.g.*, Smith v. Bd. of Supervisors for the Univ. of La. Sys., No. 13-5505, 2015 WL 10663156, at *9–10 (E.D. La. Dec. 11, 2015) (reading disclaimer to mean faculty handbook was not a contract and relying instead on the customary understanding of tenure "protect[ing] . . . academic freedom by preventing arbitrary or repressive dismissal" (quoting Thorne v. Monroe City Sch. Bd., 542 So. 2d 490, 491 (La. 1989))).

279 *See* Bason v. Am. Univ., 414 A.2d 522, 525 (D.C. 1980) (remanding to consider issue of fact on whether contract required university to give advance notice to plaintiff of his deficiencies regarding tenure in light of academic custom); Mawakana v. Bd. of Trs. of the Univ. of D.C., 113 F. Supp. 3d 340, 352 (D.D.C. 2015) (denying the university's motion to dismiss on the basis that the combination of the university's tenure standards and procedures, its other policies, and its customs and practices may amount to an implied contract to provide plaintiff with feedback on his progress toward tenure).

Second, courts have used academic custom to provide context for interpreting faculty handbook disclaimers. A leading case on academic custom—specifically, the relevance of custom in providing context for interpreting a disclaimer—is *Greene v. Howard University*.[280] *Greene* involved the dismissal of several nontenured faculty in response to student protests on campus.[281] The dismissed faculty members alleged that the university failed to honor its faculty handbook policy, which required advance notice of nonretention of certain faculty appointments.[282] Although the faculty handbook at issue in *Greene* included a disclaimer, the court found the disclaimer was not dispositive: "Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is."[283]

The *Greene* court held that the disclaimer should be read in conjunction with the rest of the faculty handbook, including handbook provisions requiring a hearing before terminating tenured faculty members for misconduct and requiring substantial advance notice of nonrenewal of faculty appointments. The disclaimer conflicted with the spirit of these other faculty handbook policies.[284] In *Joshi v. Trustees of Columbia University*, an assistant professor sued the university for sanctioning him, allegedly in retaliation for reporting research misconduct.[285] The university moved to dismiss the complaint, claiming its policies against retaliation were not contractually enforceable due to the handbook disclaimer.[286] The court denied the university's motion, finding there were issues of fact over whether the disclaimer language was sufficiently conspicuous and clear to be effective in connection with the university's retaliation policies.[287] Courts have also refused to give effect to a handbook disclaimer when doing so would nullify the requirement that a tenured faculty member be dismissed only for cause.[288] In other

280 412 F.2d 1128 (D.C. Cir. 1969).

281 *Id.* at 1129.

282 *Id.* at 1132.

283 *Id.* at 1135.

284 *Id.* The university argued that the disclaimer should be read to vest in it "unfettered discretion" to deny reappointment to its faculty. *Id.* at 1134. But the court was unconvinced of this interpretation, suggesting that, depending on the scenario, exercising such discretion could have jeopardized the university's standing with the AAUP and with "respectable academic opinion generally." *Id.* at 1134 n.9.

285 No. 17-CV-4112, 2018 WL 2417846, at *1 (S.D.N.Y. May 29, 2018).

286 *Id.* at *6.

287 *Id.* at *7.

288 *See* Crenshaw v. Erskine Coll., 850 S.E.2d 1, 21 (S.C. 2020); Smith v. Bd. of Supervisors for the Univ. of La. Sys., No. 13-5505, 2015 WL 10663156, at *10 (E.D. La. Dec. 11, 2015); *cf.* Robinson

contexts, however, courts have given effect to disclaimers, relying on them to conclude that faculty handbook procedures were not contractually binding.[289]

Third, as discussed in the previous Section, courts tend to accord deference to a higher education institution's academic decisions.[290] However, deference has not been given when a faculty termination decision is made inconsistent with principles of shared governance as codified in an institution's handbook policies. Because of the widespread practice of shared governance in higher education,[291] handbook policy changes directly affecting faculty termination, as well as faculty termination decisions themselves, typically are adopted with the participation of a college or university's faculty senate or comparable shared governance body.[292] When enforcing modifications to university policies affecting faculty termination, courts have emphasized the fact that the institution adopting the modification followed its policies requiring administrators to consult or work with faculty. For example, *Rehor v. Case Western Reserve University* involved a challenge to the university's revision of its mandatory retirement policy, which affected the plaintiff, a tenured faculty member.[293] In upholding the modified policy, the Supreme Court of Ohio concluded that the modification was reasonable, emphasizing how the changes were made consistent with AAUP norms and "upon the recommendation of its faculty, after study and open hearings."[294]

v. Ada S. McKinley Cmty. Servs., 19 F.3d 359, 360–61 (7th Cir. 1994) (holding that the public employee who was offered "tenure" after completion of a trial period had a reasonable expectation of more than at-will status, in spite of a handbook disclaimer).

