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EMERGING ISSUES AFFECTING ACADEMIC FREEDOM AND TENURE

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PROLOGUE: UNDERSTANDING WHAT FACULTY MEMBERS DO

- A. Although widespread in institutions of postsecondary education, tenure is controversial because of the widespread perception that it guarantees lifetime employment to faculty and requires virtually no accountability with respect to their performance or behavior. Although tenure does provide faculty with substantial job security, tenure's principal rationale is only indirectly related to the economic security of faculty members. Tenure's most important purpose, as the American Association of University Professors observed almost a century ago, is to serve as "a means to certain ends," one of which is "freedom of teaching and research and of extramural activities"—what we know today as *academic freedom*.¹ As one court put it succinctly in a recent decision, "tenure serves to protect academic freedom by ensuring tenured faculty will not fear reprisals on account of their academic pursuits...."²

Tenure is the defining characteristic of American higher education and the most distinctive part of working in the higher education setting.

- B. From Henry Rosovsky, *THE UNIVERSITY: AN OWNER'S MANUAL* (1990), pages 161, 163-64:

A friend of my father's, a tutor at St. John's College in Annapolis, when asked about his choice of occupation, said that he loved reading more than anything else; college teaching was the only profession that paid a salary for doing that. The essence of academic life is the opportunity—indeed, the demand—for continual investment in oneself. It is a unique chance for a lifetime of building and renewing intellectual capital....

Another critical virtue of academic life ... is the absence of a boss. A boss is someone who can tell you what to do, and requires you to do it—an impairment of freedom. ... But as a professor, I recognized no master save peer pressure, no threat except, perhaps, an unlikely charge of moral turpitude. No profession guarantees its practitioners such a combination of independence and security as university research and teaching.

- C. From James O. Freedman, *IDEALISM AND LIBERAL EDUCATION* (1996), pages 99-102:

Viewed from outside academe, the life of a university professor seems sheltered from everyday reality, a haven for those too delicate and sensitive to

¹ American Association of University Professors, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm.

² *Saxe v. Board of Trustees of Metropolitan State College of Denver*, 2007 Colo. App. LEXIS 395, at *28 (Colo. App.).

succeed in the workaday world. Few understand that the life of a professor is a difficult, lonely and dedicated one. It is a life of privilege, to be sure—of autonomy in the classroom, of control over the use of time, of free inquiry, of tenure. But in return for those privileges, a professor pays exacting costs in ways that are rarely visible to people who are not academics.

The first of those costs is the continuous struggle to learn afresh what remains fundamental about a discipline that is always evolving, while bringing that language to life in the minds of new students. . . . A second cost is the struggle to compress a host of protean and unruly tasks into a day that is always too short. A professor's enormous flexibility in the use of time, so incomprehensible to people who are not academics, is undeniably a great privilege, but it is purchased at a price. In the absence of a clear boundary separating vocation from avocation, teaching from scholarship, creative effort from routine chores, no single block of time can be protected from a flood of conflicting but equally legitimate demands. . . .

But just as the costs of a life of scholarship and teaching are largely invisible outside the academic community, so are its unique rewards. The reward that animates every scholar is the joy of discovery—the satisfaction of finding out what no one else knows and making that knowledge available to others. . . . At the close of long days of work, at the conclusion of long years of scholarly solitude, professors are entitled to feel that rapture, to recognize that their teaching will create a ripple of influence that will be felt in the lives of students years after graduation. . . . [T]he measure of the scholar's thought is the source of the university's vitality and the standard by which it must judge itself.

I. ACADEMIC TENURE AS A CONTRACTUAL CONCEPT

- A. *Tenure fundamentals: what tenure is and what purposes it serves.* “I learned long ago,” wrote former Harvard University Dean Henry Rosovsky in his magisterial work *THE UNIVERSITY: AN OWNER'S MANUAL*,³ “that the overwhelming majority of non-academics view tenure with deep suspicion.” He continued:

[One respected magazine] described tenure as a promise to professors that “they can think (or idle) in ill-paid peace, accountable to nobody.” Somehow we, in academia, are getting away with something; that is the general feeling. Lifetime tenure induces laziness, stifles incentives, and directly contributes to lack of performance on the job. It is a prescription for going to seed.

³ New York: W.W. Norton & Co. 1990. This is as close to an indispensable volume as exists in the library of a higher education legal practitioner. This quotation is from Chapter 10 (“Tenure: The Meaning of Tenure”).

It will come as no surprise that tenure is widely misunderstood, both inside and outside the academy. Tenure is also, in a real sense, the defining characteristic of American higher education and the most distinctive part of practicing employment law in the higher education setting. So let us begin with a quick consideration of tenure: what it is and what purposes it purports to serve.

I offer this capsule description of tenure, taken from a CHRONICLE OF HIGHER EDUCATION opinion piece by Professors Matthew Finkin and Emanuel Donchin published three and a half years ago:

Tenure is a limit on the institution's ability summarily to dismiss a professor; it prevents pretextual grounds to be proffered for dismissals that are actually motivated by public—or even intramural—outrage over a faculty member's teaching or research. ... [T]enure is a constraint on dismissal, or an action tantamount to that.⁴

Tenure's purposes are most lucidly explained in the *1940 Statement of Principles on Academic Freedom and Tenure*, formulated jointly by the American Association of University Professors and the Association of American Colleges and endorsed subsequently by hundreds of learned societies and professional organizations. It is widely accepted and widely cited as the most influential expression of tenure principles to be found anywhere in the extensive literature on American higher education. The *1940 Statement of Principles* explains tenure's central purposes:

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

The *1940 Statement of Principles* enumerates the essential requirements of academic tenure:

- (1) A **written contract of employment** clearly setting forth the precise terms and conditions governing the appointment;

⁴ Matthew W. Finkin & Emanuel Donchin, *Counterpoint: Tenure's Rationale and Results*, CHRON. OF HIGHER ED., March 30, 2007, page B13. For further reading on the purposes served by academic tenure, see William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP BULL. 329 (1971); Fritz Machlup, *In Defense of Academic Tenure*, 50 AAUP BULL. 112 (1964). Both essays and a wealth of other materials are reproduced in Matthew W. Finkin, ed., *THE CASE FOR TENURE* (1996), probably the best single volume one could have on one's shelf on this subject.

