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I am submitting herewith a dissertation written by Julee Tate Flood entitled "Judicial Influence on Academic Decision-Making: A Study of Tenure Denial Litigation Cases in which Higher Education Institutions Did Not Wholly Prevail." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Higher Education Administration.

E. Grady Bogue, Major Professor

We have read this dissertation and recommend its acceptance:

Joan M. Heminway, Jimmy G. Cheek, Terry L. Leap

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Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

Judicial Influence on Academic Decision-Making:

A Study of Tenure Denial Litigation Cases in which Higher Education Institutions Did Not Wholly Prevail

A Dissertation Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

Julee Tate Flood
May 2012

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DEDICATION

This dissertation is dedicated to my mother, Dorothy Mills Tate, who taught second grade for over 40 years in the public school system of Florida, nurtured generations of children and families, and exemplified that teaching and learning are privileges to be pursued with excellence.

ACKNOWLEDGMENTS

Many deserve thanks for their contributions to this interdisciplinary dissertation and to my doctoral education experience. I begin by thanking Dr. E. Grady Bogue, who serves as the Chair of my Supervisory Committee. Dr. Bogue has left an indelible influence on me through his teaching and mentoring. It is a privilege to have studied with Dr. Bogue, and I hope to continue his legacy of stellar scholarship and commitment to the students of higher education. I also appreciate the contributions of the other members of the committee. Chancellor Jimmy G. Cheek, who serves as both Chancellor and a faculty member in the Department of Educational Leadership and Policy Studies, has exemplified boldness and vision in institutional leadership. Distinguished Professor of Law Joan M. Heminway—a renowned expert in business law and a campus leader—has challenged me to think critically about the legal and policy issues raised by this study. I especially appreciate her encouragement to delve more deeply into issues touched on in this study, as well as her support for my interdisciplinary professional goals. Finally, Dr. Terry L. Leap, who sits at the helm of the Department of Management, has inspired my vision for interdisciplinary work. His scholarship on tenure, employment law, deviant organizational behavior, and white collar crime has demonstrated the interconnectedness between departments, studies, and venues. To learn from such accomplished scholars is humbling; I will endeavor to reflect their many lessons as I move forward.

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ABSTRACT

This study examined judicial influence on academic decision-making by identifying factors in the tenure process that have induced courts to rule against higher education institutions in litigation stemming from tenure denials. Many interdisciplinary legal and educational studies have been conducted pertaining to tenure related litigation using qualitative, quantitative, and legal research methodologies. Empirical studies have been directed at varied issues, such as the peer review process; specific claims, such as discrimination; types of institutions; or time periods. Much of this scholarship has noted the importance of judicial deference to decisions made in academia. Unique to this study was the application of dual conceptual frameworks of shared governance and judicial deference as to decisions made in the academic tenure denial process. The study was also unique in that it was limited to tenure litigation cases in which institutions did not wholly prevail.

Included in the study were published judicial opinions from the period of 1972 to 2011 from the U.S. Supreme Court, U.S. Courts of Appeal, and states' highest appellate courts. The study sought to determine first, the policies and procedures employed in public and private colleges and universities that have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation; second, the remedies granted to faculty plaintiffs who prevail in tenure denial litigation; and finally, the steps that colleges and universities can take to minimize and mitigate tenure denial litigation.

Complementary legal and qualitative research methods yielded evidence that courts were highly deferential to academic decision-making and that courts ruled against institutions' tenure decisions when the decisions were contrary to law. Courts granted legal and equitable remedies when institutions infringed upon a professor's rights, discriminated against a professor, or breached a contract with a professor. Based on the analysis of case law, this study proposed steps that institutions could take to avoid or mitigate tenure denial litigation. By gaining a better understanding of potential flaws in the tenure process and why courts have substituted judicial decisions for those of institutional decisions, this study contributes to our understanding as to how to decrease the influence of the courts on decisions made in academia.

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CHAPTER 1

INTRODUCTION

Background and Context

"Tenure is the defining characteristic of American higher education and the most distinctive part of working in the higher education setting" (White, 2010). The term *tenure* exceeds strict definition, as its parameters must be described broadly enough to encompass institutional differences (Poskanzer, 2002). In general, a grant of tenure is a contractual right of employment that is given to faculty members, with dismissal only for cause (Olswang, 2006).

Based on a collective set of academic and legal principles, academic tenure has evolved concurrent with the evolution of American higher education and the academic profession; therefore, to fully comprehend academic tenure requires an examination of numerous attendant issues. Educational literature discussing tenure frequently references both educational and legal influences and their significant impact on administrative and policy choices. Legal literature, which customarily includes analyses of the courts' impact on an issue, commonly integrates into discussions of tenure an acknowledgement of the historical roots of academic freedom, higher education, and the privileged status of academia in the eyes of the courts. This intertwining of higher education and legal principles is fundamental to the complexity of academic tenure.

Widely misunderstood and heavily debated, tenure is a distinctive aspect of higher education employment (Finkin, 1996; Leap, 1995; Poskanzer, 2002). Perceived by some as a guarantee of lifetime employment that comes with little or no accountability for

performance or behavior, tenure is heralded by others for its role in protecting job security and academic freedom (Poskanzer, 2002; White, 2010). While some claim it is ineffective and outdated in today's segmented institutions, others claim it is essential to maintaining traditional values of higher education—most importantly, the unimpeded search for truth (Alexander & Alexander, 2011; Chait, 2002a; Kaplin & Lee, 2006). Varied viewpoints of tenure's value may be influenced at least in part by one's role as a faculty member, administrator, or member of the public (Leap, 1995).

Even among faculty members, tenure's purposes and usefulness are debated. The most significant argument for tenure—propounded by the American Association of University Professors (AAUP) and many faculty members—is its protection of academic freedom. Not all faculty members are proponents of tenure, however. Some believe that a tenure system reinforces the status quo in academia and thus may harm academic freedom. Such doctrinal orthodoxy may be at least partly to blame for an enterprise that has been very slow to change (Greenburg, 2012; Leap, 1995; Poskanzer, 2002).

Debates about tenure and academic freedom are linked to the enduring connection between higher education institutions and society. Carrying the responsibility of "preserving and expanding intellectual freedom and leading society in the efficient pursuit of knowledge" (Alexander & Alexander, 2011, p. ix), colleges and universities have been looked to for social and economic stability. Rhodes (2001) described a coexistent "social compact" in which society provides financial support to the university, grants the university "a remarkable degree of autonomy," and in exchange, "the university uses its resources and its freedom to serve the larger public interest" (p. 215).

Autonomy granted to the higher education community also has a counterpart: accountability. Throughout the history and development of American higher education, institutions have been accountable to and influenced by people outside of the organization. Accountability often reflects societal views, with the requisites flowing from the source of external funding, externalities that require accountability measures from academe, and mutual responsibilities and reciprocal pressures within and between organizations (Geiger, 2011; Schmidtlein & Berdahl, 2011). The federal government might impose antidiscrimination measures in student admissions or faculty hiring procedures. Research funding may dictate restrictions on human and animal subjects. Financial hardship may result in a state legislature's closer look at institutional roles and the associated costs and effectiveness of programs (Schmidtlein & Berdahl, 2011).

Another significant area of accountability arises from the influence of legalism on the academy. Those who work in higher education must understand and implement a morass of laws and regulations that influence almost every aspect of the institution (Alexander & Alexander, 2011; Kaplin & Lee, 2006; Poskanzer, 2002). In 1978, Chamberlain considered the growing legalism on campus the most significant development in higher education. Decades later, scholars are ever aware of the expanded role of law on campus and the enormous impact it has on the work of colleges and universities (Kaplin & Lee, 2006; Olivas and Baez, 2011; Poskanzer, 2002). Gajda (2009) asserted that the growing "legalization" of academia is a direct threat to academic freedom (p. 234).

Altbach (2011a) explained that "[t]he legal system has had a significant influence on the academic profession in the past several decades" (p. 237). An aspect of legalism, the growing resort to the courts for resolving campus disputes raises particular concerns. Mirroring a society that has become more litigious, so too has the campus become more litigious as students sue institutions over grades, faculty members sue peers for defamation from a negative scholarly review, and faculty sue mentors for bad advice. Prior to the 1970s, few cases of litigation involved colleges and universities (Kaplin & Lee, 2006). Since the 1972, when Title VII and the Equal Pay Act were amended, there have been more than 300 federal decisions on such cases involving college faculty (LaNoue & Lee, 1987, p. 20). In the mid-1990s, the number of legal claims involving higher education tripled within the span of five years (Gajda, 2009). Contributing to the rise in litigation are factors such as universities' handling of civil unrest, the provision in federal and state civil rights statutes for new remedies for discrimination, and developments in constitutional law recognizing broader rights to free speech and due process. Also influencing the willingness of the academic community to bring suit is the increased fragmentation of the profession, a lack of a sense of community, and the increased role of the commercialization of the academy (Gajda, 2009). The commercialization of research endeavors, for example, has been criticized for the conflicts of interests that arise in an atmosphere of competition and consumerism, where education and research are viewed as products (Washburn, 2005).

Many in the higher education community view litigation as interrupting the workings of the campus, eroding administrative and faculty autonomy, and costing the

institution too much in terms of money, talent, and energy. Instead of being able to focus on the primary mission of teaching and scholarship, institutions must focus on protecting themselves from lawsuits.

Notwithstanding such legitimate concerns, the law's effect can also be seen as positive. The role of law on campus might serve to make working environments safer and personnel policies fairer. Thus, to judge the law's full effect on a campus necessitates the realization that the law can both negatively and positively impact a campus environment and freedom of thought (Kaplin & Lee, 2006; Poskanzer, 2002; Wright, 1985).

The volume of federal litigation pertaining to faculty has escalated since 1972 (Leap, 1995), though a recent study indicates that faculty may account for a declining share of those who file lawsuits (Helms & Jorgensen, 2009). Frequently litigated are faculty employment disputes, which present an increasing concern to colleges and universities (Hendrickson, 1999). Lawsuits against peer review committees, department heads, deans, and other administrators who make tenure, promotion, or retention decisions have risen (Curkovic, 2000; Leap, 1995). While very few tenure denial lawsuits were filed in the 1970s, the 1980s saw a gradual increase with a continued upward trend into the 1990s (Franke, 2001; Hamill, 2003). From the years 1974 to 2000, the number of published tenure denial decisions progressively increased with a total of 70 published tenure denial decisions being reported in that time span (Hamill, 2003).

Statement of the Problem

Equitable employment decisions are ideally reserved for the purview of the institution and its faculty, but the parameters are increasingly being imposed by the courts (Leap, 1995). Difficult decisions to deny tenure, promotion, or retention to a faculty member hold substantial potential for legal challenges for colleges and universities (Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). Despite the ongoing debates about tenure, it still maintains its coveted status. A denial of tenured status to an applicant can be very traumatic for a faculty member. A negative tenure decision can interrupt a faculty career; sometimes a career can be completely ruined (Leap, 1995; Toma, 2011). As a result of such possible consequences, "[t]enure denials are among the administrative actions most likely to precipitate a lawsuit between a faculty member and his or her institution" (Poskanzer, 2002, p. 151).

Tenure denial litigation is costly for both individuals and institutions (Franke, 2000; Leap, 1995). As is true with other types of litigation, the financial, emotional, and reputational burdens resulting from tenure litigation can be considerable (Kaplin & Lee, 2006; Leap, 1995; Toma, 2011). Traditionally deferential to academia, courts have usually sided with institutional autonomy and have been reluctant to interfere with matters of academic concern (Kaplin & Lee, 2006; Leap, 1995; Toma, 2011). Thus, few faculty have prevailed on the merits of discrimination claims, which are often the basis of tenure disputes (Kaplin & Lee, 2006; LaNoue & Lee, 1987). While deference may be the norm, recent court opinions indicate that higher education institutions are not immune from the courts' collective purview, particularly as to the requirements of federal

antidiscrimination legislation. Courts are showing a greater willingness to insert their decisions into matters of academia. In addition to emotional, financial, and reputational harms that result from litigation, the courts' infusion of decision-making in place of the decisions of the institution exacts a toll on institutional decision-making and autonomy (Gajda, 2009; Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). Yet even when a court finds that an institution has acted in a discriminatory manner, fashioning an appropriate remedy is difficult (Kaplin & Lee, 2006; Leap, 1995).

Although employment related litigation in higher education has become common and can exact a great toll on institutional autonomy, faculty members, administrators, and relationships, most of the individuals who share in the governance of higher education have little training in preparation for mitigating or dealing with litigation and its ramifications. As disciplinary specialists, faculty members who serve on peer review committees or who rise to administrative ranks typically gain training on the job. Employees who are trained as administrators are also not likely to have extensive legal preparation. Administrators might hear of cases that receive popular attention, but knowledge of the occasional case does little to inform them of the causes, circumstances, or outcomes of employment litigation and how those factors may influence legal and policy choices.

The equitable treatment of faculty in employment decisions significantly impacts the welfare of an institution (Leap, 1995). Colleges and universities attract students, scholars, and funding based on the reputation of the faculty. Learning what constitutes

the best faculty employment practices, particularly as to tenure policies and procedures, could help strengthen a campus and protect academic freedom.

Many studies have previously looked at tenure and related issues, analyzing judicial law either as background, data, or both in order to make recommendations for higher education. Given that colleges and universities typically prevail in employment litigation, most of the cases analyzed in previous studies concern institutional policies and procedures that were not found problematic to the extent that a remedy was granted to the faculty plaintiff. Lacking in the data is a focus on cases for which the defendant institution did not wholly prevail. A thorough analysis of cases in which the tenure process has broken down is needed in order to illuminate those policies and procedures that courts have found to be particularly egregious, such that it was necessary to fashion a remedy for the faculty plaintiff. This research seeks to fill that void and to add to the literature in a meaningful way.

Purpose of the Study

The purpose of this study was to examine judicial influence on academic decision-making by identifying factors in the tenure process that have induced courts to rule against higher education institutions in litigation stemming from tenure denials. By gaining a better understanding of why courts have inserted judicial decisions in place of institutional decisions in tenure related litigation, this study aimed to identify potential flaws in the tenure process, decrease institutions' exposure to tenure decisions that may result in litigation, and decrease the influence of the courts on tenure decisions.

Research Questions

This study addressed the following questions:

1. What policies and procedures employed by public and private colleges and universities have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation between the years 1972 and 2011?
2. What remedies have been granted to faculty who win tenure denial suits?
3. What steps might colleges and universities take in the tenure process to minimize tenure denial litigation the possibility of an unfavorable decision in a tenure denial lawsuit?

Conceptual Framework

Reflecting the interdisciplinary interests of this study, dual conceptual lenses of governance theory and the doctrine of judicial deference were considered. In higher education, governance reflects a multilayered system of decision-making (Mason, 1972). Judicial deference is broadly linked with the concept of judicial abstention, which applies to judicial consideration of actions taken by agencies with specialized knowledge (Cohen & Spitzer, 1995-1996).

Governance Theory

Higher education governance theory provides a conceptual lens through which a multilayered decision-making process can be viewed (Mason, 1972). The American Association of University Professors' (AAUP) (2006c) *1966 Statement on Government of Colleges and Universities* adopted the basic principle of shared authority by three

components that have a necessary interdependence for decision-making in the university: the board of trustees, the administration, and the faculty. Basic principles included in the statement indicate that each component may have input on university decisions, and that different kinds of decisions require varying weights of input, depending on the decision being made. Accordingly, in some situations, the administration will assume the initiative and will consult faculty at a later stage; in other situations, the initiative will be driven by the faculty, who will later seek the endorsement of the president and the trustees. Consulting among the groups further aligns administrative decisions with faculty decisions in order to create a more unified whole (Kaplan, 2004; Mason, 1972).

Governance theory assigns to the professoriate decisions that require professional expertise and judgment (Mason, 1972). Faculty are assigned primary responsibility—though the responsibility is shared with administration—for decisions as to curriculum; instructional subject matter and methods; faculty status, such as appointments, promotion, the granting of tenure, and dismissal; and aspects of student life that are linked to the educational process. Effective planning and budgeting as well as resource allocation involve the input of the board and the administration. Faculty status determinations, which are usually based on faculty recommendations, require joint effort in staff selection, promotion, the granting of tenure, and dismissal (AAUP, 2006c).

Doctrine of Judicial Deference

The doctrine of judicial deference was also considered for this study in relation to academic decisions. Pursuant to this concept, judges would be deferential to decision-makers in academia unless there was a clear legal basis for not doing so. Reviewing the

history of the doctrine, O'Neil (2010) posited that its origins could be traced to *Trustees of Dartmouth College v. Woodward* (1819). In *Trustees of Dartmouth College v. Woodward* (1819), the Court allowed for a "zone of immunity for academic decisions and actions" (O'Neil, 2010, p. 732). Rationales for judicial deference in academia—or academic deference or academic abstention—include and are intertwined with policies of autonomy and academic freedom, judicial respect for academic governance, and a lack of expertise in the complex matters of academia (O, Neil, 2010; White, 2010).

As summarized by O'Neil (2010), scholars vary as to their perceptions of the usefulness and currency of judicial deference. While some claim the doctrine remains vital (e.g., Katyal, 2003), others claim that it has lost its force (e.g., Gajda, 2009). Still others warn that the doctrine has been used to shield colleges and universities from discrimination suits (e.g., Bartholomew, 2000). Whether one shares the perspective that courts are overly deferential to academic governance, thus allowing controversial and discriminatory policies, or the perspective that courts unduly restrict the autonomy of colleges and universities, thus intruding upon decision-making and the pursuit of a unique mission, caution is in order when considering whether judicial deference is appropriate when applied to academic decisions. Of particular concern in applying the doctrine is discerning whether a decision was purely academic, what and how the faculty contributed to the decision, and whether the positions of the faculty and institution were concordant (O'Neil, 2010).

Significance of the Study

Emotional issues such as faculty employment can inspire administrative decisions and policies that are driven by unexamined beliefs rather than by data (Trower & Honan, 2002). In response to the trend in litigation pertaining to tenure denial decisions, Franke (2001) appealed to higher education administrators to gain a better understanding of the risks involved in the tenure process so that better management decisions could be made in response. Lee (1990) called scholars in both legal and education disciplines to extend research beyond positive or negative rulings, and posited that a deeper analysis would better explain the substantive content of the case. Kent (2002) encouraged an "analysis and synthesis of case law to identify relevant categorical trends" (p. 65). The collective lesson from these scholars is that basing arguments on data and drawing conclusions from systematic analysis is fundamental to the academy.

By systematically analyzing cases in which the tenure process has broken down, much can be learned about policies and procedures that are particularly problematic. This study will benefit higher education administrators who will be called upon to create and adhere to tenure processes that meet legal and equitable standards. The data gathered and analyzed from judicial opinions can be used to influence how administrators frame problems in the tenure process and aid in their determination of which issues are most important in law and policy discussions. Data can help administrators to "keep adjusting the compass," in light of current policy strengths and necessary institutional adjustments (Trower & Honan, 2002, p.289). A focus on initiatives that an institution can implement before actual legal disputes arise, a form of risk management through preventive process,

involves the ongoing cooperation between administrators and counsel who together set policy and legal parameters for the institution. By carefully considering and planning for the interrelationship between law and policy issues, administrators and counsel can together strengthen an institution's management choices (Kaplin & Lee, 2006).

Although studying appellate opinions provides only a partial picture of the underlying issues of tenure litigation, to the extent that the information gleaned helps institutions develop fair tenure policies and procedures and create a better working environment, it will also benefit faculty who apply for tenure and those who serve on peer review committees. The greater university community will also benefit from this study. Amidst the pressures of increasing expectations and decreasing resources, higher education leaders must plot a strategy for how to remain viable and relevant in the public eye. Equitable treatment and fair processes in employment decisions have important implications for an institution's academic and social standing (Leap, 1995; Poskanzer, 2002). Finally, the public as a whole will benefit from this study. The professoriate serves the core function of the education system and contributes to the public good. A quality environment in which faculty can thrive is advantageous to society.

Olivas and Baez (2011) wrote: "We know surprisingly little about the law's effect on higher education, but virtually no one in the enterprise is untouched by statutes, regulations, case law, or institutional rules promulgated to implement legal regimes" (p. 170). The significance of this study is that it seeks to improve what is known about the law's effect on higher education by better understanding the flaws in the tenure process that require judicial intervention, and placing that understanding within the conceptual

lenses of shared governance and judicial deference as to academic decision-making. With added knowledge, higher education institutions can better protect their reputation and academic freedom, foster a positive community, and attract the best faculty and students—things on which the survival of higher education depends.

Definitions of Terms

Tenure was the primary variable in this study. It is operationally defined by the AAUP as follows: "After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies" (AAUP, 2006a, p. 4).

For the purpose of this legal research based study, the following legal terms were identified, using Black's Law Dictionary, 9th edition (Garner, 2009):

1. Appellant:

   "A party who appeals a lower court's decision, usu. seeking reversal of that decision" (p. 114).

2. Appellee:

   "A party against whom an appeal is taken and whose role is to respond to that appeal, usu. seeking affirmance of the lower court's decision" (p. 115).

3. Burden of persuasion:

   "A party's duty to convince the fact-finder to view the facts in a way that favors that party" (p. 223).

4. Burden of production:

   "A party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict" (p. 223).

5. Burden of proof:

   "A party's duty to prove a disputed assertion or charge" (p. 223).

6. Confidentiality:

   "Secrecy; the state of having the dissemination of certain information restricted" (p. 339).

7. De facto:

   "Actual; existing in fact; having effect even though not formally or legally recognized" (p. 479).

8. Defendant:

   "A person sued in a civil proceeding or accused in a criminal proceeding" (p. 482).

9. Dictum:

   "A statement of opinion or belief considered authoritative because of the dignity of the person making it" (Pl. dicta.) (p. 519).

10. Directed verdict:

    "A ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict" (p. 1696).

11. Disclosure:

"The act or process of making known something that was previously unknown; a revelation of facts" (p. 531).

12. Due Process:

"The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case (p. 575).

13. Motion:

"A written or oral application requesting a court to make a specified ruling or order" (p. 1106).

14. Movant:

"One who makes a motion to the court or a deliberative body" (p. 1111).

15. Plaintiff:

"The party who brings a civil suit in a court of law" (p. 1267).

16. Pretext:

"A false or weak reason or motive advanced to hide the actual or strong reason or motive" (p. 1307).

17. Prima facie:

"Sufficient to establish a fact or raise a presumption unless disproved or rebutted" (p. 1310).

18. Procedural due process:

"The minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, esp. if the deprivation of a significant life, liberty, or property interest may occur" (p. 575).

19. Proffer:

"To offer or tender (something, esp. evidence) for immediate acceptance" (p. 1329).

20. Remand:

"To send (a case or claim) back to the court or tribunal from which it came for some further action" (p. 1407).

21. Remedy:

"The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief" (p. 1407).

22. Substantive due process:

"The doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective" (p. 575).

23. Summary judgment:

"A judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law" (p. 1573).

24. Verdict:

"A jury's finding or decision on the factual issues of a case. [] Loosely, in a nonjury trial, a judge's resolution of the issues of a case" (p. 1696).

Organization of the Study

Five chapters form the basis for this study. Chapter One lays the foundation for this study with discussions of tenure, tenure's link to academic freedom, and the rise in judicial influence on higher education employment decisions and academic freedom. Also in the introduction are the purpose statement, research questions, an introduction to the conceptual framework, significance of the study, and definitions of key terms. Chapter Two offers a critical review of the scholarly literature on academic tenure and concomitant issues, the link between tenure and academic freedom, the tenure process, and tenure denial litigation. Further, Chapter Two contains a review of studies on tenure litigation that that most closely relate to and set the stage for the present study. Chapter Three explains the methods that were used in this historical legal research and qualitative study including the design, the sources of data, and the data collection and analysis procedures that were used. Chapter Four reveals the findings of the study, with a summary of the data and a presentation of the findings as related to the conceptual lenses and research questions. Finally, Chapter Five summarizes the findings and discusses the findings in context of the theoretical lenses and existing literature. The chapter further offers recommendations in light of the study's findings, thus providing an answer to the third research question. Also in the final chapter are recommendations for further studies that would extend this study, and concluding remarks.

CHAPTER 2

REVIEW OF THE LITERATURE

Introduction

The complexities of tenure and its many related topics, in general, and tenure litigation, more specifically, implicate the impossibility of an all-encompassing literature review—the breadth and depth of literature related to tenure is simply too large. As Chait (2002a) explained, “Tenure is a topic better illuminated by multiple spotlights than a single floodlight” (p. 2). While numerous sources were consulted to develop understanding and expertise for this study, the review of the literature illuminates multiple spotlights related to tenure by framing the literature in five major sections. The first section sets the stage by providing an overview of tenure concepts, perspectives, and concomitant issues. Section two provides an underlying framework for tenure by discussing links between tenure and academic freedom. Section three narrows the focus by examining the tenure process. Narrower still, section four looks specifically at tenure litigation. Section five then highlights tenure litigation scholarship in which case law has been examined for parameters of tenure as influenced by the judiciary. By illuminating these five spotlights, this literature review provides background and context for the instant study.

Academic Tenure: Concepts, Perspectives, and Concomitant Issues

Any discussion of tenure is enhanced by a conceptual understanding of why tenure exists and of diverse perspectives on how well it serves its purposes. This section begins with a consideration of what tenure is (and what tenure is not) by looking at both

academic and legal concepts of tenure. It then turns to perspectives on tenure, both favorable and unfavorable, as considered through the lens of various constituents. Finally, this section provides a brief overview of changes in and alternatives to the tenure system.

The Academic Concept of Tenure

Academic tenure is rooted in the belief that the common good is best served by the pursuit of truth under the principles of academic freedom (Finkin, 1996; Greenberg, 2012). The American Association of University Professors explicated fundamental standards for faculty employment in its *1940 Statement of Principles on Academic Freedom and Tenure*. In the *1940 Statement*, the AAUP defined tenure as follows: "After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies" (AAUP, 2006a, p. 4). Following the definition, the AAUP provided interpretive comments regarding acceptable academic practice for appointments. According to the AAUP, tenure serves to promote a means to an ends, specifically: "(1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability" (2006a, p. 3).

Specified in the 1940 *Statement of Principles* is that academic tenure requires: (a) a written contract that clearly sets forth the terms and conditions of employment; (b) a probationary period with the length specified; (c) a notice period that precedes any

nonrenewal of a term period for an affected probationary faculty member; and (d) procedural standards for the termination of a tenured faculty member for cause (White, 2010). Based on these definitions and requirements, tenure policies assure a faculty member's right to hold an appointment, once competence has been established. Those assurances, according to the AAUP, are crucial to the success of an institution in fulfilling its obligations to students and to society; by protecting professors who espouse unpopular views, tenure protects academic freedom.

A conferral of tenure signifies that following a probationary period, which often lasts as long as six years, an institution has had a significant amount of time in which to assess the professional competence of the faculty member and "has rendered a favorable judgment establishing a rebuttable presumption of the individual's professional excellence" (Van Alstyne, 1996, p. 5). The individual has thus garnered the benefit of the doubt from the institution. In the event of a question of professional fitness, the institution would have the obligation to show why the tenured faculty member had fallen short of the standards of excellence to an extent that the individual would be subject to dismissal (Van Alstyne, 1996).

The Legal Concept of Tenure

From a legal perspective, tenure is an enforceable promise made by the institution that relates to the duration of the faculty appointment (White, 2010). Although there is no claim to a guarantee of lifetime employment, Professor William Van Alstyne (1996), a former president of the AAUP, clearly stated that 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*" (pp. 3-4, emphasis in original).

Pursuant to contract law, tenure means two things: (a) an appointment of tenure has no specified end date; it is a contract of indefinite term; and (b) the appointment is subject to termination only for reasons and only in accordance with contractual procedures, as understood by the parties at the time they entered the employment relationship (White, 2010). Sources of rights may emanate from an institution's governing documents, state statutes and regulations, a faculty handbook, or an employee's individual contract. Tenure provisions that are found in a faculty handbook or policy manual will usually be construed by a court as an abrogation of the common-law "employment at will" doctrine (White, 2010, p. 6). Regardless of whether they become incorporated by reference in a faculty member's appointment letter, the terms in the handbooks and manuals become part of the employment contract between the faculty member and the institution.

Standards of employment to which faculty members are held accountable are determined within each institution, so long as those standards do not violate academic freedom and individual civil liberties. In practical terms, tenure assures that professional security and academic freedom will not be questioned without the observance of full academic due process. An award of tenure means that if any formal complaint were made about a professor who has tenure, there would be a rigorous procedure in order to determine the authenticity of causes given for dismissal, that the stated causes exist in

fact, and that the degree of stated professional irresponsibility warrants termination, rather than some lesser sanction (Van Alstyne, 1996).

Generally, cause has been found to exist based on incompetence, illegal activity, or sexual harassment. Claims of sexual harassment may be grounded in either claims of illegal activity or in a violation of university policies. The more specific the claims, the clearer the case may be made for dismissal for cause. Insubordination may also serve as a basis for a claim. Claims rooted in subjective terms, such as incompetence or insubordination, typically involve a history of problems rather than an incident with one occurrence. In reviewing dismissals, courts will typically defer to the institution and affirm the dismissal, so long as procedures were followed in a fair manner (Adams, 2006-2007).

Termination of employment can also arise separate from a faculty member's problematic behavior or job performance (Poskanzer, 2002). When based on institutional reasons that extend beyond an individual's control, such terminations do not threaten the academic freedom bases of tenure. A widely recognized "neutral" base for terminating faculty is for financial exigency (Poskanzer, 2002, p. 226). So long as an institution acts in good faith, financial exigency that is "demonstrably *bona fide*" is a legitimate reason for terminating faculty positions (Poskanzer, 2002, p. 226). Key issues for institutions facing such termination decisions include what qualifies as a financial exigency and who makes the decision as to when an institution is in such a dire situation as to rely on this reason for terminations. Courts have placed the responsibility for determining whether an exigency exists on the college or university's governing board; accordingly, the

institution has the burden for proving a financial exigency. If a financial exigency is shown, additional decisions follow, such as what part of the institution should incur the losses, and what criteria are used to make the terminations. The procedural protections that are mandated when a faculty member is terminated "for cause" are not required in a termination for financial exigency, because faculty members are being terminated for no fault of their own. Rather, a scaled-down process is required that notifies the faculty member in writing as to the basis of the decision, furnishes the faculty member with a description of how the decision had been made, discloses to the faculty member information and data the contributed to the decision, and provides the faculty member with the opportunity to respond (Poskanzer, 2002 citing *Johnson v. Board of Regents*, 1974).

Perspectives on Tenure

From the time that the academic profession initially sought tenure in 1915 to the present, the issue of tenure has raised much debate among proponents and opponents of the tenure system (Finkin, 1996; Leap, 1995; Poskanzer, 2002). As summarized by Poskanzer (2002), proponents of the tenure system make the following arguments as to the purpose and effect of tenure:

- Tenure is the "linchpin of academic freedom" and of scholarship and knowledge, because it allows freedom of inquiry and sharing knowledge (p. 148).
- Tenure assures honest faculty voices rather than those that are tied up with trying to gain favor with internal or external "vested interests" (p. 148).
- Through job security, tenure serves to attract talented people to the professoriate.

- Tenure allows faculty to focus energies on research and teaching, rather than on "base economic incentives" (p. 149).
- Through a "substantial cadre of tenured faculty," tenure "promotes institutional stability, enhances shared governance, and builds collegiality and esprit de corps" (p. 149).
- Because tenure is intended to be permanent, absent certain circumstances, a tenure application forces an institution to make tough choices about the quality of faculty and about future academic program needs.

In contrast to those who propound tenure's benefits, the voices against tenure have increased in recent decades. Major arguments include that it removes incentives for productivity and unfairly relieves professors of the economic uncertainty suffered by other workers (Adams, 2006-2007; Bodah, 2000). Poskanzer (2002) summarized additional negatives of the tenure system:

- Tenure creates financial burdens on the college or university that are inflexible in terms of financial and pedagogical needs.
- Tenure perpetuates traditional departments and disciplines while hindering new or unorthodox thinking.
- Tenure's "guarantee" of lifetime employment protects mediocre or "deadwood" faculty, absent employing and following cumbersome discharge requirements (p. 150).
- Research is disproportionately rewarded in tenure systems; thus, teaching quality may be eroded.

- Pressures of tenure systems may require institutions to make decisions too quickly about the work of a junior faculty member.
- Tenure systems place undue pressure on junior faculty members to perform and respond.
- Grievances and lawsuits arise under tenure systems.
- Because tenure allows power to be concentrated in senior faculty members, it is "undemocratic" (p. 150).
- With the First Amendment and contract law assuring academic freedom, tenure is not a precondition of academic freedom and should be uncoupled from it.
- Tenure allows a "one-way street" whereby institutions make long term commitments to a faculty member, but the faculty member has no reciprocal commitment to the institution (p. 151).

