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Public University Professors: Employees or Appointees?

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Introduction

In the area of employment law, defining who is and is not an “employee” is often a perplexing task that comes with important distinctions. Misclassifying an employee could lead to serious implications for the employer and a variety of potentially missed protections for the worker. Specifically, many statutory benefits that are available for “employees” are not afforded to “non-employees.”^[2] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn2)

The 1915 Declaration of Principles on Academic Freedom and Academic Tenure (the “Declaration”) illustrates the complexity involved in defining the employment relationship between university and college professors that courts often overlook.^[3] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn3) However, before analyzing the exact complexity found in the Declaration, it is important to understand the significance of the Declaration and its influence on American colleges and universities.

The Declaration “became the first sustained articulation of the principles of academic freedom in America.”^[4] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn4) The American Association of University Professors (“AAUP”) created the Declaration, and the Declaration formed “the ideological foundation of the AAUP’s doctrines.”^[5] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn5) The purpose of the AAUP is to help “shape American higher education by developing the standards and procedures [to] maintain quality in education and academic freedom in this country’s colleges and universities.”^[6] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn6) Therefore, the subject of the Declaration aims at defining what academic freedom means when applied to a professor.^[7] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn7) The Declaration reveals, “[a]cademic freedom . . . comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”^[8] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn8) Since its enactment, the Declaration has become “one of the most influential definitions of academic freedom in America.”^[9] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn9)

The relevant parts of the Declaration to the employment classification context reveal that “members of university faculties,” which include college professors, are “appointees” and “not in any proper sense the employees” of the university.^[10] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn10) This refusal to label professors as employees portrays the AAUP’s goal, which is to showcase the importance of “professional

autonomy and collegial self-governance” through the Declaration.[11] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn11) The Declaration goes further in explaining this refusal by saying, “faculty are not ‘employees’ answerable to the will of their employers but instead ‘appointees’ who are answerable to the public.[12] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn12) Moreover, professors are labeled “appointees” rather than employees because “[faculties] are ‘appointed’ to discharge the essential university function of producing knowledge” to the public.[13] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn13)

The Declaration explicitly states that professors should not be considered employees of their respective university.[14] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn14) Once appointed, the Declaration claims “the [professor] has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene.”[15] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn15) The appointing authority that the Declaration is referring to is the college or university employing the professor.[16] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn16)

Further, the Declaration reveals “ordinary institutions should be viewed as public trusts” that should not be able to resist the teachings of professors.[17] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn17) With professional autonomy and collegial self-governance at the heart of the AAUP, the Declaration states, “[u]niversity teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions.”[18] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn18)

Although professors have historically been thought to be employees in terms of receiving statutory protections from their respective institutions, the Declaration urges against this classification.[19] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn19) Since the Declaration explicitly states that professors should not be considered employees, the proper label for professors is not entirely clear.

The purpose of this Note is to examine the working relationship of university professors and the statutory protections afforded to employees and “non-employees.” This Note argues that despite the Declaration explicitly stating professors should not be considered employees, the employee categorization is the best classification available for professors. Part I will begin with a brief overview of the historic distinction between being an employee and an independent contractor. Part II will examine why classifying professors as “employees” and not appointees best suits their job duties. Finally, this Note will conclude by reiterating that regardless of how much the AAUP urges that professors are appointees, this classification is not plausible with how America has defined worker classifications.

I. A Brief Historical Overview of the Distinctions Between Employees and Independent Contractors

A. The Common Law Control Test and The Economic Realities Test

Before the current employer-employee label developed to define an employment relationship, the precursor was the “master-servant” label.[20] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn20) Although the terms master and servant have largely been replaced with that of employer and employee, sometimes the old master-servant language is still used to refer to employment classifications.[21] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn21)

When courts analyze the employer-employee relationship, the “paramount consideration” for “determining the scope of . . . liability” is “the master’s control over [the] servant.”[22] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn22) The Restatement of Agency defines a master as “a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the [worker] in the performance of the service.”[23] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn23) “A servant is [a person] employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”[24] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn24) The master-servant relationship is not the only possible classification for a working relationship either.[25] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn25) The Restatement of Agency recognizes another well-known classification known as the employer-independent contractor relationship.[26] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn26) An “independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”[27] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn27) Defining the working relationship as either employer-employee or employee-independent contractor is important and courts, using various factors, have developed several tests to help aid in determining which classification is best.

