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LABORING IN THE ACADEMIC MARKETPLACE: THE CASE FOR TENURE

BY
KENNETH G. DAU-SCHMIDT*

“Ultimately, the case for tenure rests on a firm understanding of what it is and what it is not. This book is meant to illuminate that understanding. My hope is that once tenure is seen in each of its parts and as a whole, warts and all, it will need no defense.” Matthew W. Finkin¹

There has been considerable debate about the merits of academic tenure in recent years. Articles and books questioning tenure’s continued utility and proposing alternatives, including term contracts and post tenure review, have appeared in both the popular and academic press.² The forces driving this reconsideration of tenure include: genuine interest in improving faculty performance; suspicion of any institution that seems inconsistent with the corporate private sector model ascendant in the American imagination in these later years of the twentieth century; suspicion, or perhaps jealousy, of job security in the academic labor market at a time when workers in other labor markets are experiencing job insecurity due to corporate reorganization and “downsizing;” and political discontent among right-wing theorists and activists who perceive academia as the last bastion of liberals in the United States.³ As a result, the attack on tenure has generally come as a characterization of tenure as an outmoded and elitist institution

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1. THE CASE FOR TENURE 2 (Matthew W. Finkin ed. 1996).

2. See, e.g., RICHARD P. CHAIT AND ANDREW T. FORD, BEYOND TRADITIONAL TENURE: A GUIDE TO SOUND POLICIES AND PRACTICES (1982); Richard P. Chait, *The Future of Academic Tenure*, AGB PRIORITIES (Spring 1995); David W. Breneman, *Alternatives to Tenure for the Next Generation of Academics*, working paper #14, American Association for Higher Education New Pathways Serves (1997); Brent Staples, *Editorial Notebook; The End of Tenure?*, N.Y. TIMES, June 29, 1997, at 14. Editorial, *Tenure Tenacity*, WASH. POST, March 10, 1996 at C06; but see FREEDOM AND TENURE IN THE ACADEMY (William W. Van Alstyne ed. 1993); Julius G. Getman and Brian Leiter, *There’s No Good Reason to Junk Faculty Tenure at UT*, AUSTIN AMERICAN-STATESMAN, July 22, 1996, at A7; Jeanne M. Zarucch, *Tenure Protects Quality Teaching*, ST. LOUIS POST-DISPATCH, March 31, 1997, at o7B.

3. For an example of a politically motivated article see George Will, *Disgusted Teaching Assistants, Tenure Plague College Campuses*, FRESNO BEE, April 21, 1997, at B5.

that protects academic sloth and incompetence and interferes with the efficient operation of colleges and universities. In response to this assault on tenure, academics across the country have found themselves debating the problems and virtues of the tenure system, and usually fighting a rearguard action to preserve the system, generally on the somewhat mushy ground of maintaining "academic freedom." This debate has not been entirely "academic," since trustees and administrators at several colleges and universities have gone beyond merely questioning tenure's utility, to attempting to institute changes in the substantive and procedural protections afforded by tenure.⁴

Matthew Finkin's new book, *The Case for Tenure*, should provide much needed rigor to the debate on academic tenure, and act as an excellent resource for those of us who have always known that the institution of tenure lay at the heart of the academic enterprise. In the book, Finkin combines excerpts from articles and cases on tenure with his own instructive notes to provide the reader with a complete view of the institution of tenure, as Finkin would say, "warts and all." The selected articles and notes provide a rigorous exposition of the academic freedom argument, as well as other often ignored reasons for the institution of tenure such as its importance to the academy's systems of peer review and faculty governance. The selected cases breathe life into these arguments and place the flesh of real live academics over the bones of this theoretical structure. As a sound scholarly examination of the subject, the book also addresses the problems of tenure, including "dead wood,"⁵ constraint of university hiring policies including the recruitment of minority and female faculty,⁶ and the specter of an ancient doddering tenured academy freed from the bond of mandatory retirement by the Age Discrimination in Employment Act (ADEA).⁷ The book also examines the efficacy of the alternatives, including employment at will, term contracts and post tenure review. Ultimately the book succeeds, just as hoped by Finkin, in providing a convincing account of the need for academic tenure, not just to provide academics with some measure of protection against politically motivated restrictions on their teaching and research, but also for the efficient operation of a modern university. Moreover, the book implicitly and expressly challenges those who want to amend or re-

4. These institutions include such esteemed schools as the University of Wisconsin, the University of Minnesota, the University of Colorado, and the Arizona State University System.