Faculty members' viewpoints. A faculty appointment carries prestige. Society often views professors as being able to pursue their work separate and apart from the demands of the outside world. Even so, untenured faculty members can face significant pressures as they go through the tenure and promotion process. Advancing through the ranks of tenure and promotion takes years of service and extensive proof of professional accomplishments. Pressures to publish, teach, and offer service to the profession and community are numerous. In the years leading to a tenure decision, prospective candidates are faced with learning the culture and expectations of their organization. At many institutions, uncertainty surrounds the reappointment, promotion, and tenure process. Meetings are conducted in secrecy and participants do not discuss their

viewpoints or votes. Furthermore, the process has become more strenuous over time, due to decreasing numbers of available tenure-track appointments (Leap, 1995).

A denial of tenure typically means that the faculty member has one more year of employment prior to termination. In addition to losing a job and a "long and often hard-fought battle," a faculty member whose application for tenure is denied may feel rejection and alienation from the academic community (Leap, 1995, p. 4). For academics, a lifelong association with school through years of graduate school that ends with tenure denial is often the first failure the individual has had to face. For those who have realized during the process that their performance fell short of expectations, the blow of a denial may be softened. For others who may have been led to believe that their performance was satisfactory or better, a tenure denial may be traumatic. Moreover, the search for suitable employment elsewhere may be hampered by their failure to achieve tenure (Leap, 1995).

Administrators' viewpoints. For administrators, the decision to grant promotion or tenure serves two key purposes: to reward past performance and to provide a vote of confidence regarding a faculty member's potential to help the institution succeed in reaching its future mission. One major concern of administrators in making tenure decisions is that such decisions have financial implications, potentially for twenty or thirty years. An award of tenure that does not meet an institution's future needs can create problems such as an oversupply of academicians in some departments and an undersupply in others. An award of tenure cannot be easily reversed through termination

or layoff procedures, so decisions carry great weight for an institution's current and future needs (Leap, 1995).

Legislators' viewpoints. An award of tenure is not an absolute right of an institution; rather, the right to grant tenure is given to public colleges and universities by state legislatures. In light of some views about higher education's substandard performance in providing the requisite talent to meet societal goals (e.g., Rosen, 2011; Warner, 2012), an institutional right to grant tenure may be questioned or taken away by the legislature. Since institutions compete for public money, political representatives may be less sympathetic to a privilege of lifelong employment for tenured faculty, particularly during times of budgetary shortfalls and economic uncertainty. As Greenburg (2012) explained, the job security and level of independence achieved with a grant of tenure may not be easily understood by the taxpayers who fund public higher education and pay soaring tuition.

Legislative inquiry into tenure systems may also increase due to the expansion of higher education in the United States during the past 50 years, which has removed much of the mystery of the academy. Once viewed as a somewhat cloistered environment, the move towards educating the masses has revealed more to the general public about the tenure system. The problem, then, is not a lack of public understanding of the workings of higher education and the common good served by tenure; rather, "[t]he problem is that the public *does* understand when self-interest is tied to the common good" (Greenburg, 2012, n.p.).

Changes in the Tenure System

Differing perspectives and debates involving tenure from faculty, administrators, and legislators have inspired attacks on the tenure system (Altbach, 2011a; Zirkel, 1984-1985). In particular, the tenure system came under attack in the 1970s and again in the 1990s. During the fiscal crises of the 1970s, some universities addressed fiscal problems by firing professors, even those with tenured appointments. Particularly hard hit were institutions such as City University of New York and the State University of New York System, which declared fiscal emergencies, fired a small number of academic staff, fired some tenured professors, and closed several departments and programs. Although professors and the AAUP contested such firings, claiming they went against the implied lifetime employment arrangement offered through the tenure system, courts consistently ruled against professors and explained that tenure protects academic freedom but does not prevent firing due to fiscal crises. Neither the 1970s nor the 1990s debates resulted in much change in tenure itself, although more recent reforms have been implemented such as post-tenure review. Proponents laud such review as good management, while opponents deem it a second chance to get rid of under-performing faculty (Altbach, 2011a).

The growth of fiscal problems and deterioration of the job market over last two decades have again heightened debates about tenure (Altbach, 2011a). Change is seen in the fact that a growing number of academics are not part of the tenure system (Benjamin, 2010). The recent rise in the proportion of faculty who are not on the tenure track has taken several forms. As reported by Benjamin (2010), since the 1970s, the total faculty

headcount increased by almost 120 percent, part-time and nontenure-track positions have each increased at twice that rate, while full-time tenured positions have increased by only 28 percent and probationary tenure-track positions have increased less than seven percent (Benjamin, 2010, p. 4). As a result, nearly 40 percent of full-time positions and 70 percent of all faculty positions are not on the tenure track (Benjamin, 2010, pp. 4-5). "[M]ost alarming," according to Benjamin (2010), is the very small 6.8 percent increase in the probationary tenure-track positions, since these positions "represent the future of the profession" (Benjamin, 2010, p. 5).

Using a fall 2007 report of tenure status by type of institution, Benjamin (2010) further stated that of the 50 percent of all full-time faculty who teach at public four-year institutions, two-thirds are either tenured or probationary tenure-track faculty (p. 5). In addition, about three-fifths of the full-time faculty at private four-year nonprofit institutions are tenured or are on the tenure track, and so are more than half of the 16 percent of faculty who teach full-time at public community colleges (Benjamin, 2010, p. 5). Benjamin (2010) attributed the increase in full-time nontenure-track appointments as at least partly due to the growth of the two-year institution sector, in which institutions may not employ faculty ranks. Even so, full-time nontenure-track appointments are increasing at both public and private four-year institutions (Benjamin, 2010).

Despite the decline in the proportion of tenure-track positions, however, there has not been a significant decline in the proportion of institutions that continue to offer tenure-track appointments to full-time faculty. Reporting from a 2004 NCES National Study of Postsecondary Faculty institutional survey, Benjamin (2010) stated that 71.5

percent of all institutions continue to offer tenure, with tenure being offered at 64 percent of public community colleges, 100 percent of public doctoral institutions, 98 percent of public master's institutions, 93 percent of nonprofit master's institutions, 92 percent of nonprofit doctoral institutions, and 84 percent of nonprofit baccalaureate institutions (p. 5).

Collectively, these figures demonstrate that while tenure is not likely to become extinct, it does prevail disproportionately at institutions that provide graduate degrees and research opportunities. Even at four-year and graduate institutions, nontenure-track appointments are largely used for instructional faculty in lower-division programs. A two-tier system effectively exists, in many instances, as a contrast between lower-division instruction and upper-division, graduate, and research instruction (Benjamin, 2010).

Some institutions have sought to reduce tenure's privileges and increase institutional flexibility in dealing with tenure-track appointments. Others are making it more difficult to achieve tenure by imposing tenure quotas and increasing the requirements. Still others are reestablishing tenure, after eliminating it (Altbach, 2011a; Baldwin & Chronister, 2002). As institutions see positions open due to retirements, some are converting tenure-track positions into nontenure-track and part-time positions. The numbers of full-time, nontenure-track staff are likely to continue to increase in number in response to institutions that are trying to increase flexibility in budgeting and management (Altbach, 2011a).

Strengthening the Process and Alternatives to Tenure

With attacks on tenure rising, some have questioned whether the tenure process can be improved, while others have suggested alternatives to tenure. Ideas for improvement have included changing the substance of the process and institutional reward systems, shifting the unit of analysis of productivity from the individual to the department, and making the tenure process more understandable such as through role modeling and leadership development (Rice & Sorcinelli, 2002). Post-tenure reviews have also been suggested as a means to strengthen the process and identify professors whose productivity is not up to par. Initially opposed to post-tenure reviews as costly and a threat to academic freedom, the AAUP later altered its stance to be tolerant of the practice, so long as any such review focused on faculty development rather than on accountability or disciplinary action (Chait, 2002b).

Alternatives to tenure are increasingly being used. One alternative to traditional tenure is the use of contracts, or employment for a specific term. Under a contract system, a faculty member is initially appointed to a term, typically two to three years. In the case of solid performance, terms are often renewed. While contracts are overwhelmingly renewed and turnover is low, contracts have been criticized as harming academic freedom (Fishman, 2005).

Another alternative to tenure is to offer financial incentives to faculty candidates who will eschew tenure or a tenure-track position. Attributed to market forces, this alternative may offer an employee a choice between a tenure-track position and a higher starting salary or other appealing employment parameters. Criticism of this method has

arisen because some academics see this option as not supporting the mission and values of higher education (Fishman, 2005). Even so, many faculty members find attractive an increased salary and decreased work load in place of a tenure-track appointment.

A third alternative to traditional tenure is to downplay faculty influence in an institution, while increasing the importance of administration. This alternative critiques the value of faculty as being influenced by market forces. Decisions about faculty are to be made in the context of the economic and managerial considerations of an institution (Fishman, 2005).

Debates about tenure and tenure alternatives will continue. Much discussion centers on their effectiveness in improving institutional performance and the resources required to implement any alternatives (Fishman, 2005).

Tenure and Academic Freedom: Inextricably Linked

In practical and philosophical ways, academic freedom and tenure are entwined, so a thorough examination of tenure requires a parallel examination of the development and concept of academic freedom. Many doctoral dissertations have recognized this entwining (Ancell,1978; Crittendon, 2009; Davis, 1980; Deering, 1985; Hamill, 2003). In addition to doctoral studies, many scholarly works have drawn positive correlations between academic freedom and tenure (Brown & Kurland, 1993; Finkin, 1996; Fishman, 2000; Joughin, 1969; O'Toole, 1978; Vaccaro, 1972; Van Alstyne 1978, 1996). One of the strongest arguments on the usefulness of tenure in protecting academic freedom was made in a study on faculty tenure conducted in 1973 by the Commission on Academic Tenure in Higher Education, which made forty-seven recommendations for strengthening

the future of tenure. Also in the study publication were three informative essays: an historical essay on American academic freedom, an essay on the legal dimensions of tenure, and an essay on faculty unionism and tenure. More recently Adams (2006-2007) argued in favor of tenure in the promotion of job security and academic freedom, particularly as it pertains to research, scholarly activity, and societal benefits. Tierney and Lechuga (2010) argued that academic freedom and tenure permit higher education institutions to act as "vehicles for public engagement" (p. 118).

Not all commentaries about tenure deem it positively linked to protecting academic freedom, with critiques spanning four decades. In 1965 Nisbet propounded that tenure and academic freedom should be considered separately, because academic freedom was necessary for all faculty members, not just those who were tenured. Silber (1971) viewed the granting of tenure as encouraging sloth among academics. Park (1972) deemed tenure harmful to academia in that it was an unfair, outdated, and divisive among faculty members who did or did not have tenure. In 1997, Silber maintained that academic freedom and tenure were not inherently linked because both nontenured and tenured faculty members have academic freedom. He further argued that tenure promotes infringements upon academic freedom in that tenured professors may compel nontenured professors to follow established departmental doctrine and to suppress their own intellectual interests.

This section provides a background on tenure, with a focus on its connection to academic freedom. First, academic freedom is defined using the parameters established

by the AAUP. Next, cultural and legal foundations of academic freedom are reviewed. A review of tenure's cultural foundations concludes the section.

Definition and Parameters of Academic Freedom

Whether tenure is viewed as a protector of or a detractor from academic freedom, the relationship between the two concepts is pertinent to fully understanding educational and legal issues surrounding tenure. A champion of academic freedom, the AAUP sought in its *1940 Statement* "to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities" (2006a, p. 3). The AAUP defined the parameters of academic freedom as follows:

> 1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
>
> 2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
>
> 3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or

> discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(2006a, pp. 3-4). Viewed by the AAUP as essential to the common good through the "free search for truth and its free exposition," principles of academic freedom apply to both teaching and research (2006a, p. 3). Research freedom is essential to the advancement of truth. Freedom in teaching is fundamental to protecting the rights of both the teacher in teaching and the student to freedom in learning. The statement makes clear that academic duties exist that are correlative with rights.

Cultural Foundations of Academic Freedom

Academic freedom is a right that is difficult to define and is claimed by both faculty members within institutions and by institutions themselves. Professional freedoms and institutional autonomy are based on the rationale that the vigorous exchange of ideas is best fostered within a community of scholars. Such an exchange then serves a public benefit.

A good basis for understanding academic freedom in the United States comes from reading the works of Hofstadter and Metzger (1955), who wrote about the history, development, and philosophy of academic freedom in American higher education. After

jointly publishing their initial work, Hofstadter (1955) and Metzger (1955) each published their study under separate titles. Several doctoral dissertations have examined historical aspects of academic freedom (e.g., Lucas, 1967; Sullivan, 1971; Sutton, 1950). In addition, other scholars have sought to further understand and explain academic freedom (e.g., Baade, 1984; MacIver, 1967; Pincoffs, 1972).

Academic freedom is foundational to knowledge creation and innovation. In the context of academia, academic freedom correlates to the express rights of free speech and press granted under the First Amendment to the U.S. Constitution. Kaplin and Lee (2006) explained this to mean that the rights of speech and press cannot be effectively protected in the college and university environment unless academic freedom, as a corollary of free speech and press, is also recognized. Associated with the concept of academic freedom, the halls of academe are commonly thought of as a "marketplace of ideas" in which competing ideas and open discourse can coexist. Justice Brennan used the phrase "marketplace of ideas" in his concurrence in *Lamont v. Postmaster General* (1965), a landmark First Amendment case that discussed the free exchange of ideas.

Historical influences. A look back in history aids in discerning how academic freedom was understood by scholars in the past. In American higher education, the concept of academic freedom dates back more than a century, but its roots go much deeper. Dating to 399 B.C. Athens, where Socrates argued in his own defense against charges that he was corrupting the city's youth, the heritage of academic freedom is rich. The origins of American academic freedom are more customarily traced to the Middle Ages and the European universities of Salerno, Bologna, Montpelier, Paris, and Oxford,

which were gatherings of scholarly guilds that were interested in advancing areas of expertise. With humble beginnings, they served as model institutions for others that developed throughout Europe, England, and the United States (Hofstadter, 1955).

The organizational structure was important to the independence of the university. As autonomous corporations based on a gild system, their members elected their own governance and created their rules and systems of discipline. An institutional framework arose from the corporate independence; the framework supported the idea that the members were men of learning who were to be defended from outside interference (Hofstadter, 1955).

The freedom of the corporate body and the freedom of the individual scholar were not the same, nor were they absolute. Two forms of authority governed the scholars; one was a positive form of authority, which referred primarily to external pressures, and the other was an authority of tradition, which grew from a desire for salvation (Hofstadter, 1955). It was, thus, a system of faith that prevailed authoritatively over intellectual freedom of the twelfth century. When necessary, the Church intervened in academia to issue condemnation and censures of scholars who committed heresy (Hofstadter, 1955).

As heresy grew in the thirteenth century, Church doctrine became more structured. A greater clash arose between scholars and the Church when scholars began to discuss issues that were condemned by the Church. With the advent of Aristotelianism came new areas of inquiry, such as faith and philosophy (Hofstadter, 1955).

The period of corporate independence and relative scholarly freedom declined through the fourteenth and fifteenth centuries, as the university became less a center of

intellectual inquiry. Many nobles individually sponsored the work of scholars, and the corporate autonomy grew less secure. The fourteenth century began the period in which the spheres of reason and faith were separate. Medieval philosophy and science arose, and scientific teachings began to flourish in the fifteenth century. In an effort to protect autonomy, university migration occurred to areas that did not have a university. As the number of universities grew, universities became less mobile. With better endowments, universities' interests in their library collections and physical possessions grew, and intellectual inquiry suffered (Hofstadter, 1955).

A dramatic change in the university's autonomy resulted from political changes in Europe. As nation states developed, sovereigns, princes, and parliaments began to meddle in the internal affairs of the universities. Scholars were hired by the political sovereigns, and autonomy and prestige suffered. (Hofstadter, 1955).

During the Reformation of the sixteenth century, the Church again took an active role in suppressing scholarly inquiry. The Church tried to suppress Protestantism and humanistic philosophy. Religious authority was challenged by the rise of Protestantism, which added to the diversity of religious beliefs and furthered the right of the individual. Academic freedom thus had important foundations in the pursuit of religious liberty (Hofstadter, 1955).

A small group of universities such as Leyden and Helmstedt helped the concept of academic freedom to establish roots (Sutton, 1950). Tolerance began to be practiced in the seventeenth and eighteenth centuries. Pious men realized that if faith was forced, it would not be sincere and would create hypocrites. The modern concept of academic

freedom grew from intellectual freedom to investigate free from religious controls. An increasing number of scholars were granted freedom in their academic pursuits (Hofstadter, 1955).

Academic freedom was firmly established in most European universities by the end of the eighteenth century. In the latter half of the nineteenth century, academic freedom evolved to a closer resemblance of what we know today. Two factors are thought to have contributed to the current view of academic freedom: Darwinism and the academic traditions of the German university (Hofstadter, 1955).

Darwinism. Darwinian thought redefined the nature of "truth," established a justification for tolerating error in intellectual inquiry, and advocated the standards by which research process and results may be verified. Rather than being viewed as an absolute, truth was seen as being in a state of flux as knowledge was continuously explored in order to verify beliefs as true or false. Darwinian standards did not allow undisciplined inquiry, but required verification and procedural rules (Hofstadter & Metzger, 1955).

Also significant in this era was the limit on administrative prerogative to judge the fitness of professors. Faculties argued that professional standards were examined through the purview of experts who must be chosen from peers. Tolerance and right of conscience were affirmed during this period, which supported a new rationale of academic freedom (Hofstadter & Metzger, 1955).

German university heritage. The mid-nineteenth century German universities also impacted the emerging conception of academic freedom. German academic

philosophy, the tradition of *akademische Freiheit*, was comprised of the concepts of *Lernfreiheit*, the freedom to learn, and *Lehrfreiheit*, the freedom to teach. Taken together, the terms are close in meaning to the English term “academic freedom.”

Lernfreiheit provided a learning situation that was free of administrative coercion. This concept allowed students in German universities to have freedom in both their personal lives and in their academic activities. *Lehrfreiheit* provided German professors the freedom to examine bodies of information and evidence and to report the findings in lecture or printed form. Freedom of inquiry and teaching extended into the process of research and instruction. Intellectual freedom permeated the atmosphere of the German university. Subjective teaching was encouraged with the idea that intellectual growth was possible only if varying opinions could be presented. Through such growth, the major purpose of the university could be realized. In contrast to the few liberties granted to German citizens, the academic community enjoyed many rights (Hofstadter & Metzger, 1955).

Contributing to American academic freedom, many scholars who first studied with German masters then transplanted *Lehrfreiheit* to the United States. The term “academic freedom” became widely used in American academic rhetoric, and it was assumed that the concept defined the university. Academic freedom was thus elevated to the status of necessity (Hofstadter & Metzger, 1955).

American university heritage. While *akademische Freiheit* was accepted as a necessity to American higher education, the differences found in the American university led to America’s own unique theory of academic freedom. Three areas of difference can

be identified: the dissociation of *Lernfreiheit* from *Lehrfreiheit*, the proselytization of students, and the development of a system of the American-Constitutional system of individual rights and freedoms (Hofstadter & Metzger, 1955).

In contrast to the breadth of educational freedom experienced by a German university student, the American student was more restricted. Based on a policy of *in loco parentis*, universities stood in place of the parent and largely controlled the student educational experience (Kaplin & Lee, 2006). To protect academic employment in its formative stages, academic leaders sought more to protect the institution than to protect education. Universities have changed over time from this stance; in addition to experiencing the benefits of the academic freedom practiced by professors, students likewise enjoy more control over their learning experience.

Differences between the German and American models of academic freedom also arose from the American Constitution, which provides for individual rights and freedoms. The United States system of government allowed for the freedom of *Lehrfreiheit* through guarantees provided in the Constitution. Thus, academic freedom is not a separate right in America, and those in educational institutions do not possess that right above other citizens of the United States (Hofstadter & Metzger, 1955).

The development and governance of American colleges and universities. Various scholars have arranged the complex development and governance of American higher education into patterns of issues (Altbach, 2011b), eras and ages (Hofstadter & Metzger, 1955; Metzger, 1973), or specific time periods of development (Baldridge, Curtis, Ecker, & Riley, 1978; Geiger, 2011; Veysey, 1965). From various sources, this

section extrapolates elements of governance that arose during the formation of American higher education that provide context to the development of academic freedom.

From the mid-1600s to the mid-1700s, the earliest colleges formed in the British colonies of America. Each was established as an adjunct to a respective church, and each was crucial to the civil government of the colonies. Expanding religious liberty was reflected in these colleges, and freedom of thought was a great asset of the eighteenth century college (Hofstadter, 1955).

Established first in 1636, Harvard College had a unique organizational structure—that of a nonresident board of trustees. The structure was then borrowed by William and Mary, Yale, and other colonial colleges. The lay board shared the institutional governance with internal clerical authority, and boards of trustees functioned to raise money and appoint presidents (Baldridge et al., 1978). The shift from clerical boards to boards that were controlled by lay people also reflected the fact that, while the institutions were private, state support was part of the equation. (Heller, 2004).

The unique feature of self-governing lay boards found in the United States played an important and lasting role in the way that policies were developed in and for higher education (Hofstadter, 1955; Thelin, 2004). A concept adapted from Scotland, an external board became responsible for university governance, as opposed to faculty association governance, which had been the model at Oxford and Cambridge (Thelin, 2004). While lay people could broadly influence policy, they could not run the institution on a daily basis. Because the lay boards were nonresident, power vested in a college president eventually also emerged and was a complement to lay authority. The president

was powerful and could dictate rules that affected the school and students' conduct (Hofstadter, 1955).

A nonprofessional faculty served a tutorial role as they prepared for the ministry (Geiger, 2011). Faculty members, who were more regularly involved in the institutional affairs and teaching, were viewed as too inexperienced and too temporary to govern the institution. This conundrum opened the door for a strong presidential role (Hofstadter, 1955).

The first truly "public" institutions that were chartered in this era showed up mainly in the South and Midwest (Heller, 2004, p. 50). Heller (2004) described their control as "quasi-public"; even though the institutions received direct state subsidies, a high degree of autonomy was maintained by the trustees (p. 50). Some institutions had self-perpetuating boards, which kept the institution well out of public reach.

In the early 1800s, signs of trouble abounded as the underpinnings of republican education were dislodged, some institutions lost state support, and others steadily declined. As some institutions declined and others flourished, questions emerged from the republican model regarding the ownership, educational content, mission, and governance of the institutions. Efforts to construct a republican curriculum that contained both scientific and professional subjects collapsed—there were not qualified teachers, and students were not interested. A restandardized classical curriculum and a reforming of the institutions resulted in a refocusing on collegiate missions. A mix of public function and private control remained and created controversies (Geiger, 2011). Such problems caused an overall decline in academic freedom (Hofstadter, 1955).

The Dartmouth College decision. While colleges continued to have both public and private aspects, the case of *Trustees of Dartmouth College v. Woodward* (1819) provided resolution. The *Trustees of Dartmouth College v. Woodward* (1819) decision is noteworthy in the history of American higher education because it influenced how later colleges were organized. The court was faced with the question of whether the state of New Hampshire could alter the charter of the school. Initially established by a royal charter of King George III in 1769, Dartmouth operated with a form of shared governance. Control was vested in a Board of Trustees, and the board had delegated its power to Dartmouth's president. The state of New Hampshire tried to assert control over the college because of its chartering and support of the institution (Freedman, 2004; Heller, 2004; *Trustees of Dartmouth College v. Woodward*, 1819).

Particularly unusual to Dartmouth's circumstances was that the college presidency had been shared between a father and a son, who had administrated the affairs of the school without the input of the board. As the son's presidential reign neared the end, the board was asked whether it would increase its influence on the college. In a highly politicized move, the Democrats in the New Hampshire legislature passed a law that nullified the original charter and declared Dartmouth College a state university. The New Hampshire Superior Court found in favor of the state, ruling that Dartmouth College was a public institution. On appeal to the U.S. Supreme Court, Daniel Webster argued for the defense of the college and its independence from the state. Quoted in Heller (2004), Webster passionately argued that the case was not only of Dartmouth College but "of every college in the land" (p. 51). He further asked: "Shall our state legislature be

allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion shall see fit?" (Heller, 2004, p. 51).

In a decision authored by Chief Justice John Marshall, the U.S. Supreme Court ruled that the Dartmouth College charter was a contract as defined by the federal Constitution. As such, the state of New Hampshire could not alter Dartmouth's corporate charter. The ruling shielded the college of the legislature's intrusion and resolved the question of ownership of the college. The decision made clear that private colleges had a right to exist separate from the state (Heller, 2004; *Trustees of Dartmouth College v. Woodward*, 1819). Following the ruling, states began to focus public financial support for higher education to publicly controlled institutions while also phasing out most of the direct appropriations for private institutions (Heller, 2004).

Changing governance. Governance in higher education also began to change towards the end of this era. Knowledge and maturity became respected faculty traits. Presidents sometimes arose out of professionalized faculty ranks rather than being selected solely from the ministry. That they had been formerly faculty members themselves allowed them greater empathy towards the concerns of faculty (Baldridge et al., 1978). Presidents likewise transitioned from the role of speaking for the board to being an intermediary between the board and the professoriate. Also emerging from some Eastern United States institutions was the idea that faculty should be appointed only with the consent of future colleagues (Hofstadter, 1955).

In the early 1800s as the country expanded westward, there was significant growth in the number of private liberal arts colleges, many which were religious schools.

While hundreds opened, most did not survive (Thelin, 2004). In the mid to late 1800s, German style universities that offered graduate education evolved. Schools offering practical and advanced subjects were created, in part because of the Morrill Land Grant Act of 1862, and collegiate education grew to include students other than white males (Geiger, 2011). At the same time, a lack of uniformity created tension between how public colleges and universities interpreted their role in serving the state, and how policymakers and the public viewed that role (Heller, 2004).

In 1869 the paradigm of the American university evolved when Charles W. Elliot assumed the presidency of Harvard. In professional schools, he replaced practitioner-teachers with a learned, full-time faculty; put into place a mandatory curriculum, and eventually defined professional school as requiring a bachelor's degree. The Harvard model allowed for the development of the American university, in which the instruction of undergraduates would support a specialized faculty that taught graduate students (Geiger, 2011).

A significant trend during the nineteenth century was a decline in academic freedom (Hofstadter, 1955; Gerber, 2010; Tierney & Lechuga, 2005). A primary reason was the growth in the number of higher education institutions that exceeded the number needed in the country (Hofstadter, 1955). Before the last quarter of the nineteenth century, college teaching was not viewed as a very prestigious vocation. After about the mid nineteenth century, presidents and governing boards exercised control over decision-making with little input from the faculty (Gerber, 2010; Tierney & Lechuga, 2005). Until the late nineteenth century, professors did not meet what might now be considered the

basic criteria as a professional (Gerber, 2010). Violations of professors' academic freedom during the time period are "legendary and well documented" (Tierney & Lechuga, 2005, p. 8). Two other events occurred in the nineteenth century that impacted academic freedom. Educational reformers secured elective courses, less liberal education, and alternative scientific programs. In addition, faculty governance began to emerge, due to weaknesses in governance by trustees (Hofstadter, 1955).

During the late 1800s and early 1900s, colleges experienced significant growth in enrollment; many of those that failed to grow were closed. Growth occurred in part from the assimilation of women into higher education and from the growth in component parts of the institutions such as units and specialties. Academic freedom began to resemble academic freedom as we know it today, based strongly on Darwinism and the academic traditions of German universities. The major disciplinary associations formed from about 1890 to 1905. Teaching positions increasingly became occupied by faculty members who contributed to the knowledge base of the disciplines, and universities influenced the definition of the academic profession. Faculty members enshrined this definition by organizing the AAUP in 1915 to" champion their professional rights, particularly academic freedom" (Geiger, 2011, p. 54).

The extraordinary growth in higher education during this era was also due to the ability of some institutional presidents to attract vast financial resources. With greater growth, the universities became more complex as presidents needed help in managing the administrative duties. Both administrative and academic hierarchies developed during

this period. Those in the academic hierarchy made academic decisions such as regarding curriculum, academic standards, and faculty hiring (Baldridge et al., 1978).

During the 1920s, enrollments approximately doubled, and higher education became less elite and more geared towards the masses. Hierarchy among institutions increased, as emergent forms of higher education offered different types of instruction for different students. To develop a true liberal education while advancing the academic disciplines was a challenge that created tension (Geiger, 2011).

Prior to this era, faculty members were typically hired by administrators and lay boards, though other faculty members may have been consulted. With increased specialization came increased faculty participation in governance because presidents and lay boards found it difficult to assess the performance of a faculty member. In addition, the growth in institutional size made centralized control more difficult. In light of these factors, the academic department became the primary community within which faculty members exercised personnel responsibilities.

Following World War II, American higher education was in a state of turmoil for about thirty years. The years were marked primarily by expansion and academic standardization, and institutions became more alike in terms of curricular offerings, faculty training, and administrative practices. Soldiers returning from the war who were supported by the GI Bill and the significant increase in the numbers of students attending community college were primary reasons for the expansion (Geiger, 2011). Education during this period was described as transitioning from being for the elite, for the masses, and then universally for all. A direct influence of the rapid expansion was student unrest,

precipitated in part due to deteriorating academic conditions (Altbach, 2011b). Student unrest also arose due to debates on campus over the Vietnam War and the Civil Rights Movement.

Also resulting from rapid expansion was an increased market for the professoriate. As faculty demand was greater than faculty supply, the professoriate gained power within institutions. Part of this power included making decisions that were related to teaching and research duties (Baldridge et al., 1978). This was also the time frame in which the "multiversity" arose, defined by Kerr (1963) as "a whole series of communities and activities held together by a common name, a common governing board, and related purposes . . . [that] is neither entirely of the world nor entirely apart from it" (p. 1).

The transitions that occurred in the 1970s led into a period in the 1980s in which the demographics, politics, and social relations of American higher education changed. The previous explosion in growth ceased in 1975, and the growth in full-time students crept slowly over the next twenty years. Federal investment in higher education increased through the mechanism of student financial aid. Federal regulation over higher education became ever more present and required greater access for women and minorities (Geiger, 2011).

An era of privatization of higher education occurred in the 1980s (Geiger, 2011). Privatization includes, among other things, a retreat of public dollars from public higher education institutions with a corresponding increased reliance on private money and diversified revenue streams, and increased competition for resources (Morphew & Eckel,

2009). Higher education's increased revenues from the private sector in the 1980s resulted in a rise in tuition that outpaced the rise in median family income, which shifted the burden of college costs to students and parents. College rankings and media publicity made selectivity an issue. Some private colleges and universities prospered, while public institutions had to adapt to decreased public support (Geiger, 2011).

Federal actions in the 1980s, such as the Bayh-Dole Act, encouraged the transfer of university technology to private industry. The commercialization of research and the call for universities to contribute to economic development has contributed to greater federal, state, and private investment in academic research. Not without controversy, the importance of research has increased relative to the weight of the importance of faculty instruction in the current era (Geiger, 2011). The ultimate challenge, according to Geiger (2011), is for the next generation "to sustain the immeasurable contributions that colleges and universities make to American society, let alone to improve them" (p. 64).

Institutional governance is currently marked by a culture of tremendous unrest due to economic problems, a push toward privatization, the increase in a managerial structure, large numbers of graduates from colleges and universities, and a decline in enrollment. Internal conflict has increased as institutional units compete for limited resources. Such tensions affect faculty personnel decisions and inspire activities such as unionization. Another result of the collective problems is that outside groups such as governments have pressured institutions to eliminate departments and restrict budgets (Altbach, 2011b; Baldridge et al., 1978). Some have characterized the reforms that occurred near the end of the twentieth century as a "managerial revolution" in higher

education, where accountability and efficiency were sought (Altbach, 2011b, p. 25; Keller, 1983). Rising undergraduate student tuition rates have led Congress to review college costs and make recommendations as to how to keep tuition increases in check (Ehrenberg, 2004). While faculty members assert principles of self-government, academic freedom, and equality of relations, administrators seek to establish order, efficiency, a commitment to mission, and a working relationship with the legislature and constituencies to assure the success of the institution (Mason, 1972).

With the increasing complexity of modern societies and the economy, higher education has expanded in response to public demands for a more highly trained workforce, and “curricular vocationalism” has built a greater link between higher education institutions and industry (Altbach, 2011b, p. 25). As higher education has expanded and adapted to societal needs, so too has the management and governance of universities grown more complex (Altbach, 2011a, 2011b; Mason, 1972).

Shared governance. University governance literature weighs heavily on the side of needing a nonhierarchical approach for university decision-making. Even so, the university is full of “quasi-hierarchical” features, which coexist with the concept of shared governance in higher education (Mason, 1972, p. 2). The varied roles of the trustees, president, deans, and department heads, along with the multiple ranks of faculty members are facially similar to hierarchical chains of command, and differ from institution to institution (Hammond, 2004). There is a split along chains of academic and administrative lines, but an absolute dichotomy between the two is “arbitrary and simplistic” and ignores how interrelated most decisions are (Mason, 1972, p. 7). As an

example, financial and personnel decisions directly affect academic policy, and vice versa.

