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Academic Freedom and the University Title VII Suit after University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University

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NOTES

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I. INTRODUCTION

Tenure¹ is the crowning laurel of academia. The process of reviewing a candidate for tenure at the university level generally begins with an evaluation and recommendation by a group of the candidate's peers.²

1. "Tenure is a university institution that grants faculty members permanent and continuous positions at the university, and ensures that a professor's services will only be terminated for adequate cause." After a probationary period, typically six years, one either earns or is awarded tenure based on the particular system in place. Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J.L. & EDUC. 319, 319 (1986); see also AMERICAN ASS'N OF UNIVERSITY PROFESSORS AND ASS'N OF AMERICAN COLLEGES, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, reprinted in ACADEME, Jan.-Feb. 1986, at 52-53 [hereinafter 1940 STATEMENT] (stating that the goals of tenure are to protect academic freedom and to provide economic security); 1982 RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE, reprinted in ACADEME, Jan.-Feb. 1983, at 15a-20a (clarifying the term of appointment and the conditions under which such appointments may be terminated).

2. The tenure review process typically involves screening by several groups within the university. First, the department reviews the candidate and recommends that tenure be granted or denied. Second, a special tenure review committee composed of deans and faculty members reviews the candidate. The president and board of trustees make the final decision on whether to grant tenure. The evidence used to review the candidate includes letters of recommendation from fellow faculty and students, a review of published materials, and a self-evaluation expressing the candidate's future goals. Kluger, *supra* note 1, at 319-20.

Courts have acknowledged, however, "that the faculty has at least the initial, if not the primary, responsibility for judging candidates. '[T]he peer review system has evolved as the most

Candidates who are denied tenure may seek judicial review of the decision and discovery of peer review materials. Not surprisingly, universities encourage courts to defer to tenure decisions and to deny plaintiffs access to confidential peer review documents.

Traditionally, in fact, courts have given great deference to university tenure decisions.³ Judicial deference has pervaded every phase of review from discovery to trial and remedy.⁴ As deference to university tenure decisions and the confidentiality of the tenure review process have become increasingly entrenched, another branch of law has developed.

Title VII of the Civil Rights Act of 1964⁵ prohibits discrimination in employment because of race, color, religion, sex, or national origin.⁶

reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution.' " *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980) (quoting *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977)).

3. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (stating that "judges asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment"); *Kumar v. Trustees of the Univ. of Mass.*, 774 F.2d 1, 12 (1st Cir.) (Campbell, C.J., concurring) (stating that "courts must be extremely wary of intruding into the world of university tenure decisions"), *cert. denied*, 475 U.S. 1097 (1985); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974) (asserting 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"); see also *Johnson*, 435 F. Supp. at 1353, 1371 (explaining that the court is not a "Super Tenure Committee" and "is way beyond its field of expertise" when asked to review tenure decisions); *Green v. Board of Regents of Tex. Tech. Univ.*, 335 F. Supp. 249, 250 (N.D. Tex. 1971) (questioning whether a court should "substitute its judgment for the rational and well-considered judgement of those possessing expertise in the field"), *aff'd*, 474 F.2d 594 (5th Cir. 1973).

Commentators also have acknowledged this deference. See, e.g., Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom*, 16 U.C. DAVIS L. REV. 1023, 1034-36 (1983) (addressing the traditional judicial stance in the review of university decisions); Note, *The Challenge to Antidiscrimination Enforcement on Campus: Consideration of an Academic Freedom Privilege*, 57 ST. JOHN'S L. REV. 546, 553 (1983) (noting the historical aversion courts have for reviewing tenure decisions).

4. See, e.g., *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983) (refusing to compel disclosure of peer review materials); *Gurmankin v. Costanzo*, 626 F.2d 1115 (3d Cir.) (affirming the district court's decision that award of tenure is not appropriate relief), *cert. denied*, 450 U.S. 923 (1980).

5. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)). Title VII provisions outline "an integrated, multistep enforcement procedure" that enables the Commission [EEOC] to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984).

6. 42 U.S.C. § 2000e-2(a) (1988) states:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Although universities originally were excluded from Title VII coverage, Congress eliminated that exclusion in 1972, thereby bringing universities within the scope of Title VII.⁷ Congress recognized that the university was no less likely to discriminate than any other employer.⁸ In fact, Congress found discrimination in the academic community even more troubling than in other areas because of the effect on the Nation's youth.⁹

Since these two different historical progressions met in 1972, confrontations between the university, with its concerns for confidentiality and autonomy, and the enforcement of Title VII were inevitable. The dilemma posed is exceedingly complex.¹⁰ Should the university's desire for confidentiality and autonomy trump the social goal of eradicating discrimination or, in the alternative, should Title VII concerns prevail over university concerns, which often are presented under the name of academic freedom?¹¹

Not surprisingly, some courts find university Title VII cases much more difficult to review than other Title VII cases.¹² Traditionally, uni-

7. See EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2155 [hereinafter EQUAL EMPLOYMENT]; see generally Note, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1444-47 (1989).

8. EQUAL EMPLOYMENT, *supra* note 7, 1972 U.S. CODE CONG. & ADMIN. NEWS at 2155.

9. *Id.*

10. The Seventh Circuit, deferential to university decisions, has articulated the dilemma: [A]n experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions.

But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII was extended to the university, and have found no solution.

Namenwirth v. Board of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1243 (7th Cir. 1985).

11. A recent Title VII case has made it clear that "Title VII strikes a balance between protecting employees from unlawful discrimination and preserving for employers their remaining freedom of choice." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

12. In a recent case, the Second Circuit articulated five factors that make the tenure decisions more difficult to review than other employment decisions:

(1) The lifelong commitment by the university that tenure entails accentuates the importance of collegiality among professors.

(2) Tenure decisions are often non-competitive. An award of tenure to one individual does not necessarily preclude the tenure of another whereas in other areas of employment a decision to hire one person means a decision not to hire another.

(3) Tenure decisions are unusually decentralized, and there is greater deference given to the department's position than in most employment decision-making processes.

(4) There are numerous factors that a school considers in tenure deliberations that are peculiar to the university setting.

(5) Tenure decisions are often a source of unusually great disagreement, and because opinions of a candidate are solicited from students, faculty members and outside persons,

versity Title VII plaintiffs have been less successful than plaintiffs in other Title VII actions.¹³ In the name of judicial deference to university decisions, courts have thrown up blockades in the path of the aggrieved tenure candidate. First, some courts have inhibited the discovery process through the use of privileges and balancing tests.¹⁴ Second, the order of proof and burdens at trial have been very difficult for the plaintiff to meet.¹⁵ Finally, even upon discovering the existence of discrimination in the peer review process, courts have been reluctant to order tenure as a remedy, thereby failing to meet one of the goals of Title VII—to make the plaintiff whole.¹⁶

Although discovery has been at issue in nearly every jurisdiction in

tenure files are frequently composed of irreconcilable evaluations.

Kluger, *supra* note 1, at 330 (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984) (affirming summary judgment for the university)); *see also* *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1404 (D. Mass. 1989) (stating that the courts allow academic tenure decisions more subjectivity because selecting a professor is very different from selecting a regular employee).

13. A plaintiff seeking reversal of a tenure denial through Title VII "has an even tougher row to hoe than other Title VII plaintiffs." Shanor & Shanor, *The Practical Labor Lawyer: Title VII and University Tenure Denial Decisions*, 7 EMPLOYEE REL. L.J. 145, 146 (1981).

14. *See infra* notes 115-16 and accompanying text.

15. The order and allocation of proof for Title VII litigation was outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973):

The complainant in 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 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. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

. . . .

Finally the complainant must have an "opportunity to demonstrate that petitioner's assigned reason . . . was a pretext or discriminatory in its application."

Id. at 807.

This Note will not discuss the actual proof at trial, but a number of other articles do. *See generally* Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983). Professor Tepker explains that most actions against universities have been based on the disparate treatment theory under which one must show intentional discrimination. *Id.* at 1050. This theory is very deferential to the university. *Id.* at 1068. A second method of proving discrimination is the disparate impact theory espoused in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under *Griggs* if "illegal disparate impact is shown, discriminatory intent need not be proved as a condition precedent to a plaintiff's recovery." Tepker, *supra*, at 1073; *see also* Note, *The Ineffectiveness of Title VII in Tenure Denial Decisions*, 36 DEPAUL L. REV. 259, 281 (1987) (urging courts to reject the *McDonnell Douglas* analysis in tenure denial cases and to put the ultimate burden of proof on the defendant; therefore, after plaintiff showed only an inference of discrimination, the defendant would have the burden of proving lack of discriminatory motive by a preponderance of the evidence); Note, *Title VII in Academia: A Critical Analysis of the Judicial Policy of Deference*, 64 WASH. U.L.Q. 619, 631 (1986) (suggesting that defendant should have the burden of proving that the "non-existence of discrimination is as probable as the existence of discrimination" (emphasis deleted)).

16. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

the country,¹⁷ the United States Supreme Court did not address the issue until *University of Pennsylvania v. EEOC*.¹⁸ In that case the Court refused to create a special privilege to prevent disclosure of peer review materials in a Title VII case,¹⁹ thereby resolving a circuit split.²⁰ In the area of remedy, *Kunda v. Muhlenberg College*²¹ and more recently *Brown v. Trustees of Boston University*²² stand for the proposition that the award of tenure is a potential remedy for victims of discrimination.

Are these changes in the judicial stance on discovery and remedy the beginning of the end for judicial deference to university decisions? Or are they merely facial changes giving the appearance of bringing university plaintiffs up to par with other Title VII plaintiffs? If the burdens of proof at trial are more taxing in university Title VII cases than those imposed on other Title VII plaintiffs, then any changes in discovery and remedy will not make all Title VII plaintiffs equal.

This Note will discuss discovery of peer review materials in the investigation of a Title VII claim, tenure as a potential remedy flowing from a successful action, and the interaction of academic freedom with discovery and remedy issues. Part II examines two recent cases that have had an impact on discovery and remedy. Part III explores the history of academic freedom in both its academic and legal definitions. Part IV focuses on the issue of discovery in university Title VII cases, and Part V addresses the issue of remedy in successful university Title VII cases. Finally, Part VI concludes that *University of Pennsylvania* and *Brown* mark the beginning of a new phase for university Title VII plaintiffs by providing them with the opportunity to prevail.

II. RECENT CASES CHANGING UNIVERSITY TITLE VII LAW IN THE AREAS OF DISCOVERY AND REMEDY

Two cases in which universities relied on a claim of academic freedom set the backdrop for this discussion. In one case the university used academic freedom in an attempt to preclude the plaintiff from gaining access to peer review materials. In the other case the university tried to use academic freedom to prevent the plaintiff from obtaining

17. See *infra* notes 115-18 and accompanying text.

18. 110 S. Ct. 577 (1990), *aff'g* 850 F.2d 969 (3d Cir. 1988).