289 *See, e.g.*, Grant v. Trs. of Ind. Univ., 870 F.3d 562, 573 (7th Cir. 2017) (affirming dismissal of professor's breach of contract claim, citing handbook disclaimer and noting plaintiff offered no evidence to overcome the disclaimer).

290 *See supra* notes 236–47 and accompanying text.

291 *See supra* notes 258–70 and accompanying text.

292 *See* Joint Statement, *supra* note 260, at 121 (recognizing that the faculty have "primary responsibility" for matters affecting faculty status, including faculty "appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal"). For an example of university policies that require faculty participation in these matters, see UNIV. OF ILL., STATUTES art. X, § 1.e (2023), https://www.bot.uillinois.edu/userfiles/Servers/Server_694865/file/Statutes.pdf [https://perma.cc/H2UX-8W7J], which requires a hearing before a senate committee before terminating the appointment of a tenured faculty member. The *University of Illinois Statutes* apply to the three campuses in the University of Illinois system. Modifications to the *Statutes* require the approval of two or more of the system's university senates and the Board of Trustees. *Id.* art. XIII, § 8.

293 331 N.E.2d 416, 420–22 (Ohio 1975). Federal law currently prohibits mandatory retirement policies. *See supra* note 155.

294 *Rehor*, 331 N.E.2d at 421; *see also Storti II*, 330 P.3d, 159 165 (Wash. 2014) (noting that the faculty were on notice of the challenged policy change, and that the policy was modified in accordance with handbook procedures, which required consultation with the faculty senate). *Storti*

Conversely, in cases where an institution has failed to involve a faculty committee in its decision-making, or where the administration decided against a faculty committee's recommendation, courts have declined to defer to the institutional decision. For example, in *McConnell v. Howard University*, the university terminated the appointment of a tenured mathematics professor when he refused to teach until a student apologized for calling him an "condescending, patronizing racist" during class.[295] The university's board terminated the professor against the recommendation of a faculty committee that concluded the plaintiff had not neglected his professional responsibilities when viewed in the context of the teacher-student relationship.[296] Quoting *Greene* on the relevance of academic custom, the court held there should be a trial to determine whether plaintiff was terminated for cause in light of the faculty committee's findings.[297]

Finally, courts have invoked academic custom when deciding cases challenging terminations of tenured faculty, or challenging modifications of handbook policies affecting faculty termination. Terminations of tenured faculty often arise when institutions decide to eliminate academic programs or lay off faculty in the face of budgetary challenges. In *Krotkoff v. Goucher College*, a tenured faculty member challenged her dismissal as part of a financial retrenchment.[298] Since the college's bylaws did not mention financial exigency as a ground for dismissal of tenured faculty,

II is not a faculty termination case, but it involved a university policy modification that adversely affected faculty salaries. In addition, many of the cases on judicial deference to academic decision-making similarly reference faculty participation in a termination decision as a justification for according deference. *See, e.g.*, Nieman v. Yale Univ., 851 A.2d 1165, 1172 (Conn. 2004) ("The university officials *and the plaintiff's peers* are most familiar with the requirements of tenure." (emphasis added)); Berkowitz v. President & Fellows of Harvard Coll., 789 N.E.2d 575, 583 (Mass. 2003) (noting that the ad hoc tenure committee's review of plaintiff's work was "only one of several" and that the department's faculty as well as outside scholars were consulted); Pomona Coll. v. Superior Ct., 53 Cal. Rptr. 2d 662, 668 (Ct. App. 1996) (discussing why a tenure candidate's academic peers are the only people "suited to undertake the responsibility" of making tenure decisions).

295 818 F.2d 58, 60–61. (D.C. Cir. 1987).

296 *Id.* at 61–62.