In today's institutions, boards of trustees, comprised of lay representatives, typically have legal control over the institution (Kaplan, 2004). Boards control such responsibilities as property management, financial management, selecting administrators, appointing faculties, determining institutional mission and developments, and reviewing all programs and actions (Freedman, 2004; Kaplan, 2004). Administrators face the challenges of negotiating the details of complex higher education funding (Johnstone, 2011), managing increasingly entrepreneurial universities (Toma, 2011), and understanding and implementing the countless laws and regulations that have an influence throughout the entire institution (Alexander & Alexander, 2011; Kaplin & Lee, 2006; Poskanzer, 2002). Faculty members likewise continue to play a key role in higher education governance. As the creators of new knowledge and key participants in the educational process, the faculty often prevails in educational decisions. These decisions include, for example, admission standards, curriculum, graduation requirements, and faculty hiring and promotion processes. Trustees retain the final authority on academic matters, but overturning administrative recommendations—which are influenced by faculty decisions—is rare (Altbach, 2011a; Ehrenberg, 2004; Kaplan, 2004).

Accountability to external forces. Even though faculty members participate in governance, pressures on the academic profession have negatively impacted the basic conditions of the academic work of faculty (Altbach, 2011a). A decline in public support for the work of faculty (Anderson, 1992; Sykes, 1988), salaries that have remained

relatively stagnant for several decades (Bell, 1999), an uncertain job market (Altbach, 2011a), and a greatly segmented academic profession (Altbach, 2011a) are pressures facing today's professoriate that ultimately affect academic freedom.

In the past several decades, the governance of academia has faced increased intervention by outside forces that may further threaten academic freedom. Accrediting agencies have held higher education accountable to voluntary nongovernmental agencies for meeting certain minimal standards. Institutional, system-wide, and state agencies may influence academia's programs and quality (Altbach, 2011a; Schmidtlein & Berdahl, 2011). Pressures towards more structure have arisen from federal and state legislation on issues such as affirmative action and equal employment opportunity. Assessment measures have increased; for example, some states have implemented performance funding in more recent years (Bogue & Brown, 1982; Bogue & Johnson, 2010; Heller, 2004).

Additionally, in the past four decades higher education has increasingly lost the privilege of self-regulation to courts. Through judicial decisions has arisen an increasingly structured system of faculty rights and responsibilities. Courts have guaranteed faculty the constitutional protections of freedom of speech, freedom of inquiry, and due process. (Kaplin & Lee, 2006; Leap, 1995; Olivas & Baez, 2011; Schmidtlein & Berdahl, 2011).

The forms of organization and governance of higher education will continue to be influenced by the changing environment in which it exists. Myriad and complex issues emerging in higher education will require that academics, organizations, and constituents

continue working together to address the challenges of the future. Given the current financial strain and competition, the tension between how institutions view their role and how the public views that role will remain (Heller, 2004). New accountability measures required by state and federal governments are likely to emerge (McLendon, 2003; Schmidtlein & Berdahl, 2011). Research funding and control and the related issue of knowledge dissemination will face issues of quality and control. The role of the private sector and the diversification of institutions will continue to reshape the academic system. In a globalized market, student and faculty mobility and global competition among academic systems will be ever present (Altbach, 2010b).

Trends in governance. With increasing criticism of the traditional forms of governance in colleges and universities as being inefficient and cumbersome, the rise of the "administrative state" will likely become more established through bureaucratic structures (Altbach, 2011b, p. 28). Patterns of delegation and the practice of shared governance are neither absolute nor uniform and are adaptable (Kaplan, 2004). Mason (1972) encouraged a "[c]omplementary social ordering" in the university whereby "[c]ollegialization" becomes a device for allowing the academic institution to adapt to emerging societal and academic demands through more intensive collaboration between the lines of command (p. 6).

The development of the academic profession. Historical and organizational influences on the development of the academic profession also underlie American academic freedom. The model of professorial authority has evolved within the evolving institutions. Although academe "enjoys relatively strong internal autonomy and

considerable academic freedom," social, political, and economic societal trends of higher education have shaped the American professoriate (Altbach, 2011a, p. 228).

Historical influences. Medieval European influences can be seen in the self-governing nature of the professoriate and in the concept of a university made up of communities of scholars. German reforms in higher education in the nineteenth century strengthened the prestige and authority of the professoriate and linked universities and the academic profession with the state. Professors were viewed as civil servants, and the universities were expected to contribute to Germany's development. Research became a responsibility of universities. Developments at Oxford and Cambridge also influenced intellectual trends in the United States (Altbach, 2011a).

The profession in its current form in America was most significantly influenced by the period of development beginning with the rise of land-grant colleges. After the Civil War and the establishment of research-focused private universities in the late nineteenth century, the university became committed to public service and to "relevance" (Altbach, 2011a, p. 231). Societal issues, applied scholarship, and professional training became a focus. Private and public universities began to emphasize research and graduate training, and a doctorate became necessary to reach the upper levels of the academic profession. The culture of research, graduate training, and professionalism began to undergird professorial values (Altbach, 2011a).

After World War II and into the 1960s, massive growth occurred in all sectors of American higher education. As student enrollments rose, the profession tripled, new institutions opened in every sector, and new departments formed. The particularly rapid

growth of the 1960s created plans and expectations of continued growth. Population shifts and fiscal crises of the 1970s ended the expansion, however, and the bulk of continued growth in enrollments has been among part-time students. Corresponding with the temporary nature of the rapid expansion, the growth in faculty has more recently been along the nontenure-track lines (Altbach, 2011a).

Altbach (2011a) posited that "[e]xpansion shaped the vision of the academic profession for several decades" (p. 232). Postwar growth, the seller's market for jobs, significant salary improvement, and access to research funds benefited the academic profession. Mobility and career advancement were favorable, but institutional loyalty and commitment suffered. To improve faculty retention, institutions lessened teaching loads and increased fringe benefits. As external research funds became more available, some professors were able to rely less on their institutions (Altbach, 2011a). Effects of the expansion are still felt in higher education today, as a legacy of "divisiveness and the politicization of the campus" has continued since the 1960s (Altbach, 2011a, p. 234).

Today's institutions of higher education are central to America's postindustrial society; as such, the professoriate is pressured from many sources. Constituents call for greater productivity, accountability, effectiveness, and social relevance. Students demand vocationally oriented courses. A lackluster job market has made gaining tenure more difficult, and the growth of part-time academic staff has risen to more than half of the professoriate nationwide—a growth of 376 percent between 1970 and 2001 (Altbach, 2011a, p. 230). Also increasing are the numbers of full-time, but nontenure-track faculty who hold limited-terms jobs and have a primary teaching role.

The academic profession, largely white, male, and Protestant a half century ago, is increasingly diverse. Women have increased to about 36 percent of the total and about half of those who are entering academe (Altbach, 2011a, p. 231). Racial and ethnic minorities have also increased in academe. Recognizing variations in demographic, cultural, disciplinary, and other variations, Altbach (2011a) explained, “If there ever was a sense of community among professors in the United States, it has long sense disappeared” (p. 231).

Organizational influences. Academics live dually in two worlds: that of a professional and that of an employee of a bureaucratic organization. Faculty involvement in university governance arises from the consequence of the unique professional expertise of the professor, which makes the professor’s contributions to decision-making essential to the success of the university (Mason, 1972). The description of faculty members as employees is not fully correct, because faculty are the primary authority on much of the “business” that is conducted in the university (Mason, 1972, p. 19). To that point, the U.S. Supreme Court ruled in *National Labor Relations Board v. Yeshiva University* (1980) that faculty members at private Yeshiva University could not unionize because they wielded power as managerial employees. Thus, any analogy between employees and professors as to their relationships to employers and university administrators is tenuous (Mason, 1972).

Although a framework of shared governance prevails, the realities of the American university create tensions with professors’ views of themselves as the traditional, autonomous scholar. Altbach (2011a) reported on a 1990 survey that

described two-thirds of faculty members as having fair or poor morale, and 60 percent as having negative feelings about the "sense of community" at their institutions (p. 234). He further reported that things have not recently improved.

The concept of autonomy receives wide support in the literature, yet autonomy over a professor's use of time and over research topics is greatly affected by external funding, politics, and technology. State institutions are agencies of the state and are dependent on the state, either directly or indirectly, for financial support. Collegial decision-making and autonomy have come into ever more conflict with the realities of complex organizational structures and bureaucracy, which have changed the formula of shared governance (Altbach, 2011a).

External authorities have influenced the academic profession. Through legislative action and the courts, governmental decisions impact the academic profession. Federal and state regulations have influenced higher education actions in hiring and promotion. The courts, though historically reluctant to interfere with the internal workings of academic institutions, have reviewed and sometimes reversed academic decisions. Laws have also affected faculty workloads and other accountability measures (Altbach, 2011a).

The reward system in academe has created an imbalance between the academic roles of teaching, research, and service. External constituents indicate that a greater emphasis on teaching and time in the classroom is needed. Many of the same constituents criticize the underlying value and relevance of much of the research that is done in universities. The reward system, on the other hand, is often linked to scholarly research and publications. A decline in external research funding, greater competition for

funding, more orientation towards applied research, and closer links between universities and the private sector have affected and will continue to affect faculty roles. Structural changes will likely change the research culture and motivate the professoriate to "focus attention on the customer" (Altbach, 2011a, p. 239).

External pressures are in a constant tension with the traditional autonomy of the profession. A bureaucratically arranged administration and a highly specialized and fragmented faculty contribute to a sense that shared academic purpose or community is lacking. Accountability demands have increased, and decisions concerning class size and academic direction of the institution are often placed in the purview of system wide agencies and administrators. Student demands reflect that consumerism is a central consideration. Technology affects academic publishing and can blur lines across departments (Altbach, 2011a).

While academic hiring and promotion largely remain the responsibility of the profession, this is not without the more recent influences of laws and regulations, tenure quotas, debates over curriculum relevance, or the occasional intrusion of the courts. Another problem of the current times is that the professoriate itself has failed to explain its central role in society and to promote the need for traditional academic values; the professoriate has remained central to the shared governance of institutions primarily through entrenched power and tradition. If, as many scholars have predicted, higher education's golden age of growth and public support is over, then academics are facing a period of significant change that could significantly weaken the power and autonomy of the professoriate (Altbach, 2011a). While many pressures affect the autonomy of the

professoriate, Altbach (2011a) opined that American professors presently have a fairly high degree of academic freedom, particularly in areas of academic substance (Altbach, 2011a).

Legal Foundations of Academic Freedom

Conceptually, the *1940 Statement on Academic Freedom and Tenure*, as interpreted in 1970, provides instructors with the right to address their work without the fear of negative employment consequences (Toma, 2011). Legally, infringements upon academic freedom can be adjudicated under constitutional principles, contract law, or state statutes and administrative regulations, depending on basis of the claims and the type of institution in which the claims arise. While constitutional rights are usually the focus of the courts, the legal boundaries of institutional authority over academic freedom are initially provided under contract law. Individual contracts and collective bargaining agreements of the faculty provide the parameters of the academic freedom rights. AAUP documents including the *1940 Statement of Principles on Academic Freedom and Tenure*, related interpretive documents, and other recommended regulations are sometimes referenced and incorporated into faculty contracts (Kaplin & Lee, 2006). Documents that are incorporated by reference will be interpreted and enforced by the courts by referencing contract law principles. If the documents are not incorporated by reference, courts may consider the documents as an important source for determining the custom and usage of the documents in academia (Kaplin & Lee, 2006).

In private institutions, principles of contract law, which can be supplemented with principles of academic custom and usage, may be the sole restriction on administrators'

legal authority to limit faculty academic freedom. Special institutional missions may also make the courts' involvement and interpretation of academic freedom infringement claims more complex. For example, academic freedom expectations may be adjusted and differently interpreted at religious colleges and universities when deference to doctrinal authority is necessary (Kaplin & Lee, 2006).

Distinctions between public and private institutions can also influence the application of constitutional freedom of expression principles to academic freedom claims. Constitutional academic freedom discourages actions such as institutional insistence upon loyalty oaths (Kaplin & Lee, 2006). Whether based in professional norms or on constitutional protections, however, academic freedom does not protect disruptive speech or unethical conduct, classroom speech that is unrelated to the content of the course, or behavior such as sexual harassment (Toma, 2011). In both public and private institutions, the First Amendment protects faculty members as U.S. citizens from governmental censorship and actions that infringe upon their freedom of expression through speech, press, and association. If a governmental body that is external to an institution restrains a faculty member's freedom, First Amendment protections extend to faculty members at both public and private institutions. When an internal restraint is placed on a faculty member's speech, the First Amendment likely protects only faculty members at public institutions (Kaplin & Lee, 2006).

Academic freedom does not depend upon appointment type, so less than full-time and nontenure-track faculty members have the same technical protections as tenured

faculty. Conceptually, professors and researchers are protected against reprisal when their work conflicts with institutional interests or views of the public (Toma, 2011).

Institutional and individual autonomy. From 1957 to 1967 the U.S. Supreme Court issued seven decisions pertaining to academic freedom. Of those, six involved institutions of higher education. From 1968 to 1978 the Court issued eight more decisions pertaining to academic freedom, with six involving institutions of higher education. Most of the Court's opinions involving academic freedom during 1979 to 1989 pertained to public schools (Van Alstyne, 1996). Although the U.S. Supreme Court has emphasized the importance of free inquiry in a democratic society, it has not held that academic freedom is an express federal constitutional right—though some state statutes or regulations may offer express protections. Many of the Courts' statements regarding academic freedom hold no precedential value, a clear standard of its protections has not been articulated, and the academic freedom rights of individuals versus those of institutions are not always clearly distinguished (Toma, 2011).

In early cases, the issue of academic freedom was from the perspective of protecting the faculty and institutions from unwanted outside influences, such as judicial interference. Over time, cases then considered the protections of faculty from outside influences (Zirkel, 1984-1985) or from institutional intrusion (Kaplin & Lee, 2006). From these perspectives, academic freedom has developed two distinct strains, institutional autonomy and individual autonomy (Zirkel, 1984-1985). In some instances, the academic freedom interests of individuals can conflict with those of institutions.

When the court considers such conflicts, the right of institutional autonomy tends to outweigh the academic freedom rights of individual professors.

Both institutions and individuals claim certain academic freedom rights. University or college interests are more likely to take precedence in decisions such as course content, teaching method, and faculty evaluation. Research interests enjoy some of the strongest academic freedom protections, yet institutional interest can still prevail as more compelling. And abusive or harassing behavior in the classroom is not protected by academic freedom principles (Toma, 2011).

One of the early cases issued by the U.S. Supreme Court pertaining to academic freedom was *Adler v. Board of Education of the City of New York* (1952), which concerned the First Amendment rights of a faculty member. The focus in in the case was a New York statute that provided that a person who teaches or advocates, or is knowingly a member of an organization which teaches or advocates the overthrow of the government by force or violence would be disqualified from employment in the public school system. While the majority found no constitutional infirmity in the statute, the minority view expressed by Justice Black condemned the statute as limiting the flow of ideas. In Justice Douglas's dissent, with which Justice Black concurred, he identified academic freedom as a subset of concerns arising under the First Amendment, stating. that "[t]here can be no real academic freedom" in an environment of "constant surveillance" that watches for "disloyalty" or "dangerous thoughts" (*Adler v. Board of Education of the City of New York*, 1952, pp. 393-394).

Paying homage to intellectual freedom in academia, the U.S. Supreme Court in *Sweezy v. New Hampshire* (1957) relied on the First Amendment to safeguard a professor's controversial lecture as an exercise of academic freedom. Justice Frankfurter, writing for himself and Justice Harlan, announced in a concurrence what is now known as the classical statement of "the four essential freedoms" of the university (Kaplin & Lee, 2006):

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. Therein, the courts attempt to guard "the four essential freedoms" of the University – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

(*Sweezy v. New Hampshire,* 1957, p. 263). The plurality opinion, authored by Chief Justice Warren, explained that "there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which the government should be extremely reticent to tread" (*Sweezy v. New Hampshire,* 1957, p. 250). The Court went on to explain the importance of freedom of inquiry to the stability of society (*Sweezy v. New Hampshire,* 1957).

In another foundational case, *Keyishian v. Board of Regents of State of New York* (1967), the U.S. Supreme Court recognized that academic freedom is essential to creating an atmosphere of inquiry in higher education (Tierney & Lechuga, 2010). In *Keyishian v. Board of Regents of State of New York* (1967), the Court overturned a New York law that required all state university personnel to disclaim allegiance to the Communist party.

Writing for the majority, Justice Brennan connected academic freedom with the First Amendment, stating:

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

(*Keyishian v. Board of Regents of the University of the State of New York,* 1967, p. 603).

Freedom of speech. Freedom of speech claims that arise at public institutions are usually subject to the line of U.S. Supreme Court cases that extends from *Pickering v. Board of Education* (1968). Under the *Pickering v. Board of Education* (1968) decision and the decision in *Connick v. Meyers* (1983), public university employees may discuss matters of public concern. Even so, if the expressions severely conflict with institutional purposes and institutional needs outweigh the interests of the individual, an institution can assert interests (Toma, 2011).

In *Garcetti v. Ceballos* (2006) the Supreme Court considered whether a public employee spoke as a citizen on an issue of public concern. The Court ruled that the First Amendment does not limit public employers from disciplining employees for statements that are made pursuant to their official duties. While some lower courts have equated faculty members with public employees, Justice Souter warned in his dissent about the impact of *Garcetti v. Ceballos* (2006) on academic freedom (Toma, 2011). In response

to Justice Souter's dissent, the Court acknowledged the argument that was raised related to constitutional interests that may arise in scholarship or classroom instruction that were not accounted for in the employee-speech analysis. *Garcetti v. Ceballos's* (2006) language left open the issue as to whether its jurisprudence would be applied in the same way when applied to scholarship or teaching.

Referencing *Garcetti v. Ceballos* (2006) in its analysis, the U.S. Court of Appeals for the Fourth Circuit issued a 2011 decision in an academic freedom case, *Adams v. The Trustees of University of North Carolina-Wilmington.* Adams, an associate professor of criminology at the university, is also a conservative commentator and author. A former atheist, Adams was hired as an assistant professor in 1993 and was promoted to associate professor in 1998. Following his conversion to Christianity in 2000, Adams claimed academic persecution that resulted in his denial of promotion to full professor, even though he had a strong record of teaching, research, and service for which he had won awards. In 2010 the U.S. District Court for the Eastern District of North Carolina ruled in a summary judgment order that Adams' nationally syndicated columns were not protected by the First Amendment, and that they represented "official" speech because the writings were referenced in a promotion application. On April 6, 2011, the Fourth Circuit Court of Appeals disagreed with the district court on that matter and ruled that the speech, which was directed at a national or international audience on issues of public importance, was unrelated to Adams's teaching duties or other terms of employment at the university. The court ruled that writings and speeches on topics such as academic freedom and civil rights constituted "private" speech at the time it was made and thus

should receive the full protections of the First Amendment (*Adams v. The Trustees of University of North Carolina-Wilmington*, 2011).

No unified theory of academic freedom. While the issue of academic freedom has appeared in many cases, a unified theory of "academic freedom" is lacking. The courts have appeared reluctant to create a working definition of the term. Courts are seemingly reluctant to intervene in issues that are educational in nature. Another aspect that may contribute to a lack of a unified theory is that the elements of academic freedom are analogous to civil rights granted to all citizens, thus it is incorporated into constitutional framework. The conflict of rights between institutions and individual also raises debate (Ancell, 1978). In *Parate v. Isabor* (1989), the court explained that the term academic freedom meant both the freedom of the academy to pursue its end without interference from the government and the freedom of the individual teacher to pursue his or her ends without interference from the academy. The court also acknowledged that these two claims of academic freedom can sometimes conflict.

Authors such as DeMitchell (2002), who concluded that academic freedom belongs to institutions, assert nonetheless that professors have rights when their interests align with those of their employers. Although the AAUP supports the academic freedom rights of individual faculty members, it also concludes that institutions have rights when academic questions are at issue (Toma, 2011). Toma (2011) asserted that "[t]he real issue in academic freedom may not be where rights exist, but if individuals, particularly those lacking in tenure, are positioned to assert those that do apply" (Toma, 2011, p. 97).

Cultural Foundations of Academic Tenure

As expressed in the*1915 AAUP Declaration of Principles*, which is now titled *Recommended Institutional Regulations on Academic Freedom and Tenure*, a primary purpose of tenure is to protect academic freedom (AAUP, 2012). The AAUP's *1940 Statement* advanced the concept that higher education institutions support the common good and that the common good is best reached through principles of academic freedom. Accordingly, the AAUP advocates for tenure to benefit the common good. The concept of tenure originated in twelfth century Europe (Fishman, 2000). Designed to safeguard academic freedom and job security, it is viewed in academia both as the foundation for great rewards and as a negative condition of employment (Adams, 2006-2007).

In a 1973 essay for the Commission on Academic Tenure, Metzger provided an historical overview of academic tenure, with three eras or "ages of academic man" forming the basis of his essay: The Era of the Master, in which tenure was granted as a privilege; The Era of the Employee, in which tenure was granted as a function of time; and The Era of the Professional, in which tenure was granted as judiciality—a function of procedures and regulations (Metzger, 1973, p. 94). For each era, Metzger (1973) discussed the influence of tenure on the academic work force and on academic life. Metzger's (1973) eras are summarized in order to provide an overview of the historical roots of tenure. The historical development of tenure is best considered in conjunction with, not separate from, the development of academic freedom and American institutions.

Scholars as masters. From the emergence of teaching in the Middle Ages until the Reformation, teaching in a university—or *stadium generale*—was a privileged

occupation. In the turbulence of the times, rulers of church and state sought to protect scholars' safety in their journeys and domiciles. Other sovereigns followed suit in protecting university scholars from harm. In addition to physical comfort, material comfort was provided through the equivalent of income and fringe benefits (Metzger, 1973).

Favors could be retracted, however, so medieval scholars also sought the benefits of *immunity* from the reach of power and *corporate autonomy* for the ability to assist and defend themselves (Metzger, 1973, p. 96). Through the formation of communities and societies, they created collective rules and regulations and sought the right to sue and be sued as a single juristic person. Metzger (1973) explained that the "two distinct yet allied ambitions" of autonomy and immunity formed the earliest roots of modern academic tenure (p. 96).

The benefits scholars sought were not solely academic; elements of prestige and status were likewise important. In return for what they received by way of privilege, they gave back in ways such as clarifying tenets of religious faith and practicing the tools of dialectic logic. Universities became diplomatists and created for society many educated persons who could fill religious and secular positions (Metzger, 1973).

In the Middle Ages, credentials were controlled by the Church. Through struggles in the local hierarchy between external licensure and diocesan discipline, tensions arose regarding faculty self-assertion. This matter came to a head in the thirteenth century, and eventually, the process of qualification was granted to the faculty (Metzger, 1973). Battles against diocesan discipline were also fought. Metzger (1973)

recounted stories of faculty playing the distant against the local; forming advantageous alliances, even with the state against the church; and displaying academic claim to competence. An intermingling of shared and special privileges marked an early approximation of what tenure meant in the Middle Ages. Tenure at that time meant an admission to a *corpus* that was possessed of a legal personality with considerable governmental power. Admission to this power was granted by license over which the masters had command. As a privilege, tenure was a declaration of opposition to any academic sanction that came from a nonacademic source (Metzger, 1973).

Every faculty member lived under common rules and compelling vows. Under the rule of peers, scholars subscribed to written regulation and received religious truth. Sanctions such as fines, suspension, or expulsion could be given, but not without a formal hearing of charges and for the appeal of adverse decisions. Most often, it was the novice theologian rather than the experienced teacher who came under peer scrutiny. It was not the function of medieval tenure to limit the tyranny of colleagueships (Metzger, 1973).

Also significant in the system was terminology that indicated those masters who were removed were banished, rather than discharged or dismissed. A master was not an employee of a university, but rather one of its corporate directors. If he had not been hired, then he could not be fired. The loss of academic privileges, in addition to a loss of earning a living, indicated ostracism, perhaps a blockage of the study of advance degrees, and could result in being excommunicated from the Church (Metzger, 1973).

As trends became more hostile to an academic system based on privilege, a transition occurred between vitality and dissolution. The Protestant Reformation added

strikes to a system that was headed towards an increasingly secular professoriate and state dependence. The Reformation removed the barriers of inside and outside. After the seventeenth century, the universities became less sectarian, and the politics of religion subsided. In the eighteenth century the locus of authority in religious matters shifted from church and state to the individual. In the nineteenth century the ideology of research emphasized knowledge as a public good, which resulted in a resurgence of autonomy and immunity. Professors in the nineteenth century exercised administrative powers, set educational standards, awarded academic degrees, and extended licenses to novices to teach. They also established rules and regulations about elections, discipline, and governance. This alliance between state and corporation relied on the state for appropriations and ministerial consent in certain administrative matters. Thus, the master in these regions was effectively a member of higher civil service, with unusual prestige and scope (Metzger, 1973).

The English universities were also affected by the Reformation. The English kings further influenced academic offices and had a greater influence on academic autonomy. College tutors were paid to prepare young scholars of the fifteenth century for the rigors of study, with the ultimate goal of the theological degree. During the Reformation, tutors absorbed teaching and administrative functions of the university (Metzger, 1973).

Scholars as employees. Metzger's (1973) Era of the Employee began with the 1650s corporate charter by the General Court colony of Massachusetts Bay to Harvard. The document retained a Board of Overseers made up of a body of ministers and

magistrates who had governed the institution. It left undetermined the boundaries between the inner and outer powers between the governing and teaching roles of the college. The charter was seen as having demoted the Board of Overseers. With the nomination of tutors to the corporation, it effectively asserted the autonomy of academics (Metzger, 1973).

This vision did not hold on due to Harvard's limited funds and a high turnover rate of tutors. The overseers chose the president, set the salaries of tutors, and maintained control of the college. It was not until 1707 that the overseers began to relax their power, and not until 1780 that the "republicanized corporation became entirely lay" and the overseers became a "vestigial body" (Metzger, 1973, p. 113). Other colleges were formed similarly, and lay control triumphed in America. To some extent, a lack of a scholarly class in America contributed to this formation. The shift to lay control came at the same time as faculty privileges were diminished everywhere (Metzger, 1973).

Early tenure policies signaled that teaching and governance began to be dissociated. As a result, the relationship between faculty and corporation became contractual, founded on a promised exchange of value. In a collegial relationship that is multilateral, there is a presupposition that it will last. With the promise between parties and an exchange of salary for a service, the consideration of time enters the relationship. This relationship marked the beginning of the regulation Metzger (1973) labeled "tenure as time" (p. 116).

Through a lengthy review, Metzger (1973) traced the tenure as time concept to Harvard's beginnings. He surmised that Harvard began to apply the rule of "up or out,"

with the "out" dictated by the limit on time spent in temporary service and the "up" made possible by a system of ranks (Metzger, 1973, p. 121). Other organizations likewise began to use lower ranks as proving grounds. Even so, professors were allowed up but were not typically forced out, thus resulting in a sort of indefinite tenure (Metzger, 1973).

During the nineteenth century, one year appointments competed with indefinite tenure. Reappointments under the one year system required a *de novo* test. Metzger (1973) explained that the "austere system of appointing all faculty members for a year" and reappointing only those who passed a new review "brought on annual sieges of springtime nervousness that imperilled [sic] the efficiency of the faculty" (p. 122). From 1860 to 1914, the trend was away from the harsh mode. In 1910, a survey of the 22 Association of American Universities showed that none of the institutions made all of the faculty members submit to annual reappraisal, but for the most part, faculty members who were appointed at the rank of instructor were appointed for one year (Metzger, 1973).

On one end of the spectrum, indefinite tenure meant that the recipient of an indefinite appointment was not removable except for grave dereliction, such as a neglect of duty, physical or mental incapacity, or serious moral lapse. The German model interpreted tenure this way, and American professors who made it through the ranks may have expected this. On the other end of the spectrum, indefinite tenure might have assured a recipient that he could keep his place as long as he remained proficient. Administrative judgment could have deemed him not proficient, but the professor still had the presumption of proficiency, until proven otherwise. Metzger (1973) reported that

research of many sources does not identify which end of the spectrum best described the meaning of indefinite tenure of that time. Largely, all appointments were legally temporary and instantly extinguishable. In practice, academic matters depended on the people and the place (Metzger, 1973).

Scholars as professionals and the formation of the AAUP. Metzger's (1973) Era of the Professional signaled the beginning of professors joining together in association. In 1913, eighteen full professors on the faculty of Johns Hopkins University sought to go beyond disciplinary societies to form an organization that would support their institutional and societal interests. With a favorable response, the American Association of University Professors was formed (Metzger, 1973). First, it was proposed that the organization form general principles about the tenure of the professional office and grounds for the dismissal of professors. This proposal was focused on standardizing the tenure process and making the rules favorable to the interest of professors. Second, it was proposed that a committee be established to investigate any administrative interferences with freedom by harming the professional standing or opportunities of any professor. Effectively, this proposal would set up a committee of professors who would investigate administrative conduct that was associated with dismissals. The "marriage of these two concerns in one professional plan of action" was of historical significance; together these proposals were to protect tenure and academic freedom (Metzger, 1973, p. 136). The last two schemes became prevalent in academic thinking: first, the faculty was to judge the fitness of a current member when it was brought into dispute, through fair procedures separate from the administration; and second, there was to be a link

between tenure and judiciality. The goal was to make academic discharges more difficult than they had been by interposing a body of faculty members between the administration and the board, with a faculty trial before a dismissal (Metzger, 1973).

The AAUP and the American Association of Colleges (AAC) (now the now the Association of American Colleges and Universities) jointly developed a 1925 Conference Statement, which was developed to address gaps in the initial 1915 Declaration and included such provisions as peer review for charges against tenured faculty and faculty input in hiring decisions for junior faculty (Metzger, 1993). The AAUP 1925 Statement supported granting tenure to those faculty members who held long-term appointments (Fishman, 2000).

In 1940 the AAUP and the AAC developed the *1940 Statement of Principles on Academic Freedom and Tenure*. This statement provided a key link between academic freedom and tenure. Employment security and due process in case of dismissal were key features of the *1940 Statement* (AAUP, 2006a, Fishman, 2000). The force provided in the *1940 Statement* was moral rather than legal. Even so, it served as a framework to aid faculty and institutions in dealing with certain employment conflicts (Lucas, 1994).

Following the *1940 Statement* was a supplement, the *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings* (AAUP, 2006b). Released by a joint committee representing the AAC and the AAUP, the *1958 Statement* formulated the due process that should be observed in academia for dismissal proceedings (AAUP, 2006b). Since then, gendered references have been removed, and the *1940 Statement* is

accepted in higher education, is endorsed my many professional organizations, and is incorporated into many faculty handbooks.

While the AAUP sets the standards, institutional differences may include the extension of protections to guest speakers, adjunct faculty, or students. Other differences might be found such as the length of probationary periods or credit for prior teaching experience (Chait, 2002b).

The Tenure Process

Thus far, this literature review has dealt with an overview of tenure and the intertwining of academic freedom and tenure. These concepts are foundational to the personnel policies found in higher education institutions today and may aid in developing a greater understanding of tenure and its significance in academia. Narrowing the focus, the review now turns to a closer examination of the tenure process. This section begins with an overview of the process for gaining tenure, and continues through a discussion of the criteria used in evaluation, grievance procedures for unsuccessful candidates, confidentiality of the peer review process, and changes that have been recommended for the process.

The Process of Gaining Tenure

Underlying most relationships between an institution and its faculty members is a relationship based in contract. Contracts may be written or implied and may culturally or formally incorporate policies and practices found in institutional and organizational policy documents. Policy documents, faculty handbooks, or individual contracts may

state the tenure and promotion process, which is formalized in most institutions (Kaplin & Lee, 2006).

The tenure review process begins upon a faculty member's hiring for a tenure track position. Process timing and standards required can vary widely from institution to institution. Most commonly, tenure is granted at the same time that a faculty member is promoted from assistant to associate professor. Faculty members who are not likely to receive tenure may be terminated before the year that they will be up for tenure, and faculty members who are excellent candidates for tenure may be promoted early, during their period of probation. During the probationary period, the renewal of a contract does not mean an absolute receipt of tenure at the end of a faculty member's probationary period (Leap, 1995).

A persistent challenge for departments, chairs, and deans is to provide open and candid advice to tenure-track faculty members. Some faculty peers may be inclined to share only positive feedback. Evaluations that do not signal areas of difficulty can be harmful at a later time and instigate litigation (Franke, 2010). For the faculty applicant, he or she may be unaware of weaknesses and taken by surprise when a contract is not renewed. For the institution, consistently positive evaluations—even if weak—may make it more difficult to support a claim that its reasons for nonrenewal of a contract were nondiscriminatory.