19. See 110 S. Ct. at 582.

20. At odds were the Seventh Circuit's approach in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 331 (recognizing a qualified privilege), and the Third Circuit's approach in *EEOC v. University of Pennsylvania*, 850 F.2d 969 (3d Cir. 1988) and *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985) (rejecting a privilege for peer review materials), *cert. denied*, 476 U.S. 1163 (1986).

21. 621 F.2d 532 (3d Cir. 1980).

22. 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

tenure as a remedy.

A. *University of Pennsylvania v. EEOC*²³

Rosalie Tung, an associate professor at the University of Pennsylvania's Wharton School, was denied tenure in 1985. Subsequently, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on the basis of race, sex, and national origin.²⁴ The EEOC began an investigation of Tung's charge, but was unable to obtain tenure-review materials relating to her case even after issuing a subpoena.²⁵ The EEOC sought enforcement of the subpoena, and the district court entered an enforcement order, which the court of appeals later affirmed.²⁶

On appeal to the United States Supreme Court, the university asked the Court to recognize a qualified privilege, which, based either on common-law principles or on its first amendment right of academic freedom, would prevent disclosure of confidential peer review materials.²⁷ Under either theory, the university sought a qualified privilege which would require a judicial finding that the plaintiff had a specific need for access, instead of merely showing relevance,²⁸ before the EEOC could gain access to peer review materials. The Court refused to create such a privilege.²⁹

University of Pennsylvania presented many perplexing legal questions.³⁰ Consequently, the Court's holding is significant for several reasons. First, the case provides a dispositive ruling on the privilege question.³¹ Second, the case offers guidance on other discovery issues in university Title VII cases.³² Finally, and perhaps most importantly, for the first time a majority of the court clearly acknowledged the existence of institutional academic freedom.³³

23. 110 S. Ct. 577 (1990), *aff'g* 850 F.2d 969 (3d Cir. 1988).

24. 110 S. Ct. at 580.

25. *Id.* For a description of the procedures used in enforcing Title VII, see 42 U.S.C. § 2000e-5 (1988).

26. *University of Pennsylvania*, 110 S. Ct. 577, 581; *see* *EEOC v. University of Pennsylvania*, 805 F.2d 969 (1988), *aff'd*, 110 S. Ct. 577 (1990).

27. *University of Pennsylvania*, 110 S. Ct. at 581.

28. *See infra* notes 107-09 and accompanying text.

29. *University of Pennsylvania*, 110 S. Ct. at 582.

30. *See* Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 317-20 (1989).

31. *University of Pennsylvania*, 110 S. Ct. at 582.

32. *Id.* at 582-83.

33. *Id.* at 586-88.

B. *Brown v. Trustees of Boston University*³⁴

After being denied tenure, Julia Prewett Brown sued Boston University claiming breach of contract and violation of Title VII. A jury found that the university had breached the antidiscrimination provision of its collective bargaining agreement. The district court then applied the jury's finding of sex discrimination to the other claims and ordered monetary damages, enjoined the university from discriminating against Brown, and awarded tenure to Brown.³⁵

Brown marks the third instance of a circuit court upholding an award of tenure as a remedy after unlawful discrimination.³⁶ In fact, *Brown* may be the most controversial case to award the tenure remedy because the court was willing to grant tenure even though the candidate's qualifications were in dispute. With this decision, the award of tenure may be fully accepted as a legitimate judicial remedy. Although the Supreme Court has not spoken on this issue, it is unlikely that it would dispute the idea that tenure is a proper remedy.³⁷ Now that the award of tenure is an available remedy, the question remains: How many courts will be brave enough to use it?

III. ACADEMIC FREEDOM

A. *The Meaning of Academic Freedom Prior to University of Pennsylvania v. EEOC*

The traditional definition of academic freedom is based on the freedom of the individual scholar to teach and research without intervention.³⁸ Today, however, courts and academics face dual definitions of academic freedom.³⁹ One definition has its roots in the academic community; the other finds support in court opinions.⁴⁰ The academic defi-

34. 891 F.2d 337, 340 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

35. *Id.*

36. For previous decisions, see *Ford v. Nicks*, 741 F.2d 858 (6th Cir.), *cert. denied*, 469 U.S. 1216 (1984), and *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980).

37. This conclusion is logical because the goal of Title VII is to make the plaintiff whole. If tenure is the sole remedy capable of making the plaintiff whole, why would a court challenge its legitimacy? See *infra* notes 219-40 and accompanying text.

38. Over 50 years ago, Arthur O. Lovejoy wrote a very influential definition of "academic freedom." Academic freedom is the:

freedom of the teacher . . . to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authorities, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his profession to be clearly incompetent or contrary to professional ethics.

Lovejoy, *Academic Freedom*, 1 ENCYCLOPEDIA OF SOCIAL SCIENCES 384 (1930).

39. See generally *Symposium on Academic Freedom*, 66 TEX. L. REV. 1247 (1988).

40. There are two definitions of academic freedom—one in the academic field and another in the legal field. For a good explanation of each definition, see Byrne, *supra* note 30, at 255. Byrne

nition has remained true to tradition and extends academic freedom only to the individual scholar.⁴¹ The legal definition, however, extends protection for academic freedom to both the individual scholar and the academic institution.⁴²

The dual definitions of academic freedom have created much confusion.⁴³ Even more problematic is the fact that no court or scholar has explained the rationale or purpose behind academic freedom adequately.⁴⁴ The combination of dual definitions and lack of adequate analysis has created an elusive doctrine.⁴⁵ Although it may not address every issue involved in academic freedom, *University of Pennsylvania* does begin to provide some guidance on this unwieldy doctrine.

1. Academic Freedom As Defined by the Academy

Before the Civil War, professors did not consider claiming academic freedom. At that time the role of the university was to prepare men for the clergy, law, and medicine by drilling them in the ancient languages and math.⁴⁶ Research was not essential to academic life. Only in the postbellum days when science began to increase in importance could academic freedom begin to develop.⁴⁷

Soon the purpose of higher education shifted to educating students in science.⁴⁸ Professors began to want time to research and write and looked longingly to the German universities devoted to research and specialization.⁴⁹ The German model boasted *Lehrfreiheit*, teaching freedom; *Lernfreiheit*, learning freedom; and *Freiheit der Wissenschaft*,

defines academic freedom as "a non-legal term referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance." *Id.* He then uses the term "constitutional academic freedom" when referring to the legal definition, which protects "scholarship and liberal education from extramural political interference." *Id.*; see also Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) (referring to the professional definition and the constitutional definition). This Note will use the terms "individual academic freedom" and "institutional academic freedom."

41. See 1940 STATEMENT, *supra* note 1 (discussing only instructors, not institutions).

42. See *infra* notes 63-106 and accompanying text; see generally Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987) (arguing that the three faces of academic freedom are professional autonomy, limits on governmental indoctrination through schools, and institutional autonomy).

43. See Byrne, *supra* note 30, at 252.

44. *Id.* at 253; see also Metzger, *supra* note 40, at 1290 (noting that court opinions make this same charge).

45. See Byrne, *supra* note 30, at 253 (describing academic freedom as a doctrine that "floats in the law, picking up [judicial] decisions as a hull does barnacles").

46. *Id.* at 269.

47. *Id.* at 269-70.

48. *Id.* at 269-72.

49. *Id.* at 270, 272.

the university's right to control its own internal affairs.⁵⁰

In the early 1900s professors seeking to keep lay trustees from interfering in their scientific research began to rally for academic freedom.⁵¹ In 1915 the American Association of University Professors (AAUP) formed a committee to focus on academic freedom.⁵² Because many members of the committee had earned degrees in Germany,⁵³ *Lehrfreiheit* naturally became the basis of the *1915 Declaration of Principles*.⁵⁴

The *1915 Principles* provided a comprehensive shield⁵⁵ by protecting not only the freedom to teach and research⁵⁶ as in the German concept, but also the freedom to express opinions on controversial topics even when those topics fell outside the scope of a professor's academic specialty.⁵⁷ Academic freedom clearly was created for the individual instructor, not for the institution.⁵⁸

In 1940 the AAUP produced the *1940 Statement of Principles on Academic Freedom and Tenure*,⁵⁹ which summarizes the academic free-

50. Metzger, *supra* note 40, at 1269-70.

51. Byrne, *supra* note 30, at 272.

52. Metzger, *supra* note 40, at 1268.

53. *Id.* at 1269.

54. *Id.* at 1274; see THE 1915 DECLARATION OF PRINCIPLES, reprinted in ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASS'N OF UNIVERSITY PROFESSORS 157-58 (L. Joughin ed. 1967) [hereinafter 1915 PRINCIPLES].

55. See Metzger, *supra* note 40, at 1274.

56. In studying natural science, social science, philosophy, and religion, professors must have "complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity." 1915 PRINCIPLES, *supra* note 54, at 164.

57. *Id.* at 172. The *1915 Principles* protected the "freedom of extra-mural utterance and action." *Id.* at 158.

58. Metzger, *supra* note 40, at 1284; see also 1915 PRINCIPLES, *supra* note 54, at 158-59 (stating that "[i]t need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher"). The *1915 Principles* make the distinction between professor and student. It never would have dawned on the drafters to make a distinction between professor and university.

59. The *1940 Statement of Principles on Academic Freedom and Tenure* states:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

1940 STATEMENT, *supra* note 1, at 52 (footnote omitted). The statement also asserts that under academic freedom:

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he

dom rights faculty members enjoy.⁶⁰ The *1940 Statement* also reveals the interrelationship of academic freedom and tenure. According to the AAUP, tenure is the means of protecting academic freedom.⁶¹ The *1940 Statement* and later AAUP documents set the definition of academic freedom for the academic community.⁶²

2. Academic Freedom As Defined by the Court

Although courts have been using the term "academic freedom" since 1952,⁶³ critics charge that courts have neither defined the term adequately⁶⁴ nor expounded on which rights academic freedom protects and why.⁶⁵

a. *Academic Freedom for the Individual Faculty Member*

Although the academy began developing its concept of academic freedom for the individual faculty member soon after the Civil War,⁶⁶ the courts did not recognize any constitutional protection until the

should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Id.

60. See Byrne, *supra* note 30, at 279.

61. 1940 STATEMENT, *supra* note 1, at 52.

62. See Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988).

63. See *Adler v. Board of Educ.*, 342 U.S. 485, 508-11 (1952) (Douglas, J., dissenting).

64. See Byrne, *supra* note 30, at 252-55; Metzger, *supra* note 40, at 1289 (citing to David Rabban and other commentators who argue that the "Supreme Court constitutionalized academic freedom without adequately defining it"). *But see* Metzger, *supra* note 40, at 1291 (stating that the Court did know what it meant by academic freedom).

