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COMMENTS

JOHN JAY, DISCRIMINATION, AND TENURE

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I. INTRODUCTION

America's first Chief Justice, John Jay, once wrote: "I wish to see all unjust and unnecessary discriminations everywhere abolished and that the time may soon come when all our inhabitants of every color and denomination shall be free and equal partakers of our political liberty."[1] This statement, describes Jay's aspirations for American education, and is only part of a section found in a letter sent to Dr. Benjamin Rush in 1785, congratulating him on a recent college charter.[2] "In Jay's political philosophy education was the 'soul of the Republic' and the best fortification against a pernicious alliance of 'the weake [ignorant] and the wicked.'"[3] In another letter, Jay described his thoughts on the condition of mankind:

> As to the position that "the people always mean well," that they always mean to say and do what they believe to be right and just — it may be popular, but it cannot be true. The word people, you know, applies to all the individual inhabitants of a country, collectively considered . . . . We have not heard of any country, in which the great mass of the inhabitants individually and habitually adhere to the dictates of their conscience.[4]

Unfortunately, Jay's thoughts still ring clear in our hearts as we look at our country, our world, and ourselves. They even ring true for the microcosms of society known as college and university tenure boards. This comment examines three subjects that John Jay cared a great deal about: education, human nature, and America's courts. More specifically, this comment will discuss tenure, discrimination, and "academic deference" by American courts. In today's courts, plaintiffs in employment cases will

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1. Letter from John Jay, former U.S. Supreme Court Chief Justice, to Benjamin Rush (Mar. 24, 1785), *in* THE PAPERS OF JOHN JAY (on file with Columbia Univ., Butler Library, Rare Book & Manuscript Div.), *available at* http://www.columbia.edu/cu/lweb/digital/jay/ (expressing desire for an end to discrimination and equality for all).

2. ALLAN R. CRIPPEN II, JOHN JAY INST. FOR FAITH, SOCIETY, AND LAW, JOHN JAY: AN AMERICAN WILBERFORCE? (2005), available at http://www.johnjayinstitute.org/index.cfm?get=get.johnjaypaper (describing the context of Jay's letter to Dr. Rush).

3. *Id.* (describing Jay's thoughts on the importance of education). "Jay's high goal of education for all was reinforced with his leadership, professional prestige, and personal funding." *Id.* "The Society also founded New York's African Free School in 1787 as a long-range cultural transformation strategy for combating slavery in New York." *Id.* "By 1834 the New York African Free School was incorporated into the New York school system." *Id.* "It had educated more than 2000 free blacks and groomed the future leadership of African Americans in early republic of the United States." *Id.*

4. Letter from John Jay, former U.S. Supreme Court Chief Justice to Richard Peters (Mar. 14, 1815) *in* THE PAPERS OF JOHN JAY (on file with Columbia Univ., Butler Library, Rare Book & Manuscript Div.), *available at* http://wwwapp.cc.columbia.edu/ldpd/app/jay/image?key=columbia.jay.095 (explaining the depravity of all men, even apparent good men because they do not adhere to the dictates of their consciences).

usually face an academic deference argument when the defendants are universities or colleges.[5] The colleges and universities will normally cite "academic freedom" as the reason for seeking academic deference from the courts, and both courts and defendants have often asserted that "of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."[6] Courts do not always directly

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5. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2 (2006) ("When the defendant in an employment case is a college or other institution of higher education, the plaintiff usually will face an 'academic deference' argument.").

6. Jiminez v. Mary Wash. Coll., 57 F.3d 369, 377 (4th Cir. 1995) ("While Title VII is available to aggrieved professors, we review professorial employment decisions with great trepidation . . . . The federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions." (citations omitted)). The court opposed the viewpoint that a judge can make the necessary determination in respect to the qualifications of academic faculty and staff for hiring, promotion and tenure. *Id.*; *see* Bina v. Providence Coll., 39 F.3d 21, 26 (1st Cir. 1994).

> [C]ourt review of tenure decisions should be guided by an appropriately deferential standard. A court may not simply substitute its own views concerning the plaintiff' qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported. *Id.*

See also Dorsett v. Bd. of Trs. for State Colls. & Univ., 940 F.2d 121, 123-24 (5th Cir. 1991) ("In public schools and universities across this nation, interfaculty disputes arise daily . . . . A federal court is simply not the appropriate forum in which to seek redress for such harms. We have neither the competency nor the resources to undertake to micromanage the administration of thousands of state educational institutions."). The court laid out the issues that typically arise in school districts on a daily basis that and concluded that such issues are better suited for officials in the district rather than by judges in a court room. *Id.*; *see also* Carlile v. S. Routt Sch. Dist. RE 3-J, 739 F.2d 1496, 1500-01 (10th Cir. 1984) ("School districts are given wide latitude in discretion concerning whom to award tenure."). The court noted that while courts are reluctant to examine the merits of a tenure decision, such decisions are not necessarily exempt under Title VII. *Id.*; *see also* Smith v. Univ. of N.C., 632 F.2d 316, 345–46 (4th Cir. 1980).

> University employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the courts review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason. *Id.* (footnote omitted).

See also Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2 (2006) (citing Faro v. New York Univ., 502 F.2d 1129, 1231-32 (2d Cir. 1974)) (noting how defendants and courts alike support the idea of "academic freedom" so that federal courts avoid intrusion into "education and faculty appointments at a Univer-

use the academic deference argument; rather they have displayed hostility towards those professors claiming discrimination based on dismissal as a matter of law, despite their cases appearing to be strong.[7] One effect of this practice, as cited in one study, is that "faculty plaintiffs prevail on the merits in civil rights cases only about one quarter of the time."[8] Another and perhaps a more detrimental effect of the harsh judicial treatment of faculty discrimination cases is that it has made Title VII ineffectual in redressing gender discrimination in higher education, as the majority of academic deference precedents are gender discrimination cases.[9] It has

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sity level"). *But cf.* Lynn v. Regents of Univ. of Cal., 656 F.2d 1337, 1343 n.3, 1342 (9th Cir. 1981) (acknowledging the importance of avoiding excessive interference in the affairs of a university, but nonetheless holding that the plaintiff did not fail to establish a prima facie case of sex-based discrimination).

7. *See* Fisher v. Vassar Coll., 114 F.3d 1332, 1333 (2d Cir. 1997) (reversing a verdict for professor claiming sex and age discrimination based on its holding that the district court's finding of discrimination was clear error). The lengths the appellate courts have gone in dismissing academic discrimination claims can be illustrated by the split decisions of *Farrell* and *Fisher*, with *Farrell* being a 2–1 panel decision and *Fisher* a hotly contested 12-judge en banc decision that included five dissenting judges. *Id.* The decisions in these case were subsequently abrogated by the Supreme Court shortly thereafter in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *see also* Courtney T. Nguyen, *Employment Discrimination and the Evidentiary Standard for Establishing Pretext:* Weinstock v. Columbia University, 35 U.C. DAVIS L. REV. 1305, 1308–09 (2002) (criticizing Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000), yet another split (2–1 panel) decision affirming a defense grant of summary judgment on a professor's sex discrimination claim, as establishing "an evidentiary standard that makes it too difficult for a plaintiff to survive a motion for summary judgment . . . [and frustrating] the intent of Title VII by insulating universities from judicial scrutiny"). The Second Circuit Court of Appeals in *Weinstock* held the plaintiff did not establish a genuine issue as to the material facts that showed Columbia's reason for vetoing her tenure as pretextual. *Id.* at 1308; *see also* Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2–3 (2006) (citing Farrell v. Butler Univ., 421 F.3d 609, 611, 616 (7th Cir. 2005)) (affirming a summary judgment to the defendant on a professor's sex discrimination claim, and noting that the Seventh Circuit and other courts "have been reluctant to review the merits of tenure decisions and other academic honors in the absence of clear discrimination"). The *Farrell* court stated, "[S]cholars are in the best position to make the highly subjective judgments related [to] the review of scholarship and university service." *Id.*

8. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2 (2006) (citing Barbara A. Lee, *Employment Discrimination in Higher Education*, 26 J.C. & U.L. 291, 292 (1999)). "In contrast, employment discrimination plaintiffs as a whole (i.e., not just academic plaintiffs) prevail between [forty-one] and [fifty-seven] percent of the time, depending on the type of claim (e.g., retaliation claims are the most successful, whereas race discriminations succeed less often than gender or age discrimination claims)." *Id.* at n.3.

9. *Id.* (describing the particular impact on gender discrimination cases and how gender segregation has persisted in the academic profession and other professions). *See gener-*

been argued that academic deference should not be used in employment decisions challenged as discriminatory, but may be used in tenure decisions.[10] This comment argues that the "academic deference" argument should not only cease to bear fruit in discriminatory employment decisions, but it should also be dismissed in discriminatory cases involving tenure appointments.

A. *What Is Tenure and Where Did It Come From?*

Tenure is defined in Black's Law Dictionary as "[a] status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause."[11] The American Association of University Professors' 1940 Statement of Principles supplies the description of tenure that is most commonly supported:

> Tenure is a means to certain ends, specifically; (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to students and society.[12]

Although now used in most universities, tenure has not always existed in America.[13] The founding universities and colleges in the United States

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ally Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994); Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1 (2004) (discussing the persistence of occupation segregation by gender in a wide range of occupations). Title VII has not been able to effectively reduce occupation gender segregation, despite its positive effect on gender discrimination and female participation in the workplace. *Id.* at 1. Additional action to adjust the focus of gender discrimination law and change the burden of proof in Title VII cases should be taken in order to address the segregation issue. *Id.* at 5–6.

10. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 19 (2006) (arguing that tenure cases may be the only appropriate use of "academic deference" while citing that most academic deference precedents involve "evaluation of incumbent employees").

11. BLACK'S LAW DICTIONARY 1509 (8th ed. 2004) (defining the term "tenure" in the educational setting). "A status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause. This status has long been considered a cornerstone of academic freedom." *Id.*

12. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940), http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf (explaining the need and reason for academic tenure).

13. *See* Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 67 (2006) (recognizing the historicity of tenure in America).

typically had a contract for a term of years with a professor.[14] With the passing of time came the formation of endowed chairs that enabled professors to obtain lifetime or indefinite appointments.[15] In the 1800s, there was a presumption that a professor would only be dismissed for cause and that the employment was for an indefinite term.[16] However, there was no agreement on the precise definition of adequate cause and professors were legally classified as employees-at-will, able to be extinguished at any time for any reason.[17] In the late 1800s, professors began to organize into departments to reflect national specialist organizations.[18] This narrowed the professors identity, and inaugurated a system in which faculty could conduct peer review, rather than university administrators

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The concept of tenure originated in Europe in the twelfth century. Several hundred years later, after the termination of several faculty members at Stanford University and other colleges, professors from leading universities in the United States called for the creation of a national association to develop general principles regarding tenure and legitimate bases for the termination of faculty members. *Id.*

14. *Id.* at 71–72 (describing the employment situation at universities in colonial America). "With the founding of the first universities and colleges in the United States, the relationship between a university and a professor was typically contractual for a term of three years." *Id. See* Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, *in* COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 93, 117–19 (1973) (recalling the history of academic tenure in American universities). Harvard was examined as an example of early development of a specific type of tenure called tenure "in time," leading to term contracts for professors. *Id.* at 116. This type of tenure developed out of consideration of the length of time allowed to possess an exchangeable commodity. *Id.* In this case, professors were exchanging payment for a service. *Id.* Harvard began to develop charters requiring contracts for a term of years in order to motivate professors to take greater care in the quality of their work, and thus, increase the quality of the service being given to the university. *Id.* at 118.

15. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 72 (2006) (describing the employment situation at universities in colonial America). "Later, the creation of endowed chairs revised this relationship to award the individual professor a life-term or indefinite appointment." *Id.*

16. *Id.* (indicating that professors began to rely on indefinite term lengths). "By the nineteenth century, faculty appointments were presumed to be for an indefinite term with dismissal only for cause . . . ." *Id.*

17. James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others,* 21 PACE L. REV. 159, 164 (2000) (pointing out that there was no legal change in a professor's status). The presumption of continuous, indefinite employment was not legally binding. *Id.* Therefore, employment was legally temporary and the board of trustees for educational institutions could terminate appointments at will. *Id.*

18. *Id.* (describing the changes in the academy based on specialties). Re-organization of educational departments based on specialty was a reflection of the formation of national specialist organizations appearing across the United States. *Id.* Administrative modifications of curricular and structural aspects of the American higher education system paralleled department re-organization. *Id.* at 165.

or other outsiders.[19] Consequently, other faculty inside a department and national organization members who specialized in the same field outside the university were acknowledged as having more insight about their colleagues' abilities and contributions to a particular area of learning than a university administrator.[20] Peer review was instituted as the means for a university to make educated hiring and promotion decisions and monitor employees.[21]

In 1900, the firing of E.A. Ross from Leland Stanford Junior University set into motion what we now know as tenure in the United States.[22] In 1913, largely in response to the firing of Ross and others, a group of professors from around the country created a national association to develop general principles covering tenure and the legitimate termination of faculty.[23] The organization came to be known as the American Association of University Professors (AAUP) and it published the *1915 Declaration of Principles on Academic Freedom and Academic Tenure* that described the procedures for dismissal, and made academic freedom the

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19. *Id.* (describing the consequences of specialties in relation to faculty oversight). The focus on organization by specialty gave educational professionals admission to two groups: the faculty as a whole and their own specific educational department organized by discipline. *Id.* Adopting both roles as faculty and as scholars in a specific discipline helped peer review become part of the evaluation process. *Id.*

20. *Id.* (indicating that field specific peer-review began to dominate in higher education as a means to evaluate professors). Faculty-administrative consultation was a result of administrative changes in the American higher education system and re-organization of faculty by specific discipline. *Id.* at 164–65. Peer review evaluation was one step away from faculty participation in judicial dismissal proceedings. *Id.* at 165.

21. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 72 (2006) (describing the reason behind peer review).

> In the latter part of the nineteenth century, the organization of professors into departments based on national specialist organizations, and the professors' research within these narrower fields, created a system in which faculty could be better evaluated by peers, rather than university administrators or lay trustees. Faculty within a department and members of the national organizations who also specialized within the same field were recognized as possessing more knowledge about their colleagues' abilities and contributions to an area of learning than a university administrator. Peer review thus became the mechanism for a university to monitor employees and make informed hiring and promotion decisions. *Id.*

22. James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others,* 21 PACE L. REV. 159, 164 (2000) (explaining the catalyst for the modern tenure system). Ross was dismissed based on political views opposing those held by founders of Stanford University. *Id.* at 165–66. Because of Ross's political activism, the founders instituted a ban on political activity. *Id.* at 166. Ross, as well as several other Stanford faculty members, were dismissed as a result of the ban. *Id.*

23. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 72 (2006) (describing the reason why a national organization to develop principles was necessary).

foundation for professional autonomy and collegial self-governance.[24] Tenure development reached another high point with the *1940 Statement of Principles on Academic Freedom and Tenure*.[25] This statement, now signed by over 200 professional organizations, provided "a new set of principles that provided job security based on years of service, and declared that all dismissals, except in cases of financial exigency, must be for cause and reviewed through a trial-type process."[26]

The decision whether to grant a junior member of the faculty tenure has been called the "most important decision subject to peer review."[27] Generally, peer review begins with the faculty member's colleagues, who are instructed to base their decision on three criteria: teaching, scholarship, and institutional service.[28] The evaluation of scholarship comes from both within the faculty member's department and from professors in that particular field outside the university.[29] The initial tenure deter-

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24. *Id.* (noting the name of the new organization and its historic contribution to tenure in America).

25. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 327 (1990) (acknowledging that the 1940 Statement of Principles was a positive move forward for tenure in America). The Statement characterized tenure as necessary to ensure "freedom of teaching and research" and "economic security" in the education profession. *Id.* at 326. The Statement established a link between the proper standards of tenure and academic freedom. *Id.* at 327.

26. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 73 (2006) (summarizing what the 1940 Statement negotiated by the AAUP and the Association of American Colleges contributed to tenure in America).

27. JULIUS G. GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 109 (Univ. of Tex. Press 1992) (describing the importance of tenure at colleges and universities).

> One aspect of faculty governance of particular importance to the running of academic institutions is peer review: the evaluation of faculty for appointments, promotions, and tenure by other faculty. Peer review ensures that basic personnel decisions will be made with the participation of those knowledgeable about the quality of the performance being evaluated and about the academic standards for conducting such faculty evaluations. The most important decision subject to peer review is whether to grant a junior faculty member tenure. *Id.*

28. *See id.* at 110 (illustrating the process of tenure evaluation).

> Normally a person is voted on initially by colleagues who are instructed to judge on the basis of three criteria: teaching, scholarship, and institutional service . . . . Service is rarely significant even in marginal cases. Most institutions claim that teaching and scholarship are of comparable importance, but in the past two decades the balance has steadily shifted toward giving greater weight to scholarship. Despite official rhetoric to the contrary, scholarship is almost always given greater weight at the most prestigious schools. *Id.* (footnotes omitted).

29. *See id.* (describing the scholarship evaluation for a tenure candidate). "Conclusions about scholarship are typically arrived at by reading the candidate's published scholarly writing and by sending his or her articles and books to senior professors in the appropriate field for evaluation." *Id.*

mination is made by the faculty member's department and is reviewed by another committee that makes its own decision.[30] Both generally require a two-thirds majority vote before a recommendation to grant tenure goes before the university administration.[31] This process generally works well. However, one scholar points out the following:

> Political affiliations, the expression of unpopular opinions, race, gender, and appearance are almost never referred to in the review process. Nevertheless, because faculty members are human, unfair and extraneous factors sometimes affect tenure decisions. . . . The process is thus on occasion subject to manipulation. One factor that makes this possible is that the standards by which the untenured person's performance will be judged are rarely spelled out with any precision. It is thus possible for these standards to be applied differently to different candidates. Departments or institutions can therefore change the standards that they apply without acknowledging that they are doing so.[32]

B. *Brief Background on Title VII*

Title VII of the Civil Rights Act of 1964 prohibits discrimination because of race, color, religion, sex (including pregnancy), or national origin by private and public employers, and by labor organizations and employment agencies, regarding hiring, classifying, promoting, demoting, firing, pay, or employment conditions.[33] In general, Title VII applies to employers with fifteen or more employees hired for twenty calendar weeks.[34] Originally, Title VII did not apply to sex discrimination cases; however, it

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30. *See id.* (stating that two separate committees review the credentials for a candidate for tenure). "The initial determination of a professor's entitlement to tenure comes from the tenured members of the candidate's school or department . . . . [A] positive recommendation is sent on to a campus- or institution-wide committee, where the same evidence is reviewed and sometimes new evidence is gathered." *Id.*

31. *See id.* (stating the general requirement of a two-thirds vote for approval).

> The initial determination of a professor's entitlement to tenure comes from the tenured members of the candidate's school or department. A favorable vote of two-thirds majority is usually required before a positive recommendation is sent on to a campus- or institution-wide committee, where the same evidence is reviewed and sometimes new evidence is gathered. The review committee makes its own determination, and it, too, generally requires a favorable vote of two-thirds majority before it recommends the grant of tenure to the university administration. *Id.*

32. JULIUS G. GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 111 (Univ. of Tex. Press 1992) (bemoaning the obvious room for discrimination in the tenure evaluation process and actual practice of it).

33. *See* 42 U.S.C. § 2000e-2 (2000).

34. *Id.* § 2000e(b) (establishing the definition of "employer" under the statue).

was amended two days before voting to prohibit just that.[35] In 1972, the Civil Rights Act was amended to apply to states as employers.[36] Also in 1972, higher education's exemption from the Act was curtailed and universities became subject to judicial scrutiny.[37] To this day, there is no indication that Congress intended to create an exception for academia.[38]

It is quite possible that without any further explanation of Title VII, one can see the tension between the tenure system and Title VII. The tenure system was designed to provide autonomy and keep outsiders who lack the necessary credentials out of the decision making process. But if what John Jay says is true: that there is no group of people who can be trusted to do what is right, then even well intentioned tenure boards must refine the process to allow practical checks and balances, and courts must be willing to provide those checks and balances. Section II will provide

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35. Ann K. Wooster, Annotation, *Title VII Sex Discrimination in Employment—Supreme Court Cases*, 170 A.L.R. FED. 219 (2001).

> Any possible inconsistency between the Equal Pay Act and Title VII did not surface until late in the debate over Title VII in the House of Representatives, because, until then, Title VII extended only to discrimination based on race, color, religion, or national origin, while the Equal Pay Act applied only to sex discrimination. Just two days before voting on Title VII, the House of Representatives amended the bill to proscribe sex discrimination, but it did not discuss the implications of the overlapping jurisdiction of Title VII, as amended, and the Equal Pay Act. *Id.* (footnote omitted).

Neither house of Congress was afforded an opportunity to undertake the relationship between the two statutes because the Senate acted without reference to any committee in making its consideration. *Id.*

36. *Id.* (discussing Congress's intent that the 1972 amendments apply both to governmental and private employers, essentially furthering the interests and rights in both the public and private sectors).

> The 92nd Congress made important amendments to Title VII in 1972. In amending the Civil Rights Act to make its provisions applicable to the states as employers, Congress intended that the principles of the Act be applied to governmental and private employers alike. These amendments did not change the substantive requirements of Title VII, however. The 1972 amendments expanded the Equal Employment Opportunity Commission's (EEOC) enforcement powers by authorizing it to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII; in so doing, Congress sought to implement the public interests as well as to bring about more effective enforcement of private rights. *Id.* (footnote omitted).

37. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 86 Stat. 103, 104 (1972) (codified as amended at 42 U.S.C. § 2000e-1(a) (2000)) (bringing higher education institutions under Title VII coverage). It continued to exclude any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." *Id.*

38. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 3 (2006) (asserting that legislative history shows that Congress did not give any special consideration to universities and colleges).

history, a synopsis of the legal cases that have pitted employment and tenure decisions against Title VII, and examine the historical impact on women in the academy. Section III will examine the distinction courts have made between tenure decisions and regular employment discrimination cases and why the reasoning fails to make a significant distinction. It will also examine the availability of tenure review materials to plaintiffs and why redaction is not ideal for proper adjudication. Finally, it will posit suggestions for a way to move towards fair and transparent tenure decisions in our colleges and universities.

II. LEGAL BACKGROUND

Discrimination cases under Title VII are usually brought by a claim of disparate treatment or disparate impact.[39] In order for a plaintiff to demonstrate disparate impact, the plaintiff has the burden of identifying the precise employment practice that resulted in disparate impact.[40] Once the employment practices are identified, the plaintiffs has to specifically demonstrate how the practice disparately impacted a Title VII protected group.[41] On the other hand, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[42] In disparate treatment cases, the plaintiff must provide direct or indirect evidence that an employer has intentionally acted in a discriminatory man-

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39. Judge Debra H. Goldstein, *Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both*, 56 ALA. LAW 294, 297 (Sept. 1995) (describing how discrimination claims are often brought). The two models for discrimination are disparate treatment and disparate impact. *Id.* Disparate treatment involves a claim that an employer intentionally discriminated against an employee based on the employee's race, sex, religion, or national origin. *Id.* Disparate impact arises when an employee claims that an employer's facially neutral employment practice burdens one group of persons more than others unnecessarily. *Id.*

40. *See* William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 539 (2007) ("The Court [in *Wara's Cove Packing Co. v. Antonio*] held that in order to establish a prima facie case of disparate impact, the plaintiffs would have the burden of identifying the specific employment practice thought to be responsible for the disparate impact."); *see also* Judge Debra H. Goldstein, *Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII*, or Both, 56 ALA. LAW. 294, 297 (1995) (describing the burden of production of evidence in disparate impact cases).