Criteria and standards vary widely for assessing tenure qualifications. For example, smaller institutions may place a high value on teaching skills, while larger research institutions may place a premium on scholarship. Criteria and standards may

also vary between departments or colleges within an institution, or professors may negotiate aspects of their tenure track within their contract. Institutional needs and fiscal constraints also play into the tenure process and decisions that are made. Changes in institutional programming needs and budgetary constraints would likely alter an institution's planning and its long range staffing needs (Kaplin & Lee, 2006; Leap, 1995).

Most commonly, the tenure process begins with a contract lasting one to three years, and the contract may be renewable with continued satisfactory job performance. Expressed in the *1940 Statement of Principles on Academic Freedom and Tenure* is the AAUP's "seven-year, up-or-our rule," under which a faculty member is provided with a six-year period of probation (Leap, 1995, p. 44). Typically during the sixth year of employment, a faculty member's teaching, scholarship, and service are evaluated through the faculty member's submission of a dossier substantiating her or his contributions in the area of scholarship, teaching, and service (Leap, 1995). When a faculty member goes up for tenure, the process is often suspenseful and takes a large part of an academic year.

Peer review. In decisions of tenure, and related decisions of hiring and promotion, an institution's current faculty members have a voice in determining the future faculty. Poskanzer (2002) deemed this "guildlike control over hiring and promotion" of value to the institution, because it aids in assuring that "decisions about the quality of scholarship are made by experts" (p. 158). Within a multi-layered, shared governance format, the process begins with a peer evaluation in the faculty member's department (Hammond, 2004; Leap, 1995). Initial recommendations are largely in the hands of tenured senior faculty who serve on a department's peer review committee. A

faculty member’s disciplinary training and personal concerns may greatly influence their control over tenure, hiring, curricular, and faculty-retention decisions and input (Adams, 2006-2007; Hammond, 2004).

Including the faculty voice has not always been a common feature of tenure decisions. Franke (2001) reported that a 1959 survey conducted by Byse and Joughin found that only 26 of 80 institutions involved faculty in tenure recommendations. Byse and Joughin later recommended in 1967 that tenure procedures should involve decisions by faculty (Franke, 2001). Today, most all institutions include faculty input in tenure recommendations (Franke, 2001). Peer review is viewed as a mechanism for a university to monitor employees and make informed hiring and promotion decisions (Adams, 2006-2007).

While peer review committees have established a place in promotion and tenure decisions, they are not favored throughout academia. Tenured faculty members who have established academic records may limit innovation and creativity among new faculty. The fear of research and ideas that they see as unorthodox or threatening may result in a negative vote for tenure. This view has led some to believe that tenure, instead of being a protector of academic freedom, is actually a hindrance to academic freedom (Leap, 1995).

Additional reviewers. Most tenure decisions include in the process input from external reviewers and internal peer review committees, department heads, college deans, and other academic administrators. Upon the recommendation of the initial peer review committee, a faculty member’s file is forwarded through the process, including the

department head and the dean of the college. Customarily nonbinding, the decisions of the committee, department head, and dean are then forwarded to an institution's chief academic officer for the final authoritative decision on reappointment, promotion, or tenure. Only in cases of a split vote among the peer review committee, department head, or dean is the chief academic officer likely to reverse a decision. The focus of the top academic officers is typically the financial and institutional commitment to a decision to grant promotion or tenure. Even so, conflicts can arise between the influence of the faculty and the influence of the administration (Leap, 1995).

The tenure process concludes either with a vote of approval by the institution's board of trustees (though some decisions that have no adverse action are not reviewed by upper-level administrators or governing boards) or with a denial of tenure. An evaluation that deems a faculty member's performance as meritorious and that views his or her research and teaching expertise as being aligned with institutional needs likely results in a grant of tenure. A faculty member who is not deemed worthy of tenure is subsequently put "on notice" with a one-year terminal contract (Leap, 1995, p. 45). During the terminal year, tensions can arise from hurt feelings of the applicant and divisiveness among departmental peers who have split views about the tenure decisions. Much of the unsuccessful applicant's attention may be turned from teaching, research, and service commitments and towards the grievance process or job search. When that contract ends, the employment relationship between the institution and the faculty member terminates. A second way in which probationary faculty members can be denied tenure is through the nonrenewal of a term contract (Leap, 1995).

Criteria for Evaluating Faculty Performance

A grant of tenure is based on standards that are unique to each institution. Personal characteristics and accomplishments as well as institutional needs are incorporated into reappointment, promotion, and tenure decisions. Three major criteria are most often used in faculty performance evaluation: (a) record of research and publications; (b) teaching effectiveness; and (c) service to the public, profession, or institution. The ability of a faculty member to work well with others is also evaluated, and can emerge as either a separate category or as a consideration that exists as a crucial component of the other three major categories. The emphasis placed on each category differs from institution to institution. For instance, while a small college may favor teaching ability, a doctoral granting institution may favor research. The emphasis placed on each category may also differ within an institution but among departments or colleges. As an example, extension service faculty members at a land-grant institution may have higher expectations for outreach and service than would be placed upon a social science faculty. Such diversity has limited the formulation of standard criteria in faculty evaluation (Leap, 1995). For the purposes of the following discussion, working relationships will be discussed separately as a fourth category, collegiality.

Measurability of criteria. Within the categories of criteria used for evaluating a faculty member applicant are factors that are both objective and subjective. Objective factors are those that can be observed and measured or counted, such as years of service, scores on a numerical student feedback evaluation, number of articles published, or the number of committees on which an applicant served. Subjective factors, on the other

hand, are those that are open to interpretation by those assessing the applicant, such as the reputation of a faculty member's graduate degree awarding institution, value of service activities, or quality of teaching. A faculty member's ability to work in harmony with others is also an area that is widely open to subjective interpretation (Leap, 1995).

The use of subjective criteria in reappointment, promotion, and tenure decisions raises the possibility of reviewers masking discriminatory attitudes behind subjective standards. Congress recognized this possibility when it decided in 1972 to include academic institutions under Title VII of the Civil Rights Act of 1964, which is further discussed later in this review. In a discussion, Congress noted that the central problem of employment discrimination was not blatant discrimination but rather hidden biases that could be used to systematically exclude women and minorities from discrimination. Such biases could be hidden under facially neutral employment criteria (Leap, 1995).

In addition to masking possible discrimination, the use of subjective criteria and their lack of measurability raises additional debate about tenure and promotion decisions as potentially harmful to academic freedom. A scholar who responds unfavorably to an applicant's tenure application may do so based on his or her own beliefs about the value of an applicant's research or about the quality of an applicant's service activities. Likewise, a voting scholar may feel threatened by the scholarly viewpoints of an applicant.

Courts and criteria. Courts have confirmed the need for institutions to be clear in establishing standards and procedures for the evaluation of tenure candidates. As an example, the court in *Taggart v. Drake University* (1996) determined that the university's

evaluation procedures created an enforceable contract. In light of the contract, the court ruled that Drake University did not need to provide more criteria than what the contract specified.

Record of research and publications. A faculty member's record of research and publications is commonly referred to as scholarship. Scholarly activities often form the primary basis for promotion, tenure, and compensation activities, particularly at four-year institutions. Those who promote an emphasis on research and publications view knowledge creation as lying at the heart of higher education. By publishing, ideas can be challenged and improved. In addition, proponents argue that it is a more objective measure of faculty performance than is teaching effectiveness, with external and internal evaluations of publications being regularly practiced (Leap, 1995).

Opponents of the focus on research and publications argue that such activities detract from excellence in teaching. Particularly at the undergraduate level of teaching, the skills necessary for classroom teaching are quite dissimilar from those required to perform valuable research. The highly specialized scholarship that is often pursued in universities is criticized for its time-consuming nature, lack of relevance, and narrow constraints (Leap, 1995).

The publication of research results in peer-refereed journals is the gold standard for quality in academia. This focus on research is attributed to the onus upon universities to create knowledge through research and to disseminate knowledge through teaching. As technology and knowledge rapidly change, scholars who have an active research agenda are thought to be the most aware of changes. Professors who actively engage in

research may then be best poised to bring new ideas and intellectual prowess into the classroom. Accordingly, a focus on research effectively brings the focus to teaching. The acclaim brought to an institution based on a researcher's excellence is likewise valued. By gaining attention and prestige through quality research, a college or university can then attract quality faculty, grants, and external funding (Leap, 1995).

Assessing a faculty member's record of research and publications is performed using objective and subjective factors. A quantitative summary of publications, while seemingly objective, does little to assess quality or impact of the publication. Differences arise among disciplines, peer review committees, department heads, and deans as to the value of various journals, based on their focus and orientation as theoretical or practical (Leap, 1995).

Reviewing a faculty applicant's scholarship can also be influenced by the use of external evaluators. In order to assess the quality and impact of a scholar's research, letters are often sought from professors who are affiliated with other universities. Peer reviewers who attempt to assess a colleague's highly specialized research may benefit from the expertise of an external reviewer who knows more about the applicant's research. Potential accusations that a decision was discriminatory may be thwarted by the use of an outside reviewer, though the same biases that can affect internal reviewers can be found in external reviewers. Perceived fairness can also increase when a faculty candidate is able to name his or her reviewers (Leap, 1995).

Teaching effectiveness. A criterion for promotions and tenure, student reaction to a professor's teaching effectiveness has been deemed by the Eighth Circuit Court of

Appeals as a "legitimate, nondiscriminatory factor on which to evaluate tenure candidates" (Leap, 1995, p. 92 quoting *Brousard-Norcross v. Augustana College Association*, 1991, p. 976). Even so, teaching effectiveness can be difficult to measure. Criteria used can lack reliability and validity; students who complete questionnaires about their professors' performance may deem them useless and a bother to fill out (Leap, 1995).

The stated importance of teaching effectiveness, given by college and university administrators, is often perceived differently by faculty. Differences in perceptions can be exacerbated by a lack of definition of what constitutes effective teaching. The diversity of characteristics that make up a good teacher, the cultural diversity of students, and the individualized nature of the learning experience are among the factors that make defining effective teaching particularly difficult. In addition, who does the rating, the conditions under which the rating was performed, and other issues of quality that extend beyond a teacher's control may greatly affect the perceived quality of a teacher's effectiveness. Thus, while scores on a professor's evaluation may appear to be objective measures, the selection and design of a measure of teaching effectiveness is replete with subjectivity (Leap, 1995).

Service to the public, profession, or institution. Also subjective in measure, service activities are usually included as part of the formal appraisal process and can include service to the community or public, to the profession, and to the university. At most institutions, service is not highly valued in the tenure and promotion process. Even

so, commitments to service can be very demanding and can infringe upon an applicant's time for scholarship and teaching (Leap, 1995).

Collegiality. Establishing and maintaining good working relationships with administrators, colleagues, and students is an unwritten expectation of faculty members. Disputes may arise from personality and disagreements over professional issues and schools of thought. As well, disputes may be caused when faculty members harm working relationship and create ill will among colleagues (Leap, 1995). Increasingly used to evaluate faculty, considerations of an applicant's collegiality qualifications can increase the political stakes of the tenure process.

Courts have viewed collegiality as a valid basis upon which colleges and universities can make tenure, promotion, or termination decisions for many years (Connell & Savage, 2001; Connell, Melear, & Savage, 2011; Leap, 1995). Collegiality is usually deemed by the courts to play an important role in the ability of higher education institutions to fulfill their missions. Even so, case law did not focus on the term "collegiality" until 1981 in the Fourth Circuit case of *Mayberry v. Dees* (Connell & Savage, 2001), in which the court introduced the collegiality as a distinct criterion for use in tenure and promotion decisions. The court defined collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests" (Connell, Melear, & Savage, 2011, p. 532 quoting *Mayberry v. Dees*, 1981, p. 514). Since *Mayberry v. Dees* (1981), most courts that have addressed a faculty member's working relationship with colleagues in consideration of an employment related decision have upheld the use of collegiality as a factor (Connell,

Melear, & Savage, 2011). In a review of court cases from 2000 to 2010, Connell, Melear, and Savage (2011) found the most heavily litigated area in collegiality cases is that of tenure and subsequent nonreappointment of a nontenured faculty member. In a great majority of cases, courts have given almost unanimous support for consideration of collegiality (Connell, Melear, & Savage, 2011).

Despite the courts' acceptance of the use of collegiality as a factor, it is an issue that is at the forefront of higher education policy debates (Adams, 2006-2007; Connell, Melear, & Savage, 2011; Johnston, Schimmel, & O'Hara, 2010). The debates raise many questions as to whether one's ability to fit in or to get along should be used as a requirement, whether it should be considered as a separate factor or as part of other factors, and what weight it should be given. Arguments for using it as a factor include the need for faculty to work well within and for the benefit of a system, the fact that most all hiring and promotion decisions involve some measure of collegiality, and courts' acceptance of the factor as legitimate. Arguments against considering collegiality as a separate consideration include that considering collegiality could constitute a breach of contract, if it was not specifically mentioned in the contract as a criterion for tenure and promotion decisions; that the subjective nature of collegiality could allow its consideration to be used as a pretext to mask unlawful discrimination; and that using collegiality as a distinct criterion could harm academic freedom (Adams, 2006-2007; Connell & Savage, 2001).

The debate, at least in part, arises from the varied perceptions of collegiality that exist in higher education (Adams, 2006-2007; Connell, Melear, & Savage, 2011;

Johnston, Schimmel, & O'Hara, 2010). Academics tend to view collegiality as an ability to fit in, to be a team player, and to contribute usefully to academic responsibilities. Fulfilling responsibilities such as mentoring, recruiting, and administrative roles may all be factors. Many court decisions, which largely agree with the views of academia, have described both collegial and uncollegial behaviors, and have differentiated collegiality from congeniality (Connell, Melear, & Savage, 2011).

Another aspect of the debate is that the professoriate is not fully in agreement with having collegiality as a fourth criterion. Critics note the amorphous nature of the construct, and the AAUP has advised against including it as a separate entity, while recognizing the importance of respect for the opinions of others as well as for each other (Adams, 2006-2007; Johnston, Schimmel, & O'Hara, 2010). Johnston, Schimmel, and O'Hara (2010) recommended delineating and validating behavioral indicators through a model of collegiality, as a tool for effective job descriptions and reviews. They argued that using a model would help to better communicate expectations and to address the academic freedom concerns raised by the AAUP. Zirkel (1984-1985) suggested that when an institution does adopt collegiality as a criterion, it should be defined clearly and interpreted narrowly in order to not impede the flow of ideas. The support of courts for collegiality as a factor and an increasing use of the factor by departments, schools, and institutions reflect a growing trend in the realization by faculty and administrators that collegiality is an important factor to consider in long-term, binding decisions such as a grant of tenure (Connell, Melear, & Savage, 2011).

Grievance Procedures

A faculty member who receives an unfavorable decision in reappointment, promotion, or tenure may be angry or frustrated (AAUW, 2004). Measures employed by an institution to mitigate hurt feelings can help lessen the likelihood of litigation. Meeting with a candidate to explain the decision and to listen to the candidate’s concerns, for example, may soften an unexpected blow (Franke, 2010). As part of the process, an unsuccessful applicant is typically offered the opportunity to appeal the decision through established grievance procedures. Public institutions are bound by state administrative laws, which typically require a plaintiff to exhaust all remedies through the grievance procedure prior to resorting to the court system. Private institutions, which are not typically deemed agents of the state, are not bound to the administrative laws of the states. Even so, courts may require plaintiffs from private institutions to follow any available internal grievance procedures before bringing a case in court (Kaplin & Lee, 2006).

A grievance committee, comprised of faculty outside of the faculty member’s department, is typically established through the faculty senate, as an independent committee, or as part of a collective bargaining agreement. The grievance committee serves three primary functions: (a) to help resolve the dispute between the faculty member and the institution as to whether tenure or promotion was deserved; (b) to determine whether due process was afforded to the faculty member; and (c) to ensure that the adverse personnel decision was not made based on the faculty member’s race, sex, or age or for other potentially illegal reasons (Leap, 1995).

A grievance committee is likely to admit certain pieces of evidence, such as the scholarship of the applicant. The committee also might accept testimony from various interested parties. After receiving the evidence, the grievance committee then submits a recommendation to the chief academic officer, who may then sustain or reverse the adverse personnel action. Grievance procedures that are clearly established and followed help to assure that a faculty member who has been denied reappointment, promotion, or tenure is granted due process and the opportunity to learn more about his or her individual situation. Likewise, conflicts may be diffused by allowing a grievant to understand more about the strengths and weaknesses of his or her case. A grievance procedure can also help the parties involved in the process to make reasonable personnel decisions that are based on pertinent information (Leap, 1995).

Although a thorough discussion of collective bargaining and its role in reappointment, tenure, and promotion practices is beyond the scope of this literature review, it is important to note that the collective bargaining process can nonetheless affect the grievance procedure. For example, unionized faculty members who are covered by a collective bargaining agreement may have options such as binding arbitration. Unionization also may preclude faculty members from using an internal grievance mechanism if they have filed suit through the EEOC or through courts (Leap, 1995).

Confidentiality of Peer Review

Evaluation proceedings are conducted in private; faculty members are not usually granted access to details about deliberations at the various levels of review (LaNoue &

Lee, 1987; Leap. 1995). Even so, the faculty member is typically notified of the progress of the application and whether his or her application has received favorable review at each stage of the process. When a review is unfavorable, tension can arise when an unsuccessful applicant's desire to have more information about the decision conflicts with the institution's need to protect the confidentiality of the proceedings. Especially challenging is an unsuccessful faculty member's demand for access to confidential files and other documents when pursuing tenure denial litigation (Leap, 1995).

A party's ability to access pertinent evidence that is crucial to his or her case is fundamental to the full and fair litigation of a case. In academia, this raises questions of whether recommendations and discussions made during the peer review process must be provided and whether identities of committee members can be redacted if and when the information must be provided. Peer review evaluations, letters of recommendation, and committee deliberations, for example, may be replete with evidence of discriminatory treatment by a reviewer involved in the process (Leap, 1995).

Qualified privilege. While an unsuccessful applicant in a tenure decision is likely to seek information about an adverse decision, an institution's officials and legal counsel may strive to keep peer reviewers' discussions confidential, claiming that certain information is protected by a qualified privilege and is not subject to disclosure (Leap, 1995; Poskanzer, 2002). Subpoenas requesting information have been challenged on issues of overbreadth, irrelevancy, confidentiality, and guarantees under the First Amendment of the U.S. Constitution, among others (Leap, 1995).

Limited professional relationships enjoy a qualified privilege to protect the confidentiality of communications. Such protections honor the public interest in protecting open and honest communications in relationships that outweigh a societal need for disclosure of sensitive information. Examples include attorney-client, priest-penitent, husband-wife, and newspaper reporter-informant. Courts have been divided on whether universities enjoyed a qualified privilege for tenure proceedings, as confidentiality in academia does not fall into a traditionally recognized category. Trending towards greater access, courts have eroded institutional protections and have allowed faculty members and the EEOC access to confidential peer review materials (Leap. 1995).

On the one hand, institutions argue that compelling disclosure of sensitive materials and discussions would place a damper on the entire process and detract from open and honest conversations. Without guarantees of confidentiality, peer reviewers and administrators would be less likely to candidly assess an applicant's work, which could erode the entire tenure and promotion process. On the other hand, if promotion and tenure documents receive unlimited qualified privilege protections, a plaintiff's chances of proving a valid claim of employment discrimination are minimal if the plaintiff is denied access to pertinent evidence. Because evidence may be circumstantial and nuanced, it must be gleaned from personnel records and testimony of the reviewers (Leap, 1995).

Academic freedom. Some who argue in favor of greater openness and less confidentiality or privilege contend that academic freedom would be enhanced. Removing any confidentiality protections or privileges would bring openness to the

process beyond a small group of scholars. Negative employment decisions made in response to a faculty member's unpopular ideas implicates the protections of the First Amendment and academic freedom. In such instances, the threat to academic freedom arises from within the institution, rather than external from it. With greater openness, peer review committees who may be inclined to deny tenure to a faculty member solely based on his or her unpopular views would be exposed to greater scrutiny. Others who argue in favor of confidentiality or privilege submit that reviewers who are assured confidentiality might be more thorough in their deliberations. Whether secrecy improves the quality of decision-making or protects or diminishes academic freedom has been greatly questioned (Leap, 1995).

Discovery rules. The Federal Rules of Evidence (FRE) are liberal as to a faculty member's ability to obtain information on any relevant matter, so long as the information is not privileged. Any proposed evidentiary privilege must be analyzed through the lens of four sources: (a) federal statutes, (b) U.S. Supreme Court Rules, (c) common-law principles, and (d) U.S. Constitutional principles. The explicit right of institutions of higher education to use a qualified privilege to protect tenure and promotion files does not exist; rather, any right granted by courts has arisen under the auspices of institutional academic freedom (Leap, 1995).

FRE 501 allows those who are defending an institution against charges of employment discrimination to work within the liberal discovery rules. If necessary to protect a party from unreasonable requests and associated difficulties, a court may require a litigant to exhaust all other alternative means to obtain the desired materials prior to

requiring a party to disclose confidential information. Competing interests are weighed by a court including the social benefits of discovery as a means to eliminate employment discrimination and the private interests of the college or university in preserving academic freedom and the work of the peer review and administrative committees (Leap, 1995).

Common law rules may also be called upon in information discovery. An institutional claim of common law academic privilege will necessitate a court's examination of the interests of the plaintiff. Free accessibility of evidence is strongly supported in the common law. As well, the congressional extension of Title VII to higher education institutions supports the right of a faculty member to obtain confidential promotion and tenure files (Leap, 1995).

Qualified privilege and the courts. Disparity has existed in courts' willingness to protect the claimed qualified privilege of academia in reappointment, promotion, and tenure records and proceedings. Academic freedom interests of the individual and the institution have been weighed and debated as well as the integrity of the peer review process. While some courts have recommended a balanced approach and a weighing of interests, other courts have rejected the qualified privilege protection. Prior to 1990, plaintiffs had a difficult time in the process of discovery of peer review materials. Institutional claims of academic freedom were successful in many Circuit Courts, though not in all. Plaintiffs who sought to show discriminatory intent under a Title VII claim experienced particular difficulty extracting the information necessary to show discriminatory intent, particularly when institutions could obtain protective orders

allowing them to redact certain information from the peer review materials. Courts grappled with the question as to whether defendants could be compelled to disclose confidential discussions and votes of the peer review committee, pursuant to evidentiary rules (Leap, 1995).

The U.S. Supreme Court in *University of Pennsylvania v. Equal Employment Opportunity Commission* (“EEOC”) (1990) squarely addressed this issue and upheld the EEOC’s need to be able to obtain peer evaluation materials. The Court also refused to require the EEOC to demonstrate a specific need for the evaluations before it could obtain them. In addition, the Court refused to adopt a balancing test proposed by the university or to create a special academic privilege. Several important considerations grounded the Court’s decision, including: (a) Congress extended Title VII to higher education institutions in 1972, without including a special privilege; (b) Title VII provides the EEOC with broad access to relevant evidence; (c) sanctions are available under Title VII if the EEOC discloses confidential information; and (d) peer evaluations are subject to harboring evidence of discrimination (Kaplin & Lee, 2006; Leap, 1995).

While the *University of Pennsylvania v. EEOC* (1990) court clarified an institution’s responsibility to provide peer review materials when those materials were requested by the EEOC to investigate an employment discrimination claim, and when the materials were shown to be relevant, the case left open two issues. First, it left unanswered the rights of a faculty member to obtain peer review files, when the claim was not pursued through the EEOC. Second, it left unanswered the question of seeking the files when the claim was based on something other than Title VII.

Participation in the process. Poskanzer (2002) called the overall tone of the Court's decision in *University of Pennsylvania v. EEOC* (1990) "rather hostile to higher education" (p. 153), in that it rejected higher education as being unique. He raised further questions as to the rigor of peer review and the possibility that reviewers would be unwilling to put anything in writing (Poskanzer, 2002). This and other legal developments advocating disclosure may discourage members of peer review committees and administrators from keeping detailed records of their deliberations. Letters of evaluation and comments on research and publication may be superficial and guarded (Leap, 1995). Poskanzer (2002) asserted, however, that both scholars and institutions "should be comfortable making and expressing hard-headed judgments about quality," and that those who have "nothing to hide . . .[have] nothing to fear" (p. 154).

State public disclosure laws. Some public disclosure laws have arisen in states allowing access to public documents, data, and meetings. Courts continue to resolve whether these laws require access to promotion and tenure documents. The uncertainty of the evolving law may discourage reviewers and administrators from keeping detailed records of deliberations about a particular candidate (Leap, 1995).

Changes in the Tenure Process

The promotion and tenure system has been criticized as outdated and in need of significant overhaul (Fishman, 2005; Tierney & Bensimon, 1996). Tierney and Bensimon (1996) urged changes in the socialization process, with particular emphasis on mentoring and setting clear expectations. Fishman (2005) advocated that tenure processes should "evolve to attenuate" the problem of disparity of policies that are

particularly harsh to women on the tenure track. Suggestions for increased flexibility in the process have included extending the probationary period for those recently hired professors who need it and allowing for part-time status (Fishman, 2005).

Tenure Denial Litigation

Higher education and the tenure system developed with little influence from the courts. Before the early 1970s, scant literature existed that focused on—or even mentioned—court cases and their influence on colleges and universities. Brubacher opined in 1973: "Time was when higher education was a self-governing community and, internally, a law unto itself. Recently, all of this has changed" (p. 267). The 1991 amendments to Title VII that allowed plaintiffs to try federal discrimination cases before juries rather than judges contributed to a substantial increase in the number of discrimination lawsuits (Franke, 2010).

Franke (2001) reported that the number of employment discrimination cases had risen from 8,400 in 1990 to 23,700 in 1998. She stated that the number of tenure denial cases was unavailable, but suggested that they, too, had increased. Since data sets about tenure awards and denials, internal appeals pursued, lawsuits filed regarding tenure denial, or number of dismissal proceedings against tenured faculty do not exist (Franke, 2010), commonalities and inferences about lawsuits and relevant policies and procedures about tenure denial claims must be derived from court proceedings of cases that reach litigation and associated media accounts.

As litigation involving higher education has become more prevalent, so too has the number of scholarly articles pertaining to legal influences increased. The literature

has evolved to reflect "[t]he increasingly intimate relationship between government and higher education" and the reality "that colleges and universities are in and of the world, not removed and protected from it" (Schmidtlein & Berdahl, 2011, p. 83). The gravity, substantial stakes involved, and emotional toll that tenure and promotion decisions exert make such decisions among the actions of a department "the most fundamentally important kind of conflict an academic unit can experience" (Hearn & Anderson, 2002, p. 506).

Because understanding the court system is imperative to understanding the progression or significance of cases in tenure litigation, a brief review of the court system in the United States is first covered in this section. Next, the concept of judicial deference will be discussed. Reasons for the rise in tenure litigation will then receive attention, followed by the costs of litigation, and the burden of proof when presenting a case. The legal bases for tenure litigation then receive full attention. This section then revisits the criteria for evaluation in the context of cases that have considered those criteria. Finally, a brief discussion of remedies is provided.

The Court System

United States federal and state courts perform three primary roles when dealing with problems involving colleges and universities, including: (a) settling controversies by applying appropriate laws or principles of laws to a specific set of facts, (b) construing or interpreting acts of the legislature, and (c) determining the constitutionality of legislative enactments (Alexander & Alexander, 2011). The U.S. court system is one

branch of the three parts of the tripartite system. It is provided for by the constitutions of federal and state governments (Alexander & Alexander, 2011).

Federal courts. Article III of the U.S. Constitution states, in part: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" (U.S. Const. Art. III § 1). Pursuant to this provision, the Supreme Court of the United States is the highest court, and Congress has established a network of "inferior" courts including District Courts, Courts of Appeals, and Special Federal Courts. Most education cases that go before the Supreme Court are taken on a *writ of certiorari*, a process by which a case is removed from an inferior to a superior court. Rulings from the Supreme Court become precedent. Decisions of the Federal Circuit Courts of Appeals are significant and binding in within the jurisdiction of a particular circuit. The decisions are particularly instructive when no appeal of the opinion has been made, the Supreme Court has affirmed the case, or the Supreme Court has refused to hear the case on appeal. Federal District Courts are courts that have original jurisdiction to hear a case. Issues of law arise when two District Courts or two Circuit Courts reached disparate results under similar facts. Such instances usually result in an appeal to a higher court, which then resolves the issue (Alexander & Alexander, 2011).

State courts. State court systems are organized similarly to the federal court system. The constitutions of the various states provide for the separation of powers within the state and provide the framework for a state's court system. The primary state courts are usually provided for by constitution. Operation of the constitutional courts is

usually provided for by the constitution and delegated to the powers of the legislature. State courts usually include courts of general jurisdiction, courts of specific jurisdiction, small claims courts, and appellate courts. The appellate courts are found in all states and are usually called Supreme Courts or Courts of Appeals, though the names of the courts may vary from state to state. Some state systems, like the federal system, have intermediate appellate courts. State court decisions serve as precedent only within the borders of that state. Even so, a decision rendered in one state can be persuasive as to how another state's court might rule when faced with similar facts. Opinions rendered in the highest court in the state have the most influence (Alexander & Alexander, 2011).

Courts and Deference to Higher Education

In general, courts have been reluctant to impose their views upon institutions of higher education in the realm of employment decisions (Leap, 1995; Poskanzer, 2002). Tenure denial decisions, in particular, are not likely to be reviewed by courts. When cases are reviewed, a denial of tenure will likely be affirmed, so long as the institution followed its own prescribed procedures or if bad faith on the part of the institution is not obvious. Such deference is rooted in a claim of lack expertise by the court, an institution's collective professional judgment, and the long lasting effects on an institution's decisions particularly as to economics (Kaplin & Lee, 2006; Leap, 1995).

Courts are particularly reluctant to function as super-tenure review committees (Leap, 1995). Tenure cases require a court to weigh an institution's autonomy against a faculty member's civil rights. The subjectivity inherent in the system is particularly challenging for the courts. Frequently cited for the principle of judicial deference to in

academic employment decisions of tenure, the court in *Lieberman v. Gant* (1980) expressed frustration over the review of a lengthy, multi-year, fact intensive case and described in dicta the court's extremely deferential stance.

The anti-interventionist attitude that has been expressed by some state and federal courts in employment discrimination litigation has been criticized. Although the concept of academic freedom my theoretically be at the core of the doctrine of judicial deference, courts have recognized that not every academic decision requires deference. For example, in response to the majority opinion in *Namenwirth v. Board of Regents of the University of Wisconsin System* (1985), Judge Swygert expressed in a dissenting opinion a lack of distinction between a tenure decision and any other employment. The judge noted the courts' willingness to intervene when subjective judgments made about blue-collar workers were suspicious. Because lawyers are trained in academia, the judge reasoned, courts are even better prepared to scrutinize decisions made in the academic world than in the blue-collar world. Judge Swygert explained that the use of outside experts could be employed to correct for any lack of academic expertise, particularly in the assessment of the quality of a faculty member's research and scholarship (Leap, 1995 citing *Namenwirth v. Board of Regents of the University of Wisconsin System*, 1985).

Scholars have also criticized the anti-interventionist attitude of courts as having created different standards for selection and promotion systems, based on the social and economic status of the particular jobs being reviewed. Increased complexity of a job increases the courts' demands for more convincing evidence that an employer engaged in illegal employment discrimination (Leap, 1995). As cited in Leap (1995), Bartholet

(1982) attributed such deference to judges' identification with—and thus upholding of—employers with whom they identify. Since judges came from and benefited from academic systems, they are more likely to profess a lack of expertise and to respect the decision-makers involved. The unfamiliar language surrounding academic employment decisions may make judges want to leave the decisions to academicians (Leap, 1995).

While courts lean towards deference, Leap (1995) reported an "increased willingness of federal courts to invade the sanctity of college and university personnel decisions" (p. 68). In rendering decisions, courts examine documentation surrounding reappointment, promotion, and tenure decisions. Courts focus on procedural fairness and substantive reasonableness, with deference to the professional judgment to the institutional professionals. One aspect of consistency is to make sure that decisions are fair among candidates. Another is to assure consistency over time for a particular candidate (Franke, 2010). Consistency must be weighed, however, in the context of the highly individualized nature of tenure decisions. "[T]he inconsistent evaluations might each be correct when differing audiences and circumstances are taken into account" (Franke, 2010, p. 4 quoting *Bresnick v. Manhattanville College*, 1994, p. 329).

Reasons for the Rise in Litigation

From the 1970s forward, promotion and tenure have become more difficult to achieve (Altbach, 2011a; Leap, 1995). The 1970s brought fiscal problems in institutions and a deterioration in the faculty job market that resulted in difficulty for young professors to be promoted. Tenure quotas were imposed at some institutions, while other institutions raised their standards for awarding tenure. The complications that gave rise

to debates in the 1970s again surfaced in the 1990s, stimulated by many of the same concerns as the earlier period (Altbach, 2011a).