65. See Rabban, *Academic Freedom*, 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 12 (1986) (stating that the Court has never clarified whether academic freedom is a distinctive liberty with its own constitutional contours or is simply an exemplification of the first amendment rights vouchsafed to other citizens); *see also* Byrne, *supra* note 30, at 253 (stating that the Court has provided no "adequate analysis of what academic freedom the Constitution protects or why it protects it").

Commentators are not the only ones to acknowledge this missing analysis. An Oregon federal district court judge has written: "[f]ew courts have considered whether and to what extent the First Amendment protects academic freedom Lower courts have spoken more frequently, but none has clearly defined the theory's legal contours." *Wilson v. Chancellor*, 418 F. Supp. 1358, 1362 (D. Or. 1976), *cited in* Metzger, *supra* note 40, at 1290.

66. See *supra* notes 46-52 and accompanying text.

1950s⁶⁷ when the government used loyalty tests to remove subversive teachers.⁶⁸ *Sweezy v. New Hampshire*⁶⁹ marked the birth of constitutional academic freedom.⁷⁰ Justice Felix Frankfurter, in his concurring opinion, recognized the importance of maintaining a spirit of free inquiry⁷¹ within a university and creating an atmosphere "in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁷² Thus on June

67. See *Adler*, 342 U.S. at 508 (Douglas, J., dissenting) (acknowledging that all members of society, especially teachers, need constitutional protection for thought). In his dissenting opinion in *Adler*, Justice William O. Douglas introduced the term "academic freedom" when he wrote that the "system of spying and surveillance . . . cannot go hand in hand with academic freedom." *Id.* at 510-11. But see *Scopes v. State*, 154 Tenn. 105, 111-12, 289 S.W. 363, 365 (1927) (finding no constitutional protection for a governmental employee in 1927).

68. McCarthyism was the threat that forced the Court to begin developing a doctrine of academic freedom. Threats to academic freedom continue today although in different forms. Present threats to academic freedom arise from universities, "Accuracy in Academia" (AIA), and the federal government. See Strohm, *Convocation on Current Threats to Academic Freedom*, *ACADEME*, Jan.-Feb. 1986, at 41. The AAUP committee on academic freedom censures academic institutions that are found to have violated a professor's academic freedom. See Blum, *How Censure Decisions Are Reached*, *The Chronicle of Higher Educ.*, June 28, 1989, at A18, col. 4. For example, the AAUP committee on academic freedom recently found that Catholic University violated Rev. Charles E. Curran's academic freedom. The university had barred him from teaching theology after a Vatican censure regarding Curran's published views on birth control and abortion. See Steinfelds, *Report on Priest Assails University*, *N.Y. Times*, Sept. 29, 1989, at A17, col. 1 (city ed.).

In addition, the AAUP has sponsored a convocation to explore today's threats to academic freedom, which include AIA and the federal government. AIA has stated that it is a watchdog group that will detect academic error by using student recruits in the classroom. Also, the government is restricting academic freedom by trying to control unclassified information. According to Robert Park of the American Physical Society, many scientists feel pressured to withdraw unclassified contributions from conferences. The National Security Decision Directive 84, requiring that those with access to certain levels of classified information sign prepublication review agreements, is a further threat to academic freedom. Over 150,000 people have signed these lifetime contracts that limit their freedom to share the results of their research. See Strohm, *supra*, at 42.

69. 354 U.S. 234 (1957). The Supreme Court reversed a contempt order entered against Sweezy after he refused to answer questions before a legislative committee. New Hampshire statutory provisions required that all governmental personnel take a loyalty oath stating that they were not subversive. *Id.* at 236. The statutes also authorized the formation of a committee to investigate "violations of the subversive activities act of 1951." *Id.* at 236-37. The committee questioned Sweezy on two occasions. He refused to answer questions about his knowledge of the Progressive Party of New Hampshire and the subject of one of his lectures. *Id.* at 238, 243-44.

70. Five years earlier Justice Douglas, in a dissenting opinion, did use the phrase "academic freedom" when he wrote that academic freedom is central to "the pursuit of truth which the First Amendment was designed to protect." *Adler*, 342 U.S. at 511 (Douglas, J., dissenting) (disagreeing with majority's upholding of the Feinberg laws).

71. *Sweezy*, 354 U.S. at 262.

72. *Id.* at 263. Justice Felix Frankfurter relied on a statement from a conference of South African scholars. *Id.* One modern scholar has suggested that the root of Justice Frankfurter's concern was "the threat of McCarthyism to the autonomy of universities, rather than with a violation of any individual professor's rights." Byrne, *supra* note 30, at 313.

17, 1957,⁷³ the Court, without ceremony, robed academic freedom in the garb of constitutional protection.⁷⁴

The Supreme Court next addressed academic freedom in *Keyishian v. Board of Regents*,⁷⁵ a case in which the Court found that the Feinberg laws⁷⁶ had been applied unconstitutionally to professors at the State University of New York in 1967.⁷⁷ In his majority opinion, Justice William Brennan wrote:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."⁷⁸

Scholars have argued that although this statement was intended to define academic freedom further, in reality the statement served only to confuse.⁷⁹ As remarkable as it may seem, *Sweezy* and *Keyishian* are the only cases in which the Supreme Court has developed the concept of individual academic freedom.⁸⁰

b. *Academic Freedom for the Institution*

That the individual scholar should enjoy academic freedom is not a particularly difficult idea to grasp. That the academic institution also should enjoy the first amendment right of academic freedom is somewhat more problematic.⁸¹ According to one critic, the concept of institutional academic freedom is difficult for many to accept because it does

73. This date was dubbed "Red Monday" because the Supreme Court handed down *Sweezy* and another controversial loyalty decision. See Byrne, *supra* note 30, at 291 & n.149.

74. Neither the Supreme Court nor the press acknowledged that the Court was making law when it found that the first amendment protected academic freedom. See Byrne, *supra* 30, at 291. Byrne cites several oddities in the *Sweezy* opinion. He notes that the Court had never suggested that the first amendment protected academic freedom and that Justice Felix Frankfurter relied on nonlegal sources to discuss academic freedom. *Id.* at 290-93.

75. 385 U.S. 589 (1967). Between the decisions of *Sweezy* and *Keyishian*, the Court decided *Barenblatt v. United States*, 360 U.S. 109 (1959), affirming the conviction of a professor after he refused to answer questions posed by the House Un-American Activities Committee regarding Communist activities by students. One commentator has noted that the case did very little to develop the concept of academic freedom. See Byrne, *supra* note 30, at 294.

76. The Feinberg laws were "a series of statutes and regulations intended to bar 'subversive' persons from employment." Byrne, *supra* note 30, at 295.

77. *Id.* But see *Adler*, 342 U.S. at 485 (upholding the application of the Feinberg laws to school teachers).

78. *Keyishian*, 385 U.S. at 603 (citation omitted).

79. See Byrne, *supra* note 30, at 295-98. Byrne accuses the Court of writing a vague opinion that fails to distinguish between "protected and punishable academic speech." *Id.* at 295.

80. See *id.* at 298.

81. See *id.* at 311-12 (noting that commentators who have understood academic freedom to protect the individual scholar are shocked that the concept has been extended to protect the university).

not appear to be grounded in the traditions of the Constitution or of education.⁸² Even more perplexing is how both parties could utilize academic freedom in a dispute between a university and a professor. If the university is protected, then the individual, who also claims academic freedom protection, will be punished.⁸³ The concept is unquestionably contradictory.

Although the AAUP chose to ignore the German concept of *Freiheit der Wissenschaft*⁸⁴ and defined academic freedom only from the standpoint of the individual, the Supreme Court has acknowledged an institutional academic freedom. One commentator believes that, realizing it was straying from the traditional definition of academic freedom, the Court constitutionalized institutional academic freedom so that institutions could make educational decisions without governmental interference.⁸⁵ The Court has been developing the concept of institutional academic freedom since *Sweezy*.

Justice Felix Frankfurter's concurring opinion in *Sweezy* set forth the four essential freedoms of the university and marked the first developmental phase of institutional academic freedom.⁸⁶ Thirty years passed before the Court again pursued its development of the concept of institutional academic freedom. In 1978 the Court found the University of California at Davis Medical School's admissions program to be unconstitutional in *Regents of the University of California v. Bakke*.⁸⁷

Justice Lewis Powell's opinion further shaped the doctrine of institutional academic freedom. By relying on *Sweezy*'s freedom to determine which students may be admitted, Justice Powell found the university's goal of striving for an ethnically diverse student body to be legitimate.⁸⁸ Justice Powell stated that academic freedom had long been a special, although unenumerated, concern of the first amendment.⁸⁹

In his concurring opinion in *Widmar v. Vincent*,⁹⁰ Justice John Paul Stevens relied on the concept of institutional academic freedom. The majority held that a University of Missouri regulation, disallowing student prayer meetings on campus while allowing other group meetings on campus, was unconstitutional.⁹¹ Justice Stevens acknowledged a freedom to make administrative decisions, but concluded that the free-

82. *See id.* at 320.

83. *See id.*

84. *See Metzger, supra note 40, at 1269-70 (defining "Freiheit der Wissenschaft").*

85. *See Byrne, supra note 30, at 311, 321.*

86. *See supra note 72 and accompanying text.*

87. 438 U.S. 265 (1978).

88. *Id.* at 311-12.

89. *Id.* at 312.

90. 454 U.S. 263 (1981).

91. *See id.* at 270-73.

dom did not extend to circumstances in which the university tried to penalize a speaker for holding a viewpoint contrary to the university's.⁹²

In *Regents of the University of Michigan v. Ewing*⁹³ a unanimous majority opinion referred to academic freedom for the institution. In *Ewing* a medical student argued that the university had violated substantive due process by dismissing him after he failed an examination. He insisted that the university arbitrarily refused to allow him to retake the exam.⁹⁴ The Court would not interfere in the university's decision, stating that genuinely academic decisions should be afforded great deference.⁹⁵ In a footnote, Justice Stevens stated that academic freedom depends both on the uninhibited exchange of ideas among the faculty and the students and on the university's freedom to make autonomous decisions.⁹⁶

B. *Institutional Academic Freedom Acknowledged and Defined by University of Pennsylvania v. EEOC*

A majority opinion finally referred to institutional academic freedom in *Ewing*. The Court relegated this reference to a footnote, however. Therefore, it was still difficult to conclude that a majority of the Court truly had accepted the notion of institutional academic freedom.⁹⁷

In its 1990 decision in *University of Pennsylvania*,⁹⁸ however, a majority of the Court clearly embraced the notion of institutional academic freedom. The unanimous Court not only recognized the doctrine, but also began to define its scope.⁹⁹ While past decisions had revealed only that academic freedom is a "special concern of the first amendment,"¹⁰⁰ in *University of Pennsylvania* the Court began defining the

92. See *id.* at 280 (Stevens, J., concurring).

93. 474 U.S. 214 (1985).