5. Finkin, *supra* note 1, at 14-15, 116-17.

6. *Id.* at 89-90.

7. 29 U.S.C. §§621-634 (1994).

place the tenure system to address the very real issues and concerns in the lives of academics and the efficient operation of modern universities that the tenure system addresses.⁸

I. THE BOOK

The book begins with a chapter on "The Meaning of Tenure," which serves as an introduction to the substantive and procedural protections of tenure as well as the reasons for tenure and its problems. The chapter includes excerpts of classic articles by William Van Alstyne⁹ and Fritz Machlup,¹⁰ as well as extracts from American Association of University Professors (AAUP) reports on incidents at Rollins College¹¹ and Bennington College.¹² Van Alstyne defines tenure as a guarantee that, after a lengthy probationary period, full time academic personnel who are retained in employment by a college or university will not be punished or discharged without academic due process, consisting of a showing of adequate cause at a hearing before an impartial judge, with notice, and an opportunity to be heard.¹³ Van Alstyne nicely finesses one of the more difficult definitional problems in employment law by defining "adequate cause" as a showing of program termination, financial exigency or misfeasance sufficient to overcome a "rebuttable presumption of excellence."¹⁴ Van Alstyne also explores some of the reasons for tenure, including academic freedom, contracting high skilled labor at a reasonable wage and "to do justice and . . . avoid errors."¹⁵ Machlup delineates the institution of tenure in typical economic fashion by examining both the costs and benefits of the tenure system. Machlup examines the disadvantages of tenure to individual professors, the profession and academic institutions, but concludes that these disadvantages are more than made up for by the benefits of tenure in requiring faculties to take appointments seriously and promoting research that benefits society as a whole.¹⁶ The Rollins College incident involves the dismissal of an "excellent teacher," Pro-

8. Finkin, *supra* note 1, at 117-18, 120, 195.

9. William W. Van Alstyne, *Tenure: A Summary, Explanation and Defense*, 57 AAUP BULL. 329-51 (1971).

10. Fritz Machlup, *In Defense of Academic Tenure*, 50 AAUP BULL. 112-24 (1964).

11. Committee Report, *Academic Freedom and Tenure: Rollins College*, 19 AAUP BULL. 416-32 (1933).

12. Committee Report, *Academic Freedom and Tenure: Bennington College*, 81 ACADEME 91-103 (1995).

13. Finkin, *surpa* note 1, at 4-5.

14. *Id.* at 5.

15. *Id.* at 6.

16. *Id.* at 11-26.

fessor Rice, who runs afoul of the College President for raising questions about curriculum and pedagogy,¹⁷ while the Bennington College case relates the recent unfortunate events at that College in which the Trustees used the college's financial difficulties as an excuse to assert control over the faculty and discharge everyone with an ounce of spine.¹⁸ Both cases serve to define tenure in the negative by showing, in very real terms, what higher education might be like without the tenure system.

Further elaboration on various facets of the tenure system is provided in the next two chapters. Chapter two discusses the probationary period and includes an excerpt from the case of *Jackson v. Harvard University*¹⁹ and a further excerpt from Van Alstyne's article.²⁰ The *Jackson* case is included largely to give a detailed outline of the traditional academic probationary period and the procedures for evaluating a probationary faculty member for tenure. The Van Alstyne excerpt is used to answer the very interesting and deceptively difficult question, posed by Finkin in a connective passage, as to why there is a probationary period at all, given that tenure is necessary for the production of good research. Chapter three consists largely of an excerpt from the case *King v. University of Minnesota*²¹ which sets forth the due process procedural requirements for the discharge of tenured professors at public universities. The practice has been that tenure itself guarantees similar procedural safeguards in the private sector.²²

The fourth chapter, on the economics of tenure, is perhaps the most useful and interesting chapter of the book for those who are already well acquainted with the tenure system. The chapter consists primarily of an edited version of a book chapter on the economics of tenure by Michael McPherson and Gordon Winston.²³ In the chapter, McPherson and Winston explore the characteristics of both the demand and supply sides of the academic labor market and conclude that, "The system of rigorous probation followed by tenure is a reasonable way of solving the peculiar personnel problems that arise in

17. *Id.* at 34-36.

18. *Id.* at 60.

19. 721 F. Supp. 1397 (D. Mass. 1989), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990).

20. Van Alstyne, *supra* note 9.

21. 774 F.2d 224 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986).