297 *Id.* at 63–64; *see also* Gray v. Canisius Coll., 430 N.Y.S.2d 163, 168 (App. Div. 1980) (holding that case involving plaintiff, a tenured professor, terminated against the recommendation of a faculty committee be remanded to determine whether college's action was arbitrary or irrational); Bennett v. Wells Coll., 641 N.Y.S.2d 929, 932–33 (App. Div. 1996) (holding that case involving plaintiff denied tenure against the recommendation of two faculty committees and without consulting them required the university to conduct de novo tenure review); *Storti II*, 330 P.3d at 161–62 (describing a previous round of litigation, *Storti v. University of Washington* (*Storti I*), No. 042169739, 2005 WL 6963655 (Wash. Super. Ct. Oct. 25, 2005), in which the faculty successfully challenged a similar policy change that the administration made without faculty involvement and the university settled the dispute by paying affected faculty over $17 million).

298 585 F.2d 675, 676 (4th Cir. 1978).

the court looked to AAUP guidelines, which recognize that tenure may be abrogated in the event of financial exigency if the "financial exigency [is] demonstrably bona fide," which it was found to be.[299] The court also held that the college's response to its financial difficulties was reasonable, noting that a faculty committee had recommended eliminating the plaintiff's department.[300] Similarly, in a case involving the elimination of an academic program, the court upheld the college's decision to terminate a tenured professor, but observed in dictum that the case would be quite different if the college had sought broad discretion to dismiss tenured faculty.[301] In contrast, *Saxe v. Board of Trustees of Metropolitan State College of Denver* involved a handbook modification that was held to be likely inconsistent with academic custom.[302] Metro State College amended its faculty handbook to remove priority and relocation protections for its tenured faculty in the event of a reduction in force.[303] Five tenured faculty sued to challenge the handbook modification, asserting it breached their contract and denied them due process.[304] The trial court dismissed the claim, but on appeal the court reversed and remanded for a determination of whether the modification deprived plaintiffs of a "vested right to tenure."[305] The opinion cited expert testimony on the norms and usages of higher education institutions in the context of financial exigency and staff reduction,[306] and commented that losing job security in the event of a reduction in force would "strip tenure of its very substance."[307] Challenges to handbook modifications have also arisen in the context of mandatory retirement policies. The

299 *Id.* at 679, 681 (quoting 1940 Statement, *supra* note 227).

300 *Id.* at 682; *see also* Am. Ass'n. of Univ. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 322 A.2d 846, 856–57 (N.J. Super. Ct. Ch. Div. 1974) (citing expert testimony on academic custom to show termination of tenure in response to financial exigency "can be justified only after a faculty evaluation of the problem"). *But cf.* Gray v. Mundelein Coll., 695 N.E.2d 1379, 1387 (Ill. App. Ct. 1998) (rejecting college's argument that AAUP guidelines on financial exigency should fill in the gaps in the handbook, since plaintiffs had relied on the handbook language).

301 Rose v. Elmhurst Coll., 379 N.E.2d 791, 794 n.2 (Ill. App. Ct. 1978) (commenting that, in such a case, "[a]t the very least a factual issue would necessarily be present to determine whether there is an unwritten 'common law' comprised of the conduct, customs and usage of the academic community . . . which would permit unilateral modification by the college trustees of a college's tenure commitment to its faculty").

302 179 P.3d 67, 77 (Colo. App. 2007).

303 *Id.* at 71. The priority provision required nontenured faculty to be laid off first; the relocation provision required the college to make "every reasonable effort" to relocate tenured faculty who were laid off. *Id.*

304 *Id.* at 70–71.

305 *Id.* at 77. The issue of vested rights is addressed in the next Section.

306 *Id.* at 76 (quoting statements from the AAUP and the Association of American Colleges to the effect that termination of tenured appointments in the event of financial exigency should occur only as a matter of last resort, after other avenues have been exhausted).

307 *Id.*.