94. *Id.* at 223.

95. See *id.* at 225. The Court wrote:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. (footnote omitted).

96. *Id.* at 226 n.12.

97. Prior to *Ewing*, commentators noted that a majority of the Supreme Court had never explicitly recognized institutional academic freedom. See Gregory, *supra* note 3, at 1044-45; Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979).

98. 110 S. Ct. 577, 586-88 (1990).

99. One commentator has recognized that in *University of Pennsylvania* the Court had the opportunity to clarify the significance of institutional academic freedom whose "strength and reach . . . remain in doubt." Byrne, *supra* note 30, at 317-18.

100. See *Bakke*, 438 U.S. at 312; *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

contours of this real, but elusive, constitutional freedom.

Instead of analyzing why the academic institution should enjoy constitutional protection, the Court looked to its past academic freedom decisions and followed their guidelines. Seeming somewhat embarrassed by this ill-defined doctrine, the Court described the precedent on which the university relied as "the so-called academic freedom cases."¹⁰¹ Perhaps the Court realized that it had opened a Pandora's box in prior decisions and wanted to try to contain the damage with the *University of Pennsylvania* decision.

The Court determined that precedent has allowed a university academic freedom protection in two situations. First, a university has enjoyed protection when governmental action is "content-based regulation."¹⁰² Because the University of Pennsylvania did not argue that the EEOC subpoenas were causing the university to direct its academic activities in a prescribed way, the Court found that the governmental action was not content-based regulation that violated academic freedom.¹⁰³

The second instance in which a university has enjoyed academic freedom is when the governmental action directly infringes on the university's right to decide who may teach.¹⁰⁴ In this case the Court determined that the EEOC subpoena did not directly infringe on that right because the EEOC provided no criteria that the university had to follow in selecting its professors.¹⁰⁵ The Court found that these two instances marked the current limits of academic freedom and refused to expand the doctrine of academic freedom to protect confidential peer review materials.¹⁰⁶

IV. DISCOVERY IN UNIVERSITY TITLE VII CASES AND ACADEMIC FREEDOM

In regular civil actions a party can discover any nonprivileged material that is "relevant to the subject matter involved in the pending action."¹⁰⁷ Congress set a separate standard for Title VII discovery that allows "access to . . . any evidence . . . that relates to unlawful employ-

101. *University of Pennsylvania*, 110 S. Ct. at 586.

102. *Id.*

103. *Id.*

104. *Id.* at 587. The Court distinguished *Keyishian*, 385 U.S. at 589, in which the government wanted to substitute its teaching criteria for the standards already in place at the academic institution. That was not the situation in *University of Pennsylvania*. *Id.*

105. *Id.*

106. *Id.*

107. FED. R. CIV. P. 26(b)(1). The desire for full and open discovery is espoused in the Supreme Court's principle that "the public . . . has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950).

ment practices . . . and is relevant to the charge under investigation."¹⁰⁸ Relevance is again the standard by which discovery is permitted.¹⁰⁹

When the EEOC is investigating an alleged Title VII violation, discovery is even broader than that normally afforded civil plaintiffs.¹¹⁰ Congress wanted the EEOC to have extensive access to evidence to carry out its duties of investigating discrimination.¹¹¹ In a university Title VII case, the EEOC typically will try to gain access to the deliberations and evaluations of the peer review committee to determine whether any discriminatory motive existed in denying tenure.¹¹² If the institution refuses to disclose peer review materials, the EEOC has the authority to issue a subpoena and to seek an order to enforce the subpoena.¹¹³ Although some courts have expressed concern that EEOC investigations prior to the filing of an action can be too extensive,¹¹⁴ Congress wanted a very broad discovery process.

A. *Circuit Split Prior to University of Pennsylvania v. EEOC*

Courts asked to compel the disclosure of peer review materials in discovery have had to choose between recognizing some sort of privilege to prevent disclosure, utilizing a balancing test, issuing a protective order, or ordering disclosure. Courts have split on the decision of whether to order disclosure of peer review materials. Some courts have recog-

108. 42 U.S.C. § 2000e-8(a) (1988). See generally Annotation, *Discovery Under Federal Rules of Civil Procedure, in Actions Brought by Private Plaintiffs under Equal Employment Opportunity Provisions of Civil Rights Act of 1964, As Amended (42 U.S.C.S. § 2000e et seq.)*, 31 A.L.R. Fed. 657 (1977).

109. See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). The Court stated:

Since the enactment of Title VII, courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer. In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of "relevance" and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority.

Id. (footnote omitted).

110. See *University of Pennsylvania*, 110 S. Ct. at 583; *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 116 (3d Cir. 1985) (stating that relevancy is to be "construed broadly when a charge is in the investigatory stage"), *cert. denied*, 476 U.S. 1163 (1986).

111. See *University of Pennsylvania*, 110 S. Ct. at 582-83.

112. See Note, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions*, 28 B.C.L. Rev. 559, 560 (1987).

113. See *University of Pennsylvania*, 110 S. Ct. at 583.

114. These courts criticize instances in which an EEOC investigation becomes "a fishing expedition," or exploratory surgery without the required prior medical testing, screening, evaluation and diagnosis." *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 339 (7th Cir. 1983); see also *Franklin & Marshall College*, 775 F.2d at 120 (Aldisert, C.J., dissenting) (asserting that congressional intent could be served "without conferring on the EEOC such absolute and unyielding investigatory powers to embark upon a fishing expedition into confidential materials").

nized a qualified privilege.¹¹⁵ Others have instituted a balancing test to take into account both the university's interest in confidentiality and the plaintiff's interest in obtaining information to prove discrimination.¹¹⁶ Finally, some courts have afforded the university no special consideration and have ordered disclosure of peer review materials¹¹⁷ and peer votes.¹¹⁸

The AAUP has endorsed a position on the discovery issue. Under the AAUP's position, peer review committees would be granted a qualified privilege that the plaintiff could overcome if the facts of a particular case "raise[d] a sufficient inference that some impermissible consideration was likely to have played a role."¹¹⁹ Thus, the AAUP joined the group of commentators endorsing a qualified privilege such as the University of Pennsylvania sought.¹²⁰

Prior to the Supreme Court decision in *University of Pennsylvania*,¹²¹ commentators endorsed every imaginable solution to this perplexing problem. Many commentators rejected the idea of any privilege whether qualified or absolute.¹²² Some supported the idea of having the plaintiff make an initial showing before the court could compel disclo-

115. See *Notre Dame Du Lac*, 715 F.2d at 331 (allowing a privilege to protect the identities of the academics participating in the peer review process); see also *Zaustinsky v. University of Cal.*, 96 F.R.D. 622 (N.D. Cal. 1983) (allowing privilege after finding all of the criteria of *Wigmore on Evidence* met); *McKillop v. Regents of the Univ. of Cal.*, 386 F. Supp. 1270 (N.D. Cal. 1975) (allowing privilege for tenure files under state law).

116. See *Gray v. Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

117. See *EEOC v. University of Pennsylvania*, 850 F.2d 969 (3d Cir. 1988), *aff'd*, 110 S. Ct. 577 (1990); *Orbovich v. Macalester College*, No. 4-87-973 (D. Minn. Mar. 9, 1988) (LEXIS, Genfed library, Dist file); *Franklin & Marshall College*, 775 F.2d at 110.

118. See *In re Dinnan*, 661 F.2d 426 (5th Cir.), *cert. denied*, 457 U.S. 1106 (1981).

119. AMERICAN ASS'N OF UNIVERSITY PROFESSORS, A PRELIMINARY STATEMENT ON JUDICIALLY COMPELLED DISCLOSURE IN THE NONRENEWAL OF FACULTY APPOINTMENTS, reprinted in *ACADEME*, Feb.-Mar. 1981, at 27. The AAUP recommends that the court weigh the following factors in deciding whether to compel disclosure:

the adequacy of the procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, the adequacy of the review procedures internal to the institution, statistical evidence that might give rise to an inference of discrimination, factual assertions of statements or incidents that indicate personal bias or prejudices on the part of the participants, the availability of the information sought from other sources, and the importance of the information sought to the issues presented.

Id. For a more thorough discussion of the AAUP approach, see Finkin, *On Judicially Compelled Disclosure*, *ACADEME*, Aug. 1981, at 181.

120. See *infra* note 128 and sources cited therein.

121. 110 S. Ct. at 577.

122. See, e.g., *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1629 (1985) [hereinafter *Privileged Communications*]; Gregory, *supra* note 3, at 1023; Note, *supra* note 3, at 546; Gray, *Faculty Members Who File Tenure Grievances Should Have Access to Relevant Personnel Files*, *The Chronicle of Higher Educ.*, Nov. 1, 1989, at B1, col. 1.

sure of peer review materials.¹²³ Others looked to *Gray v. Board of Higher Education*¹²⁴ and urged judicial balancing on a case by case basis.¹²⁵ Some stated that protective orders could protect the interests of the academic institutions.¹²⁶ Another commentator suggested an entirely new analysis and order of proof for disclosure cases.¹²⁷ Many others endorsed a qualified privilege.¹²⁸ Finally, one author even endorsed an absolute privilege that would create a clear standard in response to the ad hoc determinations that courts had been making.¹²⁹ The Supreme Court recently has provided a clear standard, but it is a far cry from the absolute privilege that the author supported.

123. See Brooks, *Confidentiality of Tenure Review and Discovery of Peer Review Materials*, 1988 B.Y.U. L. REV. 705. Brooks recommends that before courts allow discovery of confidential material, the plaintiff show at least one of the following: "(1) that certain criteria of fairness in the review process were not met, (2) that discrimination occurred outside of the tenure decision, or (3) that the plaintiff was equally qualified for tenure or promotion as her recently tenured colleagues." *Id.* at 748-49. Upon such showing, the court would compel release of confidential material, but only that material relevant to the discrimination charge. *Id.* at 749; see also Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U.L.Q. 445, 468 (1987) [hereinafter Note, *Cutting the Scales*] (suggesting that the plaintiff be required to make a prima facie case of discrimination under a burden higher than that in *McDonnell Douglas* before the court compels disclosure); Note, *supra* note 112, at 593 (proposing a threshold test by which a court would intervene in the EEOC investigation and consider the university's reasons for denying tenure before allowing discovery of peer review materials); Note, *Title VII in Academia: A Critical Analysis of the Judicial Policy of Deference*, 64 WASH. U.L.Q. 619, 632-33 (1986) (suggesting that the plaintiff be required to provide evidence of discrimination outside the peer review process before the court would allow limited discovery of confidential materials).

124. 692 F.2d at 901; see *infra* notes 204-08 and accompanying text.