22. Finkin, *supra* note 1, at 92.

23. Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, in *PAYING THE PIPER: PRODUCTIVITY, INCENTIVES, AND FINANCING IN U.S. HIGHER EDUCATION* (M. McPherson, et. al. eds., 1993).

employing expensively trained and narrowly specialized people to spend their lifetimes at well-defined and narrowly specialized tasks.”²⁴ Although the chapter discusses some concepts which are generally confined to the well-defined and narrowly specialized discussions of labor economists, for example the “internal labor market,” the general text of the article is quite approachable and should be required reading for any administrator or trustee contemplating changes in the tenure system.

Chapter five on “Tenure and Resource Allocation” deals with the questions of how to determine when financial exigency or program termination allows institutions to discharge tenured professors and what procedures are required for terminations on these grounds. The chapter consists of excerpts from the AAUP’s report on the recent attempted mass discharge of tenured professors at San Diego State University²⁵ and the case of *Jimenez v. Almodovar*.²⁶ The San Diego State University case seems to be included as a catalogue of what not to do in such cases. At San Diego State the president made the decision to undertake the discharges without faculty input or hearings and when other quite viable alternatives for dealing with the university’s budgetary problems existed. The *Jimenez* case seems to be included as an example of how such discharges might be handled when necessary since the affected faculty members were afforded full due process hearings and discharged only after termination of their program was determined, in good faith, to be “unavoidable.”²⁷ In the *Jimenez* case, substantial efforts also were undertaken to find the affected faculty members comparable jobs in the same university system.²⁸ Finkin also uses the chapter as a chance to comment on Richard Chait’s proposal for a “market mediated” tenure, in which institutions would be free to discontinue select areas or individuals in response to changes in student demand.²⁹ Finkin argues that students are not strictly analogous to consumers, in that they are uninformed as to the value of certain courses.³⁰ Finkin also argues that faculty would be

24. Finkin, *supra* note 1, at 101.

25. Committee Report, *San Diego State University: An Administrator’s Response to Financial Stress*, 79 *ACADEME* 94-115 (1993).

26. 650 F.2d 363 (1st Cir. 1981).

27. Finkin, *supra* note 1, at 163.

28. *Id.* at 161.

29. *Id.* at 166.

30. *Id.* at 166-67. This certainly rings true to my experience in that I am quite confident writing would all but disappear from the curriculum if left purely to the dictates of student demand.

discouraged from investing in their specialized human capital if jobs were left subject to capricious short-run changes in student demand.³¹

The last three chapters of the book deal with topics of recent or current interest in the debate over tenure. Chapter six deals with the subject of tenure and retirement, and consists largely of an excerpt from the National Research Council's report on the effect of ending mandatory retirement for tenured faculty,³² and portions of a treatise entitled *Faculty Retirement in the Arts and Sciences* by Albert Rees and Sharon Smith.³³ Both selections conclude that prohibiting mandatory retirement will result in a postponement of retirement among tenured professors only at large private research institutions, that this will have no effect on teaching at these institutions but may result in a decline in research activities, and that, if the affected universities want to avoid these results, probably the most cost effective way to deal with the issue is to offer retirement benefits that encourage early retirement.³⁴ Chapter seven deals with the subject of post tenure review and includes portions of published remarks by Bryant Kearl³⁵ and the conclusions of the American Council on Education's Wingspread Conference on the subject.³⁶ Kearl outlines the extensive system of review to which universities and colleges already subject their tenured faculty, and concludes, as did the Wingspread Conference, that further review of tenured faculty would be a waste of time and resources. The final chapter addresses "The New Criticism" raised by Richard Chait³⁷ that tenure is superfluous to existing First Amendment protections and that it is *too* protective in that it allows faculty "to offer unsubstantiated conclusions and pernicious perspectives with utter impunity."³⁸ Finkin responds that the First Amendment only protects professors at public institutions, and then only on matters of "public concern" (not matters of pedagogy or faculty governance). Moreover, the First Amendment does not afford the same procedural protections as tenure. Finkin argues that such procedural

31. *Id.* at 167-68.

32. COMMITTEE ON MANDATORY RETIREMENT IN HIGHER EDUC., COMM'N ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUC., NATIONAL RESEARCH COUNCIL, ENDING MANDATORY RETIREMENT FOR TENURED FACULTY: THE CONSEQUENCES FOR HIGHER EDUCATION (P. Brett Hammond & Harriot P. Morgan eds., 1991).