Practices that have contributed to the rise in lawsuits include a lack of institutional support or resources, thus making it difficult for a faculty member to achieve acceptable performance; an institution's failure to adhere to its own policies and standards; political rather than academic reasons; an institution's failure to apply promotion and tenure standards consistently; and peer review committees' prejudices (Leap, 1995). Added to these problems is that institutions are moving towards using more part-time and nontenure-track faculty lines, as budgetary constraints and program needs alter the landscape. A decline in the number of tenure-track positions available in combination with more stringent qualifications for achieving tenure make lawsuits even more likely (Hendrickson, 1999). Moreover, while court intervention may be seen as intruding upon the academic freedom of some academicians who wish to make decisions about who can join their ranks, other faculty members may insist that in bringing a lawsuit they are seeking protection of their own academic freedom, by challenging the status quo decisions of a peer review committee.

The Costs of Litigation

No matter who prevails in a tenure denial case, litigation is costly (Franke, 2001; Leap, 1995; Poskanzer, 2002). For faculty members who bring suit, the litigation process alters participants' lives and their working environment (LaNoue & Lee, 1987). Litigation represents the commitment of great emotional and financial resources and can leave individuals feeling emotionally and financially drained. Plaintiffs must prepare for

cases and often become alienated from their department or colleagues as they transition from colleague to adversary.

Academic departments may be divided as to the correct position on a case. Being advised by a lawyer may mean that individuals must be more cautious about their conversations and actions. Tensions are likely to increase in the network of departmental interactions, and once cordial relationships may become strained or nonexistent. Collectively, the issues may create an undercurrent that leads to dysfunction in the department and greater university community (Leap, 1995).

From an institutional perspective, being sued or threatened with suit can harm the informal cultural context and the more formal structures of the institution. Institutions that defend a tenure claim must commit staffing and financial resources. Although costs are often fixed for staffing resources, particularly in institutions that have in-house counsel, the resources directed towards litigation are diverted from other departments and from the core mission of the institution. Added to the great financial burdens of long and protracted administrative hearings and litigation are the costs of layers and procedures for making decisions (LaNoue & Lee, 1987).

Moreover, litigation highlights problems that exist at the convergence of cultural, managerial, and legal factors (Leap, 1995; Poskanzer, 2002). As Poskanzer (2002) explained, “Intra-university disciplinary hearings and extra-university lawsuits are extreme forms of unresolved community conflict” (p. 257). Litigation is likely to heighten that conflict. When an issue must be adjudicated by the courts, both parties are seeking to win rather than to build a mutually acceptable solution to a management

problem. The negative publicity of a case may harm an institution's ability to attract the best and brightest faculty and students.

Burden of Proof

A plaintiff's decision to sue a college or university for wrongful discharge or discrimination requires that evidence is gathered to support the claim of an illegal employment decision. Evidence is gathered from personnel folders, faculty handbooks, depositions and testimonies, letters and memoranda, records of scholarship, and teaching evaluations. Statistics may likewise be used to support a claim an illegal employment decision. Initially and ultimately, the plaintiff has the burden of proof. This means that the plaintiff will have to convince the judge or jury, as trier of fact, of his or her qualifications to receive tenure or promotion, and that the facts of the case will support a claim for discrimination or some other claim (LaNoue & Lee, 1987; Leap, 1995). Upon meeting an initial burden of proof, the defendant institution must then show that its decision was grounded in proper reasons. An institution's proof must be sufficient to convince a judge or jury that its decision was appropriate (LaNoue & Lee, 1987; Leap, 1995). Defendant institutions may also demonstrate that the plaintiff did not satisfy at least one of the criteria, that it used proper decision-making criteria, and that it followed requisite procedures.

Legal Bases for Tenure Denial Suits

A measure of autonomy is provided to faculty and institutions in making employment decisions. Even so, decisional autonomy must be exercised under the umbrella of federal, state, county, and municipal laws—many of which overlap. Such

laws support the concept of diversity in academia and exert a significant influence over faculty employment (Poskanzer, 2002).

For higher education case law, a fundamental distinction exists between public and private institutions. Those that are *state actors*—colleges and universities that are considered to be part of the state or local government—are bound by different constitutional standards than those that are deemed private institutions. Thus, an institution is considered a private institution will have more flexibility in setting institutional conduct mandates than will a public institution, which is bound by constitutional dictates. Colleges and universities that are overseen, funded, and maintained by the state are most likely to be considered state actors. Private, denominational institutions are somewhat straightforward as nonstate actors. Not all institutions are easily categorized as state or nonstate actors, however, and some seemingly private institutions may be held to constitutional mandates. Thus, courts must often engage in factual inquiry to determine an institution's status (Poskanzer, 2002).

Discrimination and breach of contract claims are the most often used legal theories for bringing a tenure denial claim (ACE Report, 2000). Across the United States, discrimination laws vary widely in their protection of different classes of individuals and provide varied remedies for aggrieved parties. Each law has rules and guidelines as to the manner in which it must be followed (Poskanzer, 2002). Discrimination occurs when an employer uses a characteristic that is considered protected under the law to make an employment decision, rather than basing an employment

decision solely on a candidate's qualifications (Kaplin & Lee, 2006). In this section, the major sources of federal and state laws for tenure denial claims are discussed.

Federal laws. Federal laws have particular importance due to their comprehensive nature and remedies, national scope, and broad applicability (Kaplin & Lee, 2006; Poskanzer, 2002). While numerous federal laws pertain to employment and nondiscrimination issues, some are more likely than others to influence faculty and administrators in the academia, and more specifically, in tenure, hiring, and promotion decisions. Federal laws discussed below include Title VII of the 1964 Civil Rights Act, as amended; the Civil Rights Act of 1991; the Age Discrimination in Employment Act (ADEA) and the 1990 amendments, the Older Workers Benefit Protection Act; Affirmative Action; the Rehabilitation Act of 1973, Americans with Disabilities Act of 1990, and 2008 amendments, the ADAAA; U.S. Constitutional Amendments; the Post-Civil War Civil Rights Acts; Title IX; and Executive Orders 11246 and 11375.

Title VII. The most comprehensive federal employment discrimination law and most often invoked is Title VII of the Civil Rights Act of 1964 (AAUW, 2004; Kaplin & Lee, 2006). Title VII covers discrimination on the basis of race, color, religion, sex (gender), and national origin (Kaplin & Lee, 2006; Poskanzer, 2002). Employers with at least 15 employees are covered by Title VII; as such, virtually all higher education institutions are covered. Although higher education institutions were initially exempt from Title VII (Franke, 2001), the law was extended in 1972 to cover public and private educational institutions (Kaplin & Lee, 2006). Surrounding the passage of the amendments was much congressional debate about the pervasiveness of sex

discrimination in higher education employment practices. While the congressional debates that preceded the passage of Title VII in the 1960s lacked legislative history specific to institutions of higher learning, and the courts adopted an anti-interventionist policy regarding personnel decisions in higher education, the 1972 amendments served as a milestone for changing a policy that protected colleges and universities from employment discrimination charges (Leap, 1995).

Exceptions to the general prohibition against discrimination exempt religious institutions from Title VII religious discrimination claims (Kaplin & Lee, 2006). Pursuant to Title VII, religiously affiliated educational institutions may hire and employ faculty of a particular religion. To receive the exception, a college or university must be owned or substantially supported by a religious corporation, association, or society. Institutions in which the curriculum is directed towards the promulgation of a religious doctrine also qualify for the exemption (Leap, 1995).

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC), which may investigate discrimination charges and initiate lawsuits against violators in court or issue right-to-sue letters to complainants. An individual may file a Title VII claim in federal court once she or he has been issued a right-to-sue letter by the EEOC. Individual claims must be filed with the EEOC within 180 days following the occurrence of the alleged unlawful employment practice occurred, or within 300 days if a claim was first filed with a state or local civil rights agency (Kaplin & Lee, 2006; 42 U.S.C. § 2000e-5(e)). Because personnel decisions in colleges and universities commonly have multiple layers, and faculty members may have an additional terminal

year on their contract, following tenure denial, the timing issue of a claim can be difficult to pinpoint (Kaplin & Lee, 2006).

Sexual harassment is a violation to Title VII (and other state nondiscrimination laws) because an individual experiences harassment in the workplace and it is based on her or his sex. Male or female workers may be the victims of sexual harassment or the perpetrators of sexual harassment. With *quid pro quo* harassment—the exchange of sexual favors for employment benefits, or the threat of negative action if sexual favors are not given—the employer may be held liable, even if the victim had not reported the harassment. The standards are clear that the accused harasser must have the power to affect the employee's terms and conditions of employment. Sexual harassment that involves a hostile or offensive work environment, which can be created by virtually anyone that the target employee encounters due to the employment relationship, also may result in the employer being liable if the allegations are proven and if the employer cannot demonstrate an appropriate response when it learned of the harassment. The standards for establishing this type of harassment are less clear, and the case to be made is fact intensive (Kaplin & Lee, 2006).

The 1972 amendments making Title VII applicable to higher education were particularly aimed at ending discrimination against women and blacks, as expressed in extensive recorded congressional testimony (Leap, 1995; Poskanzer, 2002). Another amendment to Title VII, the Civil Rights Act of 1991, reversed in whole or in part seven of the decisions of the U.S. Supreme Court and addressed other employment discrimination problems as well. Particularly significant to colleges and universities was

that it increased potential financial liability for a guilty verdict of intentional discrimination. For cases in which compensatory or punitive damages are sought, the amendments allow a party to the case to demand a jury trial.

The two basic types of Title VII claims include disparate treatment and disparate impact. A disparate treatment suit is grounded in a claim that an individual was denied a job, promotion, or tenure, or claims a less favorable treatment than other applicants or employees because of his or her race, sex, national origin, or religion (Kaplin & Lee, 2006). Under a theory of disparate treatment, a plaintiff must show intentional discrimination by a peer review committee or academic administrators based on race, sex, age, or other impermissible grounds (Leap, 1995). Statistical analyses or institutional hiring, reappointment, promotion, or tenure decisions may be used. Qualitative comparisons and documentation of practices are other examples of possible proof (Leap, 1995).

Disparate treatment. Disparate treatment cases use the McDonnell Douglas-Burdine test for establishing proof. The test arose from two Supreme Court cases, *McDonnell Douglas Corporation v. Green* (1973) and *Texas Department of Community Affairs v. Burdine* (1981). In *McDonnell Douglas Corporation v. Green* (1973), the Court developed a burden-shifting paradigm. Later in *Texas Department of Community Affairs v. Burdine* (1981), the Court clarified that the employer's burden within the paradigm (Kaplin & Lee, 2006).

The resulting McDonnell Douglas-Burdine test is a three-stage procedure. In the first stage, the plaintiff must demonstrate that she or he is a member of a protected class.

Every person can meet this requirement for Title VII, because "race" applies to discrimination against any racial group and "sex" applies to males or females. In the second stage, the plaintiff must demonstrate that she or he was qualified for the job. Proving qualifications can invoke particularly vague and subjective issues surrounding the reappointment, promotion, and tenure of professors. The U.S. Court of Appeals for the Ninth Circuit held in *Lynn v. Regents of the University of California* (1981) that objective qualifications, such as the plaintiff's years of experienced or number or articles published, should be considered during the early stages of the McDonnell Douglas-Burdine test. Subjective criteria, on the other hand, should be considered during the later stages of the process, so as not to make the burden of proof a one-step process and not to defeat the underlying purpose of the test (Leap, 1995).

Stage three of the McDonnell Douglas-Burdine test requires that the position for which the faculty member was rejected or not reappointed must remain open and the employer must continue to try to fill the position with candidates whose qualifications are equivalent or inferior to those of the plaintiff's. Thus, the tenured positions must have been open at the time the plaintiff was denied tenure at relatively the same time period in which the plaintiff was denied tenure. An issue of timing can be difficult to prove, because promotion and tenure decisions do not necessarily result in immediately replacing an unsuccessful candidate with a successful candidate (Leap, 1995)

If a plaintiff fails to establish a *prima facie* case, the Court may choose to enter a summary judgment for the defendant institution, thus ending the case. On the other hand, once a plaintiff is successful in establishing a *prima facie* case by establishing the

McDonnell Douglas-Burdine criteria, the burden of proof then shifts to the college or university to articulate a job related, legitimate, nondiscriminatory reason for its personnel decision. Financial exigency, changes in an academic program, or inadequacy in research productivity might all be considered legitimate reasons. A volleying of the burden of proof may then shift back to the plaintiff, who may present evidence that the defendant's actions were, in fact, discriminatory and that the defendant's explanation is merely pretext for discrimination (Leap, 1995).

Even when the burden shifts to the higher education institution to show nondiscriminatory reasons for its actions, the original and ultimate burdens of proof remain with the plaintiff faculty member. The defendant institution need not offer a substantial defense of its decision not to promote or grant tenure to a faculty member so long as there is not any evidence of discrimination. Disparate treatment cases ultimately rest on whether a faculty member would have been granted a favorable employment decision but for her or his race, sex, national origin, or other protected classification (Leap, 1995).

Another aspect of disparate treatment cases is when a complaint is based in circumstantial evidence. In the nonacademic case of *Saint Mary's Honor Center v. Hicks* (1993), the U.S. Supreme Court considered whether a court must rule in favor of a plaintiff once it determines that the employer's reasons for its actions lacked credibility. The Court held that a plaintiff in a Title VII cases must not only show that the employer's reasons for its personnel decision were pretextual, but that a plaintiff must also show that illegal bias was the true motive for the employment decision. Thus, while pretext may

form the basis for inference of discrimination, a court must still consider all relevant evidence in making a determination of whether the employment practices were illegal (Leap, 1995).

Disparate impact. While most Title VII litigation involving academia involves claims of disparate treatment, several class action complaints have been brought against higher education institutions pursuant to a disparate impact theory. Disparate or adverse impact suits are based on a claim that an employer's neutral policy has a discriminatory impact on the claimants (Kaplin & Lee, 2006). One major point of contention in a class action is usually the definition of the class, which can significantly impact the degree of liability that a college or university may have. Faculty in a class action suit have the burden of proving either (a) a system wide pattern or practice of disparate treatment, or (b) a facially neutral policy that affected one or more groups unfavorably. Class actions must meet the following requirements: (a) the number of persons in the class must be so numerous that filing multiple claims is impracticable, (b) there must be questions of law or fact that are common to the class, and (c) the claims or defenses of the faculty members and the college or university must be typical of the claims and defenses of the class (Leap, 1995).

Disparate impact cases have arisen following the U.S. Supreme Court case, *Griggs v. Duke Power* (1971). Duke Power discriminated against black employees who worked in their North Carolina facility by limiting their employment primarily to low-paying, unskilled jobs. Following the passage of Title VII of the Civil Rights Act of 1964, blacks could no longer be prohibited from obtaining better-paying jobs. Duke

Power then required a high school diploma of its employees and the passage of intelligence and aptitude tests. Because the tests were not significantly related to job performance, and because they effectively disqualified more black applicants than white, the U.S. Supreme Court ruled that these requirements were illegal. Leap (1995) described the *Griggs v Duke Power* (1971) case as "probably the most significant of all equal employment opportunity cases because it established the concept of disparate impact and held that even unintentional discrimination may be illegal" (p. 22). The ruling helped effectuate the civil rights laws that deal with employment discrimination (Leap, 1995).

Comparisons between faculty members and statistical analyses are often used to prove disparate treatment or disparate impact. One option for the comparative approach is for a faculty member to claim that her or his credentials are at least as good as those of the faculty members who have already been promoted or tenured. Another approach is for the faculty member to contend that her or his position was filled by a less qualified person. Courts are skeptical of comparisons because of the discretion they grant to institutions in employment decisions and because it is difficult to compare teaching, research, and service among diverse faculty members. The weight given to each category of criteria can, and usually does, differ in and between departments, as well as between institutions. Past performance and future potential are important to an employment decision. And time frames can make a difference in the needs and decisions of an institution.

Use of statistics. Statistical analyses may also be used to demonstrate patterns of discrimination in faculty employment decisions. Approved by the U.S. Supreme Court in *International Brotherhood of Teamsters v. United States* (1977) and *Hazelwood School District v. United States* (1977), the primary purpose of statistical comparisons is to show that a plaintiff would have received favorable treatment but for his or her race, sex, national origin, or other protected classification. In disparate impact cases or class action suits, statistical analyses may serve as the basis of the suit. In disparate treatment cases, statistics are commonly used with other evidence. Even so, the use of statistics often fails due to such flaws as unreliable or incomprehensible measures, confusion between relevant and irrelevant data, comparisons between things that are not comparable, gaps in the requirements of a statistical procedure and the data characteristics, and disregard for the possible effects of chance. These problems can contribute to judicial bias against statistics. Thus, while the courts do allow statistical proof, particularly at the *prima facie* stage of the academic case, statistical tests alone do not often provide proof of illegal discrimination and must be supplemented with qualitative or anecdotal evidence of illegal employment practices (Leap, 1995).

Parties who prevail in a Title VII suit may be granted remedies including reinstatement, back pay, compensatory and punitive damages (for disparate treatment discrimination), and attorneys' fees. Front pay may also be available if a plaintiff demonstrates that the discrimination reduced their ability to earn a future income at the level that they would have earned without the discrimination (Kaplin & Lee, 2006).

Civil Rights Act of 1991. An amendment to the Civil Rights Act of 1964, the Civil Rights Act of 1991 strengthened civil rights laws for persons bringing discrimination suits against their employers. It provided for the right to trial by jury on discrimination claims and introduced the possibility of punitive and compensation damages.

Age Discrimination in Employment Act. For persons age forty and older, the ADEA prevents adverse employment decisions based on age rather than qualifications or ability to perform a job competently (Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). It is contained within the Fair Labor Standards Act and is subject to the requirements of that Act (Kaplin & Lee, 2006). Pursuant to section 631(d) of the ADEA, there existed a "special rule" that allowed compulsory retirement for tenured professors in higher education institutions (Leap, 1995, p. 31). Until January 1, 1994, higher education institutions could thus require tenured professors to retire when they became 70 years old; the ADEA no longer allows for the involuntary retirement of tenured professors at age 70 (Kaplin & Lee, 2006; Leap, 1995). It is permissible under the ADEA, however, for higher education institutions to offer retirement incentives to older faculty, so long as they do not coerce a faculty member to step down (Leap, 1995). Colleges and universities may offer tenured professors retirement incentives with supplementary benefits that are reduced or eliminated on the basis of age, provided there is compliance with certain provisions (Kaplin & Lee, 2006).

Few faculty have filed cases pursuant to the ADEA against colleges and universities, as compared to the numbers of cases filed pursuant to Title VII.

Discrimination cases based on age commonly focus on whether the plaintiff has the physical ability to meet the requirements of the position. Unfair treatment and pay inequities often receive greater focus than do issues of reappointment, promotion, or tenure (Leap, 1995).

The EEOC is charged with enforcing the ADEA (Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). Similar to Title VII, both public and private institutions must adhere to the ADEA, and charges of discrimination may be rooted in theories of disparate treatment or disparate impact (Poskanzer, 2002). Also similar to Title VII, the plaintiff must first make a *prima facie* showing of age discrimination, and the burden then shifts to the employer to show that (a) "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" at issue (ADEA, 29 U.S.C. § 623 (f) (1); Kaplin & Lee, 2006); (b) distinctions among employees or applicants were "based on reasonable factors other than age" (ADEA, 29 U.S.C. § 623 (f) (1); Kaplin & Lee, 2006); or (c) in disciplinary or discharge cases, the action was taken "for good cause" (ADEA, 29 U.S.C. § 623 (f) (3); Kaplin & Lee, 2006). In 1990 the ADEA was amended to include the Older Workers Benefit Protection Act, which strengthened the protections for older workers' employee benefits from age discrimination.

Affirmative action programs. Affirmative action programs are designed to assist members of underrepresented groups to gain access to jobs that have historically been limited because of discriminatory practices. A series of executive orders and laws require higher education institutions that receive federal funding to adhere to principles of affirmative action. Adhering to such programs can be particularly difficult, because the

lines between legal affirmative action and reverse discrimination can be unclear. While colleges and universities must strive to employ female and minority faculty, they are not required under the auspices of affirmative action to hire or promote females or members of minority groups who lack the requisite qualifications (Leap. 1995).

Rehabilitation Act of 1973 and Americans with Disabilities Act of 1990. The Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 provide protection against discrimination when persons who are otherwise qualified for employment have a range of physical or mental disabilities (Leap, 1995). Enacted with the goal of bringing persons with disabilities into the mainstream of society, the laws apply to employers who have at least 15 employees and require that reasonable accommodations must be made that permit an employee with disabilities to do the job. Employers are not required to make accommodations that create an undue hardship (Poskanzer, 2002). The ADA Amendment Act of 2008 (ADAAA) became effective in 2009 and made changes to the definition of “disability” under the ADA. Through the changes, congress made it easier for an individual to establish that he or she has a disability, by encouraging broad construction of the term.

Relatively few cases have been filed regarding wrongful discharge or employment discrimination for disabled faculty members (Kaplin & Lee, 2006; Leap, 1995). Procedurally different than Title VII requisites, a public employee does not have to file discrimination charges with the EEOC before proceeding with an ADA claim. Likewise, the Rehabilitation Act allows nonfederal employees to circumvent the administrative

agencies and file charges directly in federal court. This aspect could decrease the time needed to resolve disability discrimination cases (Leap, 1995).

U.S. Constitutional Amendments. In considering employment discrimination law, the Constitution has its greatest importance in areas that are not covered by any federal statute, such as discrimination based on ages less than 40 or discrimination based on residence (Kaplin & Lee, 2006). The Constitution is less desirable for challenging employment discrimination than many statutory laws because standards of proof in constitutionally-based suits are more rigorous (i.e., varying levels of judicial scrutiny apply for different claims; proof of violations is heavily dependent on interpretation of precedent), and the EEOC or other investigatory agency does not drive the inquiry and enforcement. For those who do not meet statutory requisites, however, the Constitution may provide an avenue into federal court (Poskanzer, 2002).

The Fifth and Fourteenth Amendments to the U.S. Constitution have been interpreted to prohibit discriminatory action by the federal and state governments, respectively (Leap, 1995). The Fifth Amendment generally prevents the abuse of the authority of the federal government in a legal proceeding. The Fourteenth Amendment generally prevents the abuse of authority of state and local governments and assures substantive and procedural rights to citizens. Before the constitutional amendments can be applied in employment discrimination cases, there must be some degree of "purposeful" conduct from a state actor (Leap, 1995, p. 38 citing *Washington v. Davis*, 1976).

Equal Protection. In state institutions, faculty members may pursue civil rights actions against a college or university, using the Fourteenth Amendment's equal protection clause. The equal protection clause requires the government to treat similarly situated individuals in a similar manner and may be invoked when institutions engage in racist, sexist, or other discriminatory behavior (Leap, 1995). The level of scrutiny, or standard of review used by the courts, varies with the type of discrimination being challenged (Kaplin & Lee, 2006). Even when the equal protection standards are very demanding, such as for race and sex discrimination, it is common for courts to strike down discriminatory actions only when they are found to be intentional—excepting the federal statutes, which do not always require a showing of discriminatory intent (Kaplin & Lee, 2006).

Due Process. If an institution does not adhere to a prescribed promotion, tenure, grievance, or other civil service procedure, and if the lack of adherence is detrimental to a faculty member, the due process clause of the Fourteenth Amendment may be invoked (Leap, 1995). The due process clause of the Fourteenth Amendment requires that states shall not "deprive any person of life, liberty, or property, without due process of law." An example of a liberty interest includes a negative employment decision that causes an employee difficulty in obtaining employment elsewhere (Poskanzer, 2002). Property interests are raised in the case of tenure termination, but a tenure denial may or may not infringe a property or liberty interest that triggers due process protections (Kaplin & Lee, 2006). In a tenure decision, the institutional procedures themselves do not create a property interest (Kaplin & Lee, 2006 citing *Siu v. Johnson*, 1984).

Due process includes both substantive and procedural due process. Substantive due process claims may be brought by a faculty plaintiff who asserts that an employment decision was made for arbitrary, irrational, or improper reasons. If an institution has not interpreted its own policies correctly, substantive due process claims may be made (Leap, 1995; Poskanzer, 2002). To make claim, the plaintiff must demonstrate that the interest at stake is *fundamental* pursuant to the U.S. Constitution (Kaplin & Lee, 2006). Substantive due process rights in continued public employment have not typically found favor with federal courts (Kaplin & Lee, 2006).

If an institution's decision would infringe a property or liberty interest, procedural safeguards are required by the Constitution, before the decision becomes final. The requisite procedures include notice and an opportunity for a hearing. The institution must notify the faculty member of the decision and the reasons for the decision, and must then provide a fair opportunity for the faculty member to challenge the institution's reasons at a hearing before an impartial body (Kaplin & Lee, 2006).

Two seminal U.S. Supreme Court cases that established that faculty members have a right to a fair hearing whenever a personnel decision deprives them of a "property interest" or "liberty interest" under the Fourteenth Amendment's due process clause include *Board of Regents v. Roth* (1972) and *Perry v. Sindermann* (1972) (Kaplin & Lee, 2006; Poskanzer, 2002). In *Roth* (1972) and *Perry* (1972), which are the primary cases on faculty contracts, the Court distinguished between faculty members who are under continuing contracts and those who are employed under contracts that have expired (Kaplin & Lee, 2006).

In *Board of Regents v Roth* (1972), the Court was asked to consider whether the professor had a right to a statement of reasons and a hearing, pursuant to the U.S. Constitution. The respondent was hired as an assistant professor at Wisconsin State University for a fixed term of one year. Pursuant to a state statute, all state university professors were employed for one-year terms and became eligible for tenure only after four years of continuous service. The professor was notified by February 1 that he was not to be rehired, no reason was given, and no hearing was offered. The Court held that the professor had neither a "property" nor a "liberty" interest that had been violated by nonrenewal; thus, his Fourteenth Amendment rights had not been violated, and he did not have to be given a reason or a hearing for the nonrenewal (Kaplin & Lee, 2006).

In *Perry v. Sindermann* (1972), the professor was re-hired for ten consecutive one-year contracts, and then was not rehired. Relying on tenure guidelines that originated from the Board of the Texas College and University System and on an official faculty guide's statement regarding faculty tenure, Perry argued that the Board, in not rehiring him, had violated his Fourteenth Amendment right to procedural due process. The Court ruled that the professor had established a genuine claim to *de facto* tenure, and thus had a constitutionally protected property interest in continued employment (Kaplin & Lee, 2006).

Roth (1972) and *Perry* (1972) demonstrate that rules, policies, or institutional practices, as well as understandings between the faculty member and the institution can create an entitlement to continued employment and thus a property interest (Kaplin & Lee, 2006). These cases also exemplify the intertwining between constitutional rights

and issues of contract. While procedures alone or promises to observe procedures do not rise to the level of constitutionally protected property, a contractual claim may still arise under state law (Poskanzer, 2002). Contractual claims under state law are further addressed below in the discussion of state laws.

Post-Civil War Civil Rights Acts. The Civil Rights Acts of 1870 and 1871, which may be invoked instead of Title VII of the Civil Rights Act of 1964, effectuate the Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution, which granted rights to former slaves. Applying to both public and private employers, the 1870 Act (also referred to as the 1866 Act) prohibits race discrimination in the making and enforcing of contracts. Provisions of the act exist as codified statutes, with Section 1981 being commonly used in employment discrimination claims. The 1871 Act bars anyone acting pursuant to state or local laws from depriving an individual of constitutional or legal rights. Particularly useful against firms that have fewer than 15 employees, which are not covered by Title VII, the laws can also be used against higher education institutions when a plaintiff has missed the deadline to file within the time period of Title VII. In addition, compensatory and punitive damages are not limited under the post-Civil War laws (Leap, 1995). Provisions of the act exist as codified statutes, with Section 1983 being commonly used in employment discrimination claims.

Title IX. Title IX of the Education Amendments of 1972 disallows sex discrimination in educational programs or activities that receive federal financial assistance. Title IX applies to both employees and to students. What constitutes programs or activities is greatly controversial (Leap, 1995). While Title IX can be used

as a basis for employment discrimination suits, it is more often used as a basis of gender equity suits in intercollegiate athletics (Poskanzer, 2002).

Executive Orders 11246 and 11375. Paralleling Title VII, Executive Order 11246, as amended by Executive Order 11375, prohibits discrimination based on race, color, religion, sex, or national origin (Kaplin & Lee, 2006). Unique to the Executive Orders is that they apply only to contractors and subcontractors who received $10,000 or more in federal government contracts and federally assisted construction contracts. Private higher educations that receive federal funds are covered by the orders, and they must establish an affirmative action program (Poskanzer, 2002). However, church-related educational institutions are exempt from the orders (Kaplin & Lee, 2006).

The Office of Federal Contract Compliance Programs is responsible for enforcing the requirements of the Executive Orders. If the Executive Orders are violated, the primary remedy is a cutoff of federal funds and/or debarment from future contracts. The courts have found no private right of action in the orders (Kaplin & Lee, 2006).

State laws. In addition to federal laws, state laws are sometimes invoked in tenure denial litigation. State equal employment opportunity laws and constitutions may be used as a basis for some claims (Kaplin & Lee, 2006; Leap, 1995). Common law claims are also raised in certain instances of employment litigation.

Nondiscrimination laws. Discrimination claims are increasingly being brought pursuant to state nondiscrimination laws. Distinct from Title VII, many state laws do not have caps on damages. Establishing a *prima facie* case may also be easier under some state laws than under Title VII. Many states and the District of Columbia offer specific

prohibitions on discrimination based on sexual orientation in both the public and private sectors (Kaplin & Lee, 2006).

Breach of contract. Faculty are connected to their institutions through terms and conditions of their employment contract. Written or unwritten, the rights and obligations that exist between an institution and its faculty are determined by contracts. Contracts may spell out a faculty member's teaching, research, and service obligations as well as an agreed upon salary. Further guidance as to a faculty member's obligations may be incorporated into the contract via faculty appointment letters, handbooks, organizational policies, or institutional custom (Poskanzer, 2002).

Plaintiffs often rely on the law of contracts as a basis for tenure denial litigation (ACE Report, 2000). Interpretation of a contract is dictated by state common law (Kaplin & Lee, 2006; Poskanzer, 2002). The nature of academia and the special relationship between a higher education institution and its faculty often complicates the development and interpretation of faculty contracts. State courts differ in their views as to whether oral promises and incorporated documents create binding contracts (Kaplin & Lee, 2006).

While a court will typically first look to the plain language found in a contract, and written agreements in contracts will typically override any alleged oral agreements, a court must also fill in missing terms and pieces. To do so, a court will consider the intent of the parties. A court looking to discern the intent of the parties may consider academic custom and usage to help determine what the parties might have decided, had they addressed a particular issue that is not addressed in the contract. Academic custom and usage includes the established practices and understandings of a particular institution.

Academic custom and usage is not necessarily a written source of law, and even if written, it tends to be less formal than institutional rules and regulations. Policy statements, internal memoranda, and expert testimony may serve to inform a court about an institution's custom and usage and thus help to guide a court's interpretation of a contract. As an example, in the previously discussed due process case *Perry v. Sindermann* (1972), the U.S. Supreme Court looked to academic custom and usage to analyze a professor's claim that he was entitled to tenure (Kaplin & Lee, 2006).

Tort law. Few tenure denial litigation claims are grounded in tort. Theories used in tort claims may include defamation, fraud, and infliction of emotional distress, among others (Hamill, 2003).

Evaluation Criteria and Litigation

Tenure denial claims often involve complex issues and interactions (Franke, 2001). Multi-layered decision-making by peers and administrators as well as the subjectivity of the criteria are factors that contribute to the complexity of tenure litigation. Rather than taking issue with the criteria on which tenure is based, tenure denial claims frequently take issue with the fairness with which the institution administered the criteria (Leap, 1995). Tenure denial litigation has created the need for institutions to review their policies and procedures and to strive to make the application of criteria fair (Hendrickson, 1999; Poskanzer, 2002).

Subjective criteria, as discussed previously, are frequently the issue upon which cases dealing with wrongful discharge are based. Evaluations that are made on personal attributes pose a difficult dilemma for courts when faced with the tension between

academic judgments and possible discrimination. The U.S. Court of Appeals for the Seventh Circuit in *Namenwirth v. Board of Regents of the University of Wisconsin System* (1985) grappled with the issue of the decision-maker also serving as the source of the qualifications: "The courts have struggled with the problem since Title VII was extended to the university and have found no solution . . . winning the esteem of one's colleagues is just an essential part of securing tenure" (Leap, 1995, p. 73 quoting *Namenwirth v. Board of Regents of the University of Wisconsin System*, 1985, p. 1243). It is this subjectivity that invites the potential for the use of proscribed criteria to enter the promotion and tenure process—decision-makers could discriminate by choosing those candidates based solely on their race or gender.

Another focus of the case law is whether a faculty member did more than meet the minimum criteria set forth in an institution's faculty manual or handbook. Courts have typically held that a faculty member's achievement of the minimum standards does not per se warrant a favorable decision. For example, the First Circuit Court of Appeals explained in *Kumar v. Board of Trustees, University of Massachusetts* (1985) that "in the selection of a professor, judge, lawyer, doctor, or Indian chief, while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities" (Leap, 1995, p. 75 quoting *Kumar v. Board of Regents of the University of Wisconsin System*, 1985, p. 11).