125. See Comment, *Out of Balance: The Disruptive Consequences of EEOC v. Franklin & Marshall College*, 50 U. PRR. L. REV. 323 (1988).

126. See DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?*, 14 J.C. & U.L. 121 (1987) (asserting that protective order, not privilege, is the appropriate judicial approach); see also Recent Development, *A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?*, 40 VAND. L. REV. 1397, 1431 (1987) (suggesting protective orders as an additional aid in proposed two-step procedure).

127. See Note, *Cutting the Scales*, *supra* note 123, at 465-70.

128. See Tepker, *supra* note 15; Recent Development, *supra* note 126, at 1397. This author endorses a two-step analysis. First, a qualified privilege would be allowed if the university furnished a detailed statement giving the reasons for the denial of tenure. Second, the court would allow the plaintiff to try to rebut the presumption of privilege. Recent Development, *supra* note 126, at 1430-31; see also Note, *Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases*, 21 SUFFOLK U.L. REV. 691, 721 (1987) (concluding that a "qualified privilege protecting the confidentiality and integrity of the peer review system is necessary to ensure that Title VII discovery does not subvert the decision making process upon which academic freedom and university autonomy depend").

129. See Note, *In Pursuit of Academic Freedom: The Peer Evaluation Privilege*, 28 SANTA CLARA L. REV. 441, 461 (1988).

B. *Failure of Privilege Approach in University of Pennsylvania v. EEOC*

1. The Failure of the Common-Law Privilege Approach

Courts traditionally have recognized certain common-law privileges including those for husband and wife, attorney and client, physician and patient, and priest and penitent.¹³⁰ Rule 501 of the Federal Rules of Evidence sets guidelines by which federal courts may recognize privileges.¹³¹ Beyond those provided by the Constitution and Congress, the courts determine privileges by common-law principles, interpreted in light of reason and experience.¹³²

The Supreme Court has stated that privileges are not favored and if recognized must be narrowly construed.¹³³ The Court has said also, however, that it will establish a new privilege if some public good would override the normal goal of obtaining all possible evidence.¹³⁴ For example, as noted in *University of Pennsylvania*,¹³⁵ the Supreme Court has recognized a qualified privilege for Presidential communications¹³⁶ and absolute privileges for grand jury¹³⁷ and petit jury deliberations,¹³⁸ and for deliberative intra-agency documents.¹³⁹

In *University of Pennsylvania* the university had the task of convincing the Court that the peer review process was worthy of a new privilege. In light of the pervasive judicial deference to university decision making, the creation of a new privilege was not a remote possibil-

130. For a thorough examination of all of these privileges, see *Privileged Communications*, *supra* note 122, at 1450.

131. Instead of accepting the nine nonconstitutional privileges proposed by the Supreme Court as the exclusive list of privileges, Congress adopted rule 501, which allows courts to remain flexible and to continue developing privileges as needed. E. GREEN & C. NESSON, *FEDERAL RULES OF EVIDENCE* 73 (1988).

132. *FED. R. EVID.* 501; *see also* 8 J. WIGMORE, *EVIDENCE* § 2285, at 527 (McNaughton rev. ed. 1961) (stating the four factors needed to establish an evidentiary privilege).

133. *See* *United States v. Nixon*, 418 U.S. 683, 710 (1974) (stating that "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"). *But see Privileged Communications*, *supra* note 122, at 1450, quoting a nineteenth century English case:

Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely . . . the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself.

134. *See* *Trammel v. United States*, 445 U.S. 40, 50 (1980).

135. *University of Pennsylvania*, 110 S. Ct. at 585.

136. *See* *Nixon*, 418 U.S. at 683.

137. *See* *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979).

138. *See* *Clark v. United States*, 289 U.S. 1, 13 (1933).

139. *See* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

ity. The university failed to establish adequate need for a privilege, however.¹⁴⁰

One reason for this failure may be that institutional privileges, such as that sought by the University of Pennsylvania, are more difficult to establish than individual privileges because no individual privacy arguments apply.¹⁴¹ Also, before a court will grant an institutional privilege, the institution must have certain characteristics.¹⁴² First, the institution must fulfill a significant need in society.¹⁴³ Second, the process of communication must be essential to the goals of the institution and must demand confidentiality for its effectiveness.¹⁴⁴ Finally, the institution must show that the litigants will not be unduly burdened by the privilege.¹⁴⁵

In addition to the inherent difficulties in sustaining institutional privileges, the fact that the University of Pennsylvania sought a privilege for an internal process only contributed to its ultimate failure.¹⁴⁶ Internal process privileges are difficult to establish both because no proof exists that disclosure actually will chill communications and because the communication itself may give rise to litigation.¹⁴⁷ Similar peer review process privileges have been rejected in the hospital¹⁴⁸ and media¹⁴⁹ contexts.

140. *University of Pennsylvania*, 110 S. Ct. at 582-85.

141. See *Privileged Communications*, *supra* note 122, at 1594.

142. *Id.* at 1593.

143. *Id.*

144. *Id.*; see also *Douglas Oil*, 441 U.S. at 218 (stating that secrecy is essential to an effective grand jury process).

145. *Privileged Communications*, *supra* note 122, at 1593.

146. *Id.* at 1612.

147. *Id.* For a discussion of proposed governmental process privilege, editorial process privilege, and peer review process privileges, see *id.* at 1613-29.

148. The author of *Privileged Communications* analyzed the peer review processes in both the university and hospital settings. *Id.* at 1625-29. In comparing the two, the author noted that while the academic peer review process had been granted privilege in some circuits, the hospital peer review process has never been granted a common-law privilege. In *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1059-60 (7th Cir. 1981), the plaintiff wanted disclosure of disciplinary proceedings, which were privileged under state law, to prove an antitrust suit. The court determined that the antitrust objectives outweighed the hospital objective of bolstering the effectiveness of in-hospital peer review committees. In *Ott v. St. Luke Hospital*, 522 F. Supp. 706 (E.D. Ky. 1981), the court denied the hospital a privilege upon finding no evidence that the peer review process would be harmed. *Id.* at 711-12.

Some states have statutes that preserve the confidentiality of hospital peer review materials. *Privileged Communications*, *supra* note 122, at 1627. Statutory protection could come to universities.

149. In *University of Pennsylvania*, 110 S. Ct. at 584, the Court analogized to *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg* the Court refused to create a constitutional privilege shielding news reporters from testifying before grand juries because it was "unclear how often and to what extent informers [we]re actually deterred from furnishing information when newsmen [we]re forced to testify before a grand jury." *Id.* at 693.

Utilizing the institutional privilege analysis referred to above, the Court in *University of Pennsylvania* recognized that universities are important to society and that confidentiality is necessary for the peer review process to function effectively.¹⁵⁰ The Court, however, focused on the final element of the institutional privilege analysis—the impact on the plaintiff.¹⁵¹ The Court determined that files in the institution's possession could contain a smoking gun essential to the plaintiff's case. The Court also concluded that a showing of particularized need was too heavy a burden to place on the plaintiff.¹⁵²

Beyond its concern for the plaintiff, the Court noted another rationale for its decision. First, the Court stated that allowing a privilege for the university would open the floodgates to requests for privileges from other groups including writers¹⁵³ and lawyers.¹⁵⁴ Second, the Court argued that the precedent cited by the university did not support its claim because the privileges in those cases were grounded in the Constitution, history,¹⁵⁵ or statute while the proposed privilege did not enjoy a similar background.¹⁵⁶

2. The Failure of the "Academic Freedom" Privilege Approach

As an alternative to its common-law privilege argument, the University of Pennsylvania contended that the Court should recognize a first amendment privilege based on academic freedom.¹⁵⁷ In making this argument, the university relied on the principle that it had a first amendment right to determine who may teach.¹⁵⁸ The university began with the premise that the tenure system is the means by which a university can exercise its first amendment right. Based on that premise, the university argued that increased disclosure would have a chilling effect on evaluations; therefore, the evaluations would not be as reliable, less qualified people would be granted tenure, and, ultimately, the

150. *University of Pennsylvania*, 110 S. Ct. at 587-88.

151. *Id.*

152. *Id.*

153. *See supra* note 149.

154. *University of Pennsylvania*, 110 S. Ct. at 585.

155. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 218 n.9 (stating that grand jury proceedings have been secret since the seventeenth century).

156. *See University of Pennsylvania*, 110 S. Ct. at 585. *But see Comment, Out of Balance: The Disruptive Consequences of EEOC v. Franklin & Marshall College*, 50 U. Prrt. L. Rev. 323, 323 & n.1 (1988) (quoting from a Papal Bull dated 1231, which stated that the confidentiality of opinions expressed in the university tenure review process had been assured). Thus, the confidentiality of the tenure review process arguably has historical roots.

157. *See University of Pennsylvania*, 110 S. Ct. at 581.

158. *See Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), cited in *University of Pennsylvania*, 110 S. Ct. at 586.

quality of scholarship would decline.¹⁵⁹

The Court denied the university's request for an academic freedom privilege because the facts did not fit within the contours of academic freedom that the Court presently recognized.¹⁶⁰ In other words, the argument failed because the governmental action was neither an attempt to control the content of university speech nor a direct infringement on the right to select the faculty.¹⁶¹ Justice Harry Blackmun concluded that the university's argument was too remote and attenuated and that the alleged injury to academic freedom was speculative.¹⁶²

3. Possible Effects of the Decision on the Peer Review Process

Both scholars¹⁶³ and courts¹⁶⁴ have tried to predict whether the denial of a special evidentiary privilege will affect the peer review process. Those who supported the university continue to argue that disclosure of confidential peer review materials will chill candid evaluations of tenure candidates.¹⁶⁵ Under the Supreme Court's view, however, academics will continue to give honest, candid reviews of their peers although those evaluations may provide more specific illustrations in support of the final recommendation to deflect potential discrimination claims.¹⁶⁶ Com-

159. *University of Pennsylvania*, 110 S. Ct. at 586 (quoting from the petitioner's brief).

160. *Id.* at 587 (concluding that "petitioner's claim does not fit neatly within any right of academic freedom that could be derived from the cases on which petitioner relies. In essence, petitioner asks us to recognize an *expanded* right of academic freedom to protect confidential peer review materials from disclosure").

161. *Id.* at 586-87.

162. *Id.* at 588.

163. William W. Van Alstyne, general counsel for the AAUP and a law professor at Duke University, stated: "To operate in a fishbowl is necessarily to inhibit candor." Blum, *Supreme Court Rejects Privacy Claim for Tenure Files, Says University Must Disclose Information in Bias Case*, *The Chronicle of Higher Educ.*, Jan. 17, 1990, at A17, col. 1. Ernst Benjamin, the general secretary of the AAUP, has predicted that there will be "less in the files . . . more phone calls, more use of the grapevine; really illicit means." Kelly, *Tenure Ruling Has Universities Wary*, *USA Today*, Jan. 16, 1990, at 4D, col. 1. Others predict that recommendations will be much blander or that universities will begin to rely more on outside reviewers. Mooney, *Academics Are Divided Over High-Court Ruling on Tenure Documents*, *The Chronicle of Higher Educ.*, Jan. 24, 1990, at A18, col. 1. Perhaps the most troubling opinion is that the "decision sets a tone for government intervention in university affairs." *Id.* (quoting Anne H. Franke, associate secretary and counsel for the AAUP).