To help determine worker classification, the court in *McCary v. Wade* outlined the common law approach, which focuses on how much control the employer has over a worker to determine worker classification.[28] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn28) The court in *McCary* provides an example of how the control test can be applied with various factors of a court’s choosing to help determine worker classification status.[29] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn29) The common law approach is not the only test to determine worker classification though. Eventually, another worker classification test, known as the economic realities test, developed.[30] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn30) Instead of focusing on control as the paramount consideration the economic realities test looks to the totality of the circumstances to determine worker classification.[31] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn31)

Under this test, one factor that courts can look to is how integral “the performance of the [worker’s] duties” is to “the employer’s business.”[32] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn32) By looking at not only how much the worker relies on the employer, but also how much the employer relies on the worker is a shift from the common law approach.[33] (applewebdata://D18A0BE2-575D-48AA-BFB8-

FA8E15A10E6C#_ftn33) However, like the common law control test, not all courts apply the same factors.[34] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn34) Overall, “figuring out whether or not a person is an employee of an organization (as opposed to a contractor, for example) is complicated.”[35] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn35)

II. Why Employee Status Makes Sense and Appointee Status Just Doesn't Work

This Note argues that although the 1915 Declaration insists that university professors are appointees of their respective universities that classification is not appropriate. There currently is not a test to determine whether a worker is an appointee rather than an employee or independent contractor.^[36] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn36) It is quite surprising that the Declaration is such an influential document in terms of defining academic freedom for public professors; however, courts have not considered labels other than that of an employee or independent contractor when analyzing the professor worker classification.

Moreover, some courts appear to be so confident that a professor is an employee that other classifications, such as independent contractor status, are usually not considered.^[37] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn37) When looking at the bigger picture, it makes the most sense to label university faculty into a category that already exists rather than creating a new category of appointees in the employment context.

Although the Declaration demands that university professors be considered appointees, appointees do not fall into the common worker categories. Generally speaking, workers are either classified as employees or independent contractors.^[38] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn38) In addition, courts will be less inclined to consider a professor as an appointee when that categorization requires reworking worker classifications within employment law. Appointees of a university may be viewed differently than say, for example, a political appointee. However, it's unclear whether both would fall under the new label of appointee and it certainly does not make sense to burden courts with creating a new employee classification that only applies to public university professors. Keeping the main labels of an employee or independent contractor is the most practical solution because it is what courts, employers, and workers are used to.

Since categorizing a professor as an appointee is not an available alternative, it is important to consider whether a professor should be labeled as an employee or an independent contractor. When an employer classifies a worker as an employee rather than an independent contractor it requires the employer to pay minimum wage and overtime^[39] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn39), follow occupational safety laws^[40] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn40), and follow federal anti-discrimination laws, to name a few.^[41] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn41) However, these same protections are not afforded to independent contractors.^[42] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn42) Employers "do not generally have to withhold or pay any taxes on payments to independent contractors."^[43] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn43) Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or national origin but even these protections only apply to employees, not independent contractors.^[44] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn44) Applying the economic realities test and the common law approach to the university professors' duties will help explain why the employee classification is best suited for university professors.

A. Applying the Economic Realities Test to a Public Professor's Job Duties

The economic realities test looks to the totality of the circumstances to determine worker classification.^[45] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn45) The court in *Fitzgerald v. Mobil Oil Corp.* reiterated the idea that the economic realities test is a highly fact-intensive inquiry and that "the language of a written [employment] agreement . . . is not controlling."^[46] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn46) The elements of the economic realities test that the court in *Fitzgerald* used include: "(1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal."^[47] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn47)

Applying the economic realities test to professors' job first requires consideration of the control the university has over the professor's duties.^[48] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn48) Public universities and colleges that employ professors generally exert little control over them.^[49] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn49) According to the American Association of Undergraduate Professors, who authored the Declaration, teachers are entitled to freedom in research, in publication, and the classroom as long as they are following their academic duties.^[50] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn50) Professors have the freedom to inquire into new topics; however, they are still engaged in the university by teaching certain courses.^[51] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn51) Furthermore, though professors have the freedom to explore new topics, the university benefits every time a professor's work is published by gaining publicity and sometimes by even gaining a monetary benefit.^[52] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn52)

Also, in terms of control, universities' control could take the "form of 'goals' subject to annual review, such as . . . writing goals for law professors."^[53] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn53) Nevertheless, professors still enjoy "considerable discretion over the hours they work," which cuts against the finding of an employment relationship.^[54] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn54) The more autonomy a professor enjoys, the more they resemble an independent contractor.^[55] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn55)

The next element of the economic realities test factors in the payment of wages.^[56] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn56) University faculty professors are provided with a salary from their respective public institutions.^[57] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn57) Since pay is provided by the university, this leans more toward professors being employees. The reason for this is because "[a]n employment relationship involves being placed on the employer's payroll" and "[e]mployees [are] . . . paid a pre-determined amount" such as a salary.^[58] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn58)