33. ALBERT REES & SHARON SMITH, *FACULTY RETIREMENT IN THE ARTS AND SCIENCES* (1991).

34. Finkin, *supra* note 1, at 172-73, 174-78.

35. Bryant Kearl, *Remarks*, 69 ACADEME 8a (1983).

36. Conference Report, *Statement of the Wingspread Conference on Education of Tenured Faculty*, 69 ACADEME 149 (1983).

37. Chait, *The Future of Academic Tenure*, *supra* note 2, at 1.

38. *Id.* at 3.

protections are important in evaluating cases of “academic dishonesty” like those alleged by Chait.³⁹

II. THE CASE FOR TENURE

Considering Finkin’s collected materials as a whole, the case for tenure is that the present tenure system is a useful adaptation to certain unusual attributes of academic labor, and that this adaptation provides important benefits to professors, institutions of higher education and society as a whole.

The first argument, which is basically a rigorous statement of the traditional academic freedom argument, is that universities are engaged in a somewhat unique endeavor, the production and dissemination of knowledge, and that the academic freedom that tenure affords professors is vital to the success of this enterprise.⁴⁰ Scholars will not be as successful in developing new ideas and disseminating those ideas to the general population if they do not have some protection from retribution in their personal career for challenging the conventional wisdom.⁴¹ Moreover, the usual business hierarchy is not useful to this endeavor. Thus universities do not value the subordination of the individual that comes with the traditional corporate model of employee discipline, at least with respect to academic employees.⁴² Finally, because universities undertake this enterprise largely on a non-proprietary basis, the benefits of this labor, and academic freedom, are largely external to the contracting parties. Accordingly, as useful as tenure might be to the parties to the academic labor contract, there are also benefits of tenure to the larger society. So a case might be made for imposing the tenure system on academics and institutions of higher learning even if they had not developed it themselves.⁴³

Second, it is maintained that, in comparison with other employees, academic personnel possess an unusual amount of information that is useful in the management of the enterprise and that tenure is necessary to ensure that academics successfully share this information with their institution.⁴⁴ It is the faculty and perhaps departmental

39. Finkin, *supra* note 1, at 195.

40. *Id.* at 22, 26.

41. *Id.* One can also argue that without job security, senior colleagues will be less likely to mentor young colleagues, who are now potential rivals for their job. Since mentoring is an important part of learning how to undertake the work of an academic, the demise of tenure would also make it more difficult and costly to train academics.

42. *Id.* at 124.

43. *Id.* at 125.

44. *Id.* at 107, 114.

chairperson, and certainly not the provost, president or trustees, who know which subatomic physicist and which Kantian philosopher should be hired, retained or promoted.⁴⁵ Moreover, the faculty have the knowledge necessary to determine what research and teaching agenda the institution should undertake and how to pursue that agenda most efficiently: what projects to pursue, what resources are needed, what pedagogy is most successful, and what curriculum will be successful. As a result, it is very important to the successful running of a college or university that faculty participate in these decisions through systems of peer review and faculty governance. Tenure is vital to a system of peer review, to ensure that faculty evaluations are not compromised by the potential impact of hiring, promotion, and retention decisions on the faculty member conducting the evaluation.⁴⁶ Tenure is also essential to an effective system of faculty governance, to ensure that faculty are free to disagree with the administration on administrative matters and fully share the information they have on such issues.⁴⁷

Third, it is argued that, because they invest heavily in “occupation specific human capital,”⁴⁸ faculty have a strong interest in occupational job security and can achieve a mutually beneficial bargain with their employers by accepting lower wages in exchange for security in a specific job.⁴⁹ Unlike most nonacademic employees, academics’ training is predominantly “occupation specific,” or how to be productive in one job (for example, that of a political science professor), rather than “firm specific,” or how to be productive within a firm or institution, perhaps in a variety of different jobs.⁵⁰ As a result, unlike nonacademic employees whose employer will pay for their firm specific training, academic employees will be left to bear the costs of their own, rather extensive, occupation specific training, because its value is nonappropriable by their employer.⁵¹ Also, unlike nonacademic employees who may have a number of different jobs or occupations with the same employer, academics will generally change employers before they change occupations because they are more tied to their occupa-

45. *Id.* at 114.

46. *Id.* at 99, 115.

47. *Id.* at 61-62, 107, 114.

48. *Id.* at 107.

49. *Id.* at 106-10.

50. *Id.* at 106-7.