164. See *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 336 (7th Cir. 1983) (asserting that "[w]ithout this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future"); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 908 (2d Cir. 1982) (stating that "a rule allowing routine discovery of tenure votes could chill frank discussion and engender disharmony among faculty"). *But see EEOC v. Franklin & Marshall College*, 775 F.2d 110, 115 (7th Cir. 1985) (holding the view that "honesty and integrity . . . will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality").

165. See *University of Pennsylvania*, 110 S. Ct. at 588.

166. Justice Harry Blackmun wrote:

[W]e are not so ready as petitioner seems to be to assume the worst about those in the aca-

mentators also have espoused this view.¹⁶⁷

C. University Strategy for Future Title VII Cases

By considering the creation of a privilege, the Court in *University of Pennsylvania* addressed the most extreme solution for handling discovery of peer review materials. Courts and commentators have proposed other, less radical, alternatives. In the next wave of university Title VII cases, universities are likely to ask the courts to consider the following options in lieu of automatic and complete disclosure.

1. Protective Orders

Under Rule 26(c) of the Federal Rules of Civil Procedure,¹⁶⁸ the trial court has the discretion to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"¹⁶⁹ upon a showing of "good cause."¹⁷⁰ Rule 26(c) is extremely flexible and allows a court to fashion a protective order to serve the needs of a specific case. A court can use a protective order to deny discovery altogether¹⁷¹ or to allow discovery with some restrictions.¹⁷² The scope of a protective order is within the discretion of the trial judge and will be reviewed under the abuse of discretion standard.¹⁷³

In *Keyes v. Lenoir Rhyne College*¹⁷⁴ the Fourth Circuit affirmed the lower court's decision ordering the production of some personnel records, but denying the disclosure of the confidential peer evaluations.¹⁷⁵ In *Jepsen v. Florida Board of Regents*¹⁷⁶ the district court fashioned a protective order by which the plaintiff's attorney could

demographic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers.

Id.

167. See *Privileged Communications*, *supra* note 122, at 1627-28. The author argues that denying a privilege will not affect the peer review process. Instead, evaluators will give objective, well-supported reports in an attempt to avoid reversal of their decisions. *Id.* at 1627.

168. FED. R. CIV. P. 26(c).

169. *Id.*

170. *Id.*

171. FED. R. CIV. P. 26(c)(1).

172. FED. R. CIV. P. 26(c)(2)-(8).

173. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *General Dynamics Corp. v. Selb Mfg.*, 481 F.2d 1204, 1211 (8th Cir.), *cert. denied*, 414 U.S. 1162 (1973).

174. 552 F.2d at 579.

175. *Id.* at 580-81.

176. 610 F.2d 1379 (5th Cir. 1980).

view, but not copy, the fourteen files requested if a file contained a less than satisfactory evaluation.¹⁷⁷ In *Lynn v. Regents of the University of California*¹⁷⁸ the district court issued a protective order completely denying the plaintiff access to the file containing peer review materials.¹⁷⁹ In *EEOC v. University of Notre Dame Du Lac*¹⁸⁰ the Seventh Circuit ordered the district court to issue a protective order assuring that the privileged materials would not be disclosed to persons not directly involved in the action.¹⁸¹

Similarly, one commentator has suggested that limiting access to the material to the parties, their experts, and their attorneys would be the best use of a protective order.¹⁸² This solution would allow the plaintiff to prepare a discrimination suit, but also would assure the university that evaluations would not be revealed to the public unnecessarily.¹⁸³

In 1988 the New Jersey Supreme Court, in *Dixon v. Rutgers*,¹⁸⁴ refused to allow a privilege for peer review materials. The court instead held that trial courts should issue protective orders to prevent overly broad discovery and unlimited access.¹⁸⁵ Now that the United States

177. *Id.* at 1384. The court of appeals upheld the protective order, but reversed the decision saying that the plaintiff should have been allowed to introduce the records into evidence with further protective orders if necessary. *Id.* at 1384-85.

178. 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

179. *Id.* at 1345. The district court viewed the file *in camera* without disclosing any of the contents to the plaintiff.

180. 715 F.2d 331 (7th Cir. 1983).

181. *Id.* at 340. The court also noted that the university should not disclose the privileged materials at all unless the EEOC found some evidence of discrimination. *Id.* at 340 n.7.

182. See DeLano, *supra* note 126, at 150 (proposing the utilization of Fed. R. Civ. P. 26(c)(5)).

183. See *id.* at 151. Ms. DeLano has made the following suggestions about how such a protective order could work:

Confidential documents could be used during a deposition only if the witness wrote the document, is otherwise familiar with it, or would have had independent access to it under university regulations. Relevant portions of depositions could be sealed. The court could require any plaintiff wanting to introduce confidential documents at trial to file a motion in limine. By the time such a motion is filed, a plaintiff should have sufficient information to allow the court to decide whether the confidential materials should be made public during trial.

By limiting access to confidential materials, a protective order can shield evaluations from general scrutiny until the plaintiff has enough evidence of discrimination to go to trial. Although it will not entirely silence the concern that a plaintiff can get access to confidential materials merely by alleging discrimination, limiting dissemination of the confidential materials should reassure evaluators that the evaluations will not unnecessarily be exposed to public scrutiny. In light of the goals of Title VII, the peer review process cannot be completely shielded from judicial scrutiny. Protective orders, however, can limit public scrutiny to those cases in which the plaintiff has discovered evidence of discrimination.

Id. at 150-51.

184. 110 N.J. 432, 541 A.2d 1046 (1988).

185. See *id.* at 435, 541 A.2d at 1048.

Supreme Court has followed the *Rutgers* holding in denying a qualified privilege, perhaps other courts will follow the *Rutgers* ruling on protective orders.

Courts should follow *Notre Dame* and *Rutgers* instead of fashioning protective orders denying all access to peer review materials. If courts ever automatically denied all access to peer review materials, the victory university Title VII plaintiffs won in *University of Pennsylvania* will be virtually useless. One specific way that courts could use protective orders effectively would be by the use of redaction.

2. Redaction As a Specific Condition of Protective Orders

In *University of Pennsylvania* Justice Harry Blackmun noted that the Court would not decide whether the petitioner could redact information from the requested files before giving them to the EEOC¹⁸⁶ because the lower courts had not considered the issue fully.¹⁸⁷ Redaction would allow universities to remove certain information from the files that would reveal the identity of the evaluator. By negating the argument that the disclosure of the evaluator's identity would have a chilling effect on future evaluations, redaction could be a viable solution capable of meeting the needs of both parties.¹⁸⁸

The Third Circuit affirmed redaction in *EEOC v. Franklin & Marshall College*,¹⁸⁹ and the Seventh Circuit ordered it in *EEOC v. University of Notre Dame Du Lac*.¹⁹⁰ The Seventh Circuit even set forth an entire process for redaction.¹⁹¹ These guidelines could become the na-

186. See *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 581 n.2, 589 n.9 (1990).

187. *Id.* at 589 n.9; see also *EEOC v. University of Pennsylvania*, 850 F.2d 969, 982 (3d Cir. 1988) (remanding the redaction issue to the district court), *aff'd*, 110 S. Ct. 577 (1990).

188. Redaction also could be useful in preserving "whatever harmony exists between individual committee members and the disgruntled plaintiff, who may continue to work side by side." Recent Development, *supra* note 126, at 1431.

189. 775 F.2d 110, 117 (7th Cir. 1985) (affirming the district court's order to remove names and other identifying information of evaluators).

190. 715 F.2d at 331 (remanding to allow the university to redact); see also *Jackson v. Harvard Univ.*, 111 F.R.D. 472, 476 (D. Mass. 1986) (requiring that names be redacted from files produced).

191. See *University of Notre Dame*, 715 F.2d at 338-39. The court stated:

Before producing the personnel files sought by the EEOC, the University should be permitted to redact the name, address, institutional affiliation, and any other identifying features (e.g., publications, professional honors received, or any other material which could be used to identify the particular academician) of the reporting scholar from the evaluations found in each of the files.

Id. at 338. After completing redaction, the university should give a copy of the redacted and the unredacted files to the district court. The court will then review both files, and if it determines that it is necessary for the party to have access only to the redacted file, then the court will make the redacted file available. *Id.* To obtain more information, information not found in the redacted file, the EEOC should show a particularized need for the information. In determining whether to compel further discovery of the material covered by the qualified privilege, the court would utilize

tional standard for addressing the redaction issue.

The Seventh Circuit cautioned, however, that it would not allow the EEOC access to redacted files in all instances.¹⁹² How available will redacted records be? In *Franklin & Marshall College*,¹⁹³ the most recent decision to address the question of redaction, the Third Circuit affirmed the district court's order instructing that information revealing the evaluator's identity be redacted.¹⁹⁴ The court did not analyze the redaction issue in that case probably because the university offered redacted files, and the EEOC was willing to accept them.¹⁹⁵

University of Pennsylvania has been remanded for the district court to decide whether the university will be allowed to redact identifying information from the peer review materials.¹⁹⁶ In arguing for redaction before the Third Circuit, the university relied on *Franklin & Marshall College*.¹⁹⁷ The EEOC, on the other hand, argued that *Franklin & Marshall College* does not set a rule for automatic redaction and that in this instance redacted information would be useless.¹⁹⁸ The Third Circuit indicated that, based on its study of the limited record, redaction should be allowed.¹⁹⁹

At first glance, redaction appears to be a good compromise for courts because both the university and the plaintiff benefit. By removing the names and other identifying words, the court actually may help preserve some of the confidentiality eroded by compelled disclosure,²⁰⁰ thereby salving, even if only slightly, the wounds wrought by the Supreme Court's decision. The plaintiff, on the other hand, would gain

a balancing test and make the plaintiff show a "compelling necessity" for the specific information requested. *Id.*

The Seventh Circuit believed that this procedure would "accommodate the competing interests which are at stake and . . . prevent an EEOC investigation from becoming 'a fishing expedition,' or exploratory surgery without the required prior medical testing, screening, evaluation and diagnosis." *Id.* at 339.

192. *Id.* at 337 n.4. The court also pointed out that the instant case was unique because Notre Dame voluntarily disclosed redacted files to the EEOC. Normally "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.*

193. *Franklin & Marshall College*, 775 F.2d at 110.

194. *Id.* at 117.

195. *Id.* at 112.