The third element pertains to the rights of the worker in question in being able to hire, fire, and discipline other workers.^[59] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn59) Though such occasions may be rare, universities are certainly free to discipline their faculty.^[60] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn60) This reveals that professors resemble an employee because employers hiring

independent contractors are encouraged not to conduct “performance reviews or tak[e] disciplinary action” as they would with an employee.[61] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn61)

The last element concerns mutual dependence.[62] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn62) The more dependent a worker is on the employer, the more likely the worker is considered an employee.[63] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn63) Although faculty and the university seem somewhat dependent on each other, the fact that professors depend on the university for their salary and workplace shows they are probably still best suited to be an employee.[64] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn64)

B. Applying the Common Law Control Test to a Public Professor’s Job Duties

The common law control test approach “focuses on the employer’s right to control the employee/independent contractor” as a paramount consideration.[65] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn65) Similar to the economic realities test, “labels placed on employees, are not controlling and the entire circumstances must be examined.”[66] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn66)

Under the common law control test approach, the elements considered are:

The extent of control which . . . the master may exercise over the details of the work; whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the workman supplies the instrumentalities . . . and the place of work for the person doing the work; the length of time for which the person is employed; the method of payment . . . ; whether or not the work is a part of the regular business of the employer; whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business.[67] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn67)

University professors are given a considerable amount of control over their work, which makes them similar to independent contractors. For example, professors typically have the freedom to teach their subjects in a manner in which they choose and professors have plenty of freedom to inquire into new topics.[68] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn68) Although university professors are not supervised daily like the average employee, they should still be considered independent contractors because university professors typically do their job without supervision when it comes to inquiring into new research topics, publishing their work, and controlling their classroom.[69] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn69)

Furthermore, lack of supervision should not always equate to independent contractor status. In today’s world, “it is increasingly typical for a business to rely on a large number of . . . professional workers, employed on a regular basis, but without close supervision and instruction.”[70] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn70) A university’s control might take “the form of ‘goals’ subject to annual review, such as . . . writing goals for law professors.”[71] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn71) Professors, in general, do not need a lot of daily supervision from their employer because universities want their professors to be able to teach the material in a way that the professor sees fit.[72] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn72) Having a university supervise how a professor teaches and engages in academic writing would be counterintuitive because professors are hired to engage in original thought.[73] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn73) Therefore, when looking at the employment relationship as a whole, it appears the proper label for university professors, under the control test, is employees.

Also, it is worth mentioning that courts rarely analyze the worker status of university professors.[74] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn74) Consider the Supreme Court case of *Garceetti v. Ceballos* regarding a teacher’s right to free speech.[75] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn75) The Supreme Court held “[w]hen public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”[76] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn76) The Court went on to say “[h]is ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor.”[77] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn77) Although the Court does not engage in an analysis regarding the employment classification of public university professors, this case could at least imply that the Court may consider a university professor to be an employee.[78] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn78)

Even in the rare instance that the courts engage in the employee analysis, it’s not in regards to the typical university faculty professor.[79] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn79) For example, the court may engage in the analysis for an adjunct professor, but an adjunct professor is obviously different than being a full-time professor of a university.[80] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn80) “Adjunct professors are hired by schools on a contractual, part-time basis as opposed to the traditional university model of full-time employment”:[81] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn81) therefore, it makes sense that courts would engage in the worker classification analysis.

Regardless of whether courts typically engage in the worker categorization analysis in regard to university professors, the courts seem to have it right, as the Declaration is not viable in terms of it defining professors as appointees.

Conclusion

In conclusion, university and college professors should be labeled as employees under worker classification labels. Although the influential Declaration demands that professors should be considered appointees and not employees, the employee label provides university faculty with the most statutory protections.[82] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn82) In addition to statutory protections, university faculties do not

fit under the category of “non-employees,” often referred to as independent contractors.

Furthermore, it is not practical to consider university professors appointees when appointees are not a category in the worker relationship – the options are generally limited to employee or independent contractor.^[83] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftn83) Courts have traditionally labeled those in an employment relationship as employees or non-employees, typically referred to as independent contractors. Creating a whole new category for university faculty does not seem like a plausible solution.

Overall, it makes the most sense to label university faculty as employees. University professors enjoy considerable independence in their work, but the university still exerts control over the faculty through various other areas of the worker relationship. The courts, by bypassing analyzing the employment relationship and regarding university professors as employees, seem to have gotten it right. Despite this, the Declaration should still be considered viable for its overall definition of academic freedom in America, but it is certainly not viable in terms of defining the employment relationship between that of the university and the professor. Essentially, the language of the appointee classification should be removed as a label for public university professors.

[1] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref1) J.D. expected 2020, University of Kentucky J. David Rosenberg College of Law; B.A.; Eastern Kentucky University (2017).