- (2) A **probationary period** of specified maximum length;
 - (3) The notion that a term appointment cannot be non-renewed without providing a minimum **notice period** to the affected probationary faculty member;
 - (4) Minimum **procedural standards** for the termination of a tenured appointment for cause.
- B. *Drilling down: academic tenure as a legal concept.* Tenure is an enforceable institutional promise relating to the duration of a faculty appointment. “Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, *tenure provides only that no person continually retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause.* ... [T]enure is translatable as a statement of formal assurance that ... the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process.”⁵

In accordance with the law of contracts, tenure means two things:

- (1) **The appointment is of indefinite term.** It has no specified end date.
 - (2) **The appointment can be terminated only for reasons and only in accordance with procedures that are specified as part of the contract** and understood by the parties at the time they enter into the employment relationship.
- C. *Institutional sources of tenure rights.* The enforceable tenure rights of faculty members are defined in many places, the most significant of which are:
- (1) *The institution's governing documents* (charter, bylaws, institutional regulations, etc.).
 - (2) [At publicly supported institutions:] State statutes, implementing regulations, and other legislative or regulatory sources.
 - (3) *The faculty handbook.* At most institutions, the handbook contains detailed definitions of faculty ranks; prescribes the procedure by which faculty members are appointed, promoted, and given tenure; establishes a maximum probationary

⁵ W. Van Alstyne, “Tenure: A Summary, Explanation, and ‘Defense,’” AAUP BULL. 57:329 (1971), *reprinted in* Matthew W. Finkin, THE CASE FOR TENURE 3, 4 (1996).

period; and describes both the standards the institution will employ to determine whether a tenured faculty appointment (or a non-tenured appointment during the term of the appointment) should be terminated and the procedures to be used in effecting that decision.

(4) *The faculty member's individual employment contract or appointment letter.*

Tenure exists at a particular institution only if it is identified in the governing documents, in the handbook, by statute, or elsewhere as an enforceable right belonging to eligible faculty members. Individual institutions are free to depart from traditional notions of academic tenure, and even to do away with tenure altogether. In fact, however, tenure is virtually universal in American colleges and universities. The tenure provisions in the institution's faculty handbook and tenure policies rise to the level of *enforceable institutional promises* that (1) cannot be modified unilaterally by the institution, and (2) can give rise to pecuniary damage claims against the institution if they are breached or not observed.

Phrased more formally, the inclusion of tenure provisions in a faculty handbook or institutional policy will usually be construed by a reviewing court as an abrogation of the traditional common-law "employment at will" doctrine. As courts have held in a series of cases over the last two decades, the tenure terms in faculty handbooks and institutional policies become part of the employment contract between faculty member and institution, regardless of whether or not they are incorporated by specific reference in the individual faculty member's appointment letter.⁶

D. *The commonly understood guarantees associated with tenure.* As stated above, a tenured faculty appointment can be terminated only for *reasons* and only in accordance with *procedures* that are specified legally and understood by the parties at the time they enter into the employment relationship. Let's pause to consider what that means as a matter of law.

(1) **First, tenured appointment can be terminated only for *reasons*.** Under the AAUP's definition of tenure and under the tenure policies at most institutions of higher education in this country, "reasons" sufficient to support the termination of a tenured appointment come in two categories: "cause" and "reasons unrelated to cause."

(a) *Terminations for cause.* Under AAUP policy, an institution is free to define for itself the standards constituting grounds for for-cause

⁶ *Moffie v. Oglethorpe Univ.*, 367 S.E. 2d 112 (Ga. App. 1988); *McConnell v. Howard Univ.*, 818 F. 2d 58 (D.C. Cir. 1987); *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W. 2d 880 (Mich. 1980); *Rehor v. Case Western Reserve Univ.*, 331 N.E. 2d 416 (Ohio 1975).

termination, as long as those grounds “relat[e], directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”⁷ Most institutions define “cause” by using some or all of the infamous “four I’s”—incompetence, insubordination, immorality, and incapacity.

- (b) *Terminations not for cause.* AAUP policy recognizes three narrow circumstances in which a tenured faculty appointment may be terminated for reasons unrelated to the fitness of the faculty member:
 - (i) *Financial exigency.* A tenured faculty appointment may be terminated if that is the only way for an institution to cope with a financial exigency, restrictively defined under AAUP policy as “an imminent financial crisis which threatens the survival of *the institution as a whole* and which cannot be alleviated by less drastic means.”⁸
 - (ii) *Program discontinuation.* A tenured appointment may be terminated if the institution elects, for programmatic reasons not related to financial exigency, to discontinue a program or department of instruction.⁹
 - (iii) *Institutional merger or affiliation.* Under narrowly defined circumstances, it is arguably consistent with AAUP policy for one institution to void the appointments of tenured faculty members as part of that institution's merger into or affiliation with another.¹⁰

- (2) **Second, a tenured faculty appointment can be terminated only in accordance with *procedures that are specified as part of the contract and understood by the parties when they enter into the employment relationship.*** These procedures usually entail, at a minimum, a predetermination *hearing* before a body of faculty peers. At the hearing, the faculty member is entitled to certain procedural rights, such as receipt of a

⁷ Regulation 5(a), *Recommended Institutional Regulations on Academic Freedom and Tenure*, in AAUP, POLICY DOCUMENTS AND REPORTS 26 (10th ed. 2006). This volume is commonly referred to and is cited in this paper as the “AAUP Redbook.” Many Redbook policies are available online at the AAUP website at www.aaup.org/AAUP/pubsres/policydocs/contents.