51. *Id.* at 107. The value of an academic’s occupational training is “non-appropriable” because, at least early in his or her career, if the institution does not pay him or her the value of that knowledge the academic will go elsewhere to work. Accordingly, at least initially, the employer cannot appropriate any of the value of the academic’s training.

tion than to a specific employer by their training.⁵² Thus, academics have a large personal investment in training for a specific occupation and, being risk averse, are willing to accept substantially lower wages in return for guarantees of job security in that occupation.⁵³ It seems reasonable that colleges and universities, being able to diversify and therefore being relatively less risk averse, would seek to recruit the best faculty they could, given their budget constraints, by offering job security and lower wages.⁵⁴

Finally, it is asserted that the current tenure system is a logical and efficient solution for universities to the problem of assigning academic workers responsibilities and wages in accordance with their productivity when such workers are costly to monitor and very strongly tied to one occupation.⁵⁵ Academics are costly to monitor because much of their job is creative and because, as previously discussed, you generally need to employ another highly trained and specialized academic to evaluate their work. As has already been established, academics are strongly wedded to their occupation by their extensive occupation specific training. For nonacademic labor that is not costly to monitor and not so heavily invested in occupation specific training, the traditional corporate solution to the problem of assigning responsibility and wages in accordance with productivity is solved by monitoring the employees over the course of their employment and assigning employees to higher or lower responsibility and wage jobs within the corporation according to their productivity. Promises of job security that can be used to lower wage bills and decrease turnover costs are made in the form of an express or implicit promise of continued employment with the firm rather than a promise of a particular job. Since academics are costly to monitor, and there is little selection of jobs in the institution for which their training might qualify them (a French professor can't teach physics, or, be productively employed as a secretary), it is rational to instead solve the problem of assigning employees responsibility and wages in accordance to their productivity through a costly initial screening, including an extensive probationary period, followed by a nonprobationary period in the same job with less monitoring after the institution has decided the

52. *Id.* at 108.

53. *Id.* at 20.

54. *Id.* There is indeed empirical evidence that academics accept lower wages in return for the job security afforded by tenure. RONALD EHRENBERG, ET. AL., *Would Reducing Tenure Probabilities Increase Faculty Salaries?* National Bureau of Economic Research Working Paper No.5150 (1995).

55. Finkin, *supra* note 1, at 101, 104-9.

employee is of sufficient productivity to employ.⁵⁶ Promises of job security to reduce wages and turnover costs would logically attach to the job for which the employee was trained rather than to the institution as a whole.

There are of course costs to tenure. The intense scrutiny of the probationary period is not always successful in weeding out people who cannot be trusted to be productive during the later period of job security and lessened monitoring resulting in the proverbial "dead wood."⁵⁷ Even faculty who remain productive through out their career may be less productive with the security of tenure than they would be if they could be constantly fairly and effectively monitored and rewarded or punished based on their performance.⁵⁸ Moreover, tenure restricts college and university administrations in their efforts to undertake administrative goals, for example the quick upgrading of the faculty of a certain department⁵⁹ or the speedy diversification of a faculty by hiring numerous qualified women or minority professors.⁶⁰ The tenure system may also be unfair to individual academics who are meritorious, but develop too slowly to prove themselves within the probationary period, or who are of only average ability but start out at first rate institutions and end up moving from job to job as they move down the institutional hierarchy to a school at which they can achieve tenure.⁶¹

However, the contributors to Finkin's book argue that the benefits of tenure out weigh its costs,⁶² and this argument seems persuasive. Academics obviously have an enormous personal investment in very highly specialized human capital. Although opportunities with other employers might protect them early in their careers, as academics progress over the life-cycle and become less mobile, they would seem particularly subject to coercion and opportunistic behavior by their employer. Thus, promises of job security would be particularly valuable to academic employees and would be particularly important in ensuring that these employees provided accurate information, rather than what they supposed their employer wanted to hear, in the

56. Alternatives such as adjusting individual wages to individual productivities and accepting the costs of higher turnover by dismissing low productivity employees are rejected due to monitoring costs and effects on employee morale. *Id.* at 104-5.

57. *Id.* at 11.

58. *Id.* at 14.

59. *Id.* at 12.

60. *Id.* at 12, 89-90.

61. *Id.* at 17-19.

