TITLE VII IN ACADEMIA: A CRITICAL ANALYSIS OF THE JUDICIAL POLICY OF DEFERENCE

In 1972 Congress extended coverage of Title VII of the Civil Rights Act of 1964[1] to the faculty employment decisions of colleges and universities.[2] In the ensuing years courts were reluctant to apply Title VII to tenure discrimination cases.[3] Courts deferred to administration decisions, relying on the numerous, highly subjective factors underlying academic tenure decisions.[4] Courts considered the peer-review tenure decision process used by academic institutions worthy of protection.[5] The refusal of most courts to intrude upon the tenure decision process has imposed on academicians a much heavier burden of proof than that carried by other Title VII plaintiffs.[6]

Part I of this Note examines the test established by the Supreme Court for proving discriminatory treatment under Title VII. Part II discusses the judicial response to Title VII cases challenging a tenure process. This part focuses on courts' deferential treatment of peer judgments of qualifications for tenure. In addition, this part examines the judicial reluctance to compel discovery of confidential tenure review documents. Part III proposes an analytical framework and a discovery method that will facilitate judicial review of the problems created by the unique nature of tenure decisions.

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1. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)) [hereinafter Title VII].

2. The Equal Employment Opportunity Act of 1972 removed the exemption for academicians. Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified at 42 U.S.C. § 2000e-1 (1982)). Congress intended that the statute cover discrimination in academia. A House Report states:

> There is nothing in the legislative background of Title VII nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other field of employment. . . . The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future [sic] development.

See H.R. REP. No. 238, 92nd Cong., 2d Sess. (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2156.

3. *See infra notes 26-47 and accompanying text.*

4. *See infra* notes 20-23 and accompanying text. *See generally* SELDIN, CHANGING PRACTICES IN FACULTY EVALUATION (1984); SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION (1971).

5. *See infra* notes 28-38 and accompanying text.

6. *See infra* notes 26-47.

I. TITLE VII DISPARATE TREATMENT CLAIMS

In *McDonnell Douglas Corp. v. Green*,[7] the Supreme Court articulated a test for Title VII disparate treatment claims. First, the plaintiff must establish a prima facie case of intentional discrimination.[8] If the plaintiff satisfies this requirement, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision.[9] If the defendant meets this burden, then the plaintiff must prove that the defendant's articulated justification is a pretext for discrimination.[10] Thus, the plaintiff retains the ultimate burden of proving that the defendant intentionally discriminated against her.[11]

The Supreme Court refined the *McDonnell Douglas* test in *Texas Dept. of Community Affairs v. Burdine*.[12] In *Burdine*, the Court held that once the plaintiff established a prima facie case, the defendant need only present evidence sufficient to raise a genuine issue of fact about the alleged discrimination against the plaintiff.[13] The Court required the defendant merely to clarify the factual issue for the plaintiff and provide the plaintiff with a full and fair opportunity to prove pretext.[14]

The plaintiff in *Burdine* argued that the defendant must prove by a

7. 411 U.S. 792 (1973).

8. *Id.* at 802. The Court stated that a plaintiff may establish a prima facie case 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 with equal or less qualifications. *Id.*

The Supreme Court in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), stated:

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

Id. at 254.

9. 411 U.S. at 802. The Supreme Court clarified this requirement in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). The Court refuted the plaintiff's argument that *McDonnell Douglas* required the defendant to prove an absence of discriminatory motive. The Court held that "articulating some legitimate, nondiscriminatory reason" will suffice to meet the employer's burden of proof. *Id.* at 24-25. The Court failed, however, to resolve completely the issue of the defendant's burden. *See infra* notes 13 & 14 and accompanying text.

10. 411 U.S. at 804.

11. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

12. *Id.*

13. *Id.* at 255. The defendant's evidence must raise a genuine issue of fact as to whether it discriminated against the plaintiff. *Id.* at 254-55. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted. *Id.* at 255.

14. *Id.* at 255-56. The Court held that the defendant need not prove that the person hired was more qualified than the plaintiff. Title VII does not require an employer to hire the minority or

preponderance of the evidence that nondiscriminatory reasons for the employment decision existed. The Supreme Court, however, pointed to three reasons for the lesser burden of proof.[15] First, the sole purpose of the articulation requirement was to clarify the issues before the plaintiff proved pretext.[16] Second, although the defendant did not have a formal burden of persuasion, the defendant retained incentive to persuade the trier of fact.[17] Third, liberal discovery rules and easy access to Equal Employment Opportunity Commission (EEOC) files would help the plaintiff sustain her burden of proof.[18]