41. William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS 529, 539 (2007) ("Once identified, plaintiffs then had to demonstrate specifically how the employment practice disparately impacted a group protected by Title VII.").

42. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (finding sufficient evidence to uphold the jury's finding of intentional age-based discrimination, based in part on plaintiff establishing a prima face case of discrimination).

ner predicated on race, sex, religion or national origin.[43] In most discrimination cases, the defendant makes a motion for summary judgment. If the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" then a summary judgment is appropriate.[44] Most of the time direct evidence of intent is unavailable and the plaintiff is left with circumstantial evidence that must provide for an inference of discrimination.[45]

In 1973, The Supreme Court established a three-part, burden-shifting framework in order to determine whether or not to issue a summary judgment in such cases where only indirect evidence is available.[46] First,

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43. Byrne v. Wash. St. Univ., No. CV-03-246-RHYW, 2007 U.S. Dist. LEXIS 65412, at *10 - *11 (E.D. Wash. Sept. 5, 2007) (describing how a plaintiff must offer direct or indirect evidence of discriminatory intent in accord with the *McDonnell Douglas* framework). It is important to note the defendant's argument that regardless of the *McDonnell Douglas* framework, the plaintiff falls short of showing a *prima facie* case of retaliation and unlawful discrimination. *Id.* "Defendant asserts that Plaintiff cannot show that it took any adverse employment action against her. Specifically, Defendant argues that because the tenure process was still in the review stage when Plaintiff submitted her termination notice, Plaintiff cannot show a final adverse employment action against her." *Id.* at *11.

44. FED. R. CIV. P. 56(c).

> Serving the Motion; Proceedings.
> The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.*

45. Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1116 (1988) (describing the reason why the Supreme Court established the three-part burden-shifting framework). Under this framework, introduced in *McDonnell Douglas Corp. v. Green*, the plaintiff must proffer more than mere indirect proof of disparate treatment in order to prevail in a claim for employment-based discrimination. *Id.* As per the new test, the plaintiff must first establish a prima facie case of discrimination, which may be built upon circumstantial evidence of disparate treatment. *Id.* If the plaintiff can show that the defendant's motive for its practice cannot be explained by legitimate, non-discriminatory goals, a presumption arises in the plaintiff's favor. *Id.* at 1117. Under the second part of the test, the defendant may rebut the presumption by presenting such a legitimate goal. *Id.* Finally, the plaintiff is then afforded a "full and fair opportunity" to demonstrate that the presented legitimate goal is a mere pretext for discriminatory purposes. *Id.* at 1118.

46. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (creating the three-part burden-shifting framework).

> The complainant of a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he

"Under the *McDonnell Douglas* framework, unlawful discrimination is presumed if the plaintiff can show that (1) she belonged to a protected class; (2) she was performing according to her employer's legitimate expectation; (3) she suffered an adverse employment action; and (4) other employees with qualifications similar to her own were treated more favorably."[47] Second, even if the plaintiff establishes a prima facie case and a presumption is created, the defendant may rebut the presumption by showing a legitimate, non-discriminatory reason for the employment action.[48] The defendant does not have to show that there was no discriminatory motive, just that there was a legitimate, non-discriminatory reason.[49] Third, if the defendant meets this burden then the burden shifts

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was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* (footnote omitted).

The Court however pointed to the reality that many Title VII cases will vary across the board and that the "specification above of the prima facie proof required from respondent is not necessarily applicable" in every aspect to different sorts of circumstances. *Id.* at 802 n.13.

47. *Byrne*, 2007 U.S. Dist. LEXIS 65412 at *10 - *11 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000)) (describing the first step of the burden-shifting framework while applying the *McDonnell Douglass* framework to find that the plaintiff had established a prima facie case of age discrimination under the ADEA). "In a disparate treatment claim, Plaintiff must offer indirect evidence of discriminatory intent." *Id.*

48. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (refining the *McDonnell Douglas Corp.* decision by detailing the utility of establishing a prima facie case during litigation).

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. *Id.* (quoting Teamsters v. United States, 431 U.S. 324, 358 and n. 44 (1977)).

Furnco Construction Corps. v. Waters illustrates the important function of establishing the prima facie case by raising an inference of discrimination due to the fact that we presume these acts, if otherwise unaccounted, are probably based on the contemplation of impermissible factors. 438 U.S. 567, 577 (1978); see *Tex. Dep't of Cmty. Affairs*, 450 U.S. at 255.

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. *Id.*

49. Bd. of Trs. v. Sweeny, 439 U.S. 24, 25 (1978) (focusing on the Court's *ratio decidendi* for vacating the trial court's judgment).

> While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a

back to the plaintiff to prove, by a preponderance of the evidence, that the defendant's reasons are in reality pretext for a discriminatory practice.[50]

The Supreme Court in *McDonnell Douglas* introduced the pretext framework and in 1989, the Court introduced the mixed motive framework.[51] In *Price Waterhouse v. Hopkins*, the Supreme Court adopted an evidentiary rule to supplement its decision in *McDonnell Douglas*, for use when an employer knowingly uses an impermissible criterion as one of the causes, not the sole cause for its decision.[52] The plaintiff would be allowed to bring a mixed-motive claim only if he or she were able to

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significant distinction between merely "[articulating] some legitimate, nondiscriminatory reason" and "[proving] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters,* we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. *Id.*

50. *McDonnel Douglas Corp.*, 411 U.S. at 802–3 (analyzing the three-part burden-shifting test formulated in the holding).

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination. *Id.*

51. Dean v. Am. Fed'n. of Gov't Employees Local 476, 402 F. Supp. 2d 107, 110–12 (D.D.C. 2005) (explaining the different ways to bring an employment discrimination cause of action).

[T]he Supreme Court set out four factors to consider when determining whether multiple entities should be considered as a single employer. Pursuant to the *Radio Technicians* test, a district court is to analyze: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership of financial control. *Id.* (citing Radio & Television Broad. Technicians Local 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965)).

52. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 261–62 (1989) (O'Connor, J., concurring).

The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981), for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered. *Id.*

produce direct evidence of an employer's use of impermissible criterion.[53] In 2003, the Court continued to modify this framework:

> The Supreme Court's unanimous 2003 decision in *Desert Palace, Inc. v. Costa*, however, radically altered the contours of the mixed motive framework and . . . created some confusion regarding the continued viability of the *McDonnell Douglas* pretext framework. Before *Desert Palace,* courts considered direct evidence of unlawful discrimination a prerequisite to proper use of the mixed motive framework. In the absence of direct evidence, plaintiffs with only circumstantial evidence were relegated to proceeding under *McDonnell Douglas'* pretext framework. *Desert Palace,* however, makes clear that no such heightened evidentiary requirement exists under the 1991 amendments to Title VII.[54]

The mixed motive plaintiff now only needs to present sufficient evidence that an adverse employment action was motivated by illegal discrimination.[55] However, the Fourth Circuit stressed in *Hill v. Lockheed Martin* the following:

> Regardless of the type of evidence offered by the plaintiff as support of her discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed motive or single-motive theory, "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[56]

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53. *See id.* at 276 (establishing the allowance of a mixed motive theory only if direct evidence is available). "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* This standard helps to clearly identify situations in which Title VII's deterrent effect is enacted. *Id.*

54. Sawicki v. Morgan State Univ., No. WMN-03-1600, 2005 U.S. Dist. LEXIS 41174, at *18–19 (D. Md. Aug. 2, 2005) (citation omitted) (footnote omitted) (summarizing the impact of *Desert Palace* on the adjudication of discrimination cases). It is noted that there was still confusion among federal district courts, however, concerning whether or not mixed motive and pretext frameworks existed since there was no substantive difference between the evidentiary burdens of the two frameworks. *Id.* at *20.

55. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284–85 (4th Cir. 2004) (en banc), *cert dismissed*, 543 U.S. 1132 (2005) (explaining the changes brought about by *Desert Palace*). Historically, for a plaintiff to proceed under a mixed motive theory, the plaintiff had to proffer direct evidence of the alleged discrimination. *Id.* at 284. After *Desert Palace*, the Supreme Court ruled that the plaintiff only needed to provide "sufficient evidence." *Id.* at 285. "Sufficient evidence" could be comprised of any direct or circumstantial evidence that would allow a reasonable jury to conclude that the discriminatory action motivated an employment practice. *Id.*

56. *Id.* at 286 (emphasizing the need for intentional discrimination under either a mixed motive or single motive theory). The theory of agency is used to determine whether

A. *Precedent for Using "Academic Deference" Doctrine*

One year after the *McDonnell Douglas* decision, the Court of Appeals for the Second Circuit in *Faro v. New York University* adjudicated a gender discrimination claim brought against a university and affirmed the denial of a preliminary injunction.[57] The court found that no gender discrimination existed in the denial of a tenure position and affirmed the district court, but the more startling and perhaps disturbing part of the case was the court's opinion:

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally." All this information she would obtain "through extensive discovery, either by the EEOC or the litigant herself." This argument might well lend itself to a *reductio ad absurdum*[58] rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give "due process" to all contenders, regardless of sex, to advance their "I'm just as good as you are" arguments. But such a procedure would require a discriminating analysis of the qualifications of each candidate for hiring or

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an employer will be held liable for intentional discrimination. *Id.* at 287. The Court has defined "the limits of such agency as encompassing employer liability for the acts of its employees holding supervisory or other actual power to make tangible employment decisions." *Id.*

57. Faro v. N.Y. Univ., 502 F.2d 1229, 1230 (2d Cir. 1974) (describing the previous judicial history that this gender discrimination case has gone through prior to appearing in the United States Court of Appeals for the Second Circuit, where the judge affirmed the district court's judgment to deny a preliminary injunction).

58. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1044 (11th ed. 2003) (defining *reductio ad absurdum* as "disproof of a proposition by showing an absurdity to which it leads when carried to its logical conclusion").

> advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.[59]

A deeper analysis of these statements will be made in the next section, but for now it is sufficient to say that in some respect the court is right to acknowledge potential difficulties in adjudicating these cases. On the other hand, the court misunderstands its necessary role in providing an avenue of redress, even if that avenue may present some impracticalities. The passage of time and the changes made by the Supreme Court to the adjudication of Title VII employment discrimination cases has not wholly changed this overly deferential predisposition by courts.

In 2000, the Court of Appeals for the Second Circuit heard yet another gender discrimination case involving tenure in *Weinstock v. Columbia University*.[60] In this case, the trial court had granted the defendant summary judgment on the plaintiff's sex discrimination claim on the ground that she had "failed to produce any evidence to establish a triable issue of fact as to the pretextual nature of Columbia's legitimate, non-discriminatory reason for denying her tenure."[61] Moreover, the court did not cite "academic deference" directly, but it was present. The case of *Weinstock v. Columbia University* involved Shelley Weinstock, an Assistant Professor in the Chemistry Department at Barnard College.[62] Barnard College was the Columbia affiliated undergraduate college that denied Weinstock tenure.[63] The court used the framework set out by the Supreme Court: "When a college or university denies tenure for a valid non-discriminatory reason, and there is no evidence of discriminatory intent, this Court

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59. *Faro*, 502 F.2d at 1231–32 (citation omitted) (analyzing the complexity of having legislation passed that would require a declaratory judgment to hire employees and/or offer them any advancement within the organization and arguing that it would remove all the intangible characteristics that go into the hiring and promotion process).