⁸ Regulation 4(c), *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP Redbook 23 (emphasis added).

⁹ Regulation 4(d), *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP Redbook 23.

¹⁰ *See On Institutional Mergers and Acquisitions*, ACADEME, March-April, 1982, pages 1a-7a.

written set of charges, assistance from an “advisor” (who does not necessarily have to be an attorney), and a written record of the proceedings. One of the hallmarks of such hearings is *deference* to a suitable faculty role in institutional governance. By this, we mean that standards for terminating appointments and procedures for hearings cannot be imposed unilaterally by administrators; they must be formulated with due regard for faculty primacy in all matters relating to faculty status.¹¹

II. TENURE IN TURBULENT ECONOMIC TIMES¹²

- A. For the last two years the nation has endured—and has had trouble exiting—one of the deepest recessions of the post-war era, and economic conditions are not likely to improve perceptibly in 2011. The higher education sector has been hit particularly severely by multiple effects of the economic slowdown—reductions in state and federal funding, poor endowment performance, pressure to hold the line on tuition increases, and affordability problems for students and their families. Some institutions may react to financial crises by reducing tenure lines, tightening tenure standards, and in worst cases terminating tenured positions on grounds of financial exigency or the discontinuation of underenrolled programs.
- B. *Short-term cost-saving measures.* Without eliminating faculty lines, institutions can take advantage—and many *have* taken advantage—of short-term cost-saving measures that do not implicate the employment rights of tenured faculty members. Common measures are listed below in ascending order of legal risk.
 - (1) Reduce or eliminate institutional funding for faculty travel and attendance at professional conferences.
 - (2) Cancel underenrolled classes; eliminate adjunct positions and redeploy full-time faculty members to teach consolidated (*i.e.*, larger) classes.
 - (3) Cancel prospective salary increases and merit increments.

¹¹ See AAUP, American Council on Education, and Association of Governing Boards of Universities and Colleges, *Joint Statement on Government of Colleges and Universities* (1966), reprinted in AAUP Redbook 179-185.

¹² This section of the outline borrows liberally from an excellent outline prepared by long-time NACUA members Ellen M Babbitt and Steven G. Olswang for the 2009 NACUA Annual Conference. That outline—*Financial Distress and Faculty Issues*—is available to NACUA member institutions on the Legal Reference Service section of the NACUA web site (www.nacua.org). I thank the authors for permission to take maximum advantage of the careful thinking that went into the preparation of their outline last year.

- (4) Implement faculty furloughs.
- (5) Give contractual notice to adjunct faculty members that they will not be invited to teach future courses.
- (6) Offer deferred salary payments, redeemable upon retirement without interest, in lieu of furloughs.
- (7) Cancel, postpone, or limit the duration of sabbaticals.
- (8) Adjust or reduce retirement contributions, the employer's share of health care premiums, and other fringe benefits.
- (9) Implement salary reductions across-the-board or subject to criteria that can withstand challenge under age discrimination and other anti-discrimination laws, and implement voluntary salary reductions where faculty members agree.

C. *Program elimination, financial exigency, and other long-term structural responses.* When all other possibilities have been exhausted, institutions may be entitled under their operating policies, board bylaws, state laws, collective bargaining agreements, or other sources of authority to make structural changes reducing the size of their tenured faculties. Institutional actions that permit permanent budget reductions affecting tenured faculty include:

- (1) *Program reduction.* The least drastic structural option that may justify permanent elimination of faculty positions is the contraction or reduction of a discrete program of instruction—for example, the elimination of specific languages from a “department of romance languages” (with elimination of faculty positions in the excised program area), the consolidation of two academic departments into one, or the conversion of an academic department with both undergraduate and graduate responsibilities to one offering undergraduate instruction only.

Although the AAUP does not recognize “program reduction” as a separate ground for terminating tenured appointments, many institutional handbooks or governing policies allow for termination of faculty where the board or administration makes a *bona fide* decision to reduce program offerings.

- (2) *Program elimination.* Program elimination is a more draconian structural change in which a discrete program of instruction, department, or unit is shuttered entirely. Under carefully limited circumstances, institutional policy may allow for the termination of tenured appointments as part of a program elimination. Typically, the “carefully limited circumstances” will be defined in

institutional regulations that are designed to achieve three objectives: faculty consultation in advance, diligent effort to place affected faculty in positions elsewhere in the institution, and due process for faculty who believe their terminations were infected by motives other than the elimination of their programs.¹³

- (3) *Financial exigency.* The AAUP's *1940 Statement and Recommended Institutional Regulations* allow termination of individual faculty members for financial reasons if such terminations are properly preceded by a Board declaration of financial exigency and otherwise subject to appropriate selection processes, appeal rights, and faculty involvement. See AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, Regulation 4(c), www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm#b7. Under the

¹³ The AAUP's own recommended institutional regulation on "Discontinuance of Program or Department Not Mandated by Financial Exigency" embody these limiting principles:

- d. Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction. The following standards and procedures will apply.
- (1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof. [Note: "Educational considerations" do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.]
 - (2) Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service. [Note: When an institution proposes to discontinue a program or department of instruction, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.]
 - (3) A faculty member may appeal a proposed relocation or termination resulting from a discontinuance and has a right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in such a hearing may include the institution's failure to satisfy any of the conditions specified in Regulation 4d. In such a hearing a faculty determination that a program or department is to be discontinued will be considered presumptively valid, but the burden of proof on other issues will rest on the administration.