II. THE JUDICIAL POLICY OF DEFERENCE

A. *The Subjective Nature of Tenure Decisions*

At the college level, tenure decisions, rather than initial hiring decisions, are crucial. A grant of tenure is typically a lifetime appointment. The decision has far-reaching implications for both the university and the recipient.[19] Accordingly, universities carefully evaluate the qualifications of candidates seeking tenured faculty appointments, applying standards influenced by diverse factors.[20]

At the threshold of the process, a tenure candidate must meet certain objective criteria such as employment with the university for a prescribed length of time and possession of the requisite academic degrees.[21] Once a candidate fulfills these requirements, a peer-review committee evaluates the candidate's performance in three areas: scholarship, teaching ability, and collegiality.[22] Standards for each area may depend on the depart-

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female applicant whenever her qualifications are equal to those of a white or male applicant. *Id.* at 259.

15. *See id.* at 258.

16. *Id.* The Court reasoned that the plaintiff needs a clear articulation in order to have a full and fair opportunity to prove pretext. *Id.*

17. *Id.*

18. *Id.*

19. *See* SHAW, *supra* note 4, at 17-20.

20. *Id.* Such factors include the institution's ability to attract faculty, the needs of the particular department, and the individual's academic achievements. *See id.* To complicate matters, the decisions applying these factors are highly decentralized. *See, e.g.*, Zahorik v. Cornell University, 729 F.2d 85, 92 (2d Cir. 1984).

21. SHAW, *supra* note 4, at 34-42.

22. *See* SELDIN, *supra* note 4, at 35-74. Numerous factors influence the evaluation of the overall performance of a candidate: classroom teaching, supervision of graduate study, supervision of honors programs, research, publication, public service, consultation, government and business, activity in professional societies, student advising, campus committee work, length of service in rank, competing job offers, and personal attributes. *Id.* at 36.

ment, the financial condition of the institution, or a need to improve the departmental or institutional academic standing.[23]

The highly subjective nature of academic tenure decisions deters most courts from second-guessing peer-review committee decisions on matters of tenure.[24] Judicial deference here significantly alters the application of the *McDonnell Douglas/Burdine* discrimination test discussed above. This test requires that once a plaintiff establishes a prima facie case of discrimination, the defendant must articulate legitimate reasons for its tenure decision.[25] The courts' refusal to scrutinize tenure decisions precludes plaintiffs from proving pretext, and thus discrimination, absent evidence of procedural irregularities, arbitrary or biased tenure criteria, or a discriminatory motive.

Faro v. New York University[26] exemplifies the policy of judicial deference in Title VII tenure discrimination cases. In *Faro*, the plaintiff brought suit alleging unlawful sex-based discrimination when the University terminated her employment after a research grant expired.[27] The Second Circuit denied relief, stating that the courts are ill-suited for supervising education and faculty appointments at the university level.[28]

The United States Court of Appeals for the First Circuit, however, has

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23. *See* Zahorik v. Cornell University, 729 F.2d 85, 93 (2d Cir. 1984); *see also* SELDIN, *supra* note 4, at 1-14.

24. *See infra* notes 26-38 and accompanying text.

25. *See supra* notes 8-14 and accompanying text.

26. 502 F.2d 1229 (2d Cir. 1974).

27. *Id.* at 1231. The University claimed that no tenure-track appointments were available due to the University's financial malaise.

28. *Id.* at 1231-32. *But see* Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir. 1978) (criticizing *Faro*). The *Powell* court stated:

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competencies, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.

Id. at 1153.

Similarly, in Keddie v. Pennsylvania State Univ., 412 F. Supp. 1263 (M.D. Pa. 1976), a tenure candidate alleged that the University impermissibly based its tenure decision on the candidate's exercise of first amendment rights. *Id.* at 1267. The court stated that it was powerless to substitute its judgment for that of the University. The court reasoned that courts do not possess the expertise to evaluate academic performance. *Id.* at 1270. The court stated, "courts will not serve as a Super-Tenure Review Committee." *Id.*; *see also* Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977); Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976).

recognized the heavy burden imposed on plaintiffs by a policy of deference. In *Sweeney v. Board of Trustees of Keene State College*,[29] the court noted that the sophistication of participants in tenure decisions made it difficult for plaintiffs to obtain direct evidence of discrimination. The court found that unsubstantiated reasons for denial of promotion, a discriminatory atmosphere, and stricter criteria for female candidates than for male candidates permitted an inference of sex discrimination.[30] Thus, plaintiffs may rely on indirect proof of discriminatory motives.[31]