196. See *University of Pennsylvania*, 850 F.2d at 969, *aff'd*, 110 S. Ct. at 577.

197. 850 F.2d at 982.

198. *Id.*

199. *Id.* The court noted that the university had offered good reasons for redaction: (1) the EEOC had not insisted on unredacted records in similar cases in the past, and (2) the identity of evaluators was irrelevant to the finding of discrimination. *Id.* at 982 & n.10.

200. See Blum, *supra* note 163, at A17, col. 1. Daniel Steiner, vice-president and general counsel at Harvard, which filed a brief in support of the University of Pennsylvania, stated: "We have to look for alternatives to deal with a situation which might deter totally candid evaluations. Redaction might help considerably in preserving confidentiality and the tenure process." *Id.*

access to all of the desired information, with the exception of the evaluators' identities. As long as redaction is executed properly, any evidence of discrimination still would exist. Not only is redaction fair to both parties, it also upholds the congressional intent of preventing delay during the EEOC investigation stage.²⁰¹

Some problems may lurk beneath the surface for both parties, however. From the university's perspective, will redaction provide enough confidentiality? A plaintiff in a small department of a small college who obtains a peer review file after redaction probably could identify the evaluator simply based on knowledge of the evaluator's typical comments or concerns and the evaluator's writing style or handwriting or the print type of a computer printer or typewriter.

From the plaintiff's perspective, will redacted records be effective in proving a Title VII case? The university might redact information beyond the mere identity of the evaluator. But even if the files are properly redacted, the EEOC has argued that redacted records would be useless.²⁰² Under the Seventh Circuit's procedures, if the EEOC gained access to redacted files and then wanted to get information from the nonredacted files, the EEOC would be required to meet a very high showing of particularized need.²⁰³

3. Gray's Balancing Test

In *Gray v. Board of Higher Education*²⁰⁴ a black educator at a community college brought a civil rights action²⁰⁵ after being denied tenure. In response to Gray's motion to compel discovery of two votes of tenure committee members,²⁰⁶ the Second Circuit refused to adopt either a privilege or a rule of complete disclosure.²⁰⁷ Instead, the court

201. See *University of Pennsylvania*, 850 F.2d at 978 (noting 42 U.S.C. § 2000e-5(f)(5), under which judges have the duty to "cause the case to be in every way expedited"). The court also referred to 42 U.S.C. § 2000e-9, which states that the EEOC subpoena power enables it to fulfill its investigative role and to obtain information necessary for determining if there is reasonable cause to believe a charge is true. *Id.*

202. *Id.* at 982; see Gray, *Faculty Members Who File Tenure Grievances Should Have Access to Relevant Personnel Files*, *The Chronicle of Higher Educ.*, Nov. 1, 1989, at B1, col. 1. Gray stated that if an evaluator truly and openly held hostility for the candidate, the identity of such person would be important because the evaluation could be discounted in value. On the other hand, removal of the evaluator's name would prevent the plaintiff from recognizing the identity and, thus, the evaluation might be afforded undue weight. *Id.* at B3, col. 1.

203. See *University of Notre Dame*, 715 F.2d at 338.

204. 692 F.2d 901 (2d Cir. 1982).

205. The plaintiff brought the action under 42 U.S.C. §§ 1981, 1983, and 1985, not Title VII. *Id.*

206. *Id.* at 903.

207. *Id.* at 908. The court recognized that a rule of complete privilege "would frustrate reasonable challenges to the fairness of hiring decisions" and that a rule of complete disclosure would "chill peer review decisions." *Id.* The court held that "absent a statement of reasons, the balance

took a more cautious approach and adopted a balancing test,²⁰⁸ which compared the professor's need for information to prove discrimination with the institution's concern for confidentiality. Both the Fourth²⁰⁹ and Ninth Circuits²¹⁰ also appear to have accepted a balancing approach.

Although the Third Circuit considered both a privilege and a balancing test in *EEOC v. University of Pennsylvania*,²¹¹ the Supreme Court's holding addresses only the narrow issue of privilege. The *Gray* balancing test is not mentioned explicitly in the Court's opinion and apparently never was considered. For this reason, universities are not barred from arguing that the *Gray* balancing test should be applied and that the needs of the university outweigh those of the plaintiff.

In dicta in *University of Pennsylvania*, however, the Court stated that requiring the EEOC to demonstrate a specific reason for disclosure would create much litigation, thus hindering the EEOC's attempts to investigate and remedy discrimination.²¹² If the Court was implying that any judicial standard would be an obstacle for the plaintiff, then the Court also would reject the *Gray* test. Because the congressional policy is to limit delay at the EEOC investigation stage, courts should reject the *Gray* balancing test. Whether courts will do so willingly or whether the *Gray* question will go to the Supreme Court is yet to be seen.

4. Statutory Protection

Although currently no states have statutes granting a privilege for academic peer review materials, several states do have such statutory protection for the hospital peer review process.²¹³ Hospitals may have succeeded in getting a statutory privilege because, unlike the academic area, all attempts to secure a judicial privilege for hospital review materials have failed.²¹⁴ Now that the Supreme Court has foreclosed the possibility of a privilege based either on common law or academic free-

tips toward discovery and away from recognition of privilege." *Id.*

208. *Id.* at 904-05.

209. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.) (stating that it "was, of course, necessary for the court to balance this interest of the College against the need of the plaintiff for such material"), *cert. denied*, 434 U.S. 904 (1977).

210. See *Zaustinsky v. University of California*, 96 F.R.D. 622 (N.D. Cal. 1983), *aff'd without opinion*, 782 F.2d 1055 (9th Cir. 1985); see also *Recent Development*, *supra* note 126, at 1427-28 (discussing *Zaustinsky*).

211. 850 F.2d at 969; see also *Franklin & Marshall College*, 775 F.2d at 110.

212. See *University of Pennsylvania*, 110 S. Ct. at 584.

213. See *Privileged Communications*, *supra* note 122, at 1627 nn.201 & 202 (listing state statutes).

214. *Id.* at 1627.

dom, universities may lobby for statutory protection.

V. REMEDIES AND ACADEMIC FREEDOM

A. Case Law Addressing Remedies for University Title VII Plaintiffs

Because university Title VII plaintiffs are rarely victorious, courts seldom have reached the question of remedy.²¹⁵ The *University of Pennsylvania* ruling, however, should lead to increased disclosure of peer review documents, which in turn could produce better evidence of discrimination, and, thus, more judicial findings of discrimination. Courts must be prepared to create proper remedies.

Under Title VII courts can enjoin the defendant's discriminatory practices and order appropriate affirmative action.²¹⁶ Remedies could include "reinstatement or hiring of employees, with or without back pay [or] any other equitable relief as the court deems appropriate."²¹⁷ Title VII was designed to remove discrimination from society²¹⁸ and to make the plaintiff whole.²¹⁹ For Title VII to be effective, these purposes should be reflected in the judicial remedy.²²⁰

Back pay and reinstatement are presumptively favored remedies under Title VII.²²¹ Arguably, however, money damages will not serve the purposes of Title VII properly. Money damages do not make the plaintiff whole because the plaintiff still will be deprived of tenure.²²² Neither will money damages eliminate discrimination because some defendants would "buy the right to discriminate."²²³ Despite the noted shortcomings of back pay as a remedy in tenure cases, that remedy is still presumptively favored for successful Title VII plaintiffs²²⁴ and has been awarded in tenure cases.²²⁵

In 1980 one commentator argued that only one remedy, the award

215. See Note, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206 (1982).

216. See 42 U.S.C. § 2000e-5(g) (1988).

217. *Id.*

218. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

219. See *id.* at 421.

220. See Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 463 (1980). For more information on Title VII remedies, see Note, *supra* note 7, at 1447-48.

221. See *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988).

222. Note, *supra* note 220, at 465 (stating that the plaintiff still will be "deprived of the intangible benefits of a tenured . . . position, such as job security, prestige, personal satisfaction, and enhanced professional opportunities").

223. *Id.* at 466.

224. *Gutzwiller*, 860 F.2d at 1333 (urging district court to award back pay instead of tenure as remedy on remand).

225. See *Kumar v. Trustees of the Univ. of Mass.*, 566 F. Supp. 1299, 1330 (D. Mass. 1983); see also *Ford v. Nicks*, 741 F.2d 858, 864 (6th Cir.), *cert. denied*, 469 U.S. 1216 (1984).

of tenure, can make a plaintiff whole once a university has denied tenure on the basis of discrimination.²²⁶ In the same year *Kunda v. Muhlenberg College*²²⁷ became the first decision to uphold the award of tenure as a remedy.²²⁸ For years *Kunda* stood alone as a sole beacon of hope for Title VII crusaders in the academic world and a single, but terrifying, threat to universities.

Today, however, *Kunda* should not be seen as an oddity. The ranks of courts that recognize the possibility of awarding tenure as a remedy continue to grow. To date three appellate decisions have approved tenure as an appropriate remedy.²²⁹ Courts have begun to recognize that just because discrimination occurs in an academic rather than a commercial setting, the court cannot fail to award a meaningful remedy.²³⁰

In *Pyo v. Stockton State College*²³¹ the district court denied the defendant's motion for partial summary judgment that sought to strike the judicial award of tenure as a possible remedy.²³² The court found that the judicial award of tenure was within the court's power. As long as the plaintiff has proven that discrimination affected the tenure decision and that the remedy would make the plaintiff whole and not create a windfall, tenure would be an appropriate remedy.²³³

The most recent decision to follow *Kunda* is the 1989 First Circuit decision in *Brown v. Trustees of Boston University*.²³⁴ In *Brown* a jury found that but for sexual discrimination, Ms. Brown would have been awarded tenure.²³⁵ Based on that finding, the court awarded Ms. Brown an associate professorship and tenure.²³⁶

The *Kunda* rule is relatively narrow because it requires not only that discrimination be the reason for denial, but also that a candidate's qualifications be undisputed.²³⁷ Often, however, a candidate's qualifications are in dispute. *Pyo* asserts that tenure is still a proper remedy if the plaintiff can demonstrate that others with similar qualifications

226. See Note, *supra* note 220, at 476.

227. 621 F.2d 532 (3d Cir. 1980).

228. The court awarded tenure to the physical education instructor conditioned on the achievement of a masters degree. *Id.* at 534-35.

229. See *Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (1st Cir. 1989); *Ford*, 741 F.2d at 858; *Kunda*, 621 F.2d at 532; see also *Pyo v. Stockton State College*, 603 F. Supp. 1278 (D.N.J. 1985).

230. *Kunda*, 621 F.2d at 550.

231. *Pyo*, 603 F. Supp. at 1278.

232. *Id.* at 1281.

233. *Id.*

234. 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

235. *Id.* at 362.