AAUP's recommended institutional regulation and the governing documents of most colleges and universities with financial exigency policies, a declaration of financial exigency can be issued only by the governing board. It amounts to a declaration that the financial condition of the college is sufficiently grave to require emergency action. The AAUP defines "financial exigency" as an "imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means" than termination of tenured faculty positions. Recommended Institutional Regulation 4(c)(1).

A declaration of financial exigency allows the institution to terminate employment contracts, including tenured contracts, upon proper notice (typically one year, which is what is required under the AAUP's recommended institutional regulation).

- (4) *Affiliation, merger, or institutional closure.* If the institution cannot survive on its own financially, it can look to affiliate with another institution or it can close and distribute its assets to another institution. These institutional decisions typically dissolve the obligation to honor faculty employment contracts. Before merger or closure can be effected, however, an institution must comply with state and federal laws regarding receivership and bankruptcy to avoid prolonged legal proceedings over assumption of contractual obligations by a successor institution.

D. From Ellen M Babbitt and Steven G. Olswang, *Financial Distress and Faculty Issues* (2009)¹⁴:

In the wake of the Hurricane Katrina disputes and the current economic crisis, the AAUP has offered its first significant elaborations in decades with respect to financial exigency terminations and other budget-reductions involving faculty. ... The AAUP's statements regarding the Hurricane Katrina-related terminations are particularly indicative of how the AAUP may balance interests (and, by extension, how many tenured faculty members may react) when faced with the prospect of significant faculty terminations consequent to the current financial crisis.

In 2006, the Association began investigating terminations undertaken at five different New Orleans institutions during late 2005 and into 2006 (following Hurricane Katrina). Although there was little doubt that all five institutions were in states of severe economic crisis by 2006, the Association's Special Committee concluded that all five institutions failed to conduct faculty terminations consistent with AAUP-recommended "best practices" or, in some cases, even with the individual institution's stated policies. See "Report of an

¹⁴ See n. 12 of this outline, *supra*.

AAUP Special Committee: Hurricane Katrina and New Orleans Universities,” <http://www.aaup.org/AAUP/protect/academicfreedom/investrep/2007/katrina.htm>. ... The common thread running through the AAUP’s recent statements, including the New Orleans report, is its strong view that the concept of “financial exigency” does not denote simply a financial condition. Rather, “financial exigency,” to the Association, denotes a complex process of interactive decision-making in which the faculty’s participation is critical and its rights to process and appeal are all but paramount. Suffice it to say that a finding of *bona fide* exigency is only the beginning of the inquiry, in the Association’s view. The New Orleans report clarifies that, if an exigent institution (i) changes or departs from its written policies (or deviates from fundamental AAUP recommendations), (ii) fails to involve the faculty in the process of evaluating exigency or selections for termination, or (iii) fails to afford faculty members process both in terms of the selection option and in appeals of the particular termination decisions, the AAUP may well condemn the termination decisions as violations of “academic due process.”

... The AAUP can be expected to support faculty efforts to limit budget-reduction strategies that potentially affect the compensation expectations of faculty.

III. THE PRINCIPLE OF JUDICIAL DEFERENCE TO ACADEMIC TENURE DECISIONS

- A. *The general principle of judicial deference.* As a general rule, it is the law in virtually every state that courts should defer to the academic judgments colleges and universities make concerning the tenure eligibility of faculty candidates. As stated in a typical formulation of the rule:

*[I]t is not the place of this Court to second-guess academic decisions and judgments made in colleges and universities of this Commonwealth. We are not now and will never be experts in each and every academic field open to scholarly pursuit. We are extremely cognizant that ‘academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.’ As a result, our Court abides by a general policy of nonintervention in purely academic matters.*¹⁵

- B. *Judicial deference: Supreme Court jurisprudence.* On three occasions the United States Supreme Court has explicitly endorsed the principle of academic abstention with respect to a university’s core academic decisionmaking.

¹⁵ *Swartley v. Hoffner*, 1999 Pa. Super. 168, 734 A.2d 915, 921, *appeal denied*, 561 Pa. 660, 747 A.2d 902 (1999) (emphasis added), *citing and quoting Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

- (1) In *Board of Curators of the University of Missouri v. Horowitz*,¹⁶ a case in which a medical student challenged her dismissal on academic grounds, the Supreme Court noted that “[c]ourts are particularly ill-equipped to evaluate academic performance” and warned against judicial intrusion into academic decisionmaking.¹⁷
- (2) The Supreme Court expanded on *Horowitz* in *Regents of University of Michigan v. Ewing*,¹⁸ which also involved a medical student dismissed on academic grounds. Articulating the appropriate standard of review for courts to employ when reviewing academic decisions, Justice Stevens wrote for a unanimous Court that courts are obliged to defer substantially to faculty academic decisions:

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.¹⁹

- (3) Seven years ago, in one of its most significant higher education cases of the last thirty years, the Court upheld the affirmative action program operated by the admissions office at the University of Michigan Law School. “Our holding today,” wrote Justice Sandra Day O’Connor for the Court, “is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”²⁰

C. *Judicial deference: lower court jurisprudence.* Over the last three decades, courts have consistently applied the doctrine of academic abstention and declined invitations by faculty litigants to reconsider the merits of institutional tenure and promotion decisions.

- (1) In *Faro v. New York University*,²¹ a faculty member filed an employment discrimination claim after the university at which she was employed terminated

¹⁶ 435 U.S. 78 (1978).

¹⁷ *Id.* at 92.

¹⁸ 474 U.S. 214 (1985).