[2] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref2) See generally 29 U.S.C. § 203 (2018); 42 U.S.C. § 2000e-2 (1991) (defining particular unlawful employment practices that only apply to employees).

[3] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref3) Am. Ass’n of Univ. Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915), <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [https://perma.cc/29T2-TWC5].

[4] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref4) David Randall, *Charting Academic Freedom: 103 Years of Debate*, National Association of Scholars (Jan. 15, 2018), <https://www.nas.org/reports/charting-academic-freedom-103-years-of-debate/full-report> [https://perma.cc/6E6L-X6C5].

[5] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref5) John K. Wilson, *AAUP’s 1915 Declaration of Principles: Conservative and Radical, Visionary and Myopic*, 7 AAUP J. Acad. Freedom 1, 1 (2016), https://www.aaup.org/sites/default/files/Wilson_1.pdf [https://perma.cc/PG4E-MW96].

[6] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref6) *About the AAUP*, AAUP, <https://www.aaup.org/about-aaup> [https://perma.cc/M8DE-FAXU] (last visited Mar. 1, 2020).

[7] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref7) Am. Ass’n of Univ. Professors, *supra* note 3, at 291, 292.

[8] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref8) *Id.* at 292.

[9] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref9) Wilson, *supra* note 5, at 1.

[10] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref10) Am. Ass’n of Univ. Professors, *supra* note 3, at 295.

[11] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref11) See Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U.L. Rev. 67, 79 (2006) (citation omitted).

[12] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref12) Matthew W. Finkin & Robert C. Post, *For the Common Good: Principles of American Academic Freedom* 34 (2009).

[13] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref13) *Id.* at 35.

[14] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref14) Am. Ass’n of Univ. Professors, *supra* note 3, at 295.

[15] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref15) *Id.*

[16] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref16) See *id.*

[17] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref17) Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & Educ. 445, 448 (2003).

[18] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref18) Am. Ass’n of Univ. Professors, *supra* note 3, at 295.

[19] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref19) See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 425 (4th Cir. 2000) (holding that “there is no constitutional right of free inquiry unique to professors or any other public employee”) (second emphasis added); Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. Pub. Int. L.J. 73, 89–90 (2002) (noting

public university faculty have First Amendment rights as public employees).

[20] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref20](#)) Restatement (Second) of Agency § 220(1) cmt. g (Am. Law Inst. 1958); Gerald M. Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188, 189 (1939).

[21] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref21](#)) See Restatement (Second) of Agency § 220(1).

[22] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref22](#)) John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose is Not Always a Rose*, 8 Hofstra Lab. & Emp. L.J. 337, 338–39 (1991).

[23] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref23](#)) Restatement (Second) of Agency § 2(1) (Am. Law Inst. 1958).

[24] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref24](#)) *Id.* § 2(2).

[25] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref25](#)) See *Id.* § 2(3).

[26] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref26](#)) *Id.*

[27] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref27](#)) *Id.*

[28] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref28](#)) *McCary v. Wade*, 861 So. 2d. 358, 361, 363 (Miss. Ct. App. 2003); *How To Apply the Common Law Control Test in Determining an Employer/Employee Relationship*, Social Security Administration, https://www.ssa.gov/section218training/advanced_course_10.htm#4 [<https://perma.cc/YU6S-DFTT>] (last visited Mar. 5, 2020).

[29] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref29](#)) *McCary*, 861 So. 2d. at 361.

[30] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref30](#)) Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. Legis. 295, 296–97 (2012–2013).

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[32] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref32](#)) *Id.*

[33] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref33](#)) See *id.*; *McCary v. Wade*, 861 So. 2d. 358, 361, 363 (Miss. Ct. App. 2003).

[34] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref34](#)) *Classification Tests*, WorkerClassification.com, <https://www.workerclassification.com/classification-tests> [<https://perma.cc/LWH3-MDFS>] (last visited Mar. 15, 2019).

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[42] ([applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref42](#)) Kwak, *supra* 30, at 295.

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[51] (applewebdata://D18A0BE2-575D-48AA-BFB8-FA8E15A10E6C#_ftnref51) See generally, Marshall Shepherd, *Professors Are Often Asked ‘What Do You Teach?’ But They Do Far More*, *Forbes* (July 19, 2018, 11:02 AM), <https://www.forbes.com/sites/marshallshepherd/2018/07/19/professors-are-often-asked-what-do-you-teach-they-do-far-more/#1c7d96301745> [<https://perma.cc/HTF5-UBRN>] (explaining the variety of roles that professors take on beyond the courses they teach for the university).

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