In *Zahorik v. Cornell University*[32] the Second Circuit affirmed the trial court's grant of summary judgment in favor of the university. Although recognizing the onerous burden placed on plaintiffs alleging discrimination in tenure decisionmaking,[33] the court declined to review the merits of the University's decision because of the unique nature of tenure decisions and judicial inability to determine the level of achievement required for tenure.[34]

The Seventh Circuit, in *Namenwirth v. Board of Regents of the Univer-*

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29. 569 F.2d 169, 175 (1st Cir.) (*Sweeney I*), *vacated and remanded per curiam*, 439 U.S. 24 (1978), *aff'd*, 604 F.2d 106 (1st Cir. 1979) (*Sweeney II*), *cert. denied*, 444 U.S. 1045 (1980). The *Sweeney I* court disapproved of the "hands off" attitude adopted by other courts. The court stated:

> [W]e caution against permitting judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.

569 F.2d at 176.

30. 604 F.2d at 112-13. *Cf.* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981) (discussed *infra* notes 57-58 and accompanying text); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980) (discussed *infra* notes 51-53 and accompanying text); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (discussed *infra* notes 54-56 and accompanying text).

31. *See supra* note 30.

32. 729 F.2d 85 (2d Cir. 1984). The plaintiff alleged a procedural irregularity, claiming that the department chairman maintained an indifferent attitude toward Zahorik's candidacy and abstained from serving on the tenure committee. Zahorik also contended that the committee advocated the candidacy of a male candidate but failed to do the same for her. *Id.* at 89. Further, the plaintiff demonstrated that an abstaining member of the department wrote that Zahorik had a problem in attracting graduate students because she was "too feminine" in that she was unassuming, unaggressive, and noncompetitive. *Id.* at 89-90.

33. *Id.* at 93. The court cited the potential for concealment of discrimination, and further noted that evidence of comparisons which might tend to show discrimination is scarce. *Id.*

34. *Id.* at 92-93. In *Zahorik*, the threshold issue was the sufficiency of the plaintiff's tenure qualifications. The *Zahorik* court held that a plaintiff is qualified for tenure when "some significant portion of the departmental faculty, referrants, or other scholars in the particular field hold a favorable view on the question." *Id.* at 94. *Compare* Banerjee v. Board of Trustees of Smith College, 648 F.2d at 61, 62 (1st Cir.) (holding that plaintiff need only show that her qualifications brought her among those from whom the university would make a discretionary selection), *cert. denied*, 454 U.S.

sity of Wisconsin System,[35] recently addressed the problem of discrimination in tenure decisionmaking and concluded that the inherent subjectivity of the tenure process created an irresolvable problem. Namenwirth, the first woman hired for a tenure-track position by the Zoology Department in thirty-five years, was also the first person denied tenure by the Department.[36] The *Namenwirth* court refused to question the University's assessment of Namenwirth's academic potential or that of a male candidate awarded tenure.[37] The court found that its difficulty in evaluating tenure decisions stemmed from the fact that the tenure decisionmaker was also a source for evaluations of candidate qualification. Thus, the court determined that attempts to "extricate discrimina-

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1098 (1981); Hooker v. Tufts Univ., 581 F. Supp. 104, 112 (D. Mass. 1983) (plaintiff must be qualified under the institution's standards, practices, or customs).

The *Zahorik* court also recognized that a plaintiff may rely on statistics in establishing her prima facie case, although statistics may not alone prove discrimination. 729 F.2d at 95. *See also* Coser v. Moore, 739 F.2d 746, 750 (2d Cir. 1984) (generalized statistical data is less persuasive when decision-making is decentralized and employer hires highly educated, specially qualified people); Laborde v. Regents of the Univ. of Cal., 686 F.2d 715, 718 (9th Cir. 1982) (statistical evidence relevant, though not necessarily sufficient in establishing prima facie case), *cert. denied*, 459 U.S. 1173 (1983).

The court's refusal to review the merits of the tenure decision did not foreclose a plaintiff's ability to challenge the decision. Departures from procedural regularity and conventional evidence of bias may show that impermissible factors influenced the decision to deny tenure. 729 F.2d at 93.

35. 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3461 (1986).

36. *Id.* at 1237. In *Namenwirth*, the plaintiff alleged that she was denied tenure because of her sex. The Zoology Department Salary and Promotion Committee recommended Namenwirth for promotion, but not for tenure. The Committee questioned the strength of her research and publication record. The Zoology Department initially voted against her candidacy for tenure and after two reconsiderations, voted 11-10 in favor of tenure. The Divisional Executive Committee, based on the ambivalence expressed at the Department Level, voted to deny Namenwirth tenure. After some politicking between the Department and Division, the Divisional Committee again declined to recommend Namenwirth for tenure. The Divisional Committee cited as its reasons for denial of tenure negative reviews by the Divisional Committee and budgetary concerns.