¹⁹ *Id.* at 225

²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

²¹ 502 F.2d 1229 (2d Cir. 1974).

her term appointment. The court of appeals affirmed a lower court ruling dismissing her claim, observing in a phrase that was subsequently repeated in many decisions that “[o]f 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 ... court supervision.”²²

- (2) In *Clark v. Whiting*,²³ a faculty member at a state-supported university in North Carolina applied unsuccessfully for promotion. He subsequently challenged the outcome in court by arguing that the university acted unlawfully by failing to “apply the same standards in evaluating his qualifications for promotion and his ‘scholarly achievements’ as were used ‘in the past’ in passing on promotions of other faculty members.”²⁴ The court rejected the plaintiff’s argument, holding that it was inappropriate to seek judicial reconsideration of the merits of an institutional promotion decision:

*Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions or to engage independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member denied promotion with those of another faculty member granted a promotion; in short, courts may not engage in “second-guessing” the University authorities in connection with faculty promotions. Yet that is exactly what the plaintiff seeks by his action to have the court do.*²⁵

One qualification: while courts are ordinarily deferential when asked to review the merits of faculty tenure and promotion decisions, the case law in some states recognizes that judicial scrutiny may be more searching when a disappointed tenure candidate asserts a cause of action based on violation of an anti-discrimination law. In actions brought under Title VII of the Civil Rights Act of 1964²⁶ and other laws prohibiting discrimination in employment, courts are entitled under the allocation-of-proof standard in *McDonnell Douglas Corp. v. Green*²⁷ and subsequent cases to probe

²² *Id.* at 1231-32. *Accord, Smith v. Univ. of North Carolina at Chapel Hill*, 632 F. 2d 316, 346 n. 26 (4th Cir. 1980); *Univ. of Baltimore v. Iz*, 716 A. 2d 1107, 1118 (Md. 1998); *Pourki v. Drexel Univ.*, 1999 U.S. Dist. Ct. LEXIS 4519, at *13 (E.D. Pa.); *Erickson v. New York Law School*, 585 F. Supp. 209, 212 (S.D.N.Y. 1984); *Cohen v. Community College of Philadelphia*, 484 F. Supp. 411, 420 (E.D. Pa. 1980); *Sanday v. Carnegie Mellon Univ.*, 1976 U.S. Dist. LEXIS 15500, at *13 n. 14 (W.D. Pa.).

²³ 607 F. 2d 634 (4th Cir. 1979).

²⁴ *Id.* at 638.

²⁵ *Id.* at 640 (emphasis added).

²⁶ 42 U.S.C. § 2000e *et seq.*

²⁷ 411 U.S. 792 (1973).

more searchingly into the proffered reasons supporting an institution's decision not to grant tenure or promotion.²⁸

E. *Judicial deference: the policy rationale.* Courts typically exercise deference on two policy bases.

(1) **First, tenure decisions involve complex, subjective assessments of scholarship—assessments courts are generally not equipped to make.**

Tenure decisions involve highly complex, highly subjective judgments about academic qualifications that tend to be arcane and specialized. Those judgments, scholars believe, are made most effectively in the first instance by academicians and not by judges or jurors who may not appreciate the nuances of tenure-worthy performance in a specific academic field. As stated by the court in *Johnson v. University of Pittsburgh*,²⁹ “tenure is a privilege, an honor, a distinctive honor, which is not to be accorded to all assistant professors. It is a very high recognition of merit. It is the ultimate reward for scientific and academic excellence. . . . Such decision by its very nature cannot be made by a court but must be made by the faculty, the administration and trustees of the university.”

(2) **Second, institutional autonomy promotes academic freedom by insulating colleges and universities from the possibly pernicious effects of external intrusion in the tenure review process.** In 1915, the AAUP issued its influential GENERAL DECLARATION OF PRINCIPLES describing the concerns underlying the concept of institutional autonomy:

Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations

An inviolable refuge from [the] tyranny [of public opinion] should be found in the university. . . . For the public may respect, and be influenced by, the counsels [of the academic community] if it believes those counsels to be the disinterested expression of the scientific temper

²⁸ *E.g.*, *Brown v. Trustees of Boston Univ.*, 891 F.2d 337 (1st Cir. 1989) (university president's characterization of English Department as a “G*ddamn matriarchy” persuaded court not to defer to institution's decision to deny her tenure); *Bennun v. Rutgers, the State University of New Jersey*, 737 F. Supp. 1393 (D.N.J. 1990), *aff'd*, 941 F.2d 154 (3d Cir. 1991) (trial court found numerous examples of the application of higher evaluation standards to the plaintiff than to similarly-situated faculty and rejected the university's assertion that deference should be given to its judgment). *See also* *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980); *Pomona College v. Superior Court of Los Angeles County*, 53 Cal. Rptr. 2d 662, 667 (Cal. Ct. App. 1996); *Pollis v. The New School for Social Research*, 132 F.3d 115, 123 n. 5 (2d Cir. 1997).

²⁹ 435 F. Supp. 1328, 1353 (W.D. Pa. 1977).

and of unbiased inquiry. It is little likely to respect or heed them if it has reason to believe that they are the expression of the interests . . . of the limited portion of the community which is in a position to endow institutions of learning, or is most likely to be represented upon their boards of trustees.³⁰

The AAUP's century-old insistence on institutional independence from government intrusion is based in part on the belief that government regulation threatens the academic freedom of individual faculty members by subjecting core academic decisions—including tenure and promotion proceedings—to extrinsic political considerations not necessarily related to the merits of particular tenure cases. The doctrine of institutional autonomy and limited judicial review of tenure decisions serves the public interest by preventing external intrusion into what is, at bottom, one of the most sensitive judgments an institution of higher education is called upon to make: whether to extend the lifelong protection of tenure to its faculty. “[U]niversities function best,” observed one commentator, “when largely left free from governmental interference.”³¹

IV. TWO DIGRESSIONS: WHAT ABOUT THE “ACADEMIC FREEDOM” OF INSTITUTIONS? AND DO STUDENTS HAVE ACADEMIC FREEDOM RIGHTS?

- A. *“Institutional” academic freedom.* A quarter of a century ago, Judge Richard Posner, then and now one of America’s most respected jurists, described academic freedom as an “equivocal” term embodying two different concepts that are not entirely harmonious. In *Piarowski v. Illinois Community College District*, 759 F.2d 625 (7th Cir. 1985), Judge Posner wrote:

[Alt]hough many decisions describe “academic freedom” as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment, the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government, and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict. [759 F. 2d at 629.]