60. *Weinstock*, 224 F.3d 33, 37 (2d Cir. 2000) (summarizing that Columbia University denied tenure to Shelley Weinstock). This case is an appeal from summary judgment granted to the defendant. *Id.* The court reviewed Weinstock's contentions that there was "gender stereotyping, procedural irregularities in the ad hoc committee process and disparate treatment." *Id.*

61. *Id.* at 40 (explaining that Weinstock appealed from the summary judgment granted). The United States Court of Appeals for the Second Circuit reviewed the district court's grant of F.3d summary judgment de novo. *Id.*

62. *Id.* at 38 (mentioning that "Weinstock was employed by Barnard College, an undergraduate college and affiliate of Columbia, as an Assistant Professor in its Chemistry Department from July 1985 to June 1994"). She became eligible for tenure during the 1992-1993 academic year. *Id.*

63. *Id.* (stating that Weinstock was an Assistant Professor in Barnard College's Chemistry Department for nine years).

will not second-guess that decision."[64] The court went on to acknowledge that "departures from procedural regularity . . . can raise a question as to the good faith of the process where the departure may reasonably affect the decision."[65] In the final outcome, the court, in a 2-1 decision, affirmed the summary judgment in favor of the defendant university and dismissed the plaintiff's argument, equating those arguments with advice from David Copperfield's mentor, Mr. Micawber, that the court should let the case move forward in the hope that "something will turn up."[66] The opinion of the court on its surface would appear to be free and clear of academic deference, but upon closer inspection the same predisposition that was disturbingly present in *Faro* was operating behind the curtain of judicial inquiry again.

B. *Precedent Against the Academic Deference Doctrine*

Not all courts have had such a strong predisposition towards the doctrine of academic deference. In 1972, the Court of Appeals for the Third Circuit in *Kunda v. Muhlenberg College*[67] again articulated the academic deference doctrine:

> [C]ourts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and ten-

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64. *Id.* at 43 (referencing Bickerstaff v. Vassar Coll., 196 F.3d 435, 455–56 (2d Cir. 1999)) (explaining that Columbia's "legitimate, non-discriminatory reason for denying Weinstock tenure was that she did not meet the standard for scholarship uniformly applicable within the University"). The committee reviewed Weinstock's publications and research papers and determined that they were not sufficient to warrant tenure. *Id.*

65. *Weinstock*, 224 F.3d at 43 (explaining the role of procedural irregularities in determining whether discrimination may have occurred). A plaintiff has presented triable issues of fact where sufficient evidence supports an inference of discrimination as well as an inference that the employer's stated reasons for employment decisions are false. *Id.* In Weinstock's case there were no irregularities in the procedure. *Id.* There was no doubt that the tenure denial was a valid decision by the College. *Id.* The court explains further that the "general sentiment of the Columbia Chemistry Department was that Weinstock's work was unimaginative and that her publication record was weak . . . . " *Id.*

66. *Id.* at 45 (mocking the plaintiffs arguments).

> Notwithstanding the dissent's quixotic efforts to breathe life into this case, we cannot fault the district court for aborting it by granting a motion for summary judgment. The very purpose of summary judgment is to weed out those cases that are destined to be dismissed on a motion for a directed verdict, or as it is now termed, a motion for judgment as a matter of law. Plaintiff would have us follow the advice of David Copperfield's mentor, the amicable Mr. Micawber, and let matters proceed in the hope that "something will turn up." This notion is inconsistent with the text and policy behind Rule 56 of the Federal Rules of Civil Procedure, which was intended to prevent such calendar profligacy. *Id.* (citation omitted).

67. 621 F. 2d 532 (3d Cir. 1980).

> ure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges. In the cases cited by appellant in support of the independence of the institution, an adverse judgment about the qualifications of the individual involved for the position in question had been made by the professionals, faculty, administration or both.[68]

However, the court affirmed the trial courts decision to award the plaintiff reinstatement, with back payment and tenure.[69] The court found that the defendant's argument to deny tenure for failure to obtain a master's degree was pretext due to the fact that the college had failed to inform her that a master's degree was a prerequisite for tenure and she had satisfied alternatives for a master's degree.[70] The court explained that "academic institutions and decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination."[71] The court then cited the legislative history of Title VII:

> The legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements. When originally enacted, Title VII exempted from the equal employment requirements educational institution employees connected with educational activities. This exemption was removed in 1972. The need for coverage is amply set forth in the Report of the House Committee on Education and Labor.
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> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of the educational institution employees primarily teachers from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of

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68. Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980) (summarizing the academic deference doctrine).

69. *Id.* at 534 (affirming the decision of the trial court). The court found that in failing to promote Kunda and denying her tenure, the college had discriminated on the basis of sex. *Id.*

70. *Id.* at 539–40 (eleborating on defendant's argument "that plaintiff failed to establish a prima facie claim"). The plaintiff was never "counseled that the failure to obtain a masters degree would preclude her from being considered for tenure." *Id.* at 540. "The [trial] court found that plaintiff had satisfied both alternatives to the terminal degree requirement for promotion, in that she had the scholarly equivalent of the master's degree and recognized achievement in her field." *Id.* at 539.

71. *Id.* at 545.

> employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.
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> When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGree, it was found that the primary factors determining the hiring of male faculty members were prestige and compatibility, but that women were generally considered to be outside of the prestige system altogether.
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> The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.[72]

In 2005, the Federal District Court of Connecticut in *Kahn v. Fairfield University*.[73] addressed academic deference in tenure decisions and explained one way to review the record for discrimination in a tenure decision case.[74] The university's legitimate, non-discriminatory reasons in this case were typical of the subjectivity involved in tenure decisions: 1) the university "doubted Kahn's ability to lead effectively as well as her

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72. *Id.* at 549 (discussing minority and gender discrimination in the educational workplace environment and how certain intangible qualities such as prestige and compatibility were considered in hiring faculty members; however, minority and women candidates were usually considered unqualified based on the lack of the intangible qualities).

73. 357 F. Supp. 2d 496 (D. Conn. 2005).

74. Khan v. Fairfield Univ., 357 F. Supp. 2d 496, 501–02 (D. Conn. 2005) (articulating a method for inquiry of discrimination in tenure cases). Plaintiffs must satisfy an initial burden of establishing a prima facie case of discrimination. *Id.* "[T]he plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she experienced an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Id.* Following the establishment of a prima facie case, "the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for its actions." *Id.*

ability to articulate a vision for the university"; and 2) "Kahn's inability to provide the sort of academic leadership and background required of the Dean of the College of Arts and Sciences."[75] The court was insightful in its scrutiny of those arguments:

> While Search Committee members made conclusory statements that Kahn was "arrogant" or "difficult to work with," they had difficulty providing a basis for such conclusions. For example, Committee member Katherine Schwab, Associate Professor of Art History, when asked to explain why she found working with Kahn "frustrating," could point only to Kahn's requests that Schwab gather information regarding her department in "only a few days, usually less than a week." Given the imprecise nature of the University's purported legitimate, non-discriminatory reasons, the evidence provided by Kahn to support a factual finding of pretext is sufficient to defeat a motion for summary judgment.
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> . . . The job requirements included a doctorate degree as well as "an established reputation as an academician."
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> . . . [Khan] had published six articles and book chapters. In contrast, the man first offered the position had served as a tenured professor at another institution for ten years, published four books and twenty articles and book chapters.
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> . . . [Khan] dispute[s] the true level of importance placed on the candidates' academic records by the Search Committee. Kahn argues that the retrospective emphasis on the candidates' academic records serves as pretext for its discriminatory animus based on gender.
>
> . . . [S]ummary judgment is not appropriate. . . . A jury is free to credit or discredit testimony by University administrators and members of the Search Committee.[76]

It appears that while the majority of courts articulate the academic deference argument, some move past it and others do not. Perhaps it would be more appropriate to drop this preamble from court reasoning and look just to the merits of each case before deciding whether or not summary judgment is appropriate.

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75. *Id.* at 505–06 (analyzing the arguments of the university). While universities are permitted to use subjective criteria in the hiring process, applicants are allowed to challenge the credibility of the resulting decision's rationale. *Id.* at 505.

76. *Id.* at 506–07 (citations omitted) (scrutinizing the arguments of the university). Kahn was able to create a material question of fact regarding the pretext. *Id.*

C. *Are Women Really Being Treated Differently?*

Of course, academic deference has hurt all plaintiffs in tenure discrimination cases with universities, but the numbers show an interesting trend that women have been substantially affected by this argument. A 1983 study showed that women were passed over for tenure in favor of men with similar qualifications and that gender discrimination played no small part in these cases.[77] According to the AAUP's 2006 Faculty Gender Equity Indicators, there has been slow improvement:

> [I]n 2004, women earned more than half of all graduate degrees: 59% of Master's degrees, 49% of first professional degrees, and 48% of doctorates. Among U.S. citizens, 53% of PhD recipients in 2004 were women.
>
> . . . [I]n 1972, women made up 27% of all faculty in higher education. By 2003, women comprised 43% of all faculty, 39% of full-time and 48% of part-time faculty. Women occupied about 9% of full professor positions at four-year colleges and universities in 1972, and still only 24% of all full professors in 2003.[78]

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77. Elizabeth Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J.L & EDUC. 319, 321 (1986) (citing ELIZABETH KLUGER, SEX DISCRIMINATION OF THE TENURE SYSTEM IN AMERICAN COLLEGES AND UNIVERSITIES: AN ECONOMIC AND LEGAL ANALYSIS (1983)) (summarizing the results of a study conducted in 1983).

> Other scholars have challenged this premise by emphasizing that the out-of-work lifestyles of women are the main impediment to their progress. The argument is that because women are most often the primary caretakers of the home and children, and the tenure decision often comes up in a woman's career during her prime child-bearing years, women devote a greater percentage of their time than men to outside activities and, therefore, have less time to devote to their work. However, it is my view that this claim just demonstrates that women are indirectly discriminated against by virtue of the role placed on them by society. *Id* at 321 n.10.

See RICHARD A. LESTER, REASONING ABOUT DISCRIMINATION 152-56 (Princeton Univ. Press 1980) (discussing women and the tenure decision).

> Another factor that tends to lead to inflated hiring and promotion goals, especially for tenured faculty in universities emphasizing research contributions and advanced teaching, is the differential effect that marriage and children have on men and women faculty in terms of investment in professional capability and reputation. . . . . [S]tudies show that, as a general proposition with some notable exceptions, marriage has tended to have an adverse influence on women's career progress, mainly because of the time and energy they devoted to home responsibilities at particular periods in their careers. Single women, on the other hand, have progressed in their academic careers in much the same pattern as married male faculty. *Id.* at 154. (footnote omitted).

78. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 5 (2006), http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf (footnotes omitted) (reporting the trends in women's graduate education and the lack

Another point to note and perhaps more indicative of tenure specifically is that women earned forty-one percent of the tenure-track jobs at doctoral universities compared to fifty-nine percent earned by men.[79] However, during 2005-2006, women only held twenty-six percent of the tenured positions, while men held seventy-four percent at doctoral universities.[80] In summary, women received fifty-three percent of PhDs and earned only forty-one percent of tenure-track jobs at doctoral universities in 2004-2006; currently, women hold only twenty-six percent of the tenured positions at these universities.[81] It is possible that the percentages only provide for an inference of discrimination and this same study noted that without more details it is impossible to determine this because of the following:

> At some schools women who seek tenure receive it at the same rates as men; at other schools, this is not true. . . . One needs to ask for the numbers [at each campus] of both women and men who apply for tenure and then compare those to the numbers who received it. It is more difficult to get numbers for those faculty who left academia before applying for tenure. . . . In the absence of a longer-term longitudinal analysis, following faculty members from initial hire through tenure, it is impossible to say.[82]

III. LEGAL ANALYSIS

Recent court precedent, in employment discrimination cases outside academia, has indicated that summary judgment and judgment as a matter of law, the common enemies of plaintiffs in tenure cases, should not be granted when employers' defenses are vague and subjective or when employers' defenses heavily rely on testimony of interested parties.[83]

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of expected corresponding faculty appointments). "With this extraordinary expansion of women's enrollment in graduate programs, one would expect women's presence on university and college faculties to follow suit. Women's integration into the faculty ranks, however, has occurred much more slowly." *Id.*

79. *Id.* at 9 (comparing the statistics between women and men who hold tenure-track positions at doctoral universities for 2005-2006).