Namenwirth alleged that the University treated her differently than a male candidate granted tenure. The male candidate had credentials and publications similar to Namenwirth's. The Department unanimously recommended him for tenure, but the Divisional Committee voted to deny him tenure. Three Zoology faculty members then argued his case before the Committee. The Divisional Committee reconsidered and recommended Dr. Moermand, the male candidate, for tenure, which the University granted.

A magistrate compared Namenwirth's record with records of men granted tenure and found that the University's explanation for denying Namenwirth tenure was not a pretext for sex-based discrimination. The court found that the magistrate's conclusion was not clearly erroneous. *Id.* at 1237-42. The court also found that the selected male candidate's position as editor of a respected professional journal could justify the differences in the Department votes. *Id.* at 1243.

37. *Id.* at 1243.

tory motives from collegial judgments about potential and worth were futile."[38]

As a result of judicial deference to peer-review decisions, few plaintiffs

38. *Id.* The court stated that "[t]enure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments." *Id.*

In essence, the court held that while courts may consider the objective evidence produced in tenure discrimination cases—such as publication and research output and outside expert evaluation—ultimately the tenure decision rests on factors such as esteem and professional and personal acceptance in the department. Esteem and acceptance derive from personal beliefs and attitudes, of which prejudice, which may eventually be manifest as discrimination, is one of many.

Judge Swygert, in dissent, did not view winning the esteem of those colleagues whose sexual biases are in question as dispositive. *Id.* at 1244. Judge Swygert saw no qualitative difference between tenure decisions and other employment decisions. Rather, he felt that courts were better qualified to scrutinize academic decisionmaking than that in the blue-collar context. *Id.* at 1244-45. He viewed tenure decisions as capable of judicial analysis through the use of statistics, outside experts, and other objective criteria such as number of publications. *Id.* at 1245. Accordingly, he found that Dr. Moermond did not possess a superior research record justifying a different tenure decision in his case. *Id.*

Although courts are unwilling to scrutinize tenure decisions, they frequently review employment decisions in other settings. For example, courts recognize that subjective criteria often conceal discrimination, particularly when objective criteria are readily available. *See, e.g.*, Crawford v. Western Elec. Co., 614 F.2d 1300, 1315-17 (5th Cir. 1980); James v. Stockham Values & Fittings Co., 559 F.2d 310, 328 (5th Cir.), *cert. denied*, 434 U.S. 1034 (1977); United States v. Hazelwood School Dist., 534 F.2d 805, 812-13 (8th Cir. 1976), *rev'd on other grounds*, 433 U.S. 299 (1977); Senter v. General Motors Corp., 532 F.2d 511, 528-30 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

In Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), a black employee complained that his promotion depended upon his receiving a favorable recommendation from a white foreman. *Id.* at 353. The Fifth Circuit Court of Appeals found a violation of Title VII, noting a lack of safeguards designed to avert discriminatory practices in the subjective promotion procedure. *Id.* at 358-59. The court recognized that employers may conceal discrimination in subjective evaluations. *Id.* at 359. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (Supreme Court criticized subjective rating system for failure to adequately guide evaluators).

Even with respect to employment decisions that legitimately require subjective criteria, courts ask whether the subjective criteria were a pretext for discriminatory action. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982). Courts seem to apply differing legal standards based on the socioeconomic status of the job involved. Systems involving blue collar jobs, including supervisor and highly skilled craft positions, receive stricter review than those systems involving middle and upper management jobs, professional positions, and other jobs requiring advanced educational degrees. *Id.* at 948 n.2.

A recent Supreme Court decision, Hishon v. King & Spalding, 467 U.S. 69 (1985), addressed the issue of employment discrimination in law firms. King & Spalding hired Hishon in 1972 and terminated her in 1979, after deciding not to invite her into the partnership. Hishon brought a Title VII action alleging sex discrimination in her consideration for partnership. The Court held that a promise of consideration for partnership may not be granted or withheld in a discriminatory manner. *Id.* at 76.