62. *Id.* at 22.

conduct of their research, teaching, peer evaluation and faculty governance. Moreover, it is convincing to argue that it is particularly important to the academic enterprise that academics provide accurate information, not only in their research for the benefits of new knowledge, but also in peer review and the running of the university. Comparing the academic enterprise with other enterprises, it is remarkable the extent to which the “production process,” research and teaching, is concentrated from beginning to end in one class of employees — professors. With amazingly little division of labor, teaching and research projects are initiated and completed largely within the confines of the academic’s “shop” with the remainder of university and college personnel, from the president to janitor, acting as support staff to ensure that the academics have what they need to do their job. Thus, it seems quite plausible that this vital class of academic employees might have useful information to contribute to their employer about how the production process should be undertaken. Perhaps attesting to the difficulty and expense of monitoring faculty, there are no rigorous estimates of faculty dead wood, but available administrative shirt sleeve estimates place the percent of faculty who are merely sleeping on their tenure in the low single digits.⁶³ The restrictions of tenure on university and college hiring practices are real, but with respect to promises of job security to existing personnel, these were promises freely made and on which faculty have relied, to the detriment of their wages. One would have to wonder about the equity, let alone the legality,⁶⁴ of implicit suggestions that universities and colleges be free to jettison their current tenured faculty for the purposes of “upgrading”⁶⁵ or hiring more women and minority faculty. Finally, the empirical work that does exist suggests that the fears of losses in academic productivity due to the amendments to the Age Discrimination in Employment Act extending the prohibition on mandatory retirement provisions to tenured professors have been largely groundless with what ill effects there have been largely limited to large private research institutions that have the resources to deal with the problem.⁶⁶

Moreover, the Finkin collection demonstrates that, at the very least, the case has not yet been made that any of the proposed alterna-

63. *Id.* at 186. Dean Rosovsky of Harvard has estimated faculty “dead wood” at under 2%. *Id.* Even David Breneman, a detractor of the current tenure system and a proponent of change, estimates faculty “dead wood” at only 7.5%. Breneman, *supra* note 2, at 11.

64. *See* *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938).

65. Query, what “grade” of academic would wish to work for such an institution?

66. Finkin, *supra* note 1, at 122, 174.

tives or amendments to the tenure system adequately address the problems of the academic labor market. Employment-at-will fails to take advantage of the potential gains from trade in job security and wages afforded by academics' heavy investment in human capital and risk averseness relative to their employer. How these at-will academics would be effectively monitored using evaluations by other at-will academics, in constant competition for the same position, has also not been established. Faculty governance would be a joke, so that the useful information academics contribute toward the running of their institutions would be seriously compromised. Research and teaching would be subject to pressure from the public and major donors to an even greater extent than they are now, so that the academic product would come to more closely resemble and reaffirm the status quo than genuinely new insights and advances. Term contracts and post tenure review do little better. These alternatives remove the "nodal point"⁶⁷ of the up-or-out tenure decision and run the risk of becoming pro forma under a system of "tenure by courtesy."⁶⁸ Faculties and administrators will not take the reviews as seriously as the current tenure reviews because they commit the institution only for a limited term and, as a result, may let substandard performers slide to be dealt with by future decision makers. Alternatively, if the decisions are taken seriously, the periodic reviews will be very costly.⁶⁹ Moreover, although these alternatives would offer faculty some protection from discharge, to the extent they make faculty subject to the whim of administrators, they are subject to the same criticisms of undermining faculty governance, teaching and research as the employment-at-will option.⁷⁰

III. THE MUSINGS OF A TENURED PROFESSOR

Like all good scholarship, the materials in Finkin's book prompted me to think about some related arguments and questions regarding the tenure system that might bear further discussion and analysis. Humor me now, while I set forth an initial discussion of these arguments and questions, confident that, as a tenured professor, my years of investment in my career and my family's economic future are safe regardless of what my employer or any other reader might think of my arguments.

67. *Id.* at 106.

68. *Id.* at 118.

69. *Id.*

70. *Id.*

First of all, in reading the materials in Finkin's book, it struck me that much more can be done with the argument that tenure is a public good.⁷¹ Several authors in Finkin's book put forward the argument that research is a public good and thus, to the extent tenure makes possible or improves research, it is also a public good.⁷² But the argument can be stated more broadly. Certainly with respect to tenure's role in supporting peer review and faculty governance, tenure is a public good. Peer review and faculty governance are themselves public goods from the perspective of the educational institution, since the benefits of these important functions are enjoyed much more broadly in the institution than merely among the people that undertake these tasks and there is generally very little individual reward to compensate the people who perform these tasks.⁷³ Accordingly, to the extent that tenure makes the performance of these public goods possible, it is also a public good. Furthermore, it can be argued that the determination of whether an institution operates with or without tenure is also a public good. It is hard to imagine academic faculty of equal rank and function operating, some with and some without tenure. Tenured faculty would have obvious advantages in performing peer review and governance functions and thus would come to dominate these func-