Supreme Court of Rhode Island's *Drans* decision illustrates how courts have upheld handbook modifications imposing mandatory retirement policies on faculty but have scrutinized these policies to ensure that they conform with faculty members' reasonable expectations in light of academic custom.[308] In a follow-up decision, the *Drans* court held that academic custom includes AAUP guidance as well as the practices not only of the college, but of all higher education institutions in the United States.[309]

To summarize, there is a wealth of precedent supporting the idea that faculty contracts should be interpreted in a contextual matter, taking into consideration handbook policies as well as academic custom. In some of these cases, academic custom was relevant to evaluating the enforceability of faculty handbook modifications. But the judicial tendency to defer to academic decision-making, particularly when the institution has followed its existing policies, is also an important aspect of the case law on faculty terminations. A difficult question—one that has not yet been addressed in the case law—is whether a faculty member, terminated under the post-tenure review regulation recently adopted in Florida,[310] could successfully challenge their termination on grounds that the modification to the existing policy amounted to a breach of contract (or a denial to tenured faculty of their legitimate entitlement to continued employment under constitutional law).[311] Would a post-tenure review resulting in the termination of a tenured faculty member be contractually valid if the review had been conducted administratively, without the participation of a faculty committee, as provided in Florida's new regulation? The discussion in this Section suggests the answer should hinge on the parties' reasonable expectations in light of academic custom, although it is also possible a Florida court might simply defer to the institution's decision.[312] The next Section raises the question of whether tenure should be treated as a vested right in the context of handbook modification.

308 Drans v. Providence Coll., 383 A.2d 1033, 1041 (R.I. 1978); *see also* Rehor v. Case W. Rsrv. Univ., 331 N.E.2d 416, 421 (Ohio 1975) (citing consistency of university's policy with 1940 Statement and faculty recommendations); Karlan v. N.Y. Univ., 464 F. Supp. 704, 706–07 (S.D.N.Y. 1979) ("[A] university may, if acting in good faith, unilaterally modify its retirement age so long as the new age it has chosen is reasonable . . . ."); *cf.* Eshleman v. Youngstown State Univ., No. 77 C. A. 76, 1978 WL 214854 at *2–3 (Ohio Ct. App. Mar. 1, 1978) (following *Rehor* but enforcing grandfather clause in existing tenure policy). For a discussion of *Drans*, see *supra* notes 154–58 and accompanying text.

309 *Drans*, 410 A.2d at 994.

310 *See supra* note 7 and accompanying text.

311 For a discussion of the constitutional claim, see *supra* note 3.

312 The issue is especially difficult since faculty handbook policies are not treated as contractually binding under Florida law. *See supra* note 27 and accompanying text.

3. Vested Rights

As discussed in Part I, one exception to the flexible handbook modification rule recognized in *Bankey*,[313] and codified in the Restatement of Employment Law, is that employers may not make changes to handbook policies that would harm "vested or accrued employee rights" without express agreement from employees.[314] This exception likely has its origins in one-hundred-year-old decisions holding certain employer promises to be contractually enforceable.[315] These early decisions tend to involve relied-upon assurances of what Arnow-Richman and Verkerke refer to as "deferred benefits"—bonuses, commissions, severance pay, stock options, or retirement benefits.[316] Similarly, the commentary and illustrations to section 2.06 of the Restatement suggest that the vested rights exception is narrowly defined.[317] But, in the faculty handbook context, is tenure a vested right?

At first blush, it makes sense to consider tenure as a vested right. College and university faculty who have earned tenure did so by relying for years on the prospect of achieving the status and job security tenure brings. In *Saxe*, the court seemed to characterize the right to tenure as involving a vested right; it cited *Asmus*[318] for the idea that an employer may not unilaterally modify a handbook if it "abrogate[s] an employee's vested benefits"[319] and remanded the case for the trial court to determine whether the handbook protections the college had removed had created vested rights for the tenured faculty plaintiffs.[320] In *Zuelsdorf*, the court went further, holding that plaintiffs, a group of untenured faculty members, had a vested right to advance notice of nonretention based on university policy, and the university's unilateral modification of the policy amounted to a breach of contract.[321] The *Zuelsdorf* court

313 *See supra* note 123 and accompanying text.

314 RESTATEMENT OF EMP. L. § 2.06 (AM. L. INST. 2015); *see also supra* notes 131–32 and accompanying text.

315 Anrow-Richman & Verkerke, *supra* note 13, at 914 n.88.

316 *Id.* at 914–16 (describing "reward paradigm" decisions from the 1920s as fitting within the unilateral contract analytical framework).

317 *See supra* note 132 and accompanying text.

318 *See supra* note 86 and accompanying text.

319 Saxe v. Bd. of Trs. Of Metro. State Coll. of Denver, 179 P.3d 67, 75 (Colo. App. 2007) (citing Asmus v. Pac. Bell, 999 P.2d 71, 79 (Cal. 2000)). *Saxe* is discussed at *supra* notes 302–07 and accompanying text.