Litigation based on record of research and publications. Faculty scholarship that was deemed insufficient to merit favorable employment decisions has been the subject of employment discrimination cases. Courts have been generally accepting of the

use of scholarship as a facially neutral, job-relevant requirement for making reappointment, promotion, or tenure decisions, and courts are typically reluctant to substitute their judgment for that of the institution regarding the merits of scholarship, unless there is evidence invidious discrimination or significant procedural irregularities. The difficulty of measuring research output and evaluating one person's scholarship as compared to another's was noted in *Chang v. University of Rhode Island* (1985), in which the Court explained that such comparisons of scholarship were "no easy task" (Leap, 1995, p. 90 quoting *Chang v. University of Rhode Island*, 1985, p. 1253).

Litigation based on teaching effectiveness. In *Brousard-Norcross v. Augustana College Association* (1991) and *Fields v. Clark University* (1992), two employment discrimination cases in academia that concerned teaching effectiveness evaluations, the plaintiffs complained that biased sampling measures were used as a means of dismissing the faculty members. Neither case resulted in the plaintiffs being able to persuade the court that the biased sample was used to engage in illegal discrimination (Leap, 1995).

Litigation based on service to the public, profession, or institution. Wrongful discharge or employment discrimination cases rarely arise from a professor's failure to perform service activities. In 1995 Leap found no cases that led per se to an unfavorable personnel decision, but did find one instance in which an inadequate service record contributed to an unfavorable promotion decision (Leap, 1995 citing *Ottaviani v. State University of New York at New Paltz*, 1989).

Litigation based on collegiality. Courts have found it acceptable to make adverse employment decisions on matters of collegiality, so long as such circumstances

are not rooted in illegal discriminatory motives. Because group dynamics depend on personal relationships, the motives and influences can be complex. In addition to substantive claims, faculty members who are denied tenure based on problems with collegiality can also claim that the institution's promotion and tenure guidelines or its employment contracts failed to reference collegiality or related criteria. Even so, courts may be reluctant to second guess tenure decisions and may view collegiality as essential to departmental functioning, even if not precisely expressed in the terms and conditions of an appointment (e.g., *Bresnick v. Manhattanville College*, cited by Leap, 1995).

Remedies in Tenure Litigation

In considering remedies, a court will examine the faculty contract, handbook, and policy documents to determine whether policies and procedures have been adequately followed. For example, if timely notice regarding a faculty member's tenure denial is not provided, a court may award damages pursuant to the contract (Kaplin & Lee, 2006). Upon a judgment from the court that is rendered for the plaintiff, three common types of remedies may be granted: damages, or a monetary award to a prevailing party; restitution, or the effort to prevent the defendant from benefiting from the plaintiff's loss; and coercive remedy, or the enjoining of a party through the issuance of an injunction, which orders the losing party to do something or to stop doing something (Alexander & Alexander, 2011).

In employment discrimination cases, relief sought commonly includes back pay, compensatory damages, punitive damages, and attorneys' fees (Leap, 1995). In disparate treatment cases, compensatory and punitive damages may be awarded, subject to

statutory monetary caps. In disparate impact cases, employers who have discriminated may be required to adopt and carry out affirmative action plans (Poskanzer, 2002). In rare instances, a court may even provide tenure or promotion to full professor as damages to the aggrieved faculty member (Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). Such a remedy is provided primarily when monetary damages cannot make the plaintiff whole, and when the institution is found to have discriminated against the faculty member Although the vast majority of tenure and promotion cases are decided in favor of the institution, several other grants of tenure by various courts have raised the question of whether courts and civil rights agencies are intruding jupon academic freedom by affecting appointments, particularly in Title VII cases. In such instances, judgments about academic quality can become theoretical, the line between process and substance can become blurry, and the consequences of correcting injustice can compete with the consequences of not doing so (Poskanzer, 2002).

In response to several U.S. Supreme Court cases, Title VII was amended by the Civil Rights Act of 1991. Prior to 1991, discrimination cases based on sex, religion, and disability were remedied primarily through an award of back pay. Compensatory and punitive damages were awarded only to plaintiffs in race and national origin cases. The 1991 law allowed all plaintiffs to be awarded compensatory and punitive damages in intentional discrimination suits. The amendments also allowed a jury trial in discrimination cases, which made it more attractive for faculty to bring suit. Even in absence of intentional discrimination, Title VII provides that courts may order remedies

including back pay, retroactive seniority, and certain affirmative action measures as deemed necessary (Kaplin & Lee, 2006; Leap, 1995).

Tenure Litigation Scholarship

Topics related to tenure are numerous and diverse. The aim of this section is to narrow the focus of the literature review to tenure litigation studies, and to provide context for the instant study. In particular, this section includes a review of selected studies that are either directly or closely related to tenure, promotion, or retention litigation. Beyond frequency counts or numbers of wins and losses, the studies reviewed are grounded in explaining the policies and reasons for the outcomes of the cases with attention given to relevant findings, conclusions, and recommendations. The need for the instant study is then presented in the context of the pertinent conclusions and recommendations.

Selected Studies

Ancell (1978) sought to identify the then-current legal profile of academic tenure, and to identify major trends in and practical effects of the shift in rules surrounding academic employment. The study was organized into three main sections: (a) the philosophical and historical bases of academic tenure, with a strong focus on academic freedom, which tenure was designed to protect; (b) the legal bases of tenure and pertinent judicial interpretations; and (c) the legal status of tenure, including issues and trends. Ancell (1978) concluded that academic freedom is not a legal right directly enforceable by the courts; academic tenure protects academic freedom and is grounded in both tradition and law; disputes that were once handled collegially were being taken to the

courts; courts were having a greater influence on academia; and the academic community must communicate to courts the principles and values deemed essential to academic freedom and tenure.

DiBiase (1979) looked to *Board of Regents v. Roth* (1972) and *Perry v. Sindermann* (1972), and 80 other cases to examine tenure principles that have been internalized by the courts, in post-1972 cases, as well as alternative-to-tenure principles and how they may conflict with tenure principles. Among several findings, DiBiase (1979) stated that tenure, as understood in academia, had not been fully upheld by the courts, and that courts had not substituted legal principles for basic principles of the profession. She also found that certain tenure principles were violated by alternative-to-tenure configurations. DiBiase (1979) stated that tenure in the academic world is unique, and that it is up to the professoriate to clarify its parameters. Further, the onus is on the profession to "stop the disintegration and repair the foundation" of tenure, or else actions that would endanger tenure could continue (DiBiase, 1979, p. 222).

Phelps (1979), also with a primary focus on *Board of Regents v. Roth* (1972) and *Perry v. Sindermann* (1972), examined the legal meaning of tenure in Tennessee public higher education, as influenced by state and federal court decisions. Looking at 138 cases, Phelps (1979) found the judiciary supportive of tenure, as a means to preserve academic freedom. A major concern of the courts in employment termination cases was due process. Courts were not concerned with the governance of higher education institutions, but compliance with terms of employment was a concern. He further found plaintiffs in sex or race discrimination claims to be usually unsuccessful. Phelps (1979)

recommended that institutions establish and follow well-defined policies and procedures in order to prevent litigation.

Boissé (1985) focused a study on cases brought in federal district courts during the years 1961 to 1980 in which tenured and nontenured faculty members brought charges against their institutions. The four broad areas of litigation included loyalty oaths or the abridgment of freedom of speech, termination, nonretention, and discriminatory or unequal treatment. Boissé (1985) found that institutions were successful in most lawsuits. In his conclusions, Boissé (1985) advised that institutions should carefully document their procedures and that the procedures should be strictly followed.

O'Neal (1992) examined cases and legislative history pertaining to Title VII and sex discrimination in higher education to determine employment discrimination issues and developments. Deeming these topics as areas of rapid growth for colleges and universities, O'Neal (1992) explained that the judiciary had become increasingly involved in such issues. She recommended that institutions have written and uniform policies with which institutions comply.

Timm's (1994) study zeroed in on the peer review process in promotion and tenure decisions in higher education. Using 93 court decisions from 1984 to 1990, the study included descriptive statistics of frequencies and percentages as well as qualitative data to assess the implication of the court decisions for colleges and universities. Looking at the independent variables of burden of proof, confidentiality, and documentation, and the dependent variable of the successful litigant, Timm's (1994) analysis showed no significant relationship between the level of burden of proof and

being the successful litigant. In addition to the issue of peer review, Timm (1994) identified six other points of law that were more often raised by litigants, including property interests, discrimination, letters of employment, civil rights, immunity, and due process. She stated that courts will review procedural issues, but are reluctant to preempt academic experts in academic qualifications and decisions. Recommendations from the study included that institutions increase their awareness of fair procedures, that the procedures are clearly written and established, and that procedures are followed as written and codified by the institution. Further, peer review committees must be trained to fully understand the needs of the department, the process, relevant legislation, and the fact that full confidentiality could not be assured.

Leap (1995) conducted a study on wrongful discharge and employment discrimination litigation in which he analyzed over 130 lawsuits that arose from faculty claims of discrimination in tenure, reappointment, or promotion decisions during the years 1972 to 1994. Discrimination issues included those of sex, race, national origin, religion, handicap or disability, and age. Leap (1995) concluded that the courts showed "an almost inordinate degree of respect for the complex faculty personnel decisions" that must be made in higher education institutions (p. 209). He also found that courts exert influence over decisions in academia "only to the extent necessary to ensure that illegal employment discrimination has not occurred" (p. 209). Leap (1995) also noted little to indicate that courts are willing to challenge promotion and tenure decisions, unless the court finds convincing evidence of disparate treatment or disparate impact. A third finding of Leap's (1995) study was that it is particularly difficult to prove illegal

employment discrimination, due to the considerable leeway courts have granted to institutions in justifying adverse promotion and tenure decisions. And he opined in his review that an important question remained unanswered as to "under what conditions the courts should be willing to drop their anti-interventionest posture and examine promotion and tenure decisions" (pp. 69-70).

A report published jointly by the American Council on Education, the American Association of University Professors, and the United Educators (ACE Report) (2000) identified four practices that institutions can employ to reduce the likelihood that a tenure denial will result in litigation, including: (a) clarity in standards and procedures for tenure evaluation, (b) consistency in tenure decisions, (c) candor in evaluations, and (d) caring for unsuccessful candidates. Clear standards and procedures should be communicated to all tenure-track faculty members, including the actual criteria and the respective weight given to the criteria. Consistency in tenure decisions includes a consideration of comparative elements and fairness among candidates and over time in the treatment of one candidate. Honest advice includes constructive criticism and evaluations that present a realistic prognosis. Caring for an unsuccessful candidate might include meeting with the candidate prior to the adverse decision and assisting an individual with seeking another position.

Troxel (2000) examined 81 state and federal cases from during the years 1993 to 1998 in order to ascertain the value of statistical evidence in employment discrimination litigation. Troxel (2000) organized the cases under either a disparate treatment or a disparate impact theory, and found that few disparate treatment cases made it to full trial.

In the majority of the cases, the institutions prevailed, even with the use of statistics. Troxel (2000) found that statistical evidence was used in conjunction with other evidence, such as historical and anecdotal evidence. She identified that a plaintiff who presents statistical evidence combined with other evidence would have "a good chance of surviving summary judgment and may prevail in an employment discrimination case, regardless of the evidence presented by the institution" (p. 227). She also suggested strategies that could improve communication and collaboration between institutions and their attorneys and offered risk management measures for minimizing future lawsuits. Troxel (2000) encouraged the use of employment law training to faculty, staff, and administrators; clear, concise, written policies and procedures; consultation with general counsel; examination of court cases for applicability to an institution; and internal audits for legal compliance.

Hamill (2003) examined federal tenure denial litigation in 70 cases involving private colleges and universities during the years 1972 to 2000. He reported a steady rise in the number of faculty tenure denial cases, with Title VII sex discrimination cases being the most frequently litigated; that 75% of cases involved Title VII, The ADA, the Equal Pay Act, and the ADEA; and that procedural irregularities arose under contract theories. Hamill (2003) also reported a small number of cases using underlying tort theories. Noting that institutions were the "clear winners" in a majority of the cases, Hamill (2003) attributed this factor to judicial deference to academic administrators' and trustees' decisions and to academic freedom (p. 127). He further acknowledged that institutional success was rooted in thorough, clearly written tenure policies and procedures; an

inability for plaintiffs to show that they were qualified for tenure; and a difficulty in proving discriminatory animus on the part of the institution. In considering a *prima facie* case, courts varied on their handling of plaintiffs' qualifications for tenure, with great deference being granted to the institutions. Among Hamill's (2003) recommendations were that institutions should be fair and effective in their tenure policies; policies should be clearly articulated; the pre-tenure process should be strengthened; grievance procedures should be available and followed; and risk management procedures should be put into place.

Amacher and Meiners (2004) considered tenure and its relationship within the structure of higher education. The authors looked to both state and federal case law involving disputes between a faculty member and a university on the issue of tenure, ranging from the earliest cases of tenure pre-1945 to 2003. The cases included issues of Title VII, disabilities, Fourteenth Amendment due process violations, First Amendment violations, and contract violations. Amacher and Meiners (2004) found that "the large majority of the suits were disposed of in favor of the university so long as it had followed proper procedure" (p. 21). They further posited that discrimination exists but that it "is not a major issue of academic freedom in the context of faculty retention" (p. 21). In rare cases in which faculty were dismissed for incompetence or dereliction of duties, the faculty member would prevail when proper procedure had not been followed. To summarize, the authors explained that "universities must follow proper procedure regarding contracts" and must not "violate certain speech rights" (Amacher & Meiners, 2004, p. 25).

The American Association of University Women (AAUW) (2004) published a study that focused on women who looked to the courts following a denial of tenure. Reviewing 19 post-1981 cases, the report documented the process in cases supported by the AAUW Legal Advocacy Fund. The AAUW (2004) stated that most tenure denial cases are brought pursuant to Title VII. After documenting the claims and challenges faced in presenting the cases, the report made several findings and recommendations. Among other things, the study found that the odds in sex discrimination cases do not favor plaintiffs, but that many plaintiffs found the fight worthwhile, regardless of the outcome. The AAUW (2004) advised that policies should be designed to comply with antidiscrimination laws, and that faculty and administrators should understand and comply with the policies.

Steadman (2005) analyzed 98 court cases in which issues of tenure and academic freedom were litigated during the years 1982 to 2003. She sought to determine the role of the U.S. courts in defining tenure for academia. Steadman (2005) concluded that courts tend to show great deference to higher education institutions in such cases, unless the court finds evidence of discrimination. In addition, she concluded that discrimination is difficult for faculty plaintiffs to prove. Steadman (2005) advised that in order to avoid or mitigate litigation, faculty and administrators must be knowledgeable about and should closely follow tenure policies and procedures in their institutions.

Crittendon (2009) analyzed 96 federal court cases that were decided during the period of 1980 to 2007 that pertained to Title VII and tenure denial in higher education. Statistical analyses were used to measure the extent of any association between case and

or plaintiff characteristics and case outcomes; and qualitative and legal research methods were used to analyze the interplay between federal courts, faculty, and higher education. The statistical analyses showed no significant relationship between the independent variables (sex, plaintiff's race, Title VII claim, and institution class) and the dependent variable of case outcome. A statistically significant relationship was found between the independent variables of court level and decision period and the dependent variable of case outcome. Crittendon (2009) found that faculty plaintiffs who claim race and or sex discrimination pursuant to Title VII tend to make multiple allegations of discriminatory conduct; such allegations include themes of procedural irregularities, ambiguous policies, disparate treatment, and hostile environments. Discrimination was reported as difficult to prove under the McDonnell Douglas-Burdine Standard, and the data suggested that most faculty do not succeed in showing that institutional reasons for tenure denial are merely pretext. Most often, faculty tended to be unsuccessful in their suits on appeal. Crittendon (2009) opined that courts are not likely to question the merits of institutional employment decisions and reported that faculty who brought cases in the 1980's had greater success rates than did faculty who brought cases in the 1990s and 2000s.

Justification for the Current Study

Several themes emerge from a review of the previous tenure litigation research. An overarching theme in the studies reviewed is that institutions win in a majority of the cases. As well, standards and procedures for tenure evaluation should be clearly written and articulated to tenure-track faculty members, should include guidance as to the criteria used in assessing faculty member, and should be applied in a fair and consistent manner.

The studies also showed that courts do not wish to serve in the place of academics as "super tenure committees"; rather, courts are respectful of academic freedom concepts and are likely to be deferential to institutions.

Over time, the varied studies have utilized myriad matrices of institutional type, court levels, and years; thus, the courts' interpretation of and influence on tenure, as analyzed through the lens of case law, has received significant and thorough scholarly analysis. In recommending further study, some authors have suggested a focus on public or private institutions, an assessment of cases in different courts, a limitation on different time frames, or an analysis of institutional policies and academics' knowledge of those policies. Steadman (2005) uniquely recommended that a study should focus on comparing cases in which courts have reversed tenure decisions, and suggested that such cases could reveal errors in the tenure process. Similarly, Leap (1995) considered the question of under what conditions should courts willingly drop their interventionist position in order to be involved in tenure decisions. Emanating from Steadman's (2005) and Leap's (1995) perspectives, this study sought to fill a gap in the literature by analyzing a data set comprised solely of cases in which the defendant institution did not prevail—though the data was not limited to cases in which a denial of tenure was actually reversed. Since previous studies indicated that defendant institutions most often prevail, the data search for this study casted a wide net in order to locate cases in which the plaintiff faculty member prevailed, on at least one issue. It covered public and private institutions, state and federal appellate courts, and an extensive span of years. By delving into cases in which the courts intervened into academic tenure decisions, this study

sought to focus on tenure practices that the courts deemed so egregious that plaintiffs' rights prevailed above institutional decision-making. This study could be particularly useful to administrators and academics who seek to improve the tenure process, manage risk, and protect academic freedom. The study could also bring greater focus to subsequent case study research of policies at specific institutions.

CHAPTER 3

METHODS AND PROCEDURES

Introduction

The purpose of this study was to examine judicial influence on academic decision-making by identifying factors in the tenure process that have induced courts to rule against higher education institutions in litigation stemming from tenure denials. By gaining a better understanding of why courts have inserted judicial decisions in place of institutional decisions in tenure related litigation, this study aimed to identify potential flaws in the tenure process, decrease institutions' exposure to tenure decisions that may result in litigation, and decrease the influence of the courts on tenure decisions.

Research Questions

This study addressed the following questions:

1. What policies and procedures employed by public and private colleges and universities have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation between the years 1972 and 2011?
2. What remedies have been granted to faculty who win tenure denial suits?
3. What steps might colleges and universities take in the tenure process to minimize tenure denial litigation and the possibility of an unfavorable decision in a tenure denial lawsuit?

This chapter presents the research design of the study and discusses both the qualitative and legal aspects of the design. Next, the chapter explains the research

methods, including a discussion of the data collection procedures, the data analysis plan, the case briefing method, and tenets of analogical reasoning. The delimitations and limitations of the study are then presented, followed by a discussion of the study's trustworthiness and ethics.

Research Design

To achieve the purpose of the study, this study was guided by a qualitative research design that uses a legal research method. Some scholars have broadly characterized qualitative research methodology to include legal research, which can be used to illustrate legal trends (Creswell, 2007; Merriam, 2009). Merriam (2009) further described the study of law as an "antecedent" to what is known as qualitative study (p. 19). Schimmel (1996) espoused qualitative methods and legal studies that are conducted from a policy perspective as complementary research methods. For research that is complex and for which there are shared disciplinary interests, Russo (1996) suggested that a combination of complementary research strategies can be useful for clarifying research questions and providing greater alternatives for solutions than when using only one method. The complex nature of tenure litigation decisions and the interdisciplinary interests of the legal and education communities make a qualitative strategy that employs a legal research method suitable to this study.

Qualitative Research

Qualitative research has varied definitions and encompasses many purposes. Merriam (2009) posited that the commonality among the myriad definitions is "the notion of inquiring into, or investigating something in a systematic manner" (p. 3). Creswell

(2007) defined qualitative research, in part, as "the study of research problems inquiring into the meaning individuals or groups ascribe to a social or human problem" (p. 37). Broadly, Creswell's (2007) definition emphasized a process of research that flows from "philosophical assumptions, to worldviews and through a theoretical lens, and on to the procedures involved in studying social or human problems" (p. 37). Current trends in describing the characteristics of qualitative work, as summarized by Creswell (2007), indicate that the focus is increasingly on "the interpretive nature of inquiry and situating the study within the political, social, and cultural context of the researchers, the participants, and the readers of a study" (p. 37). The emergence of themes or patterns in qualitative research can further help explain the particular phenomenon (Creswell, 2007).

In the current study, the process and procedures employed were those used in traditional legal research, as further discussed below. The problem of tenure denial litigation and the consequences it imposes were interpreted within the context of the legal and higher education communities, particularly as unsuccessful litigation is indicative of legal and managerial concerns inherent in the institution. By identifying themes or patterns that emerged, this study aims to assist higher education counsel and administrators in assessing the policies and procedures involved in making tenure decisions and in considering the implementation of practices that may improve an institution's tenure policies and help avoid tenure litigation.

Traditional Legal Research

Legal research, often called the "traditional" legal case method (Russo, 1996, p. 33), relies on the use of primary and secondary sources of authority. Primary sources of

law used in legal research include constitutions, statutes, cases, regulations, and orders. Mandatory authority is primary authority that is binding in a particular jurisdiction. This means that a court in that jurisdiction must follow existing primary sources that are relevant, or in unusual circumstances, overturn the precedent. Secondary sources of law are materials that serve to help explain, interpret, or find primary legal resources. Examples of secondary sources include legal treatises, textbooks, advisory opinions, and legal dictionaries. Secondary sources are not binding and are weighted differently as to the persuasive nature to a court (Redfield, 2011).

Precedent systematically grounds case law; present court decisions serve as guidance for future court decisions. Such reliance on precedent respects the doctrine of *stare decisis*, which means that courts will abide by decided cases (Redfield, 2011). Purposes of this doctrine include predictability and reliability in the law (Redfield, 2011), as well as evenhandedness in the administration of justice, guidance, and control of the volume of litigation (Wren & Wren, 1986). Loosely translated as a judicial principle of social policy and "a critical aspect of the rule of law" (Alexander & Alexander, 2011, p. 7), this court-created doctrine means that "when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court" (Wren & Wren, 1986, p. 80).

In practice, determining how *stare decisis* is implemented can be somewhat complicated in the American system of courts, but an explanation using categories or branches of the system is useful (Alexander & Alexander, 2011). Referencing an explanation by Henry Campbell Black, Alexander and Alexander (2011) elucidated the

principles of *stare decisis.* Inferior courts are strictly bound to follow the decisions of courts that have appellate or revisory jurisdiction over them. Any judgment that is rendered by the highest court in a state or federal judicial system is binding in all other courts if the issues of the case fall under the peculiar or exclusive jurisdiction of the court making the decision. A court of last resort has a duty to follow its own precedent unless the court is fully determines that the precedent was wrong and that overturning the prior decision will be less problematic than adhering to it. If a court does not have precedent that controls a particular decision, it may consult and be guided by applicable decisions of other courts. Judicial comity will direct a court to accept and conform to a decision of another nonbinding court in order to secure a consistent administration of the law, but not if doing so would violated the court's own convictions of what the law is (Alexander & Alexander, 2011).

While acknowledging the doctrine of *stare decisis*, the rule of law does change. Even when the facts of two cases are very similar, nuanced differences will exist. Lawyers arguing a case may draw similarities or distinctions between their case and precedent (Wren & Wren, 1986). A court may also acknowledge that precedent is wrong, which will result in the court changing or overruling its opinion (Redfield, 2011).

Research Methods

In this study, the researcher selected and reviewed court cases pertinent to tenure denial in higher education in which the institution was the unsuccessful litigant on at least one issue. Legal research known as the "traditional" legal case method (Russo, 1996, p. 33) was used to collect and analyze data for this study. Blending historical and case

study concepts, Russo (1996) described the traditional legal case method as "a form of historical-legal research that is neither quantitative nor qualitative" (p. 34). Russo (1996) further explained legal analysis as seeking "to make sense of the evolving reality known as the law" (p. 35). "Rooted in the historical nature of the law and its reliance on precedent," systematic legal inquiry that seeks to interpret and explain the law looks at the "past, present, and future" (Russo, 1996, p. 35). This reliance on precedent—or *stare decisis*— suggests that prior relevant and controlling decisions should be used to aid in the interpretation of the law in a subsequent case and has resulted in some researchers calling this form of inquiry historical-legal research (Russo, 1996).

Because legal opinions served as the data to be analyzed in this study, the legal case method was suitable for analyzing primary legal sources for explanatory and predictive purposes. While an ongoing interplay between data collection and data analysis is inherent in the legal case method, collection and analysis procedures are addressed separately below.

Data Collection Procedures

Data examined for this study consisted solely of primary source reported cases from the U.S. Courts of Appeals, the U.S. Supreme Court, and the states' highest appellate court decisions. Cases selected and reviewed related to tenure denial litigation in higher education, in which the institution was the unsuccessful litigant on at least one issue, during the years spanning 1972-2011. Primary source case law was located through the Westlaw and LexisNexis online databases. Westlaw and LexisNexis services are major online networks of searchable databases that support computer based legal

research. Through these databases, a wealth of court cases, statutes, interpretive materials, and public records may be accessed. To get an overview of the case law and issues, preliminary searches in both databases used terms that included: "tenure," "tenure denial," "academic freedom," "faculty employment," "peer review," "faculty evaluation," "higher education," "colleges," "universities," and "discrimination." The terms were searched in multiple combinations and juxtapositions. Three targeted searches were then conducted, which were developed with the assistance of a Westlaw reference librarian and a professor of law in a law library.

The first targeted search was run in Westlaw, using a WestlawNext search feature as further outlined by category: Terms: "denial of tenure at university"; Content: Cases; Jurisdiction: All State & Federal (State and Federal Supreme Courts, Federal Courts of Appeal); Date: All dates after 12/31/1971; Reported Status: Reported. This search returned 512 cases. Case summaries were then read to screen the cases for additional delimiters, including only the states' highest courts, plaintiffs prevailed on at least one issue, no class action suits, and only four year or doctoral institutions. The delimiters are further addressed in the subsequent Delimitations and Limitations section.

The second targeted search was run in Westlaw with the following query in the ALLSTATES database: CO(HIGH) & SY,DI(TENUR! /10 (GRANT! DEN! REFUS!)) & SY,DI(COLLEG! UNIV!) & da(aft 1/1972 & bef 12/2011). The state search yielded 106 cases. The same search was run for federal courts, with the adaptation of using the "search for a database box" and entering cta, sct. The federal search also eliminated the

CO(HIGH) part of the query. The federal search yielded 177 cases. All case summaries were further screened using the study's delimiters, as further discussed below.

The third targeted search was run in the LexisNexis database as outlined for each category: Legal subtab; States Legal – U.S.; view more; Combined States; Find Cases; By Court; Highest Courts All States. Using a terms and connectors search and the LN-SUMMARY segment, the following query was then entered: TENUR! w/15 (GRANT! Or DEN! Or REFUS!) and (college or university) and date (geq (1/1/1972) and leq (12/31/2011). The state search yielded 126 cases. For federal cases, the search was entered as outlined for each category: Legal Subtab; Find Cases; U.S. Courts of Appeal Cases, Combined; Search Selected. At the search screen, the same query was entered as was used for the state cases. The federal search yielded 826 cases. All case summaries were further screened using the study's delimiters.

Of the cases retrieved in the three targeted searches, 33 fit the study's purposes, 22 federal and 11 state. The WestClip Notify service was also used for identifying any cases that were decided after the initial search that met the study criteria during the research period. No cases were retrieved through this service.

Data Analysis

Cases that were identified as pertinent to the research questions were reviewed for current validity and value as precedent. Both Westlaw and LexisNexis citator tools were used to follow the procedural progress of the cases through the court system and to examine the treatment of the cases by other case law. Using both services allowed for cross-checking of the cases and the related information.

Also utilized in this study were secondary resources including law review articles; education journal articles; other journal articles; and dissertations and monographs pertaining to tenure in general, and issues coexistent with tenure. Coexistent issues included the intertwining of academic freedom and tenure, the tenure process, tenure litigation and its legal theories, and tenure litigation scholarship. Information from scholarly journals and texts served to supplement and aid in the interpretation and discussion of the case law data.

Using similar search terms as used in the primary source search, the Westlaw and LexisNexis databases were used to search for legally oriented secondary sources. Nonlegal scholarly journals, texts, and monographs were located through electronic searches of the University of Tennessee's Online Catalogue. Research was conducted through catalogue database searches including, for example: electronic journals, the ERIC education periodical database, *Pro-Quest Dissertations*, and the Social Science Research Network database. Each resource located through preliminary searches was examined for additional citations to pertinent resources. Finally, websites of professional organizations that consider interdisciplinary interests of law and education were searched for official statements, emerging issues, and scholarship. Websites included, for example, the American Association of University Professors, the Education Law Association, and the National Association of College and University Attorneys.

Case briefing. Cases were briefed to extrapolate the information that was pertinent to the research questions, with a particular focus on the policies and procedures that were central to a court's reasoning for deeming an institution the unsuccessful

litigant. A case brief is “an analytical summary of an opinion” (Redfield, 2011, p. 38). Case briefs are used to reduce lengthy judicial opinions into the most essential components of the decision. Many formats exist; researchers can employ the method that best enables them to clarify thinking, understand the judicial opinion, and create useful reference notes (Redfield, 2011).

This study used a common format for briefing a case (Redfield, 2011; Statsky & Wernet, 1995), which was adapted for the needs of this study. Generally, each case brief included: Name of the case, including parties’ names; Citation, identifying the court and year; State in which the litigation occurred; State in which the defendant institution was located; Procedural posture, including who brought the suit and how the lower courts ruled; Issue presented, including the legal theories of the plaintiff; Facts, particularly whether the institution is public or private, factual allegations of the plaintiff, and those facts on which the court focused in its reasoning; Issue or question presented; Relevant constitutional, statutory, or regulatory provisions; Analysis, or the court’s explanation for reaching the holding on a particular issue; Holding, including the resolution to the case; Disposition and remedies as a result of the litigation; and Notes, including any pertinent issues that are crucial to further understand or clarify the case.

Reasoning by analogy. Referencing the case briefs, this study employed reasoning by analogy or example to examine and analyze the legal interpretation of tenure denial litigation in the federal and state court decisions. The legal thought and writings of Edward Levi undergird reasoning by analogy, which is the “most familiar form of legal reasoning” (Sunstein, 1993, p. 741). Levi (1949) described the legal

reasoning process in a three step outline: "similarity is seen between cases; next the rule of law inherent in in the first case is announced; then the rule of law is made applicable to the second case" (p. 2). (The rule of law referred to means the law that is established in that decision.) This process of legal reasoning provides a "dynamic quality" to the law, allowing the facts of cases that are considered similar to earlier cases to shape legal standards and establishing that to ascertain whether factual situations are similar or different is the most important step in the legal process (Levi, 1949). Levi (1949) explained this forming and re-forming of legal rules as a process through which rules were first built and then broken down in response to society's changes.

According to Sunstein (1993), analogical reasoning maintains currency, represents the most common form of legal reasoning, and is central to the common law method. Even so, this method of reasoning requires that the researcher must ascertain the relevance of factual similarities and differences (Sunstein, 1993). The four "different but overlapping features" of analogical reasoning presented by Sunstein (1993) include: (a) "principled consistency;" (b) "a focus on particulars;" (c) "incompletely theorized judgments;" and (d) "principles operating at a low or intermediate level of abstraction" (p. 746). Principled consistency requires that cases be made coherent; some principle must be used to harmonize cases that have seemingly disparate outcomes (Sunstein, 1993). Key to determining relevancy, a focus on the particulars requires a bottom-up approach to analysis that "develops from concrete controversies" of a particular case, yet is not without theoretical components (Sunstein, 1993, p. 746). Relevancy determinations in analogical reasoning also require that judges and lawyers make

judgments, even though a comprehensive theoretical underpinning is lacking (Sunstein, 1993). The fourth feature of Sunstein's (1993) determination of relevancy in analogical reasoning requires that the principles be developed using some abstraction when noting similarities and differences among facts—a sort of juxtaposition against the call to focus on the particulars (Sunstein, 1993).

Despite Sunstein's (1993) arguments as to the currency, commonality, and centrality of analogical reasoning to common law, this approach to legal analysis raises debate among legal scholars. Debates emerge as to whether precedent is a legal standard or merely a social practice, what justifies precedential constraints, whether analogical and deductive reasoning are different, the role of analogical reasoning in judicial decisions, the relationship between analogical and precedential reasoning, and the relationship of reasoning by analogy on the development or presupposition of rules. Furthermore, some contest the uniqueness or value of legal or judicial reasoning (Edlin, 2007).