71. A public good is one that exhibits two characteristics: non-rival consumption and non-excludability. MIT DICTIONARY OF MODERN ECONOMICS 347 (David W. Pearce ed., 3rd ed. 1986). "Non-rival consumption" means that, if the good is consumed by one person, it can also provide benefits to other people at no additional cost. "Non-excludability" means that the producer of the good is unable to exclude the other consumers from benefiting from the good. This latter characteristic prevents private markets and bargaining from operating efficiently with respect to public goods since consumers have little incentive to pay for the good, and too little of the good will be demanded and produced. With respect to tenure, the argument would be that tenure makes good research and service possible and that, beyond the professor that undertakes this research or service, the public and fellow professors also benefit from this work and cannot be excluded from these benefits. Accordingly, in bargaining for tenure, individual professors do not take account of the benefits of their research to the public, and individual professors have incentive to free ride in the service of their colleagues, and thus have less than the efficient amount of incentive to bargain for tenure. A similar argument might also be made for the value of tenure to teaching as a public good if, as seems likely, the general population benefits from a person's education in addition to the benefits that person directly receives or for which he or she is compensated.

72. Finkin, *supra* note 1, at 7 (Van Alstyne), 22 (Machulp), 125 (Finkin).

73. It is an interesting question in itself as to why, if I am correct, service such as peer review and faculty governance is not more adequately compensated by institutions of higher learning. My own hypothesis is that the problem arises from an information asymmetry that distorts wage payments in the academic labor market. Even though research, teaching and service are all important to the mission of an academic department, the first is over compensated and the later two under compensated, relative to their actual worth to the department, because good research is much more visible and readily evaluated by competing institutions and thus is the driving force behind competing wage offers. Of course, if service is under compensated in academic institutions, for what ever reason, academics will tend to provide too little of this function, or provide it in a perfunctory manner.

tions.⁷⁴ Moreover, as Finkin has argued elsewhere,⁷⁵ it is probably true that the effectiveness of those who are active in faculty governance is in part dependent on the potential that the mass of faculty who are quiet and complacent on the subject could, at some point, be roused to action in opposing administration actions or policies under the protection of their tenure.

This public good argument directly countermands the recent suggestion by David Breneman that faculty should be given the option of receiving tenure or foregoing tenure and receiving a larger salary.⁷⁶ Professor Breneman argues that if untenured positions could be devised in a non-demeaning way, with all of the other prerequisites and amenities of a full academic appointment, some academics, especially the best and most marketable, might actually prefer a small wage premium to tenure.⁷⁷ Richard Chait has extended Breneman's proposal by suggesting that universities might also seek to buy out the tenure of current faculty members with a wage premium.⁷⁸ However, the traditional public good analysis suggests that we should take little comfort in evaluating the value of tenure from the fact that some individual faculty members would undoubtedly agree to bargain theirs away. Individual professors would not take into account the public value of their research and service in deciding whether to give up tenure and accept the higher wage, with the result being that research and service would suffer as too few professors decided to remain in the tenure system.⁷⁹ Moreover, as previously argued, it seems doubtful that equal academic positions could be constructed both with and without tenure.⁸⁰ Tenure is too important to the essential academic functions of research, teaching and service not to influence how the job is undertaken and the prestige attached to the position.

The astute reader will recognize that Professor Breneman's proposal has in fact been undertaken, on a somewhat less generous basis, at academic institutions across the country. Since at least the 1980's,

74. As proof of this assertion I point to the common phenomenon of protecting untenured faculty from "hot issues" in committee assignments.

75. Matthew W. Finkin, *The Assault on Faculty Independence*, 83 *ACADEME* 16, 20 (1997).

76. Breneman, *supra* note 2.

77. The wage premium Breneman suggests is 5%. *Id.* at 10.

78. Richard Chait, *Thawing the Cold War Over Tenure: Why Academe Needs More Employment Options*, *CHRON. OF HIGHER EDUC.*, Feb. 7, 1997, at B4.