Championed initially by the American Association of University Professors, academic freedom originally (and exclusively) referred to the right of faculty members to determine who, what and how to teach and what to study. Over time, a separate strand of jurisprudence developed protecting institutional decision-making

³⁰ AAUP, *ACADEMIC FREEDOM AND TENURE* 167-68 (L. Joughin ed. 1967).

³¹ Note, *Public Universities and the Eleventh Amendment*, 78 GEO. L. J. 1723, 1732 (1990).

from external interference—for example, by courts or government agencies. Many courts referred to this doctrine as “institutional autonomy,” but others occasionally and confusingly labeled it “institutional academic freedom.”³²

Over the last half-century of academic freedom jurisprudence in American courts, nothing has introduced more confusion than the schism between one line of cases describing academic freedom as a right possessed by individual faculty members and another recognizing academic freedom as a right possessed by and exercisable only in the name of the faculty member’s employing institution. The schism originates in two dramatically variant conceptions of academic freedom: the individualistic conception embodied in the AAUP’s 1940 *Statement of Principles*, with its explicit, reiterative emphasis on academic freedom as an entitlement belonging to “teachers,” as contrasted with the notion embraced by Justice Frankfurter in his famous concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), that academic freedom vindicates “four essential freedoms” possessed by *the university*, not the men and women who teach there.

Fifty years ago, in an era when the preponderance of academic freedom cases arose in the context of loyalty-oath challenges, the distinction between individual and institutional academic freedom mattered little because threats to academic freedom came from sources external to the academic institution—legislative committees, state attorneys general—and the interests of individual faculty members aligned with their institutions.’ In the last thirty years, by contrast, almost all academic freedom cases have arisen in the context of internal university disputes, rather than external threats, and therein lies the most profound source of doctrinal complexity in the case law: when a faculty member alleges that his or her academic freedom is abridged because of a decision made by the institution’s own officials—for example, to deny tenure, or change a grade, or command that certain books be removed from a course syllabus—then individual and institutional prerogatives collide and the outcome of the case can hinge on which variant of academic freedom the court adopts.

On this most important of academic freedom issues, the courts, sad to relate, have sent mixed signals.

- (1) In *Sweezy*, the Supreme Court’s earliest academic freedom case, Justice Frankfurter never used the phrase “academic freedom” and made no reference to the *1940 Statement of Principles*; instead, his concurring opinion focused on threats to institutional freedoms and the need to protect the autonomy of

³² For an excellent treatment of the distinction between individual and institutional academic freedom, see Donna R. Euben, *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape* (May 2002), www.aaup.org/AAUP/protect/legal/topics/AF-profs-inst.htm, and the many sources cited therein.

colleges and universities, rather than violations of the individual rights of the faculty member who brought the case. (354 U.S. at 262.)

- (2) In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Lewis Powell held that a First Amendment-derived right of academic freedom permitted a state university to take race into account in admitting students when doing so furthered the academic goal of promoting diversity in the student body. Justice Powell rested his opinion on the fourth of Justice Frankfurter's "four essential freedoms": the right of the university to determine for itself on academic grounds who may be admitted to study. Justice Powell—like Justice Frankfurter before him—spent no time analyzing the rights of faculty members in making admission or other academic decisions.
- (3) The faculty role was addressed explicitly in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), a case characterized by some scholars as the high water mark for academic freedom as an individual right possessed by individual members of the faculty. *Ewing* involved the academic dismissal of a medical student after he failed the benchmark National Board of Medical Examiners test. The medical school's Promotion and Review Board—a nine-member faculty body—reviewed the student's academic record and recommended that he be dismissed. The student then filed suit alleging that his dismissal violated his procedural due process rights in a number of respects. For a unanimous Court, Justice John Paul Stevens affirmed the decision to dismiss the student, holding that "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career." 474 U.S. at 225. Justice Stevens said that courts should defer to academic decisions appropriately entrusted to faculty members; otherwise, courts would violate the "responsibility to safeguard their academic freedom." Courts are not "the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," and are not equipped to evaluate "the multitude of academic decisions that are made daily by faculty members of public educational institutions."

In a short but significant footnote, Justice Stevens attempted to synthesize the Supreme Court's academic freedom decisions over the preceding three decades. He acknowledged that academic freedom has both an individual and institutional component, and that the two coexist uneasily and in some respects inconsistently:

Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California*

Regents v. Bakke, 438 U.S. 265, 312 (1978); *Sweezy v. New Hampshire*, 354 U.S., at 263.

- (4) In *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Sandra Day O’Connor for a slender five-justice majority of the Court returned to ground plowed a quarter-century earlier in *Bakke* and held that the University of Michigan Law School was entitled to take race into account in making admission decisions. Justice O’Connor reiterated Justice Powell’s holding in *Bakke* that the First Amendment protects “four essential [academic] freedoms,” one of which was the freedom to decide “who may be admitted to study.”