Weinreb (2005) challenged scholars' views that analogical reasoning is logically flawed. For example, he explained that scholars such as Levi and Sunstein, while promoting the virtues of analogical reasoning, actually advocated "selling reason short" (p. 67). According to Weinreb (2005), Posner attributed the prevalence of analogical reasoning to "slipshod judicial work habits and a failure to come to grips with real issues" (p. 67). Other scholars viewed analogical reasoning simply as "ordinary deductive inference" or no reasoning at all (Weinreb, 2005, p. 67). The theories that tended to dismiss analogical reasoning assumed that deductive and inductive logic defined the bounds within which questions had to be answered; when there was no answer,

analogical reasoning was assumed "too weak to support the weighty consequences of an adjudication" (Weinreb, 2005, p. 124). Diverging from those who critiqued analogical reasoning, Weinreb (2005) argued that "the capacity for analogical reasoning is hard-wired in us," and that analogical reasoning is consistently and successfully relied upon (p. 124). He also emphasized that reasoning analogically is common to legal systems and central to the adjudicatory process (Weinreb, 2005).

The debate over analogical reasoning can be traced, at least in part, to the ability to perceive similarities and to sort them according to one's purpose. The philosophic "problem of universals," which dates back to Plato and Aristotle, relates to ontological, epistemological, and linguistic issues (Weinreb, 2005). Based on Guba and Lincoln's (1994) classification of social science researchers into positivist, postpositivist, critical, and constructivist paradigms, Toma (1997) classified legal scholars into four paradigms of legal formalists, legal realists, critical scholars, and interpretive scholars. Comparing the formalist description to that of Guba and Lincoln's (1994) positivist description, Toma (1997) explained that legal formalist scholars seek to organize and generalize legal cases in order to find patterns that can be articulated as legal principles. Toma (1997) further compared the legal realist to Guba and Lincoln's (1994) postpositivists, whereby legal realists do not accredit an objective reality, do consider influential social factors, and aspire to a realist ontology and objective epistemology. Critical scholars, according to Toma (1997), similarly espouse a realist ontology, yet view reality as not neutral and formed by social, economic, and political forces. Finally, interpretive scholars assume that multiple realities exist (Toma, 1997).

Allan (2007) described the sharing of paradigms in the use of precedent and analogy as “the basis for elucidating and refining a collective moral code, expressing the fundamental legal commitments of the whole community as shaped by history and experience” (p. 198). Common law reasoning by analogy is thus valuable to a complex world in which consensus is unlikely (Allan, 2007). Both formalist and realist legal camps influence analogic reasoning, tending towards formalistic when examining factual similarities among cases and realistic when focusing on the values shared by the rule of law and those “that are at stake in the case at hand” (Huhn, 2003, p. 315). Using reasoning by analogy, courts are able in many cases to circumvent ideas that are highly abstract or very broad statements of principles and focus on a narrow range of issues (Allan, 2007). As Allan (2007) described, “[t]he true meaning of any textual provision is ultimately a matter of its correct application (or disapplication) in the infinite variety of circumstances arising from time to time; and that judgment is always a function of the reasons citizens and officials can offer one another in the debate over political morality that nourishes, and draws on, the common law” (p. 203).

Debates over methods of legal analysis and criticisms of reasoning by analogy notwithstanding, the present study was well-suited to the use of analogical reasoning based on its common acceptance and wide use by legal scholars and judges in rendering legal interpretations. Methods associated with reasoning by analogy provide a useful approach to comparing legal opinions and for allowing for the ever-changing nature of legal opinion. A focus on the facts of particular cases allows for a detailed explanation of the ways that tenure litigation decisions were influenced by policies and practices of the

institutions. In sum, the historical orientation of reasoning by analogy provided a foundation on which to observe tenure denial litigation during a near 40-year span, allowed the researcher to place the cases in the appropriate legal context, and facilitated the intellectual process of data analysis to identify themes and trends that emerge for offering constructive managerial advice based on legal principles.

Delimitations and Limitations

This study and its applicability were bounded by delimitations and limitations. Broad generalizations may not be appropriate across court jurisdictions, over a period of time, or from institution to institution.

Delimitations

The empirical data and study were delimited by the following criteria:

1. Cases included only those in which tenure denial was a litigated or underlying issue. Promotion, retention, contract renewal, and similar issues, and cases which were settled were not included unless an in-depth reading of the case indicated these issues were also tied to an issue of tenure denial.
2. Cases included only those in which the institution was the unsuccessful litigant on at least one issue. An in-depth, thorough analysis of a court's reasoning for ruling against an institution may reveal nuances of policies and procedures that are particularly problematic for institutions.
3. Cases included only decisions that were rendered in federal appellate and state highest appellate courts. Records of trial court decisions are generally less accessible, and appellate court decisions can affect law and policy.

4. Cases included only decisions rendered from 1972 to 2011. The Civil Rights Act of 1964 was made applicable to higher education in 1972, and few tenure denial cases were litigated prior to that date.
5. Cases included only decisions that were reported. Only reported cases are precedential.
6. Cases included those that arose in both public and private institutions.
7. Cases included only those that pertain to doctoral or four-year institutions. Organizational structure and tenure decisions of community and professional colleges are often different than those of doctoral or four-year institutions (Kaplin & Lee, 2006).
8. Cases did not include those that were brought as a class action. Class action suits are beyond the scope of this study.

Limitations

The empirical data of the study were limited by the following:

1. Qualitative and legal research methods rely on the researcher for data collection; thus, data choices and analysis are value-laden and dependent upon the researcher and accordingly are subject to researcher bias, constraints, and interpretation as to relevance.
2. The data are limited by the continued generation of new appellate case law on the issue of tenure denial litigation. A ruling that is current at the time of the study could be reversed or clarified by the time the study is published, new judicial

theories could arise, and the conclusions and recommendations drawn in this study could be altered.

3. The data are naturally limited by the size of the federal and state court systems.
4. The data were generated from the Westlaw and LesixNexis electronic databases. This presumes that the databases are current, complete, and correct.
5. The conclusions and recommendations are not intended to be construed as offering legal advice. Any conclusions or recommendations that a reader considers useful should not be considered an end point, but rather should serve as a starting point for discussions with General Counsel, administrators, and peers.

This study did not seek to set forth solid answers or rigid predictions of how a court would rule in a future case. Nor did it seek to present quantitative data, such as percentages of cases that involved a particular cause of action or that were heard in a particular court. It sought, instead, to utilize existing case law in order to inform higher education administrators about what courts have said regarding tenure denial litigation issues and the tenure process, and to make recommendations about policies and procedures that might be considered effective in better managing the tenure process. By considering the researcher's assessment of the case law and conclusions drawn from judicial narratives, readers may deem particular recommendations as helpful towards gaining a better understanding of how to manage and improve an institution's tenure policies.

Trustworthiness

The validity and reliability of research that is qualitative in nature is often looked upon with skepticism by researchers who use more traditional methods (Merriam, 2009). In qualitative research, the underlying philosophical assumptions and worldviews contribute to the interpretive and values-based nature of the inquiry, which can affect the validity and reliability of a study (Creswell, 2007). Creswell (2007) reviewed and summarized perspectives of and terms used by several researchers pertaining to the concepts of validity and reliability in qualitative research; he then suggested a framework of thinking by which "researchers employ accepted strategies to document the 'accuracy' of their studies," which Creswell (2007) labeled "validation strategies" (p. 207). In this study, every effort will be made to ensure that the cases chosen are pertinent to the research purpose and questions and that the researcher's analysis is thorough and accurate. Strategies used to enhance the trustworthiness or validity of the current study include a clarification of the researcher's bias, triangulation, and peer review.

Researcher Bias

In a qualitative study, the researcher is the "key instrument" (Creswell, 2007, p. 38) or "primary instrument" (Merriam, 2009, p. 15) for data collection and analysis. The researcher is thus the one who gathers the information and does not typically rely on instruments developed by other researchers. The data collected can be reduced by the researcher into patterns, categories, and themes; coded according to the researcher's needs; displayed visually; and narrated to the reader (Creswell, 2007). Rather than trying

to eliminate or cover any researcher biases, it is important to identify the biases and how they may affect the data collection and interpretation.

For this study, the researcher's bias, or "researcher's position" (Merriam, 2009, p. 219) is that of a licensed attorney and scholar who has interests that encompass both law and higher education. The researcher has gained experience researching and analyzing case law as well as drafting opinions for state and federal appellate judges on a wide range of civil and criminal issues.

Triangulation

Also employed in this study, triangulation is a validation strategy that involves the use of many and varied sources, methods, and theories to provide corroborating evidence for a study (Creswell, 2007). A combination of data sources serves to strengthen a study (Patton, 2002). Data and interpretive resources for this study were mined from multiple databases, from additional references and citations located in identified resources, and from multiple organizations. This study compared published judicial decisions for court cases that met the study criteria, and sought to identify similarities and differences represented in the cases. Case briefs also contributed to the analytical process.

Peer Review

Peer review is likewise pertinent as an external check on this study (Creswell, 2007). A dissertation committee comprised of two higher education scholars (one who serves as chancellor of a major research institution and professor, and one who is a former chancellor of a public institution and professor), a scholar of law, and a scholar of management assures that reviewers challenged the researcher as to the study's

methodology, analysis, conclusions, and recommendations. As case law evolves and additional studies are pursued by other scholars, the law will progress, and the current study will continue to be reviewed for its validity.

Ethical Considerations

Qualitative researchers must also be concerned with ethical responsibilities (Creswell, 2007; Merriam, 2009; Patton, 2002). No significant ethical considerations existed for this study. Case law comprises the data for the study; thus, there were no issues of human subjects or informed consent. All information that was collected as primary data or secondary interpretive resources is publicly accessible; thus, there were no issues of confidentiality, data access, or data ownership. No sponsor existed for the research; thus, there were no issues of the researcher losing control over the data or its subsequent constrained use.

CHAPTER 4

FINDINGS

Introduction

The purpose of this study was to examine judicial influence on academic decision-making by identifying factors in the tenure process that have induced courts to rule against higher education institutions in litigation stemming from tenure denials. By gaining a better understanding of why courts have inserted judicial decisions in place of institutional decisions in tenure related litigation, this study aimed to identify potential flaws in the tenure process, decrease institutions' exposure to tenure decisions that may result in litigation, and decrease the influence of the courts on tenure decisions.

To achieve the purposes, this study reviewed judicial opinions from the U.S. Supreme Court, U.S. Courts of Appeal, and states' highest appellate courts during the period of 1972 to 2011 in which higher education institutions did not wholly prevail in tenure denial litigation. Selected cases included reported cases that arose in public and private, four-year or doctoral institutions, for which tenure denial was a litigated or underlying issue. Class action suits were not included in this study.

Two conceptual lenses provided the theoretical framework through which to consider the information gleaned from the cases: the principle of shared governance, by which authority for decision-making is shared through a multi-layered process (AAUP, 2006c; Kaplan, 2004; Mason, 1972); and the doctrine of judicial deference, by which courts are generally deferential to academic decision-making (Cohen & Spitzer, 1995-

1996; O'Neil, 2010; White, 2010). Through these lenses, this study addressed the following questions:

1. What policies and procedures employed by public and private colleges and universities have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation between the years 1972 and 2011?
2. What remedies have been granted to faculty who win tenure denial suits?
3. What steps might colleges and universities take in the tenure process to minimize tenure denial litigation and the possibility of an unfavorable decision in a tenure denial lawsuit?

Historical legal research, a form of qualitative study, was the research method used to identify, obtain, and analyze the cases for the study. Identifying and obtaining the cases involved multiple procedures. Extensive reading on the subject of tenure contributed to an understanding of the many issues underlying and concomitant to tenure litigation and aided in the identification of appropriate terms to use in searching for relevant cases. Through Westlaw and LexisNexis online database research systems, federal and state cases were identified and screened for their suitability for the study. In addition to computer-assisted research, cases and supporting secondary materials, including other studies and academic commentary articles, were read to gather additional citations to cases that might fit the parameters of the study.

Cases that were identified as meeting the delimiters for the study were briefed to glean information pertinent to the research questions. As part of the briefing process, the

prior and subsequent histories of the cases were reviewed in the online databases. Such histories showed the progress of the cases through the court systems and indicated whether any of the legal principles relevant to the study had been cautioned against or explicitly overruled. While legal research provided the method for identifying, obtaining, and screening the cases for meeting the study parameters, qualitative methodology was then applied to glean from the data themes and trends that emerged from the cases to answer the specific research questions.

In addition to this overview of the present study, this chapter includes a description of the data and pertinent findings. Using judicial narratives and case commentary, the findings are first presented in the larger context of the conceptual lenses, and then more specifically in the context of the first two research questions. (Because the third research question pertains to risk management and measures for minimizing exposure to tenure litigation, it will be answered in Chapter 5, in the section dedicated to making recommendations.) A brief summary of the findings concludes the chapter.

Data

All cases chosen for this study met the criteria of the study's delimiters, as follows: tenure denial was a litigated or an underlying issue; the institution did not prevail on at least one issue; cases were from federal appellate or states' highest courts; the years spanned from 1972 to 2011; only reported cases were included; cases arose out of four-year or doctoral granting institutions; institutions were public or private; and no

class actions were included. It was determined that 22 federal cases and 11 state cases met the delimiters of this study, for a total of 33 cases.

Appendix A contains a listing of the case citations for cases used in this study. Appendix B includes two tables that provide a snapshot view of the cases used in the study, by providing the following information: the case citation; the basis of the suit; the claims and the law on which the claims were based; certain facts and issues that were pertinent to a court's disposition of the case; and the court's disposition. Federal case information is located in Table 1, and state case information is located in Table 2.

As displayed in Table 1, only two cases used for this study were heard in the U.S. Supreme Court. The other federal cases were spread across the Courts of Appeal. The numbers of cases identified from each circuit are follows: First Circuit (2); Second Circuit (1); Third Circuit (5); Fifth Circuit (1); Sixth Circuit (5); Seventh Circuit (1); Eighth Circuit (1); Ninth Circuit (2); Tenth Circuit (1); and D.C. Circuit (1). Table 1 also identifies that the earliest federal case reported that met the study criteria was reported in 1973, and the latest was reported in 2001. Fourteen cases arose from public institutions, and eight cases arose from private institutions.

As displayed in Table 2, cases came from several different states (or District of Columbia) courts including Alaska, Connecticut, District of Columbia, Kentucky, Ohio, New Jersey, North Dakota, Rhode Island, and Tennessee. Table 2 also identifies that the earliest case reported that met the study criteria was reported in 1975, and the latest was reported in 2007. Seven cases arose from public institutions, and four cases arose from private institutions.

Neither the federal nor the state law searches yielded enough cases to draw meaningful quantitative information, such as percentages of cases arising out of a particular circuit or type of institution, or percentages of cases which contained certain legal claims. By design, collection or interpretation of such figures was not a goal of this study. Collectively, the bases of federal and state cases arose from allegations of violation of a plaintiff's rights; discrimination on the basis of sex, race, or national origin; contract related allegations; tort related allegations, and various other claims. Underlying the suits are various laws including Title VII, state contract and tort laws, state and federal statutes, as well as a few other laws. Discrimination allegations were the most common. Further discussion of the legal bases for the claims is presented in findings as applied to the research questions.

Findings

Providing context to this study's themes that arise from the cases chosen are judicial narratives regarding conceptual frameworks of shared governance and judicial deference. While these concepts do not provide a specific answer to the research questions posed, these concepts necessarily pervade a thorough discussion of tenure litigation issues. Accordingly, the next two sections include excerpts from cases that demonstrate the judiciary's recognition of the process of shared governance as applied in tenure decisions, and the judiciary's prevailing attitude of judicial deference to academic decision-making. The conceptual framework sections are followed by findings that are applied to answer the first two research questions.

Findings Related to Shared Governance

Shared governance is a longstanding, well-recognized, respected theoretical framework pertaining to decision-making in academia that involves multiple layers and shared authority (AAUP, 2006c; Kaplan, 2004; Mason, 1972). More than half of the federal cases included in this study thoroughly presented the shared process involved in the tenure decision at issue (*Abramson v University of Hawaii*, 1979; *Abramson v. William Paterson College of New Jersey*, 2001; *Brennan v. King*, 1998; *Brown v. Trustees of Boston University*, 1989; *Gutzwiller v, Fenik*, 1988; *Harris v,. Ladner*, 1997; *Kunda v. Muhlenberg College*, 1980; *Lynn v. Regents of the University of California*, 1981; *Roebuck v. Drexel University*, 1988; *Sola v. Lafayette College*, 1986; *Stern v. Shouldice*, 1983; *Stewart v. Rutgers, The State University*, 1997). Many state cases also thoroughly presented the shared process involved in tenure decision at issue (*Craine v. Trinity College*, 2002; *Dixon v. Rutgers, The State University of New Jersey*, 1988; *Kakaes v. George Washington University*, 1996; *Shoucair v. Brown University*, 2007; *University of Alaska v. Geistauts*, 1983). The following excerpts are exemplary of judicial narratives pertaining to shared governance:

> Retention and tenure decisions in [the professor's] department are first considered by the Curriculum and Instruction Retention Committee ("the Committee"). . . .The Department Chair is an ex-officio member of the Committee. Though not a voting member, the Chair does choose whether or not to sign the Committee's recommendation. By not signing a recommendation, the Chair indicates a lack of

support for the Committee's evaluation. The Dean then makes a recommendation to the Provost. Finally, the President of [the institution] makes a determination whether or not to recommend retention (of tenure, where applicable) to the Board of Trustees. The [Institution's] Board of Trustees then decides whether to retain and/or grant tenure based on the recommendation of the President (*Abramson v. William Paterson College of New Jersey*, 2001, p. 268; internal citations omitted).

Tenure review at [Institution] is a multi-step process ultimately leading to a decision by the board of trustees . . . . At no stage of the procedure is the recommendation of any evaluator binding upon the evaluator or decision-maker at the next stage" (*Brennan v. King*, 19981998, p. 260).

Reappointment is a multistep process that involves review by several levels of faculty and administration . . . . Trustee approval is the final step in promotion and the granting of tenure (*Craine v. Trinity College*, 2002, p. 526-527).

The *Handbook* includes a section entitled, "Precise Policies And Procedure Of The Tenure Process," which details the following levels of review for a tenure application: The departmental Appointments, Promotions, and Tenure (APT) Committee, the department chairman, the College of Arts and Sciences APT Committee, The Dean of the College of Arts and Sciences, the Vice-President for

Academic Affairs, the President and the Board of Trustees (*Harris v. Ladner*, 1997, p. 1122).

Even when lengthy narratives were not dedicated to delineating the shared decision-making in the tenure process, some courts brought forth aspects of shared governance while presenting facts and identifying problems within a certain piece of the tenure process (*Board of Trustees of University of Kentucky v. Hayse*, 1989; *Ford v. Nicks*, 1984, 1989; *Hill v. Ross*, 1999; *Sawyer v. Mercer*, 1980; *Skudrzyk v. Reynolds*, 1993; *Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut*, 1973; *University of Pennsylvania v. EEOC*, 1990). Although the court in *Jones v. University of Central Oklahoma* (1993) provided little analysis of the process, it noted "the formalized nineteen-step process utilized by the University to evaluate [the professor's] application" (p. 362).

Findings Related to Judicial Deference

When reviewing decisions made in higher education institutions, courts strongly favor an attitude of deference (Kaplin & Lee, 2006). From the research findings, it is evident that courts value the preservation of institutional autonomy in making lawful tenure decisions. Several federal cases included in this study directly acknowledged the principle of deferring to a higher education institution's internal decision-making (*Brown v. Trustees of Boston University*, 1989; *Ford v. Nicks*, 1984 *Ford v. Nicks*; 1989; *Gutzwiller v. Fenik*, 1988; *Kunda v. Muhlenberg College*, 1980; *Sola v. Lafayette College,* 1986; *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 1982; *University of Pennsylvania v. EEOC*, 1990). State cases that directly

acknowledged judicial deference to academic decisions include *Craine v. Trinity College*, (2002) and *Dixon v. Rutgers, The State University of New Jersey* (1988). The following excerpts are exemplary judicial narratives confirming the judicial stance of deference:

> This Court itself has cautioned that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment . . . . Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decision-making (*University of Pennsylvania v. EEOC*, 1990, p. 199; internal citations omitted).

> In tenure cases, courts must take special care to preserve the University's autonomy in making lawful tenure decisions (*Brown v. Trustees of Boston University*, 1989, p. 346).

> To be sure, in balancing the probativeness of evidence like this against its danger for unfair prejudice, a court should realize that comparing the qualifications of others granted tenure with those of plaintiff presents the risk of improperly substituting a judicial tenure decision for a university one (*Brown v. Trustees of Boston University*,1989, p. 347).

> While we recognize that federal courts have generally deferred to the decisions of college and university officials in whether to grant tenure, particularly where the

> educational institution has not as yet had the opportunity to initially evaluate the credentials and overall performance of a tenure applicant, we need not address the issue in this case (*Ford v. Nicks*, 1984, p. 864).

> There is a general presumption in favor of reinstating discrimination victims at the level of seniority they would have attained had they remained in their jobs . . . . but federal courts have traditionally been wary of interfering with academic tenure decisions (*Ford v. Nicks*, 1989, p. 875; internal citations omitted).

> The principle of academic deference guides our view of comparison evidence because the principle that a school may choose its own faculty for any nondiscriminatory reason is never more in jeopardy than when a plaintiff puts before a jury evidence that two individuals with similar credentials were considered for tenure, and one was denied it (*Craine v. Trinity College*, 2002, p. 537).

Findings Related to Research Questions

Research Question 1. *What policies and procedures employed by public and private colleges and universities have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation between the years 1972 and 2011?*

The policies and procedures that have contributed to unfavorable rulings against institutions in tenure denial litigation can be broadly categorized as: (a) Infringement

upon rights; (b) Discrimination; and (c) Breach of contract. These categories are not necessarily discrete within a particular case or among cases. As is exhibited in Tables 1 and 2 in Appendix B, professors often bring multiple allegations that are based on multiple legal theories. As well, problematic conduct by an institution may fit into more than one thematic category. As an example, unfair scrutiny of a tenure applicant may fit the categories of both discriminatory behavior and as an infringement upon a professor's rights, such as equal protection. Similarly, contract requisites that are not met might be deemed a breach of contract or might infringe upon a professor's right to a fair process, as delineated in the contract.

Infringement upon rights. All of the cases in the study involved some sort of infringement upon plaintiff's rights, whether substantive or procedural rights, the right not to be discriminated against, or the right to have an institution adhere to a contract. The excerpts included in this section arise from cases in which an institution infringed upon a professor's procedural or substantive rights (*Board of Trustees of University of Kentucky v. Hayse*, 1989; *Brennan v. King*, 1998; *Dixon v. Rutgers, The State University of New Jersey*, 1988; *Ford v. Nicks*, 1984; *Gutzwiller v. Fenik*, 1988; *Harris v. Ladner*, 1997; *Hill v. Ross*, 1999; *Kunda v. Muhlenberg College*, 1980; *Lynn v. Regents of the University of California*, 1981; *Mumford v. Godfried*, 1995; *Roebuck v. Drexel University*, 1988; *Skudrzyk v. Reynolds*, 1993; *Soni v. Board of Trustees of University of Tennessee*, 1975; *State ex rel. Chapdelaine v. Torrence*, 1975; *State ex rel. James v. Ohio State University*, 1994; *Stern v. Shouldice*, 1983; *Stewart v. Rutgers, The State University*,

1997; *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 1982; *University of Alaska v. Geistauts*, 1983).

Procedural Rights

- **Lacked Proper Procedures (e.g., poorly established, poorly communicated, materials not provided).**

  The District Court further held that the University "objectively acted toward [Professor] in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process (*Soni v. Board of Trustees of University of Tennessee*, 1975, p. 350).

  [T]he denial of the demanded hearing frustrated the law and deprived [Professor] of constitutional due process (*State of Tennessee ex rel. Chapdelaine v. Torrence*, 1975, p. 549).

  The Faculty Handbook does not articulate the requirements of tenure as it does for promotion. The President of the College testified that the academic qualifications for the grant of tenure were similar to those published for promotion, i.e. possession of the terminal academic degree or its scholarly equivalent or recognized achievement in the field (*Kunda v. Muhlenberg College*, 1980, p. 536).

[Institution's] standards for review of a tenure candidate's teaching ability are vague, and there is little in the record to illuminate the requirements or the assessment process (*Roebuck v. Drexel University*, 1988, p. 718).

The standards for assessing service are exceedingly vague and the parties disagree about the application of these standards (*Roebuck v. Drexel University*, 1988, p. 718).

[President's] letter neither advised [Professor] that this was the final decision in his tenure process nor informed him that any appeal of the decision would have to be made within thirty days to be timely (*Skudrzyk v. Reynolds*, 1993, p. 463).

Throughout the proceedings below, [Professor] was denied access to her tenure review file. The materials contained in the file were those upon which the tenure review committee claims that it based its denial of tenure, and, as such, are highly relevant to the issues in this case. At the discovery stage, when [Professor] requested that the University produce the file, the district court issued a protective order. At trial, the University submitted the file to the court; the court reviewed it in camera but refused to disclose the contents of the file to [Professor]. [Professor] asserts that the file was submitted by the University, and used by the district court, as evidence, rather than for the purpose of determining whether the contents of the file were privileged. Thus, [Professor] contends that the refusal to

disclose the contents of the file violated due process. We agree (*Lynn v Regents of the University of California*, 1981, pp. 1345-1346).

While we are mindful of the need to maintain the confidential nature of the peer review system, we believe that adoption of the qualified academic freedom privilege would interfere significantly with the enforcement of our anti-discrimination laws (*Dixon v. Rutgers, The State University of New Jersey*, 1988, p. 1057).

[T]he promotion and tenure records maintained by a state-supported institution of higher education are "public records" pursuant to [Ohio's statute] , are not subject to any exception, and are, therefore subject to the public records disclosure requirements of [Ohio's statute] (*State ex rel. James v. Ohio State University*, 1994, p. 913).

- **Failed to follow proper procedures (e.g., unfairly applied; departed from policies, customs, and practices; departed from grievance committee's recommendations).**

  [Professor] was not bound to exhaust the arbitration aspect of the handbook procedure before bringing his discrimination claims (*Brennan v. King*, 1998, p. 269).

[I]t may have been reasonable for [Professor] to believe that the University was reconsidering her application pursuant to the *Guidelines* and that the tenure decision thus was not yet final. Her belief could have been bolstered by the fact that the University has a "grievance" procedure, wholly distinct from the reconsideration process, which is available to an unsuccessful candidate only *after* the University's final adverse action. The reconsideration [Professor] received was, according to the University's own process, not part of its grievance procedure. As a result, the reconsideration might well not have been "a grievance, or some other method of collateral review of an employment decision" that "does not toll the running of the limitations periods." Rather, the reconsideration may have been a continuation of the original application process (*Harris v. Ladner*, 1997, p. 1125-1126; internal citations omitted).

The jury could also have found evidence of [Department Head's] discriminatory intent in the manner in which he conducted the selection of [Professor's] outside evaluators. [Professor] introduced evidence that male members of the Department routinely got all five of the evaluators they requested and that requests to exclude a specific scholar were routinely granted. However, in her case, [Department Head] initially selected only two of the scholars she requested—including a scholar she had expressly requested *not* be included []—and denied her request that a German scholar be selected (*Gutzwiller v. Fenik*, 1988, p. 1326).

[Professor] testified that [Defendant reviewer] told her that when he met with a University official responsible for affirmative action, he told that person that [Defendant reviewer] did not believe in affirmative action and did not intend to follow the University's guidelines. There was testimony that [Defendant reviewer] made similar comments to [another female professor], stating that affirmative action was a lot of silly procedures and a waste of time. . . . [Further testimony showed] that after [Professor] was denied tenure, [Defendant reviewer] said that he was not inclined to ever put women in tenure track positions again (*Gutzwiller v. Fenik*, 1988, p. 1327).

The University's Regulations did not authorize the Dean to reject appointment to the rank of Associate Professor. His authority was limited to reviewing the proposal, adding his endorsement or commentary, and forwarding everything through channels, ultimately to the Board of Trustees, which had the exclusive final authority to approve or disapprove the application (*Board of Trustees of the University of Kentucky v. Hayse*, 1989, p. 611).

[Professor] is entitled to further pursue his claim for reinstatement because he was initially denied administrative due process (*Board of Trustees of the University of Kentucky v. Hayse*, 1989, p. 616).

The meetings of the tenure committee had taken place in violation of [Alaska's Open Meetings Statute], because they were not made open to the public. All actions taken by the committee were therefore deemed void (*University of Alaska v. Geistauts*, 1983, p. 426)

The grievance committee found that the [review committee's] decision to deny [Professor's] promotion to professor was "arbitrary and capricious" and "could not have been reached by reasonable evaluators." It noted various inconsistencies and procedural errors . . . . In our view, this is sufficient evidence upon which a jury could conclude that [Professor's] 1994-1995 tenure denial may have stemmed from discrimination based on race (*Stewart v. Rutgers, The State University*, 1997, pp. 433-434; internal citations omitted).

Substantive Rights

- **Equal Protection violated.**

  [T]he jury could have found from the evidence that [Department Head] intentionally treated [Professor] less favorably through the evaluation process than he treated men; that he put barriers in her path that were not encountered by men seeking tenure in the Department; that he imposed higher standards of scholarship upon [Professor] than upon similarly situated men; and that he intentionally engaged in a calculated effort over time to insure that [Professor] did not receive tenure (*Gutzwiller v. Fenik*, 1988, pp. 1325-1326). .

[A]ny preference for one sex in making offers of employment, however slight the preference may be, must be justified . . . . [Professor] has done what needs to be done to show that reliance on the plan may be pretextual by demonstrating the (i) the written terms of the plan do not support [Dean's] decision; and (ii) the University denies having engaged in prior discrimination. An employer that wants to use sex (race, religion, etc.) as a factor in hiring decisions and yet denies ever engaging in discrimination (and therefore denies that a remedy is in order) must supply some other "exceedingly persuasive" justification (*Hill v. Ross*, 1999, p. 590).

- **Retaliated against employee for supporting others.**

  We therefore conclude that the district judge did not abuse his discretion by awarding [Professor] tenure, restoring him to the position he would have been but for the illegal discrimination by [Institution] [in retaliation for protesting against Institution's employment practices regarding his wife's sex discrimination claim] (*Ford v. Nicks*, 1984, p. 864).

- **First Amendment violated.**

  [Professor] was not merely conveying information on behalf of other parties; he was espousing his personal opinion. Moreover, when we focus on the role that [Professor] assumed in advancing his opinion, the facts suggest that he was acting as a concerned public citizen speaking on a matter of public interest, not that he spoke "merely as an employee, concerned only with internal policies or practices which were of relevance only to the employees" of [Institution]. In other words,

> his speech was not "upon matters only of personal interest." Rather, it concerned a matter which can be "fairly considered as relating to [a] matter of concern to the community." (*Mumford v. Godfried*, 1995, p. 761; internal citations omitted).

> Having found [Professor's] speech to be protected, we hold that it was a question for the jury whether the defendants were motivated to terminate [Professor] in retaliation for his speech or in an attempt to rid the College of an unqualified professor (*Stern v. Shouldice*, 1983, p. 749).

> The district court found that [Professor] began speaking out concerning the misuse of research funds shortly after arriving at [Institution], and that he continued making those allegations throughout his tenure there . . . . [T]he Court found that [Professor's] conduct was constitutionally protected, that this conduct was a substantial, or motivating factor in the decision not to rehire him, and that the defendants failed to prove the same decision would have been reached even absent that protected conduct (*United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 1982, pp. 561-562).

Discrimination. Of the 33 cases, 24 included some form of discrimination claim related to Title VII, ADA, Equal Pay Act, or correlated federal and state law discrimination claims (*Abramson v. University of Hawaii*, 1979; *Abramson v. William Paterson College of New Jersey*, 2001; *Board of Trustees of University of Kentucky v. Hayse*, 1989; *Brennan v. King*, 1998; *Brown v. Trustees of Boston University*, 1989;

Craine v. Trinity College, 2002; *Dixon v. Rutgers, The State University of New Jersey*, 1988; *Ford v. Nicks*, 1984; *Ford v. Nicks*, 1989; *Gutzwiller v. Fenik*, 1988; *Harris v. Ladner*, 1997; *Hill v. Ross*, 1999; *Jones v. University of Central Oklahoma*, 1993; *Kunda v. Muhlenberg College*, 1980; *Lynn v. Regents of the University of California*, 1981; *Mumford v. Godfried*, 1995; *Roebuck v. Drexel University*; 1988; *Saint Francis College v. Al-Khazraji*, 1987; *Shoucair v. Brown University*, 2007; *Sola v. Lafayette College*, 1986; *Stern v. Shouldice*, 1983; *Stewart v. Rutgers, The State University*, 1997; *Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut*, 1973; *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 1982.). Title VII was invoked most often. Claims of discrimination were addressed through courts' analyses of procedures, policies, standards, attitudes, and behaviors, as exemplified in excerpts below.