Partnership decisions closely resemble tenure decisions. The relationship could be permanent and will substantially affect the employer's financial condition. Employers base their assessments for

have succeeded with claims based on allegations of discriminatory university peer evaluations. Thus, plaintiffs have relied on evidence of past discrimination to prove a present discriminatory intent and to prove that facially neutral policies perpetuate the effects of past discrimination.[39] In *Jepsen v. Florida Board of Regents*,[40] for example, the plaintiff introduced evidence of pre-Title VII discriminatory practices. The plaintiff claimed that the University failed to promote her for twenty-five years, whereas the University would have promoted an equally qualified male professor within six years.[41] The court found this evidence probative of pretext.[42]

Similarly, evidence of a university's dislike for a particular field of study is admissible to prove that the university based a tenure denial on impermissible criteria. Thus, in *Lynn v. Regents of the University of California*,[43] the plaintiff established a prima facie case of sex discrimination. The Ninth Circuit found determinative evidence of the institution's disdain for "women's issues" and a consequent low regard for faculty members who focused on those issues.[44]

Courts have also based findings of unlawful discrimination on procedural irregularities in the tenure decisionmaking process. In *Kunda v. Muhlenberg College*,[45] the College denied tenure to a female physical education instructor because she lacked a master's degree.[46] The Third

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qualification on subjective judgments of often intangible factors. The deference standard which courts apply in tenure cases, therefore, may influence how courts will review partnership decisions.

Courts generally adopt a more lenient view of subjective criteria in managerial and professional cases. In Grano v. Department of Dev. of Columbus, 699 F.2d 836 (6th Cir. 1983), the court found that subjective employment evaluations are not illegal per se. *Id.* at 837. The court stated that the ultimate issue is whether the defendant used subjective criteria to disguise discriminatory action. The court found that the defendant's failure to promote the plaintiff, a female public relations professional, failed to constitute a Title VII violation. *Id.* The court noted that "the more subjective the qualification and the manner in which it is measured, the more difficult it will be for the defendant to meet the burden imposed by . . . *Burdine*." *Id.*

39. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10 n.15 (1977) (pre-act violations relevant to show pattern of illegal conduct and purpose of motivation with regard to independent violations occurring after effective date of Act); Lamphere v. Brown Univ., 685 F.2d 743, 747 (1st Cir. 1982) (same); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir. 1980) (same).

40. 610 F.2d 1379 (5th Cir. 1980).

41. *Id.*

42. *Id.* at 1384.

43. 656 F.2d 1337 (9th Cir. 1981).

44. *Id.* at 1342. Lynn submitted general statistics which tended to show a pattern of discrimination by the University and specific statistical data which demonstrated that she had the same education, experience, and number of published works as other candidates who received tenure. *Id.*

45. 621 F.2d 532 (3d Cir. 1980).

46. *Id.* at 535-37.

Circuit Court of Appeals concluded that because the College advised two male tenure candidates of the degree requirement, but failed to advise the plaintiff, the college discriminated against her.[47]

B. ACADEMIC FREEDOM AS AN IMPEDIMENT TO DISCOVERY

In addition to refusing to scrutinize the substance of peer evaluations, some courts have strictly limited the discovery of confidential peer-review documents. The reluctance to permit full discovery of tenure proceedings stems from judicial recognition that confidentiality plays an important role in preserving the integrity of the peer-review process.[48] Accordingly some courts conclude that preservation of "academic freedom" warrants judicial protection of peer-review materials. Courts define "academic freedom" as the ability of members of the academic community to inquire into, experiment with and speculate about ideas notwithstanding their general acceptability.[49] Courts consider the deter-

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47. *Id.* at 545. The court concluded that the degree requirement was not a pretextual reason for denial of tenure. Rather, the court simply found that the college gave no legitimate reason for its failure to counsel Kunda. *Id.* at 546.

48. *See* Hill & Hill, *Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?*, 22 AM. BUS. L.J. 209, 209 (1984) ("Two values then collide: the individual's right to an employment decision free from discriminatory motives, and an educational institution's interest in protecting the confidentiality and integrity of peer review.").

49. Courts recognize academic freedom as the primary interest in academic Title VII cases. *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The court stated:

> The essence of academic freedom is the protection for both faculty and students "to inquire, to study and to evaluate, to gain new maturity and understanding." It is the lifeblood of any educational institution because it provides "that atmosphere which is most conducive to speculation, experiment and creation." Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop. Academic freedom prevents "a pall of orthodoxy over the classroom", it fosters "that robust exchange of ideas which discovers truth." Our future, not only as a nation but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process . . . Therefore, academic freedom, the wellspring of education, is entitled to maximum protection.

Id. at 547-48 (footnotes and citations omitted).