80. *Id.* at 8, 10 (noting the disparate number of women in tenure positions at doctoral universities). "It is at doctoral universities that the tenure disparity is most striking, however: only one-fourth of tenured faculty there are women." *Id.* at 10.

81. *Id.* at 5, 8–10 (summarizing the number of women earning PhDs, tenure-track jobs, and holding tenured positions at doctoral universities).

82. *Id.* at 15 (acknowledging that establishing a direct cause and effect relationship between gender and tenure is a difficult task to accomplish because of the lack of available data and analysis).

83. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 5 (2006) ("[U]nder the leading recent Supreme court precedent on proof

This would appear to be invaluable precedent to a plaintiff in a tenure case. However, "[a] university's assertion that its actions were based on unsatisfactory scholarship, teaching, or service is usually sufficient to justify deference to the university."[84] The subjective and self-interested testimony of the university evidently does not apply in this employment field.

A. *Why the Difference?*

The Court of Appeals for the Second Circuit in *Zahorik v. Cornell University*[85] supplied five reasons for distinguishing between tenure decision and regular employment decisions. The first put forth by the court was as follows:

> [T]enure contracts entail commitments both as to length of time and collegial relationships which are unusual. Lifetime personal service contracts are uncommon outside the protected civil service but even there difficulties in collegial or professional relationships can be eased by transfers among departments. Professors of English, however, remain in that department for life and cannot be transferred to the History Department.[86]

This reason is not convincing. The decision to grant a professor tenure does represent a long-term employment commitment, but tenured faculty are not untouchable and can be dismissed for gross misconduct, moral turpitude, negligence, or institutional financial emergencies.[87] Also, not-

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of employment discrimination, summary judgment and [Judgement as a matter of law] are inappropriate where employer's defenses are value and subjective or where employers' defenses rely too heavily on the testimony of interested parties."). Moss references various cases in different circuits, and uses them to explain why courts are rejecting summary judgment "where a jury could find discriminatory bias in criticism that only indirectly, not explicitly, related to the plaintiff's group membership." *Id.* at 14.

84. Michelle Chase, Comment, *Gender Discrimination, Higher Education, and the Seventh Circuit: Balancing Academic Freedom with Protections Under Title VII, Case Note:* Farrell vs. Butler University, 22 WIS. WOMEN'S L.J. 153, 159 (2006) (citing WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, 129–31 (4th ed., Jossey-Bass Publishers 2008) (1980) (stating many situations inwhich the courts should give deference to the university decision-makers judgment).

85. 729 F.2d 85 (2d Cir. 1984).

86. Zahorik v. Cornell Univ., 729 F.2d 85, 92 (2d Cir. 1984) (discussing the long-term nature of a tenure contract).

87. TERRY L. LEAP, TENURE DISCRIMINATION AND THE COURTS 59–60 (2d ed. 1995) (explaining that tenure does not make a professor untouchable). These points of contention were made by the Second Circuit in *Zahorik*. *Id.* The article identifies duress linked to improper behavior as another cause for losing tenure. *Id.* at 60. *See generally* Jerome W. D. Stokes & Christopher J. Reese, *Tenure at Harvard Med: No Immunity from Ill Treatment,* 18 J.L. & EDUC. 583 (1989) (discussing cases in which tenured professors were fired

ing that a tenured position is long-term and extremely important and should therefore require less oversight also seems strange. The normal stream of logic would lead to the conclusion that the more important a position, especially at state universities where tax payers are required to subsidize a professor for a potential life-time, the more oversight and transparency is needed to ensure the absence of impropriety.

The *Zahorik* court next made a distinction between tenure decisions and other employment decisions on the basis of the non-competitive nature of tenure decisions. The court's second distinguishing characteristic was:

> [A]cademic tenure decisions are often non-competitive. Whereas in other employment settings a decision not to hire one person is usually the flip side of a decision to hire another, a decision to grant or not grant tenure to a particular person does not necessarily affect the future of other tenure candidates. In some cases, of course, the number of tenure slots is fixed and an affirmative tenure decision necessarily excludes other candidates. Even in such cases, however, the effect on those excluded is uncertain since the immediate alternate candidates have no assurance that they would have received tenure had a slot been available. For the same reason, a denial of tenure to one person does not necessarily lead to tenure for another. The number of tenure slots available may be flexible and, even where fixed, there may be no pressing need to fill vacancies since teaching chores can be discharged by non-tenured faculty.[88]

This reason is also unconvincing. The court in *Zahorik* notes that there are universities with a quota on the percentage or number of tenure positions, thus making them competitive.[89] One professor noted the competitive nature of tenure positions:

> In addition to a faculty member's scholarly and teaching abilities, tenure decisions may hinge on a candidate's academic specialty and department teaching and research needs. A department with a large tenured faculty may limit the number of faculty it will tenure to ensure there will be room for newer and more promising faculty. This

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for unbecoming conduct and in which courts upheld the dismissals based on judicial deference to university decisions); *see also* Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 420, 422 (1983-1984) (expanding the reasons that tenured faculty can be terminated to include incompetence, immorality, neglect of duty, and insubordination).

88. *Zahorik*, 729 F.2d at 92 (discussing how the availability of tenure positions differs from traditional job availability in other employment sectors).

89. *Id.* (opining that most tenure decisions are non-competitive, but some are not). "[A]cademic tenure decisions are often non-competitive." *Id.*

> can pose almost insurmountable barriers to tenure when there is an abundant supply of qualified faculty in an academic specialty. Under these conditions, a department can establish rigorous promotion and tenure standards that reflect the highly competitive, survival-of-the-fittest labor markets. Thus, tenure decisions may be competitive although the identities of specific competitors may be unknown to the untenured professor whose job is on the line.[90]

Also, there is substantial evidence that the vast "majority of new full-time faculty hires since 1990 have been off the tenure track" thus making the tenure track job more scarce, necessarily making the granting of tenure competitive.[91] In fact, the number of full time tenured faculty members nationally has dropped from thirty-three percent in 1989 to twenty-four percent in 2003.[92] If tenure decisions are more like regular labor market job opportunities, that is that they are in high demand but low and lowering supply, this particular point of the courts rationale would be deemed moot.

As a third distinction the *Zahorik* court focused on the decentralization involved in tenure decisions. The third distinguishing characteristic put forth by the court was:

> University tenure decisions are usually highly decentralized. The decision at the departmental level is of enormous importance both because of the department's stake in the matter and its superior familiarity with the field and with the candidate. Authority to overrule departmental decisions may exist, particularly in the case of affirmative decisions since the downside risk of affirmative decisions is greater than that of negative ones, but the deference given to departmental decisions grows as a case travels up the chain of authority.[93]

The highly decentralized nature of tenure fails to distinguish tenure as something necessitating special treatment. The *Zahorik* court highlighted

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90. TERRY L. LEAP, TENURE DISCRIMINATION AND THE COURTS 60 (2d ed. 1995) (explaining that tenure decisions are more competitive than it may appear from the outside). Some schools have maintained quotas on the number of faculty that are tenured. *Id.* Additionally, a department that contains a large number of tenured faculty members may limit tenure to make room for fresher more skilled faculty. *Id.*

91. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 8 (2006), http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf (interpreting the findings of Schuster and Finkelstein about most of the new faculty hires since 1990 being non-tenure track positions).

92. *Id.*

93. *Zahorik*, 729 F.2d at 92 (discussing the importance of departmental discretion involved in tenure decisions).

the decentralized nature of tenure decisions,[94] but when compared with general employment decisions the decentralized nature of tenure is not unique. The decision to grant tenure can best be compared with the decision to promote, in general, employment decisions. These decisions are usually decentralized. Managers make evaluations of the promotee and provide recommendations up the chain. The chain of leadership examines the performance and the recommendations, usually with great weight given to the front-line mangers' assessment. The ultimate decision to promote in the general employment environment is just as decentralized as the one made in tenure decisions. If that were the case then this rationale separating tenure from regular employment decisions would cease to be a pillar on which to build the foundation of academic deference.

As its fourth distinguishing characterstic the *Zahorik* court discussed the types of factors typically considered in tenure decisions:

> The particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well-known scholars and up-and-coming faculty all must be taken into account. The individual's capacities are obviously critical. His or her teaching skills intelligence, imagination, willingness to work, goals as a scholar and scholarly writing must be evaluated by departmental peers and outsiders asked to render advice. The evaluation does not take place in a vacuum, however, but often in the context of generations of scholarly work in the same area and always against a background of current scholarship and current reputation of others. Moreover, universities and departments within them occupy different positions in the academic pecking order and the standard of "excellence" may vary widely according to the ability to attract faculty.[95]

The number of factors under consideration in tenure decisions is also not a distinguishing factor. Tenure decisions are not the only employment situation where there are a high number of factors involved. Unofortunately, the courts have utilized this rationale and in complex cases, courts are reluctant to examine the merits of factors such as different scholarly views because of a feeling of inadequacy in the particular academic field.[96] On the surface, this appears to be a legitimate ratio-

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94. *Id.* (highlighting the decentralized nature of tenure decisions). "The decision at the departmental level is of enormous importance both because of the department's stake in the matter and its superior familiarity with the field and the candidate." *Id.*

95. *Id.* at 92–93 (discussing the multitude of factors inherent in evaluating candidates for tenure).

96. *Id.* at 93 (articulating the courts' reluctance to review the merits of a tenure decision). "Where the tenure file contains the conflicting views of specialized scholars, triers of

nale, except for the fact that other employment fields, where the evaluation of performance entails highly specialized knowledge and is discretionary, have not intimidated federal courts.[97] The courts have ruled on discrimination claims in fields such as accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry.[98] If the courts are

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fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion." *Id.*

97. Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 6 (2006) (explaining that courts, from the Supreme Court down to lower courts, have taken discrimination cases that involve other highly specialized fields).

98. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 231 (1989) (describing a case in which a "senior manager" of an accounting firm challenged the partners' refusal to re-propose her candidacy for the position of "partner"); *see also* W. Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (explaining how flight engineers and pilots challenged mandatory retirement age). "[U]nder the FAA's under-age-60 rule for pilots, Criswell and Starley applied for reassignment as flight engineers. Western denied both requests, ostensibly on the ground that both employees were members of the company's retirement plan which required all crew members to retire at age 60." *Id.* at 405. "For the same reason, respondent Ron, a career flight engineer, was also retired in 1978 after his 60th birthday." *Id.*; *see also* Feingold v. New York, 366 F.3d 138 (2d Cir. 2004) (discussing an administrative law judge challenging termination). "Feingold alleged that while employed as an Administrative Law Judge ('ALJ') by the New York State Department of Motor Vehicles ('DMV') he was subjected to disparate treatment and a hostile work environment on the basis of race, religion, and sexual orientation, and was retaliated against for complaining of such discrimination." *Id.* at 143; *see also* Mandell v. County of Suffolk, 316 F.3d 368 (2d Cir. 2003) (explaining how a police captain/deputy inspector challenged various denials of promotion). "On four separate occasions between 1997 and 1999, Gallagher declined to promote plaintiff to the rank of an inspector . . . . These promotions went to Catholic officers instead." *Id.* at 376; *see also* Terry v. Ashcroft, 336 F.3d 128 (2d Cir. 2003) (explaining a federal "special agent" challenging denial of promotions). "In October 1992, the INS published Vacancy Announcement 92–59 for the position of supervisory criminal investigator . . . . Plaintiff was neither placed on the [Best Qualified List] nor qualified for the position." *Id.* at 134. "We find that Terry has presented sufficient evidence to make out a prima facie case of discrimination as to his non-selection for Vacancy 92–59" *Id.* at 138; *see also* Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81 (2d Cir. 1996) (explaining how a computer programmer challenged her termination). "[T]he district court further stated that the defendant had articulated a legitimate reason for terminating Chertkova – deficient performance – and that because plaintiff relied on conclusory allegations of discrimination, no genuine issue of material fact existed . . . ." *Id.* at 86. "From this decision, Chertkova appeals." *Id.*; *see also* EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (explaining how a "special projects engineer" challenged termination). "In June 1990 Ethan Allen laid off Hugh Pierce, a sixty-four year old man . . . . Immediately following the termination Pierce filed a discrimination claim with both the Vermont Attorney General's office and the EEOC, alleging that he was fired due to his age." *Id.* at 118; *see also* Brodsky v. Hercules, Inc., 966 F. Supp. 1337 (D. Del. 1997) (explaining how a chemist challenged denial of promotion and termination). "[B]rodsky filed a charge of discrimination with the Delaware Department of Labor ('DDOL') and with the Equal Employment

willing to venture into these highly specialized areas in order to determine if discrimination has occurred, then the deference given to universities where many of these fields are taught and professors tenured should cease as the court has established the precedent of adequate knowledge and expertise.

The final distinguishing characteristic put forth by the *Zahorik* court is the subjective nature of tenure decisions and the role of strongly held viewpoints in the decision process:

> [T]enure decisions are a source of unusually great disagreement. Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of tenure decisions than with employment decisions generally. As the present record amply demonstrates, arguments pro and con are framed in largely conclusory terms which lend themselves to exaggeration, particularly since the stauncher advocates on each side may anticipate and match an expected escalation of rhetoric by their opponents. Moreover, disagreements as to individuals may reflect long-standing and heated disputes as to the merits of contending schools of thought or as to the needs of a particular department. The dispersion of views occurs within departments themselves but is accentuated by the solicitation of opinion from students, faculty from other departments and faculty from other universities. Where a broad spectrum of views is sought and the candidate suggests certain persons as referents, a file composed of irreconcilable evaluations is not unusual.[99]

The court finally distinguishes tenure from other employment decisions by claiming they are a "source of unusually great disagreement."[100] However, as author Terry Leap points out: "[A]n examination of the

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Opportunity Commission ('EEOC'), alleging Hercules discriminated against him on the basis of his age and religion . . . . " *Id.* at 1342; *see also* Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 6–7 (2006) (summarizing note employment cases in highly specialized fields where federal courts have ruled including accounting partnerships, administrative law judgeships, law enforcement, engineering, computer programming, and hard sciences such as chemistry).

99. *Zahorik*, 729 F.2d at 93 (explaining why tenure decisions are different from other employment decisions).

100. *Id.* (explaining that tenure is a source of disagreement and thus different from other employment decisions). "Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of tenure decisions than with employment decisions generally." *Id.*

cases indicates that there is probably less disagreement among peer review committees, department heads, and other academic officers than is suggested in *Zahorick*."[101] This final point by the court is the launching pad for the court's assertion that it is virtually impossible to distinguish between competing views of scholarship.[102] For the Court, it is most likely impossible to distinguish between competing views of scholarship; however, this comment takes the position that there is no better reason to force universities to make clearly objective what they have, for so long wanted to keep entirely subjective.

IV. LEGAL ANALYSIS II.

The Civil Rights Act of 1964 granted institutions of higher education an exemption from Title VII.[103] However, in 1972 the autonomy seemingly ended and employment decisions of higher education became subject to judicial scrutiny.[104] Despite the changes in the law deferential treatment of universities continued and some courts even acknowledged that some peer review materials were not discoverable due to a qualified privilege of academic freedom.[105] Access to these materials can be vitally important in a Title VII claim, because the plaintiff has the burden of

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101. TERRY L. LEAP, TENURE DISCRIMINATION AND THE COURTS 61 (2d ed. 1995) (explaining that tenure decisions do not necessarily have great disagreement). When these disagreements do occur, it's usually at the university level within peer review committees, deans, and department heads. *Id.* Only rarely will the chief academic officer turn down a promotion or tenure decision in accordance with a faculty member when the tenure request or faculty member's promotion was bolstered by the departmental peer review committee. *Id.*

102. *Zahorik*, 729 F.2d at 93 (explaining that there is no common unit to judge scholarship).

103. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)) (exempting higher education from Title VII). The Act did not apply to "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." *Id.*

104. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)) (bringing higher education institutions under Title VII coverage). It continued to exclude any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." *Id.*

105. Gray v. Bd. of Higher Educ., 692 F.2d 901, 907 (2d Cir. 1984) (adhering to the AAUP's approach of qualified privilege that protects peer review materials from disclosure at universities' request). The court acknowledged that AAUP policies have been used by other courts to resolve various educational issues. *Id.* Their policy indicates that an instructor who is denied reappointment or tenure must receive a written statement outlining the reasons for the decision and be allowed to utilize the institution's grievance procedures in order for individual votes to be covered by qualified privilege. *Id.*

proving the intentional discrimination throughout the case.[106] The decision of whether or not to grant the discovery of peer review materials is vital to the plaintiff's case and can often forecast the outcome.[107]

Federal Rule of Civil Procedure 26 governs discovery in discrimination cases and generally allows the discovery of any matter, not privileged, that is relevant.[108] However, many courts reduced this rule and have denied the discovery of relevant peer review materials by acknowledging a qualified privilege to universities.[109] The courts that have done so include

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Recognizing the latitude that must be given the institution acting through its faculty, but balancing academic freedom against standards of fairness, the Statement seeks to take into account the confusion that can occur between the limited rights of probationary faculty members and the due process rights guaranteed to tenure faculty, but nevertheless determines that reasons must be given the faculty member denied reappointment or tenure who requests them. *Id*

106. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518–19 (1993) (holding that the plaintiff must prove that the employer's reason was a pretext and that the employer intentionally discriminated against her). "It is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519. The dissent argued that the employer should be required to prove that their reasons for discrimination are credible, but the Court simply required the defense to respond to plaintiff's prima facie case. *Id.*

107. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983) (recognizing the near impossibility of determining intentional discrimination because a plaintiff will usually not have evidence of employer's mental process). "The law often obliges finders of fact to inquire into a person's mental state." *Id.* at 716. However, though the Court acknowledges that mental state is a fact like any other in a case, the plaintiff is required to show that the defendant's reasons for discrimination are not credible. *Id.*; *see also* Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981) (requiring a finding of intentional discrimination).

108. FED. R. CIV. P. 26(b)(1) (stating that if the plaintiff may obtain the requested materials by more convenient means or if the requests are unduly burdensome or expensive, the court can limit the plaintiff's right to discovery). "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense-including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable material." *Id.* Relevance is defined as anything that aids in determining the existence of any fact. FED R. EVID. 401.

109. *See* Trammel v. United States, 445 U.S. 40, 47 (1980) (acknowledging Congress's intent not to congeal the law of privilege). Instead, Congress intended "to leave the door open to change." *Id.* In deciding whether to recognize a new privilege, courts should weigh the need for truth against the importance of the proposed privileged relationship; *see also In re* Dinnan, 661 F.2d 426, 428–29 (5th Cir. 1981) (discussing history of common law privileges). Federal evidentiary privileges include the attorney-client privilege, the privilege of one spouse not to testify against the other, the physician-patient privilege, and the work-product privilege. *Id.* The Federal Rules of Evidence authorize federal courts to recognize new evidentiary privileges. FED. R. EVID. 501 (stating that common law principles as interpreted by federal courts shall govern federal evidentiary privileges). Rule 501 provides courts the flexibility to develop new privileges when the need arises. *See id., see also* Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981)

the Second, Fourth, Seventh, and Ninth Circuit.[110] The most plaintiff-

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(setting forth factors for recognizing new common law privileges); *see also* Keyes v. Renoir Rhyne Coll., 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977) (denying discovery of relevant evidence in Title VII action against university where plaintiff sought to compel discovery of peer review materials). The college argued the importance of keeping the materials private to preserve confidentiality and candidness. *Id.*

> It was, of course, necessary for the court to balance this interest of the College against the need of the plaintiff for such material, and if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them to demonstrate that the explanation was pretextual. *Id.*

Federal Rule of Civil Procedure 26 explicitly excludes privileged materials from discovery. FED. R. CIV. P. 26(b)(1); *see also* Timothy G. Yeung, *Discovery of Confidential Peer Review Materials in Title VII Actions for Unlawful Denial of Tenure: A Case Against Redaction*, 29 U.C. DAVIS L. REV. 167, 176 (1995) (explaining the trend in many courts to acknowledge an academic privilege and prevent discovery of peer review materials).

110. *See* EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983) (holding that materials such as faculty personnel files were covered under the qualified academic freedom privilege). In *Notre Dame*, the Seventh Circuit recognized a qualified privilege protecting universities against the disclosure of the identities of persons participating in the tenure process. *Id.* at 337. The *Notre Dame* court responded that confidentiality was essential to the functioning of the tenure process. *Id.* at 336–37. However, the court refused to recognize an absolute privilege to prevent universities from using the process as a shield to hide discrimination. *Id.* at 337; *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (agreeing with the Fourth and Fifth Circuit in that "when evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff"). In *Lynn*, the Ninth Circuit used a balancing test to weigh the plaintiff's interest in determining whether her peer review materials contained evidence of discrimination against the university's interest in preserving confidentiality. *Id.* at 1347. Although the balancing approach of the Ninth Circuit favors the plaintiff more than the tests of the other circuits, the Ninth Circuit approach is treated as a qualified privilege approach; *see also* Keyes v. Lenoir Rhyne Coll., 552 F.2d 579 (4th Cir. 1977), *cert. denied,* 434 U.S. 904 (1977) (affirming a trial court's holding to protect records from disclosure). In *Keyes*, the Fourth Circuit approved the trial judge's balancing test weighing the university's interest in keeping faculty evaluations confidential against the plaintiff's need for such material. *Id.* at 581. The *Keyes* court rejected the plaintiff's contention that denying discovery of the faculty evaluations would preclude her from showing that the university's legitimate nondiscriminatory reason was a pretext. *Id.*; *see also* Zaustinsky v. Univ. of Cal., 96 F.R.D. 622 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985) (rejecting the claim of absolute privilege by a university and saying that "[t]he University's claim must be judged in accordance with Rule 501 of the Federal Rules of Evidence, which leaves questions of privilege to case-by-case adjudication."); *see also* McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1275 (N.D. Cal. 1975) (rejecting the university's claim of absolute privilege by saying "[i]t would be most inappropriate, therefore, to construe § 1040(b)(1) in such a way as to maximize the amount of information protected under the mantle of absolute privilege"). The court further stated that "Section 1040(b)(2) requires the Court to balance the necessity for preserving the confidentiality of the information sought against the necessity for its disclosure in the inter-

friendly qualified privilege approach taken by these courts balanced the weight of the plaintiff's interest in determining whether her peer review materials contained evidence of discrimination against the universities interest in confidentiality.[111] This was an all or nothing approach and it was not until 1983 that the issue of redaction by the universities was put before a federal court.[112]

In *EEOC v. University Notre Dame Du Lac*, the Seventh Circuit recognized a qualified privilege protecting peer review materials and used the balance test, but concluded the plaintiff should be granted discovery of the peer review materials.[113] However, the court allowed the university to redact the name, address, institutional affiliation, and any identifying information from the documents.[114] The court then imposed procedural guidelines on the university's utilization of redaction and the plaintiff's ability to obtain the redacted information.[115] To obtain the information the plaintiff needed to show a "particularized need."[116] The court noted that the relevancy and usefulness of the redacted information does not establish a particularized need, and that the first step for plaintiff to show in establishing a particularized need is to once again bear the heavy bur-

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est of justice." *Id.*; *see also* Timothy G. Yeung, *Discovery of Confidential Peer Review Materials in Title VII Actions for Unlawful Denial of Tenure: A Case Against Redaction*, 29 U.C. DAVIS L. REV. 167, 177 (1995) (summarizing the trend in the courts of acknowledging the qualified privilege to peer review materials from discovery).

111. Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1347 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (summarizing the most plaintiff friendly plan).

> When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, i.e., maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct. In making that determination it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in education employment. *Id.* (citations omitted).

See also Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384–85 (5th Cir. 1980); *see also* Keyes v. Lenoir Rhyne Coll., 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied,* 434 U.S. 904, (1977) (discussing balancing the interests of each party when considering whether the privilege applies).

112. *See generally Univ. of Notre Dame Du Lac*, 715 F.2d at 338 (addressing the issue of redaction and allowing the University "[t]o redact the name, address, institutional affiliation, and any other identifying features . . . of the reporting scholar from the evaluations found in each of the files").

113. *Id.* at 337–38 (finding that the plaintiff's interest outweighed the university's interest in regards to the discovery of peer review materials).

114. *Id.* at 338 (allowing the redaction by the university).

115. *Id.* (giving procedural guidelines to both the university and plaintiff).

116. *Id.* (outlining the procedures for the plaintiff to obtain the redacted information).

den of conducting exhaustive discovery and exploiting all possible resources of information.[117]

In 1990, the Supreme Court weighed in on the issue of whether higher educational institutions enjoyed a qualified privilege protecting peer review materials from discovery in *University of Pennsylvania v. EEOC*.[118] The Court affirmed the Third Circuit and refused to recognize a qualified privilege for peer review materials.[119] The Court found that a qualified privilege would erect a significant barrier for Title VII tenure case plaintiffs and went so far as to label the academic freedom argument by the university as remote, attenuated, and speculative.[120] The one issue that the Court left open was that of redaction.[121] The Court stated, "[w]e also do not consider the question . . . whether the District Court's enforcement of the Commission's subpoena will allow petitioner to redact information from the contested materials before disclosing them."[122] The Court even noted that its decision in *Notre Dame* was not necessarily in conflict with the Court's holding that no "academic privilege" existed for the university.[123] The Court ruled that there is no academic privilege in determining whether a plaintiff can receive peer review material during discovery,[124] but the question now is whether redaction is the new privilege and whether it can resurrect the barriers to truth that the Court in *Pennsylvania* buried.

A. *Arguments for Allowing Redaction by a Balancing Test*

In an article in the Columbia Journal of Law and Social Problems, Laura Weintraub articulated some good arguments for retaining the bal-

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117. *Univ. of Notre Dame Du Lac*, 715 F.2d at 338 (defining particularized need and setting the procedural requisites for showing a particularized need).

118. Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (ruling on whether or not qualified privileges protecting peer reviewed materials existed for universities).

119. *Id.* at 188 (articulating that no privilege exists for the university and affirming the Third Circuit Court of Appeals judgment).

120. *Id.* at 200–01 (1990) (opining that while some evaluators may hesitate to defend peer reviews not all will).

121. *Id.* at 202n.9 (limiting the judgment to qualified privilege and not addressing the issue of whether redaction of materials by the university prior to turn over is legal).

122. *Id.*

123. *Univ. of Pa.*, 493 U.S. at 188 (distinguishing the courts earlier opinion concerning academic privilege).

124. *Id.* (determining that no privilege exists for the university). The court rejected petitioner's claim that policy considerations and the First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particular need, beyond a showing of relevance, to obtain peer review of materials. *Id.*

ancing test in redaction cases.[125] In reality these arguments explain why the universities should retain the right to redact information and should be addressed.

1. Academic Freedom

Weintraub puts forth academic freedom as the strongest legal argument in favor of the protection of tenure information.[126] She states the following:

> In 1967, the Supreme Court recognized academic freedom as a constitutionally protected right. Although the extent of the protection is not clear, it was under the umbrella of this right that the academic privilege doctrine developed. The Supreme Court deems the freedom of academic endeavors to be of great importance. In fact, in the landmark decision *Regents of the University of California v. Bakke*, the Court stated that, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." As the Court held in *Bakke*, this "constitutional right" includes the "freedom of a University to make its own judgments as to education."
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> The areas that are protected by this right were discussed in an oft-cited concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*. . . . Frankfurter recognized four essential factors necessary to the protection of academic freedom: an academic institution has the right "to determine on academic grounds 'who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"
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> "Who may teach" is at issue in the Title VII academic privilege cases. . . . The rejection of any protection for the decisions of universities as to who should teach and be granted tenure . . . fails to protect academic freedom from unnecessary and potentially unconstitutional government interference.[127]

However, the strength of this argument is not based on Supreme Court opinion, but rather on minor quoting inaccuracies; the failure to distinguish between concurring opinions and court holdings; inaccurate representations of previous opinions; and the transplantation of new language

125. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege*, 33 COLUM. J.L. & SOC. PROBS. 313, 333–37 (2000) (articulating reasons why universities should retain the right to redaction).

126. *Id.* at 333 (arguing that academic freedom is the strongest legal argument in favor of the universities' ability to redact information).

127. *Id.* (footnotes omitted) (arguing why redaction should remain as an option).

into supposed prior quotations.[128] Author Richard Hiers elaborates on the idea of academic freedom:

> [T]he Supreme Court has never actually held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment. Language cited in support of the proposition that the Court has so held can be found only in concurring opinions and dicta. Nevertheless, the notion of constitutional institutional academic freedom or autonomy has taken on a life of its own-wholly apart from any constitutional roots or foundation. Advocates of various causes and concerns have invoked its authority to add weight to their arguments. But it is an illusion, a fantasy, a mirage.
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> . . . .
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> . . . [T]he Supreme Court has never held that public colleges and universities are entitled to either academic freedom or institutional autonomy under the First Amendment. Nor has any judge, Justice or commentator explained how institutional academic freedom or autonomy could be grounded upon the First Amendment. . . . [T]he First Amendment protects speech and association, not state action, whether in the form of policy-making or administrative decision. Also, it protects the rights of individual persons from governmental intrusion, not the rights-if any-of government or governmental agencies from constitutional claims by individual persons. The Court has never held that the First Amendment protects government speech. Nor has it ever held that public colleges and universities are persons for purposes of First and Fourteenth Amendment analysis.[129]

2. Best Means of Evaluating Candidates

Weintraub next states that universities and colleges often argue that confidential peer review is the best way of ascertaining a professor's tenure and teaching qualifications.[130] To support this argument, universities use statements of courts that recognize the importance of peer review and then counter that lack of confidentiality would impede their freedom to choose the best faculty if they use the court blessed process of peer re-

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128. Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage,* 30 HAMLINE L. REV. 1, 4 (2007) (describing the fundamental errors that have led to the conclusion that universities have academic freedom based on the First Amendment).

129. *Id.* (summarizing the problem with an argument relying on the academic freedom of academic instition).

130. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege,* 33 COLUM. J.L. & SOC. PROBS. 313, 335 (2000) (stating that secrecy is the best way to make tenure decisions).

view.[131] Certainly, the process of peer review should be considered, but it should not outweigh the plaintiff's right to full access to the process. Even the Supreme Court has pointed out that any evidence of discrimination, if any, will most likely be in the peer review materials.[132] This is also supported by Linda Hamilton Krieger's study of the development of stereotyping schemas which explains that "discrimination is not necessarily something that occurs 'at the moment of decision.'"[133] The focus of inquiry on the universities' intent at the moment a tenure decision is made is flawed because it fails to recognize that discrimination "can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the ostensibly objective data set upon which a decision is ultimately based."[134] Evidence of these cognitive–based errors is more likely to be found in the peer review materials.

3. Chilling Effect

A further hypothesis put forward by Weintraub stated that without confidentiality, peer reviewers and faculty members will either be unwilling to serve on tenure review boards or will be afraid to speak freely.[135] She asserted that the consequences might be the hiring of unqualified candidates or that the peer review process would be altogether discounted by decision-makers.[136] To support this assertion, the *Notre Dame* court was quoted as follows:

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131. *Id.* at 334 (articulating the arguments by universities).

132. *Univ. of Pa.*, 493 U.S. at 193 (speculating that the peer review materials are the best place to find evidence of discrimination if any are to be found).

133. Melissa Hart, *Subjective Decision Making and Unconscious Discrimination*, 56 ALA L. REV. 741, 746 (2005) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995))

134. *Id.* ("[T]he law fails to recognize that discrimination 'can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the ostensibly objective data set upon which a decision is ultimately based.'"); *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters? Discrimination in Multi-Actor Employment Decision Making*, 61 LA L. REV. 495, 498 n. (2001) (observing that "intent, as various commentators have correctly noted, is best understood not as animus but as a causation concept," but also that "in examining whether disparate treatment has occurred, lower courts continue to search for conscious intent").

135. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege*, 33 COLUM. J.L. & SOC. PROBS. 313, 335 (2000) ("Without a guarantee of confidentiality, faculty and peer reviewers will either be unwilling to serve on tenure and review committees or will be afraid to speak and evaluate candidates candidly.").

136. *Id.* ("Consequently, either inferior candidates will be hired or decision makers will discount peer reviews altogether.").

> It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. . . . Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the peer review process. . . . Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.[137]

Weintraub and others assert that in order for there to be academic excellence there must be confidentiality.[138] However, the Supreme Court in *Pennsylvania* disagreed with these lopsided assertions and articulated that the interest of university confidentiality is only one side of the equation that must be balanced against the congressional mandate to fight discrimination.[139] Other courts have logically observed that peer reviewers typically already have tenure and should have little to fear if they have made their evaluation on the candidate's record and not on improper criteria.[140]

B. *Arguments Against Redaction*

1. Congressional Intent

The legislative history of Title VII, and the amendments that forced academic institutions to abide by it are the strongest arguments for the full disclosure of all tenure related material.[141] The Supreme Court in *Pennsylvania* has elaborated on the scope of coverage for Title VII:

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137. *Univ. of Notre Dame Du Lac*, 715 F.2d at 336.

138. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege,* 33 COLUM. J.L. & SOC. PROBS. 313, 335 (2000) (describing the potential effects upon education if confidentiality were to cease); *see* James H. Brooks, *Confidentiality of Tenure Review and Discovery of Peer Review Materials*, 1988 BYU L. REV. 711–13 (1988) (explaining the rationale behind the tradition of confidentiality in tenure boards).

139. *Univ. of Pa.*, 493 U.S. at 193 (articulating the need to balance interests of confidentiality and racial discrimination).

140. Jackson v. Harvard Univ., 721 F. Supp. 1397, 1407 (D. Mass. 1989) (responding and rejecting the idea that the "disclosure will chill frank evaluations of a teacher's merit"). "If anything, because members of tenure committees and peer reviewers themselves have tenure . . . they have less to fear from disclosure of their votes or evaluations than do those making employment decisions in other fields which have no claim to such a neo-privilege." *Id.* Furthermore, the court noted that "[a] faculty member whose vote resulted from a reasoned assessment of an applicant's record, or a peer evaluator whose critique of a candidate's work is supported by scholarly analysis, has nothing to fear . . . ." *Id.*

141. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege,* 33 COLUM. J.L. & SOC. PROBS. 313, 337 (2000) ("The strongest legal argument for allowing discovery of all tenure related information is

> [Section] 2000e-8(a) confers a broad right of access to relevant evidence
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> . . . . If an employer refuses to provide this information voluntarily, the Act authorizes the Commission to issue a subpoena and to seek an order enforcing it.
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> On their face, §§ 2000e-8(a) and 2000e-9 do not carve out any special privilege relating to peer review materials, despite the fact that Congress undoubtedly was aware, when it extended Title VII's coverage, of the potential burden that access to such material might create.[142]

Other courts have noted that even a *Notre Dame* balancing approach would allow universities to conceal evidence of discrimination.[143] While this argument does not directly address redaction, it does form the foundation for a strong argument that redaction is in essence a resurrection of the aforementioned privilege and is not to be tolerated under Title VII.