320 *Saxe*, 179 P.3d at 77. The *Saxe* court's discussion of vested rights was in reference to the parties' contract as well as a statute. Metro State College is a public institution, and a clause in Colorado's constitution prohibits the retroactive impairment of "vested rights" under existing laws. *Id.* at 74.

321 Zuelsdorf v. Univ. of Alaska, 794 P.2d 932, 935 (Alaska 1990).

concluded that the university's unilateral action "could not change those rights which had already vested or accrued under the employment contract."[322]

However, the construction of vested rights seen in *Saxe* and *Zuelsdorf* is at odds with the Restatement of Employment Law's commentary and illustrations, which indicate that the vested rights exception should be narrowly construed.[323] Even the Restatement's critics observed that the vested rights exception to section 2.06 "has no real meaning" in the context of policy statements that purport to limit the at-will presumption.[324] Similarly, in the higher education context, the case law addressing faculty handbook modification tends not to treat tenure as a vested right. In the mandatory retirement policy cases, courts consistently held that institutions could qualify the right to tenure by implementing (or revising) a mandatory retirement policy, so long as the policy change did not violate tenured faculty members' reasonable expectations of job security in light of academic custom.[325] Indeed, in *Rehor*, a lower court had held that the policy change at issue undermined the faculty's right to tenure, noting that "[a]n award of academic tenure vests a university faculty member with the right to continued reappointment to the faculty" absent cause for termination.[326] But the Supreme Court of Ohio reversed, holding that the university's policy modification did not breach the plaintiff's contract.[327] Notably, in these cases the courts' decisions were premised on the fact that the challenged handbook modifications were made consistent with academic custom. The *Rehor* court emphasized the consistency of the modified policy with AAUP guidelines and faculty recommendations.[328] The *Drans* court declined to construe tenure so strictly as to prohibit the college from ever modifying its policies, even if the modification was adopted reasonably and in good faith: "[W]e find it difficult indeed to hold that tenure precludes the imposition of a mandatory retirement policy under all circumstances."[329]

To conclude, a few courts have held that rights under faculty policies addressing job security (such as tenure) can vest. But courts generally do

322 *Id.*

323 *See supra* notes 131–32 and accompanying text.

324 *See supra* note 132.

325 Drans v. Providence Coll., 383 A.2d 1033, 1040–41 (R.I. 1978); Rehor v. Case W. Rsrv. Univ., 331 N.E.2d 416, 420–21 (Ohio 1975); Karlen v. N.Y. Univ., 464 F. Supp. 704, 705–06 (S.D.N.Y. 1979). These decisions are discussed *supra* note 308 and accompanying text.

326 *Rehor*, 331 N.E.2d at 420.

327 *Id.* at 423.

328 *Id.* at 421.

329 *Drans*, 383 A.2d at 1039. *Drans* is discussed *supra* notes 154–58 and accompanying text.

not interpret the vested rights exception so broadly. In the higher education context, interpreting tenure as a vested right is in tension with AAUP guidelines, which recognize exceptions to tenure for retirement and financial exigency.[330] An alternate explanation for the results in *Saxe* and *Zuelsdorf* with greater support in the case law could be based on academic custom. For example, in *Saxe*, the plaintiffs arguably had a reasonable expectation that their right to tenure would not vanish through the administration's unilateral handbook modification and declaration of a reduction in force, since the institution was not experiencing financial exigency. Similarly, in *Zuelsdorf* it would seem that modifying the required advance notice period (after the deadline for giving faculty notice of nonretention had passed) violated plaintiffs' reasonable expectation that their appointments would be renewed. The outcomes in *Saxe* and *Zuelsdorf* seem correct when viewed through the perspective of academic custom operating as a constraint on an institution's discretion to modify policies affecting faculty job security.

CONCLUSION

Toussaint is a notable decision, both because it was among the first to treat employee handbook commitments as binding and because of its departure from standard contract doctrine. This Article contends that the *Toussaint*/*Bankey* approach, originally grounded in U.S. Supreme Court precedent recognizing a public university faculty member's property interest in continued employment, is well-suited to addressing the enforcement of faculty handbook policies. The fixed-term nature of most faculty contracts illustrates clearly why applying unilateral contract doctrine to enforcing handbook policies leads to strained and unconvincing analysis. Additionally, this approach, with its similarity to procedural due process jurisprudence, is especially appropriate for higher education institutions, which have a public character. Finally, the potentially harsh effects of a relatively flexible approach to handbook modification can be mitigated in the faculty context by invoking academic custom. This Article suggests faculty handbook modifications affecting faculty termination rights should be implemented consistent with past practices and higher education norms of academic freedom and shared governance.