Commentators argue that freedom of speech and freedom of association justify a qualified privilege for confidential communications in tenure decisions. Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 885-89 (1979). Some commentators argue that courts should establish a qualified evidentiary privilege for universities' confidential employment records. Smith, *Protecting the Confidentiality of Faculty Peer Review Records:* Department of Labor v. University of California, 8 J. COL. & UNIV. L. 20 (1981-82); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CAL. L. REV. 1538 (1981); *Evidence—Privilege—A Privilege Based on Academic Freedom Does Not Insulate A University*

mination of who is qualified to teach essential to the preservation of academic freedom.[50] Courts disagree, however, about the appropriate methods for protecting academic freedom and the peer-review process.

In *Gray v. Board of Higher Education*,[51] the Second Circuit adopted a qualified privilege, protecting the confidentiality of tenure committee documents only when the institution disclosed in a written statement the reasons for tenure denial.[52] The court stated that the plaintiff must have an opportunity to discover evidence necessary to establish a prima facie case.[53] In this sense, the court's holding is narrow. When a plaintiff

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From Disclosing Confidential Employment Information (In Re Dinnan, *5th Cir. 1981)*, 52 MISS. L.J. 493 (1982).

50. In EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983), the Seventh Circuit cited Justice Frankfurter's summary of the "four essential freedoms" that constitute academic freedom:

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

Id. at 335, quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (Frankfurter, J., concurring in result).

The court continues:

> Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration. For these reasons, academicians who are selected to evaluate their peers for tenure have, since the inception of the academic tenure concept, been assured that their critiques and discussions will remain confidential. Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.[1]

615 F.2d at 336.

51. 692 F.2d 901 (2d Cir. 1982).

52. *Id.* at 908. The court adopted the position of the American Association of University Professors that "[i]f an unsuccessful candidate for reappointment or tenure receiving a meaningful written statement of reasons from the peer review committee and is afforded proper intramural grievance procedures, disclosure of individual votes should be protected by a qualified privilege." *Id.* at 907.

53. *Id.* at 908. The plaintiff, Dr. Gray, alleged racial discrimination by LaGuardia Community College under 42 U.S.C. §§ 1981, 1983, 1985. He then sought discovery of the votes of two of the faculty members whom he believed may have discriminated against him. The district court balanced the plaintiff's right to discovery against society's interest in the confidentiality of the peer-review process. The district court ultimately held that the importance of protecting the integrity of peer-review in academia outweighed the benefit to Dr. Gray of discovery of testimony which might support his claim. 692 F.2d at 903-04. The Second Circuit reversed, approving the district court's balancing approach but adopting a different balance.

The court in Zaustinsky v. University of Cal., 96 F.R.D. 622 (N.D. Cal. 1983), applied a two-stage discovery process for confidential materials. First, when the defendant's reasons are based on confidential materials, the defendant must provide "a written statement of the reasons for defendant's

lacks information critical to the establishment of a prima facie case, the right to a nondiscriminatory employment decision takes precedence over the institution's interest in academic freedom.

In *EEOC v. University of Notre Dame Du Lac*,[54] the Seventh Circuit created a different qualified privilege. The court permitted discovery of tenure proceedings, but allowed the University to conceal the identity of the participants.[55] The court allowed the EEOC to overcome this qualified privilege by demonstrating a particularized need for the identity.[56]

Other courts refuse to recognize any privilege, holding that an institution's interest in preserving academic freedom is less compelling than a tenure candidate's right to nondiscriminatory evaluation. These courts reason that Congress did not intend to bestow special Title VII treatment on academic institutions and that a privilege against discovery would promote discrimination.[57]

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decision, including a comprehensive summary in writing of the substance of confidential documents in such records." *Id.* at 625. Second, when the material produced does not fully reflect the basis for the University's action, the court must balance the relative prejudice and injury to the parties. *Id.* at 626.

54. 715 F.2d 331 (7th Cir. 1983).

55. *Id.* at 337-38.

56. *Id.* at 338. The court defined "particularized need" as a "compelling necessity for the specific information requested." *Id.* Mere relevance or usefulness would be insufficient to meet this standard. Under this standard "a party's need varies in proportion to degree of access he has to other sources of information he seeks." *Id.*

57. *See, e.g., In re* Dinnan, 661 F.2d 426, 430 (5th Cir.), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982). The Fifth Circuit refused to find a privilege that would allow a professor who participated in the tenure decision to withhold disclosure of his vote in response to a deposition question.

In EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), the court relied on what it viewed as a "clear mandate" from Congress to deny privileged status to a wide range of peer review materials, even though the court recognized that peer review may be burdened by its decision. *Id.* at 115. The court limited the EEOC's subpoena power to that which is relevant to the charge under investigation. When the charge is in the investigatory stage, the court noted, relevance is construed broadly. *Id.* at 116.