2. The Integrity of Academic Institutions

Another argument against redaction comes from the goal of ending discrimination that institutions of higher learning are supposed to promote.[144] The Seventh Circuit noted that "[t]he important interests of academic excellence might well be frustrated if tenure decisions were allowed to be made on other than lawful grounds."[145] In the cases involving state academic institutions, another need for integrity arises from the fact that it is taxpayer funded. This should tip the scales in favor of full transparency and against the secrecy offered by redaction.

Title VII itself, its legislative history, and the 1972 amendments to the Act that subjected academic institutions to the Title.").

142. *Univ. of Pa.*, 493 U.S. at 191 (describing the legislative history that influenced their decision).

143. *See* EEOC v. Franklin & Marshall Coll., 775 F. 2d 110, 115 (3d Cir. 1985).

> We look further for evidence that Congress intended that special treatment be accorded academic institutions under investigation for discrimination and find none. No inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation. A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy. *Id.*

144. Laura L. Weintraub, *Academic Privilege and Title VII: The Birth, Death, and Possible Rebirth of an Evidentiary Privilege,* 33 COLUM. J.L. & SOC. PROBS. 313, 339 (2000) (stating that other commentators argue that academic freedom promotes the end of discrimination).

145. *Id.* (quoting the Seventh Circuit in *Notre Dame*).

V. CONCLUSION

American courts should cease applying an academic deference argument in tenure decision cases and treat tenure decisions the same way they treat any other employment discrimination case. Accordingly, the recent changes in employment discrimination cases should be applied towards tenure decisions, especially since the rationale for treating tenure decisions differently is tenuous at best. Furthermore, the plaintiff in a discrimination case should be allowed full access to his or her tenure files, as "[t]he disclosure of documents in one's tenure file does not infringe upon the academic freedom of a university to make tenure decisions."[146] The fact that many tenure systems are already non-confidential also weakens the necessity for confidentiality.[147]

Assuming that both positions in this comment are accepted, there are still many who believe the tenure system has outlived its usefulness. One professor has elaborated the idea of tenure for professors:

> The process of achieving tenure is in the worst interests of students . . . . Professors are too busy trying to get grants and writing for symposia and colloquia to have any creative energy left for the classroom. A lot of academics even come to resent having to teach because it gets in the way of their own work.[148]

The problem with tenure is even more difficult to solve because of the different desires of the parties involved: The professors seek academic freedom and security but without the pressure to constantly publish or eventually be fired; administrators desire the flexibility in getting rid of costly, ineffective faculty, but also acknowledge the necessity of job security in order to foster research; and students, or at least their parents, desire high quality well-known professors who are accessible and have

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146. Robert A. Gerberry, James v. Ohio State University: *Ohio Declares Promotion and Tenure Records of State-Supported Universities and Colleges Public Records Subject to Disclosure*, 29 AKRON L. REV. 93, 112 (1995) (summarizing the decision of the Ohio Supreme Court in a case involving whether tenure files were subject to disclosure).

147. Timothy G. Yeung, *Discovery of Confidential Peer Review Materials in Title VII Actions for Unlawful Denial of Tenure: A Case Against Redaction*, 29 U.C. DAVIS L. REV. 167, 194 (1995) ("The existence of non-confidential tenure systems further weakens the argument that the tenure process requires confidentiality.").

148. Phillip Crawford, *U.S. Debates Future of Tenure System*, INT'L HERALD TRIB., (Feb. 16, 1994), *available at* http://www.iht.com/articles/1994/02/16/tenureduc.php (internal quotations marks omitted) (quoting Robert Shupp, a tenured professor of French at the University of Houston) (explaining that the process of obtaining tenure involved "cut-throat tactics" and "skulduggery" used to obtain tenure). The students are the ones who end up suffering due to the tenure process. *Id.* The internal politics turn into a "popularity contest" and the "process itself encourages conformity rather than the freedom of thought that the tenure system was originally created to project." *Id.*

time for individual attention.[149] It has been proposed that instead of tenure, the professors could begin a unionized contract system similar to professional athletes.[150] The professor would be responsible for their individual negotiations with schools, but with the security of a minimum contract length.[151] Factors such as publications, and positive student reviews would help the professors in the negotiation, but the most a professor could get would be fifteen years and not tenure.[152]

If tenure does continue to survive in the United States, there are some things that could aid the universities in making themselves more transparent and easier for plaintiffs to determine whether they truly have a legitimate discrimination case. First, universities must make their standards and priorities for achieving tenure clear.[153] The standards or criteria set forth must measure job responsibilities and performance.[154] In developing the criteria the following checklist may prove useful:

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149. *Id.* ("Seeking a solution to the problems surrounding the tenure system is difficult because all of the players seem to want something different: The professors want job security but not the relentless pressure to publish; administrators want a freer hand in weeding out costly, ineffective faculty, but see the need for at least some type of job security to foster research; and students want star professors who also have time for them.").

150. *Id.* (Seeking a solution to the problems surrounding the tenure system is difficult because all of the players seem to want something different: The professors want job security but not the relentless pressure to publish; administrators want a freer hand in weeding out costly, ineffective faculty, but the need for at least some type of job security to foster research; and students want star professors who also have time for them."). "Meanwhile, the only thing that all factions seem to agree on is that the world of academia, perhaps not unlike the military, is its own unique type of society." *Id.*

151. *Id.* ("An alternative to the current setup, say some, could be a unionized contract system similar to that in professional sports, where each faculty member negotiated his or her own terms with the university, but with a minimum contract length of, say, five years.").

152. *Id.* ("Naturally, an impressive publishing record might enhance a professor's bargaining position for a long- term contract, as would good reviews from students, whose opinions are typically asked for when a candidacy for tenure arises. But a lengthy contract might be on the order of 15 years, not 30 or 40.").

153. WILLIAM G. TIERNEY & ROBERT A. RHOADES, ENHANCING PROMOTION, TENURE AND BEYOND 45 (1993) ("Our purpose in this text is not to determine institutional priorities toward promotion and tenure, but to point out that those priorities should be clear."). For instance, if a professor's dissertation does not count toward tenure, then all potential tenure candidates should know this information. *Id.* If publishing a textbook or manual does not assist in tenure, everyone should have such information. *Id.* There should be systematic, informed commentary provided to all candidates involved in the tenure and promotion process. *Id.*

154. John D. Copeland & John W. Murry, Jr., *Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 320 (1996) ("Furthermore, criteria must actually measure job responsibilities and performance."). The authors state that only by setting the criteria clearly can those evaluating these professors judge performance. *Id.*

1. Criteria used in the appraisal program are clearly stated in writing.
2. Evaluation criteria are specific and objective.
3. Evaluation criteria are related directly to the responsibilities of the person being evaluated.
4. To the extent possible, evaluation criteria are based upon observable job behaviors or measurable results.
5. Evaluation criteria do not rely solely on vague personal traits such as commitment, initiative, and aggressiveness, and do not include them at all unless they are defined in terms of overt observable behavior.
6. Evaluation criteria include achievement of previously agreed to objectives.
7. Criteria appraise the methods (means) employees use as well as the results achieved.
8. Evaluation criteria are flexible enough to allow for differences in specific responsibilities when two or more individuals perform similar jobs.
9. Adequate attention is given to both qualitative and quantitative criteria.
10. The weighting of various criteria in relation to the overall assessment is made known to the employee at the beginning of the evaluation cycle.[155]

If the criteria are taken seriously, tenure candidates should be able to present evidence of their success or failure in meeting the criteria.[156] Second, good documentation provides evidence for the basis of tenure decisions.[157] The following factors have been put forward as those that should govern employee performance documentation:

1. Sufficient evidence is systematically obtained to adequately assess performance.
2. Unnecessary and unused data are not required to be furnished.
3. Data are required from a variety of independent sources each of who is in a position to make a valid evaluation.

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155. *Id.* (providing a checklist for forming the criteria upon which professors will be evaluated).

156. JOAN ABRAMSON, THE INVISIBLE WOMAN: DISCRIMINATION IN THE ACADEMIC PROFESSION 5 (1975) ("Where the criteria are taken seriously, each candidate for tenure should be able to present evidence of some success at research (generally measured by publications), superior teaching, and contributions to the university community."). For example, while the finality of the decision-making process is up to the regents at the University of Hawaii, tenured faculty are protective of their right to select their permanent future colleagues. *Id.* Length reports often accompany faculty recommendations. *Id.*

157. John D. Copeland & John W. Murry, Jr., *Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 322 (1996) ("Documentation should provide an audit trail that adequately reconstructs the basis for any personnel decisions that are made").

4. Data are collected and scored under standardized conditions.
5. Procedures spell out the responsibility of both supervisors and those being evaluated in assembling necessary documentation.
6. Data are obtained only from those persons who have frequent opportunities to evaluate the employee's performance.
7. Data required includes self-evaluation by the employee.[158]

John Jay's desire was to have an education system free from discrimination, both teacher to student, and teacher to teacher.[159] He also knew that men, tenured professors included, had a depraved mind and heart with a propensity to discriminate.[160] If John Jay were given the choice today between academic deference to universities and no deference, it is very likely he would choose to have no deference given to the universities of the modern era. If he were given the choice between redaction and no redaction, it is very likely he would choose to give full disclosure to plaintiffs. Without John Jay here to speak, it is difficult to have perfect knowledge of his desires, but it is possible that he might say to untenured professors, "[w]e must keep up our guard, but we must also continue to work together to lessen and eliminate tension and mistrust."[161] And to the courts, John Jay might admonish, "trust but verify" and "still watch closely" yet "don't be afraid to see what you see."[162]

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158. *Id.* (describing appropriate factors to govern the documentation of performance evaluations).

159. *See* Letter from John Jay, former U.S. Supreme Court Chief Justice, to Benjamin Rush (March 24, 1785) *in* THE PAPERS OF JOHN JAY (on file with Columbia University, Butler Library, Rare Book & Manuscript Division), *available at* http://www.columbia.edu/cu/lweb/digital/jay/ (expressing Jay's aspiration for American education). "I wish to see all unjust and unnecessary discriminations everywhere abolished, and that the time may soon come when all our inhabitants of every color and denomination shall be free and equal of our political liberty." *Id.*

160. Letter from John Jay, former U.S. Supreme Court Chief Justice, to Richard Peters (March 14, 1815) *in* THE PAPERS OF JOHN JAY (on file with Columbia University, Butler Library, Rare Book & Manuscript Division), *available at* http://www.columbia.edu/cu/lweb/digital/jay/ (explaining the depravity of all men, even apparent good ones).

> As to the position that "the people always mean well," that they always mean to say and do what they believe to be right and just — it may be popular, but it can not be true. The word people, you know, applies to all the individual inhabitants of a country, collectively considered .... We have not heard of any country, in which the great mass of the inhabitants individually and habitually adhere to the dictates of their conscience. *Id.*

161. U.S. President, Ronald Reagan Farewell Address to the Nation (January 11, 1989), available *at* http://www.reaganfoundation.org/Reagan/speeches/farewell.asp (addressing the country in his farewell speech urging the nation to keep an eye on Russia since the government was still run by a Communist system and posed a continued threat to the United States, but to be more open minded and optimistic of the new President Gorbachev).

162. *Id.*