St. Antoine observed that only a "minuscule handful of persons" possess the talents or knowledge that gives them the leverage to negotiate

330 *See* 1940 Statement, *supra* note 227, at 15.

a contract for a fixed term.[331] In other words, similar to the contracts of rock stars and professional athletes, faculty contracts are distinct from the typical, at-will employment relationship. Given this fact, is an analysis of faculty handbooks generalizable to employee handbooks more generally? I believe the answer to this question is mixed. This Article makes the case for why faculty contracts are unique. At the same time, at least some of the points discussed also apply outside of the higher education context—such as the unsuitableness of standard contract doctrine for analyzing the enforceability of handbook policies, as well as the role of trade usage and past practices in contract interpretation. Although shared governance is somewhat unique to higher education, scholars have argued that employees should be invited to participate in the governance of U.S. companies, analogous to the practice of shared governance in colleges and universities.[332] It would be good policy, for example, for handbook amendments that affect employee termination rights to be developed and adopted in consultation with affected employees.

Although many of the cases discussed in this Article involve tenure policies, it is essential to also consider policies affecting the job security of non-tenure-track faculty, who in the aggregate currently make up a majority of faculty in U.S. colleges and universities.[333] Much of the current public discourse on higher education faculty has focused on the issue of tenure, although policies on the nonrenewal of untenured faculty appointments affect a greater number of professors in this country. Many of the key cases discussed above—including *Greene*, *Zuelsdorf*, and even *Perry*—involved the termination of untenured faculty. As a matter of policy, meaningful job security policies for non-tenure-track faculty members are not a substitute for tenure, but they provide a measure of predictability that benefits institutions as well as faculty. Research demonstrates that student outcomes improve when students are taught by full-time faculty who are part of campus life and available to students outside of class.[334] The AAUP guidelines on advance notice of nonreappointment call for at least three months' advance notice of nonretention for new faculty, with longer periods for faculty who have

331 St. Antoine, *supra* note 18, at 3; *see also* Anderson, *supra* note 179, at 62–63 (observing how tenured and tenure-track faculty "enjoy due process rights and a level of autonomy at work that is unmatched almost anywhere else among employees").

332 *See* HAYDEN & BODIE, *supra* note 258, at 13.

333 *See supra* note 11 and accompanying text.

334 SUSAN RESNECK PIERCE, GOVERNANCE RECONSIDERED: HOW BOARDS, PRESIDENTS, ADMINISTRATORS, AND FACULTY CAN HELP THEIR COLLEGES THRIVE 57 (2014); *see also* Cross, *supra* note 11, at 161–63 (citing studies showing how meaningful faculty-student interaction improves student outcomes, especially for first generation, underrepresented minority, and low-income students).

remained at an institution for a year or longer.[335] Since academic appointments are typically made months in advance, failure to provide sufficient advance notice of termination effectively denies faculty the opportunity to continue in an academic position.[336] American Bar Association (ABA) Standard 405(c) is another best practice that should be more broadly adopted in college and university faculty handbooks. Standard 405(c) requires ABA-accredited law schools to enter into multiyear, presumptively renewable contracts with their full-time clinical faculty.[337]

In short, faculty tenure is no longer the norm in higher education; what remains to be seen is whether the tradition of tenure in higher education eventually disappears. Given this reality, it is especially important that university policies safeguard protections for untenured faculty against termination—notification rights and other procedural protections applicable to the nonrenewal of fixed-term contracts. These protections are particularly important in the current politicized environment surrounding the right to tenure.

335 Notice Standards, *supra* note 235, at 99.

336 *Id.*

337 AM. BAR ASS'N SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023–2024, standard 405(c), at 31 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf (last visited Oct. 27, 2023). Standard 405(c) requires full-time clinical faculty to be afforded "a form of security of position reasonably similar to tenure." *Id.* standard 405(c). Interpretation 405-6 specifies that this could include either a separate tenure track for clinicians or, after a probationary period, a series of long-term (five-year or longer), presumptively renewable contracts. *Id.* standard 405(c), interpretation 405-6.