Chief Judge Aldisert in dissent found that Congress neither foresaw nor intended that the 1972 amendment to Title VII would permit a college instructor, merely by means of a vague allegation of discrimination, access to the confidential personnel files of his colleagues. *Id.* at 119. The court's formulation, Judge Aldisert stated, would result in a practically unlimited scope of discovery in the administrative subpoena process. Judge Aldisert adopted a balancing approach similar to the Second Circuit's in *Gray.* He proposed that the EEOC should at least be required to set forth a "justificatory factual predicate for the confidentiality of privacy intrusions instead of naked conclusory allegations." *Id.* at 121.

In Rollins v. Farris, 108 F.R.D. 714 (E.D. Ark. 1985), a district court adopted the holding of the Third Circuit in *Franklin & Marshall* and granted the plaintiff's motion to compel discovery of the minutes of faculty committees. *Id.* at 1106. The court balanced the need for discovery and the

III. COMPROMISE PROPOSALS

In response to concern about discrimination in academic employment decisions, Congress amended Title VII to extend coverage to college-level employment decisions. Nevertheless courts persistently refuse to question subjective peer judgments that play an integral role in the tenure decision process. In addition, courts are hesitant to compromise the confidentiality of that process. This Note proposes two mechanisms for courts to address fairly discrimination claims against academic institutions with minimal intrusion into academic freedom.

A. Restructuring the Defendant's Burden of Proof: An Equivalence of Probability

The *McDonnell Douglas* test requires that a university articulate legitimate reasons for denial of tenure upon the establishment of a prima facie case by the plaintiff.[58] However, judicial deference to tenure decisions usually precludes a plaintiff from proving pretext, and thus terminates the inquiry into possible discrimination.[59]

In *Texas Department of Community Affairs v. Burdine*,[60] the Supreme Court limited the defendant's evidentiary obligation to a burden of production of evidence sufficient to create an issue of fact. The Court believed that this minimal burden of production would not unduly hinder the plaintiff's ability to prove that the defendant's reasons were a pretext for discrimination. The justifications offered by the Court, however, underscore the problems created by the minimal burden of production in the context of tenure discrimination claims.[61]

First, the *Burdine* Court explained that the purpose of the defendant's burden of production is solely to classify factual issues for the plaintiff's benefit in proving pretext. Thus, the Court stated, the plaintiff must receive a "full and fair opportunity to demonstrate pretext."[62] The *Burdine* articulation requirement in the tenure context, however, denies the

societal value of academic freedom. In finding that no privilege exists for academic tenure review materials when the plaintiff must prove intent to discriminate, the court recognized that "[a]cademic freedom in employment actions extends only insofar as legitimate, academic grounds form the basis of tenure decisions." *Id.* at 1105.

58. *See supra* notes 7-11 and accompanying text.

59. *See supra* notes 24-38 and accompanying text.

60. 450 U.S. 248, 255 (1981).

61. *See id.*

62. *Id.* at 255-56.

plaintiff a reasonable opportunity to prove pretext. This result inures because of the well-established policy of judicial deference to the defendant's articulated justifications.[63] Second, the *Burdine* Court stated that the articulation requirement would nonetheless encourage the defendant to persuade the trier of fact that the employment decision was lawful.[64] Again, the policy of judicial deference in academic Title VII cases frustrates any incentive for a university to present persuasive evidence that its tenure decision was nondiscriminatory.[65] Continued judicial deference may in fact cause academic institutions to overlook discrimination in the peer-review process. Ultimately, colleges and universities will be insulated from the reach of Title VII, contrary to the clear intent of Congress.

Finally, the *Burdine* Court recognized that liberal discovery under the Federal Rules of Evidence and access to EEOC investigatory files would assist plaintiffs in proving pretext.[66] Some courts, adhering to notions of academic freedom, however, have restricted the discovery process by creating privileges against the discovery of peer-review process materials.[67] As a result, the liberal discovery envisioned by *Burdine* may be unavailable in the context of tenure discrimination claims.

The Supreme Court should modify the defendant's evidentiary burden in academic Title VII cases to reestablish the plaintiff's fair opportunity to prove discrimination. A workable solution would be to require the defendant to establish that *the non-existence of discrimination is as probable as the existence of discrimination.*[68]

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63. *See supra* notes 24-38 and accompanying text.

64. *Id.*

65. A defendant academic institution, aware that the court will defer to an explanation that the candidate's peers found the candidate's weaknesses in scholarship, teaching, or collegiality precluded an offer of tenure, will simply present the requisite evidence to meet the *Burdine* standard and await judgment in its favor. If the plaintiff makes out a particularly strong prima facie case, the university may want to present sufficient evidence to offset the plaintiff's evidence. In either case the court's policy of deference, rather than solely the strength of the plaintiff's evidence, will determine the amount of evidence that the university must offer to defeat the allegation of discrimination.