Justice O’Connor’s decision left no doubt that in her mind and the minds of the other justices in the majority those freedoms belonged, not to individual faculty members, but to the university: “*universities*,” she wrote, “occupy a special niche in our constitutional tradition.” Nothing in her opinion suggested that faculty members were entitled to assert academic freedom in their own names—although, as Justice Stevens had done in *Ewing*, Justice O’Connor mentioned in passing that a faculty body (in this instance, the law school’s admission committee) had had a hand in formulating the challenged policy. Using academic abstention language borrowed from *Ewing*, Justice O’Connor stated that the faculty’s “educational judgment” on the importance of racial diversity “is one to which we defer,” citing *Ewing* as an exemplar of the Court’s “tradition of giving a degree of deference to a university’s academic decisions.”

To summarize: in the relatively small number of academic freedom cases it decided in the last half-century, the Supreme Court managed to be less than precise in distinguishing between two strands of doctrinal thought on what academic freedom means and what it protects. Its language has been predominantly *institutional* in outlook and it has more often than not characterized academic freedom as a right exercisable by universities—not faculty members—and grounded in freedoms belonging to universities in their own names. At the same time, the Court has occasionally toyed with the notion that the First Amendment “protect[s] the academic freedom of *university faculty members*,” not just institutional employers. Pragmatically, the need to distinguish between the two strands has not been pressing because the Supreme Court has never decided an academic freedom case in which institutions and faculty members were not aligned. In every case, it mattered little to the outcome whether the particular “freedom” asserted—to teach, to admit students, to conduct research—protected faculty members or institutions, because faculty and institution occupied common ground in seeking to repel external challenges to academic freedom³³—challenges mounted by agencies and instrumentalities beyond campus boundaries.

33. See Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor’s Academic Freedom*, 96

- B. “*Student*” *academic freedom*. In the last few years efforts by determined groups to champion the enactment of so-called “academic bill of rights” legislation at the federal and state level have been accompanied by references to the academic freedom rights of *students*.³⁴ Bills modeled on templates from “academic bill of rights” advocates were introduced in 2008 in the legislatures of a handful of states, although none has yet to be enacted.³⁵

Lawyers for colleges and universities are often asked whether students enjoy rights of academic freedom. The AAUP answers no, although in its venerable JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS (www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm)—notice the absence of the word “academic” in the title of the policy—the AAUP ascribes certain bedrock rights to college and university students.

- (1) *In the classroom*. “The professor in the classroom and in conference should [1] *encourage free discussion*, inquiry, and expression. [2] *Student performance should be evaluated solely on an academic basis*, not on opinions or conduct in matters unrelated to academic standards. . . . [3] *Students should be free to take reasoned exception to the data or views offered in any course of study* and to reserve judgment about matters of opinion . . . [4] Students should have protection through *orderly procedures* against prejudiced or capricious academic evaluation. . . . [5] Information about student views, beliefs, and political associations that professors acquire in the course of their work as instructors, advisers, and counselors should be considered *confidential*. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.”

CALIF. L. REV. 1669, 1679 (2008); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1840 (1993); cf. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 839 (1983); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 231 (Summer 1990).

³⁴ See, e.g., www.studentsforacademicfreedom.org, the website of an organization called Students for Academic Freedom. This organization, which has ties to the controversial advocate David Horowitz, champions a model “Academic Bill of Rights” that contains this language:

Academic freedom consists in protecting the intellectual independence of professors, researchers and students in the pursuit of knowledge and the expression of ideas from interference by legislators or authorities within the institution itself.”

(www.studentsforacademicfreedom.org/documents/1925/abor.html.) No citation accompanies this sentence, and it goes substantially beyond definitions of academic freedom formulated by the American Association of University Professors and adopted by courts.

³⁵ The list appears at www.studentsforacademicfreedom.org/documents/?c=Legislation-Texts.

- (2) *Student affairs.* The AAUP policy recognizes five bedrock student extracurricular rights:
- (a) [*The right to form student clubs and organizations:*] Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. *They should be free to organize and join associations* to promote their common interests. ...
 - (b) [*The right to freedom of inquiry in the conduct of extracurricular organizations:*] Students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately. ...
 - (c) [*The right to invite speakers to campus:*] Students should be allowed to *invite and to hear any person of their own choosing.* ...
 - (d) [*The right to participate in institutional governance affecting students:*] As constituents of the academic community, students should be free, individually and collectively, to *express their views on issues of institutional policy* and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. ...
 - (e) [*Freedom of the student press:*] Whenever possible the student newspaper should be an independent corporation financially and legally separate from the college or university. Where financial and legal autonomy is not possible, the institution, as the publisher of student publications, may have to bear the legal responsibility for the contents of the publications. In the delegation of editorial responsibility to students, the institution must provide *sufficient editorial freedom and financial autonomy* for the student publications to maintain their integrity of purpose as vehicles for free inquiry and free expression in an academic community. ... Editors and managers of student publications should be *protected from arbitrary suspension and removal* because of student, faculty, administration, or public disapproval of editorial policy or content. ...
- (3) *Off-campus freedom of students.* “College and university students are both citizens and members of the academic community. As citizens, *students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy* and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional

powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus. ...”

- (4) *Procedural standards in student disciplinary proceedings.* Students enjoy four foundational procedural rights in disciplinary proceedings: “In all situations, procedural fair play requires that a student charged with misconduct be [1] informed of the nature of the charges and [2] be given a *fair opportunity to refute* them, that [3] the institution *not be arbitrary* in its actions, and that [4] there be *provision for appeal* of a decision.”