236. *Id.*

237. See *Pyo*, 603 F. Supp. at 1283 (construing *Kunda*, 621 F.2d at 532).

were granted tenure.²³⁸ The First Circuit reached the same conclusion in *Brown*.²³⁹ Even if a dispute about a candidate's qualifications exists, the dispute is not an absolute bar to a tenure remedy.²⁴⁰ In this way, *Pyo* and *Brown* broaden the *Kunda* holding.

B. Arguments by Academic Institutions

1. Academic Freedom

In both *Kunda* and *Brown*, the academic institutions raised academic freedom arguments. Muhlenberg College argued that the award of tenure would violate the institution's academic freedom, but the *Kunda* court concluded that the defendant misconstrued the meaning of academic freedom.²⁴¹ The court acknowledged that academic freedom should receive maximum protection.²⁴² In granting tenure to *Kunda*, however, the court asserted that although academic freedom is essential to the educational process, it does not affect every employment decision of an educational institution.²⁴³

Boston University argued, in *Brown*, that the award of tenure infringed on the university's right to determine who may teach.²⁴⁴ In response, the First Circuit asserted that academic freedom does not give universities the license or freedom to discriminate.²⁴⁵ Not surprisingly, the court rejected the university's academic freedom argument.

Both the First and Third Circuits relied on the congressional purpose behind including academic institutions within the scope of Title VII. Congress discovered that discrimination often occurred in academic arenas.²⁴⁶ By electing to award tenure after finding that the candidate would have been granted tenure but for the sexual discrimination, the courts carried out congressional policy.

The First and Third Circuits made these decisions before the Supreme Court outlined, in *University of Pennsylvania*, the instances in which an institution's academic freedom is violated.²⁴⁷ The interpretation of institutional academic freedom relied on in *Kunda* and *Brown*,

238. *See id.* at 1283-84.

239. *Brown*, 891 F.2d at 337.

240. *Id.* at 361-62.

241. *See Kunda*, 621 F.2d at 547.

242. *Id.*

243. *Id.*

244. *Brown*, 891 F.2d at 362.

245. *Id.*

246. EQUAL EMPLOYMENT, *supra* note 7, at 2155. Congress found that "women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars." *Id.*

247. *See supra* notes 102-04 and accompanying text.

however, squares with that of the Supreme Court.²⁴⁸ Neither *Kunda* nor *Brown* presented an issue involving the university's speech content; therefore, no violation existed under the first part of the Court's test. Similarly, awarding tenure does not infringe directly on the right to determine who may teach.

One could argue that awarding tenure is the ultimate usurpation of the university's decision on who may teach. The judicial award of tenure in *Kunda* and *Brown*, however, did not violate the institution's academic freedom. The Supreme Court stated that the university has the right to determine who may teach, but also specifically stated that this determination must be made on academic grounds. A finding that discrimination impermissibly entered the determination would thwart the university's argument. In the words of the *Brown* court, academic freedom "does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds."²⁴⁹

Academic freedom has not proven to be a successful argument against the prospect of tenure as remedy. This result is the only rational and just outcome. Once a court has determined that discrimination caused the denial of tenure,²⁵⁰ no reason exists for deferring to the university's decision-making process. Once discrimination is discovered, Title VII policies automatically should outweigh university concerns.

2. Freedom of Association

Defendant institutions also have argued that the award of tenure is unreasonable and intrusive because it creates a lifetime relationship between the parties.²⁵¹ Forcing an association in an area in which people must work closely together is troublesome. Now that *Kunda* and *Brown* strongly have rejected academic freedom arguments, institutions may argue freedom of association more strenuously in the remedy area.

In a similar setting, law firms have made first amendment freedom of association arguments to prevent the remedy of partnership.²⁵² In *Hishon v. King & Spalding*²⁵³ the Supreme Court asserted that, although discrimination could be characterized as a form of freedom of association protected by the first amendment, the courts never have

248. See *University of Pennsylvania*, 110 S. Ct. at 586-87.

249. *Brown*, 891 F.2d at 362.

250. In *Brown* the jury found that but for sex discrimination, Brown immediately would have been granted tenure. *Id.*

251. See *id.* at 361. See generally Note, *supra* note 220, at 468-71 (addressing the problem of forced association).

252. See *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

253. *Id.*

protected discrimination.²⁵⁴ The Court held that the plaintiff had stated a cause of action and remanded the matter for trial.²⁵⁵

The *Hishon* decision provides a prediction for the future: An academic institution's arguments based on forced association must fail once discrimination has been established. Cases may exist, however, in which a court is unwilling to award tenure even after discrimination is discovered.²⁵⁶ For example, if forced association would provoke animosity, tenure may be an inappropriate remedy.²⁵⁷

When addressing these problems, courts should consider the following factors: The size of the group, the nature of its professional working relationship, the amount of interaction anticipated, the support the group has for the plaintiff, and the feelings the plaintiff has for the group.²⁵⁸ Moreover, if a plaintiff has strong adverse feelings about the university or the department, then tenure would not be satisfying for either party. On the other hand, if the plaintiff still harbors good feelings for the department, and the department has expressed strong support for the plaintiff, then tenure would be an appropriate remedy.²⁵⁹

VI. CONCLUSION

Higher education experts predict that many colleges and universities soon will begin to restrict their tenure systems.²⁶⁰ As of 1988, sixty-three percent of all faculty members were tenured,²⁶¹ but that percentage is expected to fall in the near future.²⁶² Academic institutions will make several changes to limit the number of tenured faculty. First, they

254. *Id.*

255. *Id.*

256. Even the courts that have allowed tenure as a remedy recognize that it is not the appropriate remedy in every case. The Sixth Circuit faced this issue again in *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988). In giving the district court advice on fashioning a remedy, the court stated that reinstatement with tenure should be granted only in the most exceptional cases. *Id.* at 1333. The Third Circuit found in *Gurmankin v. Costanzo*, 626 F.2d 1115 (1980), that tenure as a remedy would be drastic relief in that case because, unlike *Kunda*, the faculty had never evaluated the candidate. *Id.* at 1125-26.

257. See, e.g., *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919 (S.D.N.Y. 1976) (granting money damages because advertising executive's animosity would make reinstatement impractical), cited in *Shanor & Shanor*, *supra* note 13, at 151.

258. Note, *supra* note 220, at 469. The author also discusses other arguments of defendants, including unique personal qualities and the difficulty of discharge.

259. For example, in *Brown* the court found that "Brown's near unanimous endorsement by colleagues within and without her department suggest strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." 891 F.2d at 362-63.

260. See Mangan, *Colleges are Attempting to Redefine Tenure Policies, but Many Faculty Members Wary of the Results*, *The Chronicle of Higher Educ.*, Mar. 1, 1989, at A10, col. 2.

261. *Id.*

262. *Id.*

are likely to hire more part-time faculty members who are not eligible for tenure.²⁶³ Second, they may impose evaluations after tenure has been granted; these evaluations could lead to dismissal.²⁶⁴ Third, universities may lengthen the traditional six or seven year probationary period.²⁶⁵

Restricting the tenure system eventually may channel the United States towards the British response to tenure. In 1988 the British Parliament voted to abolish tenure for new faculty members.²⁶⁶ At the same time, however, Parliament codified academic freedom.²⁶⁷ Now both individual professors and the institution enjoy academic freedom protection.²⁶⁸

Although the abolition of the American tenure system might be a pessimistic vision, the trend toward a restricted academic tenure system seems to be a reality. The recent decisions disallowing a privilege for peer review materials and those awarding tenure as a remedy certainly will not cause the demise of the tenure system; neither will these cases strengthen it. Universities view discovery in discrimination suits as wreaking havoc on the entire peer review process. In the wake of *Kunda* and *Brown*, universities doubtless feel threatened by the judiciary's power to make an award of tenure against the university's will.

Because tenure is intended to protect academic freedom, restriction of the tenure system will leave faculty exposed. Without the protection of academic freedom, a professor's teaching, research, and extramural speech will be threatened. Ironically, in response to the denial of a broad protection through institutional academic freedom in *University of Pennsylvania* and *Brown*, universities may begin chipping away at the professor's academic freedom by restricting the tenure system.

In *University of Pennsylvania* the Supreme Court endorsed institutional academic freedom. Although the Court still did not explain why the academic institution should enjoy such protection, institutional academic freedom is apparently here to stay. In instances involving the institution and a faculty member, an impossible zero-sum game seems to exist. With *University of Pennsylvania* as precedent, however, the faculty member at least has the chance to prepare a case properly and the chance to be successful.

Changes in judicial stance on discovery and remedy may mark the

263. *Id.* at A11, col. 1.

264. *Id.*

265. *Id.*

266. See Walker, *British Parliament Votes to End Tenure for New Faculty Members at Universities*, *The Chronicle of Higher Educ.*, Aug. 3, 1988, at A1, col. 2.

267. See *id.*

268. See *id.*

beginning of the end for judicial deference to university decisions. The fact that similar changes also are coming to the area of burdens of proof in other Title VII actions reinforces that conclusion. For example, *Price Waterhouse v. Hopkins*²⁶⁹ may encourage courts to review tenure decisions and to listen to faculty claims.²⁷⁰ Under *Price Waterhouse*, if a court finds that discrimination entered into the decision not to grant tenure, then the employer must prove by a preponderance of the evidence that the same decision would have been made regardless of the discrimination.²⁷¹ *Price Waterhouse* could lead to more successful Title VII actions in the university setting by increasing the number of cases heard and by changing the burden of proof. University plaintiffs now have the same opportunity for discovery as other Title VII plaintiffs, and they have gained the chance to obtain a meaningful remedy.

University Title VII plaintiffs certainly will not have an easy time sustaining a discrimination action and obtaining the award of tenure, but that result is possible now. Some problems are foreseeable. Courts could choose to maintain a deferential stance and to use overly restrictive protective orders, or could use the *Gray* test, thus leaving the university plaintiff in just as weak a position as the qualified privilege would have created.

When Congress brought universities within the scope of Title VII, it intended for tenure decisions to be exposed to the same enforcement actions available for employment decisions in other areas.²⁷² *University of Pennsylvania* embodies that intent and puts university Title VII plaintiffs on the road to equal treatment. Furthermore, *Kunda* and *Brown* have brought university Title VII plaintiffs within the realm of remedies available to other Title VII plaintiffs. Finally, *Price Waterhouse* should encourage more judicial review of tenure decisions. After eighteen years the courts finally have effectuated congressional intent and brought university Title VII plaintiffs up to par with other Title VII plaintiffs.

Clisby Louise Hall Barrow

269. 109 S. Ct. 1775 (1989).

270. See Jashcik, *Ruling Seen Helping Professors Bring Discrimination Cases: Supreme Court Puts Burden of Proof on Employers*, *The Chronicle of Higher Educ.*, May 10, 1989, at A1, col. 2.

271. *Id.*

272. See *University of Pennsylvania*, 110 S. Ct. at 582-83.