66. 450 U.S. at 258.

67. *See supra* notes 48-57 and accompanying text.

68. *See* 9 J. WIGMORE, EVIDENCE § 2493d. (Chadbourne rev. 1981) (defining the standard). In Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959), a court applying the proposed standard noted that "it seems pointless to create a presumption and endow it with coercive force, only to allow it to vanish in the face of evidence of dubious weight or credibility." *See also* Speck v. Sarver, 20 Cal. 2d 585, 591, 128 P.2d 16, 19 (1942) (Traynor, J., dissenting) (suggesting use of equivalence of probability standard). *See generally* McBaine, *Burden of Proof: Presumptions*, 1 UCLA L. Rev. 13, 22-29 (1954) (discussing equivalence of probability).

This equivalence of probability standard would force defendants to produce evidence of good faith, providing the plaintiff with an opportunity to challenge that evidence. In addition, courts would have a limited opportunity to scrutinize the decision-making criteria employed by the defendant, as the courts do in other contexts. Finally, an equivalence of probability standard is consistent with *Burdine*'s holding that the ultimate burden of persuasion remains at all times with the plaintiff.[69]

B. *A Multi-Tiered Discovery Process*

Courts disagree about the relative importance of a plaintiff's interest in proving pretext versus a university's interest in maintaining the confidentiality of tenure review materials.[70] This Note proposes that courts strictly regulate discovery on a case-by-case basis to minimize unnecessary discovery of peer evaluations, while retaining access to materials for plaintiffs who demonstrate a specific need.[71]

Initially, courts should require a plaintiff to provide evidence of discrimination outside the peer-review process. Once the plaintiff meets this burden, the court may be able reliably to infer the possibility of bias

69. 450 U.S. at 247. Alternatively, application of the equivalence of probability burden need not be limited to the unique academic Title VII cases. It may be applied to settings in which the unique nature of the employment decisions cause courts to refrain from applying the standard of scrutiny normally applied to Title VII suits. One potential area is law firm partnership decisions. *See supra* note 38.

70. *See supra* notes 48-57 and accompanying text.

71. This proposal does not adopt a qualified privilege approach, but rather suggests that courts regulate discovery in the outlined manner pursuant to the power granted them by Congress in Federal Rule of Civil Procedure 26(b)(1), which states:

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowlege of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii)—the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitation on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

FED. R. CIV. P. 26(b)(1).

within the confidential peer review. This initial burden preserves the confidentiality of university files when no visible evidence exists that the institution employed unlawful criteria in its review process.

Based on the type and weight of the plaintiff's initial evidence of discrimination, the court should allow limited discovery of confidential materials. The court should tailor the scope of discovery to conform to the nature and weight of the plaintiff's initial evidence and the defendant's articulation of justifications. For example, if the plaintiff produces evidence that one member of the tenure committee made sexist or racist comments about the plaintiff, then discovery of this individual's evaluation should be allowed. If discovery reveals that this individual gave a positive, nondiscriminatory evaluation, then the court should halt this avenue of discovery. Only when selective discovery provides additional evidence of discrimination should the court allow further discovery of peer-review materials.[72] The court in the exercise of its proposed regulatory control over the discovery process may require that the names of the reviewers be excised from the discoverable materials. The court may also use *in camera* review and protective orders. A carefully regulated discovery process in academic Title VII cases protects the confidentiality of university records while providing the plaintiff with a fair opportunity to obtain documents essential to proving pretext.[73]

III. CONCLUSION

The courts' approach to academic employment discrimination differs significantly from their approach to discrimination in other settings. In academic cases, courts are unwilling to scrutinize faculty tenure decisions based on highly subjective criteria and are reluctant to allow discovery of confidential peer-review materials. The two changes suggested by this Note reduce the unnecessary protection that courts presently af-

72. The court may apply differing threshold standards to civil plaintiffs and the EEOC. *See supra* note 57. While a court may adopt a relevance standard for an EEOC subpoena during the investigatory stage that is lower than that for a plaintiff in a suit in federal district court, the multi-tiered approach would still protect confidential peer review materials from indiscriminate "fishing" by the EEOC.

73. A university's awareness that its peer review materials were subject to full or partial discovery when other evidence of discrimination exists may encourage it to demand from its faculty tenure decisions free from unlawful bias and in addition, free from overt, detectable irregularities.

ford academic institutions, and offer victims of academic employment discrimination a reasonable opportunity to obtain relief.

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