79. If, as I have previously asserted, *supra* note 73, and accompanying text, quality service is already under compensated by colleges and universities. Allowing professors to individually bargain away tenure would exacerbate an already existing problem of too little quality service in academia. *See id.*

80. Breneman admits this problem with his proposal, as well as the problem of evaluating faculty in the absence of tenured faculty. Breneman, *supra* note 2, at 12-14.

colleges and universities have cut back on hiring tenure track professors and substituted graduate students and part-time and temporary "instructors" to take over teaching responsibilities. Unlike Breneman's proposal, however, the untenured nature of these jobs is not elected by the employee and the jobs are (inevitably?) low in pay and prestige and involve no service or research responsibilities. Even under the public good analysis, it is a neat question what percent of an institution's faculty need to be tenured professors and what percent can be confined to being much less without sacrificing the research and teaching objectives of the institution. Fritz Machlup has addressed this issue, asking instead how many tenured faculty can the institution accommodate consistent with other desirable institutional ends?⁸¹ However, the public good analysis is instructive as to how we should view this development. Under this analysis, the erosion of the American academy into untenured dead end jobs seems a desperate strategy on the part of institutions, strapped for cash because of cuts in state and federal support for education and encouraged in this trend by a flush market in young academics, to create low cost teaching positions that free ride on the research and service work of the remaining tenured faculty. This is a short run strategy designed to address pressing budgetary problems at the expense of research and service, rather than some optimal long run strategy for pursuit of the academic mission.

Finally, given the analysis of the academic labor market in Finkin's book, I wonder if all of the alternatives to tenure have in fact been adequately addressed in the current debate over tenure. Although the materials in the book make a convincing case that academic laborers are different, in kind or degree, from most other laborers, in reading the book I felt as if I'd seen this beast, or something very much like it, before in my studies. Let's see, the academic is highly skilled so that he or she is effectively committed to work in one occupation for life and would be difficult for an employer to replace en masse. Sounds like the proto-typical skilled tradesman that pioneered labor organization in this country in the early nineteenth century and was the back bone of the American Federation of Labor from its inception in 1886 until its merger with the Congress of Industrial Organizations in 1955.⁸² Although academics have long had an aversion to organization on the grounds that they are a "profession"

81. Finkin, *supra* note 1, at 22-26.

82. FOSTER R. DULLES, *LABOR IN AMERICAN HISTORY* 161, 373-74 (3rd. ed. 1966).

rather than a "trade," given the obvious vulnerability to employer opportunism of employees who are so heavily personally invested in highly specialized human capital, I suspect that such a fine, and frankly irrational, distinction would soon go by the boards if there were a substantial and pervasive threat to tenure in the academic industry. Thus, the real alternative to tenure is not employment-at-will, term contracts, post tenure review or any scheme devised by Brenehan or Chait, but collective bargaining. Certainly the recent experience at the University of Minnesota where a highly "professional" faculty seriously threatened to organize after the university trustees acted to compromise their tenure, and backed off only after the trustees had rescinded their prior actions,⁸³ supports this view. Thus, administrators and trustees who might seek to undermine tenure in an attempt to trim dead wood or achieve more flexibility in hiring should consider whether they want to deal with the faculty through traditional faculty governance or through collective bargaining, since I doubt that the professorate will tolerate either much insecurity in employment or a significantly diminished role in college and university administration.

IV. CONCLUSION

Matthew Finkin has produced a very useful tome that accurately describes the institution of tenure and the case that can be made for that venerable institution. The materials collected in Finkin's book go well beyond the important, yet well worn, arguments about the necessity of tenure to academic freedom in teaching and research to examine the importance of this institution in solving the somewhat unusual problems of the academic labor market and fostering the institutions of peer review and faculty governance so necessary to the efficient running of the modern college or university. The book will be useful to anyone currently engaged in the debate over tenure, but is also of sufficient detail that it could serve as a reference or resource book for someone trying to understand or administer the academic tenure system. Due to the breadth of the arguments contained in Finkin's selections, the book will also be of interest to those of us who have made a hobby, or perhaps a career, out of studying the academic labor market. Finally, I hope the book will be of interest to administrators and trustees who are tempted to tinker with the tenure system

83. Britt Robson, *Destroying the University to Save the University*, in *DEFENDING TENURE: A GUIDE FOR FRIENDS OF ACADEMIC FREEDOM* (AAUP Task Force on Tenure 1997).

or import real or imagined systems of hierarchical responsibility from private corporate America into academia. Finkin's collection sets forth the very real problems of the academic labor market that tenure is designed to address and which would have to be confronted by these managerial experiments.