EPILOGUE: THREE CONTEMPORARY CHALLENGES TO TENURE AND ACADEMIC FREEDOM

- A. *Politicized Tenure Cases.* While it is scarcely a new phenomenon for disappointed tenure candidates to claim that ideological bias infected the tenure review process,³⁶ the last few years have seen an unusual number of high-profile tenure disputes. What distinguishes this crop from similar disputes earlier in the decade were (1) the use of blogs, personal web pages, and other technologies to mobilize support and generate media interest in an effort to pressure institutional decision-makers to change their minds, (2) the emergence of high-profile national organizations lending legal and public-relations support to perceived victims of ideological bias, and (3) the extraordinary passions engendered by Israeli-Arab relations and the often self-interested interpretation of the tenure candidate’s scholarship by partisans of one or both sides.

Two of the highest-profile tenure disputes reached their zeniths in the summer and fall of 2007. At DePaul University in Chicago, Norman Finkelstein, a political scientist whose published writings explored Holocaust-related and pro-Palestinian themes, was denied tenure, prompting vitriolic attacks of anti-Semitism, outside interference in the tenure process, and intra-departmental personal vendettas. And on the campus of Barnard College in New York City, an uproar ensued over the tenure

³⁶ One is reminded with a start that it has been forty years since Angela Y. Davis, a Brandeis University graduate, Black Panther and Communist Party member, was removed from her teaching post at the University of California San Diego, and more than thirty years since former Governor Ronald Reagan vowed that she would never teach in California again—after which she taught at San Francisco State University for more than a decade. See Angela Y. Davis, *WOMEN, CULTURE AND POLITICS* (1989).

application of Nadia Abu El-Haj, a Palestinian-born anthropologist whose scholarship was adjudged by many to harbor anti-Israeli animus.³⁷

The pace quickened in 2008, with more well publicized tenure battles involving Middle Eastern scholars. After Columbia University in New York denied tenure to Joseph A. Massad, a Palestinian-American scholar in the Department of Middle East and Asian Languages and Culture, some bloggers assailed him for “openly support[ing] Islamist terrorism against Israel, including suicide bombings of civilians,” while others portrayed him as the victim of anti-Arab hostility.” And at Ithaca College in New York, sociology professor Margo Ramlal-Nankoe accused departmental colleagues of “let[ting] their political views on the Israeli-Palestinian conflict get in the way of their judgments on her tenure bid” after she was denied tenure.³⁸

In an embattled world in which scholars explore controversial aspects of contemporary wars and social divisions, it comes as no surprise that disappointed tenure candidates are quick to perceive bias in the outcome.

- B. *Travel Restrictions and Academic Freedom.* One of the most important higher education cases of the recent past involved ideology of a different sort: the United States Government’s longstanding boycott of Castro’s Cuba. In *Emergency Coalition to Defend Educ. Travel v. United States Dep’t of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008), a broad coalition of professors and higher education organizations filed suit challenging the validity of regulations promulgated by the Treasury Department that had the effect of restricting the participation of American scholars in study programs located in Cuba. The professors argued that the regulations abridged their academic freedom to determine for themselves where and how to conduct scholarly research. In a lengthy decision issued by happenstance on November 4, 2008—Election Day—the United States Court of Appeals for the District of Columbia Circuit rejected the scholars’ argument and upheld the validity of the regulations:

[T]he purpose of the Cuban embargo, and therefore also of the ... regulations, is to deny currency to the government of Cuba. Our government has long deemed this policy instrumental to the ultimate goal of nudging Cuba toward a peaceful transition from the oppressive policies of the Castro regime to a free and democratic society. The [regulations] were specifically designed to curtail tourism, a critical and much-exploited revenue source for the Cuban

³⁷ Patricia Cohen, *Outspoken Political Scientist Denied Tenure at DePaul*, N.Y. TIMES, June 11, 2007, www.nytimes.com/2007/06/11/arts/11depa.html.

³⁸ Survey Documents—Student comments about Joseph Massad, CAMPUS WATCH, www.campus-watch.org/article/id/63. See generally Robin Wilson and Richard Byrne, *Ideological Tenure Disputes—Closely Watched Tenure Case at Columbia U. Is Still Unsettled*, CHRON. OF HIGHER ED., June 6, 2008, p. A13.

government. ... None of this is remotely related to the suppression of free expression, nor is any restriction whatsoever placed on the subject matter or editorial slant a professor may choose to incorporate into his teaching on Cuba. [*Id.* at 12-13.]

- C. *Tenure, creationism, and intelligent design.* In February, 2008, the Iowa State Board of Regents upheld a decision by the president of Iowa State University to deny tenure to Guillermo Gonzales, an assistant professor of astronomy who had claimed that his departmental colleagues were biased against him because of his belief in intelligent design.³⁹ At about the same time, Nathaniel Abraham, a postdoctoral student at the Woods Hole Oceanographic Institute, filed a federal lawsuit alleging that the institute had terminated his fellowship because of his creationist views in violation of his religious freedom rights as a “Bible-believing Christian [who] accepts the Holy Bible to be the Word of God and hence infallible.”⁴⁰ Abraham’s lawsuit was dismissed in April, 2008.⁴¹

³⁹ Richard Monastersky, *Intelligent Design and Tenure: Not in the Stars*, News Blog, CHRON. OF HIGHER ED., February 7, 2008, <http://chronicle.com/news/article/3900/intelligent-design-and-tenure-not-in-the-stars>.

⁴⁰ The quotation is from paragraph 8 of the complaint in *Abraham v. Woods Hole Oceanographic Institute*, No. 07 CA 12237 (D. Mass. December 3, 2007). The text of the complaint is online at www.courthousenews.com/2007/12/06/WoodsHoleXtian.pdf.

⁴¹ *Researcher loses suit against Woods Hole*, BOSTON GLOBE, April 29, 2008, www.boston.com/news/local/massachusetts/articles/2008/04/29/sleeping_man_is_arrested_in_vandalism.