- **Failed to follow procedures.**

  [Professor] should have an opportunity to demonstrate that the ordinary and generally accepted tenure decision process included a review of reconsideration requests in the final year and that in her case the decision of the President in May, 1972 to refuse to review her tenure denial constituted discrimination against her on the basis of sex (*Abramson v. University of Hawaii*, 1979, p. 210).

- **Professor held to higher review standard.**

  [The witnesses] testified that [Professor] was either superior or equal to the other candidates who had received tenure. They testified that none of these others had been required to write a second book. The first book of the others, rewritten from

a thesis, had sufficed. One had not written any book. Yet notwithstanding acceptance and publication of [Professor's] book by a leading university press, the Assistant Provost and President, while acknowledging [Professor's] promise, insisted that she needed to do more to qualify for tenure (*Brown v. Trustees of Boston University*, 1989, p. 347).

[Professor's] evidence disclosed numerous instances from which [Department Head's] discriminatory intent could be inferred. One such instance was [Department Head's] statement to [Professor] that she would need to publish an additional book independent of her dissertation and this book would be given considerable weight in her tenure decision . . . . [T]he evidence showed that no male member of the Department had ever been advised that he should publish a second book, independent of his dissertation, before he would be considered for tenure. Further, the evidence showed that [Professor] met or exceeded the number of publications of every faculty member, except [Department Head] (*Gutzwiller v. Fenik*, 1988, p. 1326).

- **Patterns of discriminatory conduct showed motive or patronizing attitude.** [A professor] testified that [President] remarked that [a tenure applicant] was an outstanding scholar, saying "I don't see what a good woman in your department is worrying about. The place is a damn matriarchy." (*Brown v. Trustees of Boston University*, 1989, p. 347).

[President] again refused to intervene in the tenure review process, telling [a tenure applicant] that a person with her credentials would do well "and anyway, I never worried about job security, and your husband is a parachute, so why are you worried [?]" (*Brown v. Trustees of Boston University*, 1989, p. 349).

- **Those exhibiting discriminatory animus influenced or participated in the adverse decision.**

  A reasonable inference that could be drawn from the record is that [President] was influenced by both [Dean] and [Department Chair]. In fact, [President] even stated in his deposition that before making his decision not to retain [Professor], he sought [Dean's] counsel (*Abramson v. William Paterson College of New Jersey*, 2001, p. 285).

  [Professor] presented a combination of factors that, taken as a whole, permitted the jury to conclude that the demise of [Professor's] tenure bid was a *fait accompli* once the [Reviewer's] animus had infected the process (*Shoucair v. Brown University*, 2007, p. 431)

- **Research, teaching, and service evaluations obscured discrimination.**

  Wherever the responsibility lies within the institution, it is clear that courts must be vigilant as not to intrude into such determinations, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and

unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges (*Kunda v. Muhlenberg College*, 1980, p. 548).

- **Reasons provided for decision were pretextual.**

  [Professor] has successfully demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions such that a factfinder could reasonably . . . disbelieve the employer's articulated legitimate reasons (*Abramson*, 2001; p. 284; internal quotations omitted; omission in original).

  Insofar as the four professors' testimony tended to show that the qualifications of others granted tenure were beneath [Professor's] *known* qualifications, it was relevant to create an inference that the University's criticisms of [Professor's] scholarship were pretextual (*Brown v. Trustees of Boston University*, 1989, p. 346).

- **Subjective nature of review criteria can mask pretext.**

  [A] jury could conclude that [Professor] was hired in large part *because* of his ability to interact with the surrounding West Philadelphia community, and that such service was uniquely valuable to [Institution] because the strained relations between [Institution] and its neighbors. Moreover, many of [Professor's] community service activities were performed at the behest of [Institution] administrators. Given the evidence . . . that [Professor's] service was both

appreciated and found valuable by the University, a jury could infer that [Administrator's] claim that [Professor's] service was not "relevant to the mission of the University" was not credible and was, in fact, a pretext (*Roebuck v. Drexel University*, p. 728; internal citations omitted).

- **Policies were not accurately stated.**

  Underlying the [District] court's order was its finding of fact that "(h)ad [Professor] been counseled in the same manner as male members of the Physical Education Department, we find that she would have done everything possible to obtain a master's degree in order to further enhance her chances of obtaining tenure." (*Kunda v. Muhlenberg College*, 1980, p. 549).

- **Retaliation, harassment, hostile work environment existed.**

  [T]he District Court should have considered when ruling on [Professor's] hostile work environment claim: (1) [Dean's] "unprecedented" monitoring of [Professor's] conferences and absences; (2) [Institution] charging [professor] with a sick day on a Jewish holiday when she was not scheduled to teach; (3) both [Department Chair and Dean], on separate occasions, criticizing and raising their voices at [Professor] regarding her lack of availability during the Sabbath; (4) [Department Chair] scheduling meetings on Jewish holidays and refusing to change them so [Professor] could attend; (5) [Department Chair's] pointed statement to [Professor] regarding her faith and behavior ("The trouble with you is that it doesn't show that you are Orthodox.") (*Abramson v. William Paterson College of New Jersey*, 2001; p. 279).

> Although it is true that [Reviewer] did not go so far as to recommend “firing” [Professor], in the unique context of a tenure review process the jury nevertheless reasonably could have determined that his arguably subtler form of sabotage was just as damaging (*Shoucair v. Brown University*, 2005, p. 430).

Breach of contract. Breaches of contract addressed by the courts included failure to follow established policies and procedures, failure to provide timely notice, and principles of reliance (*Abramson v. University of Hawaii*, 1997; *Brennan v. King* ,1998; *Brown v. North Dakota State University*, 1985; *Brown v. Trustees of Boston University*, 1989; *Craine v. Trinity College*, 2002; *Harris v. Ladner* ,1997; *Jones v. University of Central Oklahoma*, 1993; *Kakaes v. George Washington University*, 1996; *Mumford v. Godfried*, 1995; *Sawyer v. Mercer*, 1980; *Sola v. Lafayette College*, 1986; *State ex rel. Chapdelaine v. Torrence*, 1975; *United Carolina Bank v. Board of Regents*, 1982).

- **Policies or procedures were not followed.**

> In the present case, we conclude that the evidence supports the conclusion that the defendant breached the parties’ contract by indicating that the plaintiff would be evaluated according to one standard but denying tenure because of her failure to meet a different one (*Craine v. Trinity College*, 2002, p. 541).

> Despite the faculty manual’s directive to be as specific as possible and to pay particular attention to the candidate’s prospects for tenure, the defendant was

generally positive about the plaintiff's work and vague about her deficiencies (*Craine v. Trinity College*, 2002, p. 542).

- **Failed to provide timely notice.**

  A reasonable person reading the applicable provisions of the Faculty Code could fairly conclude that the notice provided to [Professor] in [Vice President's] letter of June 28, 1993, suffered from the same defects as did the notices provided to the plaintiffs in [two similar] cases (*Kakaes v. George Washington University*, 1996, p. 135).

We see no basic ambiguity in the contract with respect to tenure. Giving the language its ordinary and popular meaning, [Professor] was to get tenure on the expiration of a four year probationary period, without more. Once [Professor] was given a contract to teach for the all-significant fourth year, [Institution] came under a contractual duty to take affirmative action by giving notice to [Professor] "within ten days after the beginning of the second semester of the academic year" if [Professor] was not to continue as a teacher at [Institution]. The contractual notice was not given, nor did [Institution] take any other action to indicate dissatisfaction with [Professor's] work as a teacher, but permitted [Professor] to finish the full four year probationary period. We agree with the Court of Appeals that under the literal wording of the contract of employment, [Professor] acquired tenure at the expiration of his four year probationary period (*Sawyer v. Mercer*, 1980, p. 699).

- **Special contract violated.**

  In this particular case, there is an additional consideration in [Professor's] favor. He accepted the appointment in reliance upon the affirmative representation that among the fringe benefits offered by the University was *tenure after three years of satisfactory service.* This created a viable understanding that satisfactory service for three years would result in tenure status (*State ex rel. Chapdelaine v. Torrence*, 1975, p. 547).

Research Question 2. *What remedies have been granted to faculty who win tenure denial suits?*

Both equitable and legal remedies were awarded in tenure denial litigation cases, depending on the type of claim brought. For example, the remedies available in a Title VII claim provide wide latitude for a district court to fashion a remedy that makes a victim whole by restoring him or her to the position he or she would have been in, had the discrimination not occurred (*Ford v. Nicks*, 1984). Reinstatement, back pay, and tenure are available to the court as remedies in a Title VII claim. As explained in *Brown v. Trustees of Boston University* (1989), however, "[c]ourts have quite rarely awarded tenure as a remedy for unlawful discrimination" (p. 359).

The issue of remedies is most frequently addressed at the trial court level in the initial case, and thus discussions of remedies at the appellate court level were relatively limited. Appellate courts can and do affect damage awards, however, by directive to the trial court on remand, by reinstating a jury's damage award, or by affirming or denying a district court's specific damages award. Though most tenure denial litigation claims

involve a professor's pursuit of tenure, a grant of tenure is not frequently provided. The equitable and legal remedies granted in the cases studied are further categorized below.

Equitable Remedies.

- Promotion with tenure was available if professor completed master's degree (*Kunda v. Muhlenberg College*, 1980).
- Reinstated professor (*Ford v. Nicks*, 1989; *Kunda v. Muhlenberg College*, 1980).
- Reinstated professor for a term, with option of reapplying for tenure (*University of Alaska v. Geistauts*, 1983).
- Reinstated professor with tenure (*Brown v. Trustees of Boston University*, 1981; *Ford v. Nicks*, 1984).
- Granted tenure (*Sawyer v. Mercer*, 1980).

Legal Remedies.

- Awarded compensatory or punitive damages (*Board of Trustees of University of Kentucky v. Hayse*, 1989; *Gutzwiller v. Fenik*, 1988; *Shoucair v. Brown University*, 2007; *State ex rel. Chapdelaine v. Torrence*, 1975; *Stern v. Shouldice*, 1983; *Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut*, 1973).
- Awarded costs or attorney's fees (*Stern v. Shouldice*, 1983; *Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut*, 1973).
- Awarded back pay (*Ford v. Nicks*, 1984 , *Kunda v. Muhlenberg College*, 1980; *Shoucair v. Brown University*, 2007; *Soni v. Board of Trustees of University of Tennessee*, 1975).

Summary

To study judicial influence on academic decision-making, this research included 33 cases that address some aspect of tenure denial litigation. Shared governance and judicial deference provided the conceptual frameworks. Using legal research methods and qualitative analysis, cases were examined to consider the policies and procedures that have contributed to courts' unfavorable rulings against universities in tenure denial, and the remedies granted to plaintiffs as a result. Courts intervened in an institution's decision as to tenure when an institution infringed upon a professor's rights, discriminated against a professor, or breached a contract with a professor. Equitable and legal remedies were granted in both federal and state courts. The remedy of awarding tenure was rare.

CHAPTER 5

SUMMARY OF THE STUDY

Introduction

The purpose of this study was to examine judicial influence on academic decision-making by identifying factors in the tenure process that have induced courts to rule against higher education institutions in litigation stemming from tenure denials. By gaining a better understanding of why courts have inserted judicial decisions in place of institutional decisions in tenure related litigation, this study aimed to identify potential flaws in the tenure process, decrease institutions' exposure to tenure decisions that may result in litigation, and decrease the influence of the courts on tenure decisions.

The study examined cases from the U.S. Supreme Court, U.S. Courts of Appeal, and states' highest appellate courts during the period of 1972 to 2011 in which higher education institutions did not wholly prevail in tenure denial litigation. Selected cases included reported cases that arose in public and private, four-year or doctoral institutions, for which tenure denial was a litigated or underlying issue. Class action suits were not included in this study.

The conceptual lenses of shared governance and judicial deference provided the framework for the study, through which the study addressed the following questions:

1. What policies and procedures employed by public and private colleges and universities have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation between the years 1972 and 2011?

2. What remedies have been granted to faculty who win tenure denial suits?
3. What steps might colleges and universities take in the tenure process to minimize tenure denial litigation and the possibility of an unfavorable decision in a tenure denial lawsuit?

Historical legal research and qualitative methodology were used to identify, collect, examine, screen, and analyze the data and information that were pertinent to this study. After identifying cases that fit the delimiters of the study, cases were briefed to glean pertinent information. Brief factual overviews and judicial narratives were provided to exemplify themes and trends that provided insight to the research questions.

Three additional sections of this chapter comprise the summary of the study. First, a summary of the research findings regarding the conceptual frameworks and answers to the first two research questions are presented. Second, a discussion of the findings considers the present study as it relates to the literature and research previously discussed in the literature review presented in Chapter Two. Answering the third research question, this chapter then includes practical recommendations for those in academia to consider so that they might avoid or mitigate litigation that may arise out of tenure denial decisions. Finally, suggestions for further research are presented that would flow logically from the present study, such that the information gleaned may be confirmed, enhanced, or extended.

Summary of the Findings

That academic tenure decisions are made through a shared, multi-layered process was fully recognized by courts. In setting for the factual basis of the case, more than half

of the judicial opinions analyzed for this study reviewed the process involved in institutional tenure decisions. Also important in judicial review of decisions in academia is the preservation of institutional autonomy. Many of the cases analyzed for this study acknowledged the significance of showing respect for professional judgment.

The policies and procedures employed by public and private colleges and universities that have contributed to federal and state appellate courts' unfavorable rulings against institutions in tenure denial litigation include three categories: infringement upon a professor's rights, discrimination against a professor, and breach of a contract with a professor. Infringement upon a professor's rights included both procedural and substantive rights. Procedural infringement themes included instances whereby an institution lacked proper procedures or when decision-makers failed to follow proper procedures. Substantive infringement themes included instances in which an institution violated equal protection rights, retaliated against an employee, or violated First Amendment rights. Discrimination against a professor arose when decision-makers in an institution: failed to follow procedures; held a professor to a higher review standard; had a pattern of discriminatory conduct, through motive or a patronizing attitude; exhibited discriminatory animus, and such animus influenced the adverse decision; did not accurately communicate the policies; provided pretextual reasons for their discriminatory decision; and created a hostile work environment. Breach of contract themes of problematic behaviors arose when decision-makers failed to follow policies or procedures, failed to provide timely notice, or violated a special contract.

Particular problems can arise with policies and procedures applied to research, teaching, and service. Courts noted the subjective nature of determining such matters. While acknowledging the need to leave such evaluative measures to professionals, it was also noted that subjectivity could obscure discrimination or to mask pretext.

Academic freedom was frequently acknowledged by the courts, and courts recognized that tenure decisions must be made in consideration of the academic needs of the institution. Although courts recognized the importance of academic freedom, courts also cautioned against claiming academic freedom in an effort to justify unlawful behavior or in an attempt to hinder a fair process. Courts noted that academic freedom is not connected to every decision made in academia.

Categories identified and themes that emerged were not discrete. Multiple claims were often pursued in a single case, state and federal claims were sometimes joined, and courts' decisions and reasoning often pertained to more than one issue. State laws and statutes can directly affect the outcome of a case, as can time, such as when a statute is abrogated. Institutional status can affect claims, as when a private institution is not bound by a state statute affecting public institution tenure rights.

Remedies granted to faculty who prevailed in the tenure denial suits reviewed included both equitable and legal remedies. The remedies granted depended on the type of underlying claim. Equitable remedies included promotion with tenure, subject to obtaining an additional degree; reinstatement; reinstatement for a term, with the option to reapply for tenure; and a grant of tenure. Legal remedies included an award of

compensatory or punitive damages; an award of costs or attorney's fees; and an award of back pay.

Discussion of the Findings

A content analysis of 33 judicial opinions provided the basis on which to discern categories and themes that comprise the findings of this study. Compared to other tenure-related litigation studies, such as those that spanned fewer years (AAUW, 2004; Amacher & Meiners, 2004; Crittendon, 2009; DiBiase, 1979; Phelps, 1979; Boissé, 1985; Hamill, 2003; Leap, 1995; O'Neal, 1992; Steadman, 2005; Timm, 1994; Troxel, 2000); those that focused on specific issues such as the peer review process (Timm, 1994), or race or sex discrimination (Crittendon, 2009; O'Neal, 1992); or those that limited their institutional scope (Boissé, 1985; Hamill, 2003; Phelps, 1979), this study aimed to cast a wide net in its search for cases by spanning almost 40 years, not limiting the analysis to a particular legal basis for tenure litigation, including public and private institutions, and including both federal and state courts. This choice was based, in part, on previous literature that indicated the likelihood of institutional success in tenure litigation (AAUW, 2004; Amacher & Meiners, 2004; Boissé, 1985; Crittendon, 2009; Hamill, 2003; Leap, 1995; Phelps, 1979; Steadman, 2005). Quantifying the relative lack of success for plaintiffs in race and sex discrimination claims in tenure denial litigation, Crittendon's (2009) research revealed that plaintiffs won only 31% of cases at the U.S. District Court level and won only 8% of cases at the level of the U.S. Courts of Appeal (p. 106), for the cases that met the parameters of her study.

Even with the perceived breadth of the parameters set for obtaining cases in the present study, the number of cases returned was few. That cases chosen for the study were few in number is at least partially attributable to delimiters placed on the study, such as not including community colleges or professional schools, not including class actions, including only published cases, and considering only those cases decided in federal appellate and states' highest appellate courts. As well, some cases were possibly excluded if the case overviews or summaries obtained through the electronic searches did not mention tenure denial. A contract issue that ultimately resulted in a tenure denial, for example, could have masked a case appropriate for inclusion. Although substantial effort was made to find every suitable case, it is not unlikely that a few relevant cases were not identified—an unavoidable reality of researcher influence.

Another limitation on the data retrieved for this study was the primary focus in some cases on issues of procedure, such as whether a plaintiff has rights to bring a case pursuant to a particular statute (e.g., *Saint Francis College v.*, *Al-Khazraji*, 1987), rather than on the merits of a tenure denial decision. Appellate reviews of summary judgment also involve issues of procedure, which are then intertwined with an analysis of the substance of the case below. Filing for summary judgment is a procedural tactic by which either party can request that the case be judicially decided in their favor. In tenure denial cases, the defendant institution is almost always the party that files the motion. Upon receipt of a request for summary judgment, the judge assesses the merits of the plaintiff's case to assess whether material or relevant facts warrant a trial. Thus, if a university wins a grant of summary judgment, the trial judge effectively rules that the

plaintiff lacks sufficient facts to continue the lawsuit. A plaintiff who survives a university's motion for summary judgment will not necessarily win the case; rather, she or he gains the opportunity to try the case before the judge or jury (AAUW, 2004). The AAUW (2004) study reported that the number of cases dismissed on summary judgment in recent years has increased.

For the cases that met this study's parameters, 12 involved a grant of summary judgment at the trial court level (*Abramson v. University of Hawaii*, 1979; *Abramson v. William Paterson College of New Jersey*, 2001; *Brennan v. King*, 1998; *Brown v. North Dakota State University*, 1985*; Hill v. Ross*, 1999; *Jones v. University of Central Oklahoma*, 1993; *Kakaes v. George Washington University*, 1996; *Lynn v. Regents of the University of California*, 1981; *Mumford v. Godfried*, 1995; *Saint Francis College v. Al-Khazraji*, 1987; *Sola v. Lafayette College*, 1986; *Stewart v. Rutgers, The State University of New Jersey*, 1997) . Of these, some were reversed on appeal, and some were affirmed in part and reversed in part, as shown in Tables 1 and 2 in Appendix B. In cases for which issues of summary judgment were reversed, courts' analyses of the law and fact typically identified problematic policies and procedures in the institution's tenure review process. Even so, this would not necessarily mean that on remand the plaintiff would win; only that there was enough of a factual issue that it was inappropriate for the trial court to have granted summary judgment. Thus, while the appellate courts' summary judgment analyses may serve to identify potentially problematic issues in the tenure process, the instructive nature of such analyses for the purposes of this study is limited.

This reveals that it would be useful in future studies to include district court cases. While this study chose appellate cases for their reported and precedential characteristics, adding district court analyses would provide much-needed depth and breadth to the judicial narratives on policies and procedures that were identified as problematic. The *Ford v. Nicks* (1984) and *Ford v. Nicks* (1989) cases provide an example of the interplay of a district court's analysis. As reported in *Ford v. Nicks* (1984), husband and wife plaintiff professors first filed suit in district court against the institution, contending that their terminations from the teaching staff at the institution constituted employment discrimination in violation of Title VII. The female professor alleged that her dismissal was due to sex discrimination, while the male professor alleged his dismissal was in retaliation for protesting the institution's employment practices and for assisting his wife in her battle for reinstatement. The district court judge found the institution had violated Title VII in both cases, and awarded both professors back pay, reinstatement to their former positions, and full tenure rights. On appeal in *Ford v. Nicks* (1984), the court found that the district court had properly awarded the male professor tenure, but remanded the female professor's case for retrial on the basis that an incorrect burden of proof had been improperly applied.

In the case on remand to the district court, *Ford v. Nicks* (1988), the court analyzed the institution's proffered reasons for not granting the professor tenure, and granted the professor reinstatement with full salary and benefits, seniority, and tenure status. The district court's analysis included the judicial theories of disparate treatment and disparate impact, burdens of proof, and the burden shifting process in proving a

discrimination claim. In considering the institution's proffered reasons for not hiring the professor, the court included extensive facts from the record regarding funds available to pay her salary, and the professor's credentials as compared to the institution's needs. Extensive review of the facts as they applied to the law resulted in the court's decision that *but for* sex discrimination, which was a determinative factor in the institution's decision not to rehire the professor, the professor would have continued in her employment with the institution.

On appeal the second time, the court in *Ford v. Nicks* (1989) held that the evidence supported a finding of discrimination and reinstatement, but that the district court abused its discretion in ordering that the professor be appointed to full professorship with tenure. The court's ruling was based, in part, on statutory interpretation and timing. The court held that the system of automatic tenure was abolished before the professor would have qualified for automatic tenure.

From following the *Ford v. Nicks* (1984, 1988, 1989) line of cases, it is apparent that there is much to be gleaned from cases that are at the district court level. The district court case heavily relied on the record. The record, facts, application of the facts to the law, and interplay between the courts holds great potential for gleaning policies and procedures that the courts found problematic regarding the institution's behavior. Future studies could benefit from including district court cases in the mix, or from delving deeply into the records of cases.

Thus, while the cases chosen for this study were identified as ones in which institutions "lost" on at least one issue in tenure denial litigation, the amount of valuable

information that served to answer the research questions was unexpectedly limited by the fact that the merits of the tenure decision were addressed in even fewer cases than those meeting the delimiters. Fully acknowledging the research-related limitations to the data, however, it is instructive that few cases retrieved in a relatively wide search actually established or affirmed the merits of a plaintiff's win in tenure denial litigation. This further supports previous reports that institutions prevail in most tenure denial litigation.

Academic Tenure, Shared Governance, and Judicial Deference

An overarching theme of this study is that the judiciary can influence decisions that are made in academia through the interpretation of legal claims brought to court. Examining the judicial influence on decisions in academia is particularly interesting in the context of tenure decisions, because of the unique attributes of academic tenure and the halls of academe (Finkin, 1996; Leap, 1995; Poskanzer, 2002). Academic tenure entwines traditional principles of the institution, which are deeply rooted in the history of academia, with legal principles. Tenure, with its strong cultural foundations (Metzger, 1973), is viewed by many as a protector of academic freedom (Poskanzer, 2002; White, 2010), and academic freedom is viewed as foundational to professors' freedoms to search for truth (Alexander & Alexander, 2011; Chait, 2002b; Kaplin & Lee, 2006).

Also unique to academic tenure is that the process is multi-layered and can be affected by multiple decision-makers, through a system of shared governance (AAUP, 2006c; Kaplan, 2004; Mason, 1972). The policies, procedures, and actions at issue in a tenure decision can take place over many years. During that time, personnel can come and go, administrators can move into another position, those who serve on the tenure

review committee can change responsibilities, departments can merge, and contracts and employment policies can be rewritten.

These and other factors contribute to the fact that academic tenure lawsuits are more complex than most other types of employment litigation. Such complexity may contribute, in part, to the level of institutional success in tenure denial litigation, as was confirmed by the limited number of cases that were identified for this study. This complexity was well-recognized in *Zahorik v. Cornell University* (1984): "Tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally" (p. 92). The court additionally noted the lifelong commitment from the university to the employee, the multi-layered process with many decision-makers, and the lack of competition for any particular tenured position.

Like the *Zahorik v. Cornell University* (1984) court, many courts in this study recognized the complexity of tenure decisions and considered the process of tenure decisions in detail. An excerpt from *Brennan v. King* (1998) provides an example:

> Tenure review at [Institution] is a multi-step process ultimately leading to a decision by the board of trustees. Initially, the candidate's record is reviewed by at least three tenured members of his or her department. This review leads to a departmental recommendation that is transmitted to the dean of the college. The dean, in turn, makes a recommendation to the provost of the university. The provost then makes a recommendation to the university president. In the last stage of the process, the president makes a recommendation to the board of trustees, and the board then makes a final decision. At no stage of the procedure

> is the recommendation of any evaluator binding upon the evaluator or decision-maker at the next stage (p. 260).

The multi-layered process, as described by the court, is a core feature of the principle of shared governance that is prevalent and valued in academia (AAUP, 2006c; Kaplan, 2004; Mason, 1972). That many courts in the study either thoroughly or partially referenced parts of the complex process exemplifies that the uniqueness of tenure decisions and the system of shared governance was recognized by the judiciary.

While decision-makers at multiple levels of the tenure process and input from both external and internal reviewers may provide veritable checks and balances that strengthen the decision-making process, the decentralized process can also be the root of problems: As an example, in *Craine v. Trinity College* (2002), the plaintiff was misled in what she thought would be the focus of her tenure review. In one review, quality of scholarship was the focus; in the tenure denial, the quantity of scholarship was identified as the focus. Due to a breakdown in the shared governance process, the advice given to the plaintiff was unclear. During her last reappointment review, the plaintiff's colleagues had determined that she was on track for tenure; two years later, the department voted that she should receive tenure. However, the appointments and promotions committee then voted against the plaintiff, based on the fact that she had only one published article in a refereed professional journal. Particularly interesting was that even the department supported the plaintiff's request for reconsideration and challenged a change in rules between the second and final tenure review as being unfair. At trial, the plaintiff won a $12.7 million jury verdict (Euben, 2002), which fully demonstrates the risk that may arise

in a multi-layered system in which the component parts neither view themselves as on the same team nor function in tandem.

Roebuck v. Drexel University (1988) provides another example of problems that can arise in a decentralized decision-making process. In this case, the professor brought a racial discrimination suit in response to his tenure denial. Although there were guidelines established for tenure review, the court explained that they were unclear and difficult to discern. The Department Chair imposed standards that were not in the Faculty Guide. The President of the institution explained that teaching and scholarship were primary, while the guidelines provided that they were to be considered equally. The departmental committee lauded the plaintiff's service activities. Thus, different levels of the process applied different standards and were in conflict.

In addition to recognizing principles of shared governance, many of the cases that met this study's delimiters further demonstrated that courts recognize and respect universities' institutional autonomy in making lawful tenure decisions. In accord with Phelps's (1979) study, the cases reviewed did not outwardly criticize the way that academic tenure decisions were made in academia. Generally supportive in their description of the concept and practices of academic tenure, many courts stated their deferential stance when reviewing academic decisions—even in this set of cases for which institutions did not wholly prevail. The *Brown v. Trustees of Boston University* (1989) court explained its position: "In tenure cases, courts must take special care to preserve the University's autonomy in making lawful tenure decisions" (p. 346).

One of the reasons provided for judicial deference to academic decision-making is in respect of academic freedom. The *Ford v. Nicks* (1984) court, citing to multiple cases that propounded this concept, noted that freedom in academic decision-making produces important societal benefits. In *Kunda v. Muhlenberg College* (1980), the court explained that "[t]he essence of academic freedom is the protection for both the faculty and students to inquire, to study and to evaluate, to gain new maturity and understanding" (p. 547). Further, the court called academic freedom the "lifeblood of any educational institution" (*Kunda v. Muhlenberg College*, 1980, p. 547). Such high importance on academic freedom raises caution, then, when courts increase their willingness to infuse their decisions into those of academia (Gajda, 2009; Kaplin& Lee, 2006; Leap, 1995; Poskanzer, 2002).

Even when courts understand and respect principles of shared governance and acknowledge deference to institutions, the judiciary wrestles with tensions that arise between understanding the concerns and structures of the academy—many that are rooted in longstanding tradition—and the interface between those concerns with the law. Though courts affirm institutional rights to select who can join their ranks, they look less to tradition and more to laws and governing boards when an issue of ultimate control of the institution arises (DiBiase, 1979). And while courts affirm the importance of academic freedom, they will not do so when freedom of the institution conflicts with higher principles such adherence to a contract. The *Craine v. Trinity College* (2002) court noted that a "university cannot claim the benefit of the contract it drafts but be

spared the inquiries designed to hold the institution to its bargain" (p. 540). Concerned about fair process, the *State ex rel. James v. Ohio State University* (1994) court stated:

> [I]t is ironic that the university here argues that academic freedom is challenged by the disclosure of the documents. It seems the antithesis of academic freedom to maintain secret files upon which promotion and tenure decisions are made, unavailable even to the person who is the subject of the evaluation (p. 913).

The court in *Kunda v. Muhlenberg College* (1980) similarly cautioned against claiming academic freedom for any academic decision:

> It does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution. Colleges may fail to promote or to grant tenure for a variety of reasons, such as anticipated decline in enrollment, retrenchment for budgetary reasons, termination of some departments, or determination that there are higher priorities elsewhere. These are decisions which may affect the quality of education but do not necessarily intrude the nature of the educational process itself (p. 547).

In sum, principles of tenure and academic freedom must still be grounded in law.

Problematic Policies and Procedures in Academic Tenure Decisions

While deference to academic decision-making is common, courts are willing to insert a judicial decision for that of an institutional decision when the process of shared governance has resulted in a decision that is not lawful. The policies and procedures that were identified through court narratives can be placed into three categories: (a)

Infringement upon rights; (b) Discrimination; and (c) Breach of contract. Studies by Steadman (2005) and Timm (1994) similarly categorized implications of judicial decisions. The emergent themes that resulted in the categorical formation implicate that courts are reluctant to preempt academic experts in decisions that require professional expertise and qualifications, but are willing to review procedural issues to determine their lawfulness. The nuances lie in determining whether a decision made was purely academic (O'Neil, 2010). In ruling on an illegal action, courts will exert their influence into a decision in academia only to the extent necessary to ensure that illegal decisions are not made (Leap, 1995).

Infringement upon rights. Procedural and substantive rights arise as issues in tenure denial litigation. Procedural rights emanate from an institution's failure to establish or communicate policies and procedures, or from a failure to follow procedures that are in place. Substantive rights arise under constitutional and statutory guarantees. A plaintiff's procedural and substantive rights are often intertwined with a discrimination analysis or contractual interpretation.

In general, institutions that fail to adhere to stated policies create property interest for affected faculty members. In *State ex rel. Chapdelaine v. Torrence* (1975), a statute required that tenure was automatic upon completion of a probationary period coupled with employment. The professor was terminated without conformity to the tenure law. The court found that after three years, the professor had developed a property interest.

In *Mumford v. Godfried* (1995), the court deemed a professor's speech on departmental issues as relating to a matter of community concern and subject to First

Amendment protection. The court in *United Carolina Bank v. Board of Regents of Stephen F. Austin State University* (1982) deemed professor's departmental criticisms a nonprivate manner and subject to First Amendment protections.

Discrimination. Discrimination in the process of tenure review remains a problem. The congressional act to strengthen Title VII resulted, at least in part, from the perception that administrative ranks in higher education were predominately made up of white males (Franke, 2001). A majority of cases included some form of discrimination claims related to Title VII, ADA, Equal Pay Act, or correlated federal and state law discrimination claims, with Title VII being invoked most often. This finding generally aligns with Hamill's (2003) study results, in which 62% were Title VII cases, with sex discrimination alleged most often (p. 62). Hamill (2003) surmised that this was due to the increased number of women entering the higher education work force. Kaplin & Lee (2006) also stated that Title VII was frequently invoked.

Most Title VII suits are claims for disparate treatment (Leap, 1995). As previously discussed in the literature review, a claim for disparate treatment is established through the McDonnell Douglas-Burdine framework (Kaplin & Lee, 2006; Leap, 1995; Poskanzer, 2002). Three stages comprise the process: (a) a plaintiff must establish that he or she is a member of a protected class. (b) a plaintiff must demonstrate that he or she was qualified for the job; and (c) the position for which the plaintiff applied and was rejected (or not reappointed) must remain open, and the institution must continue to seek other applicants who are less qualified or equivalent in qualifications to the plaintiff.

The first element, whether the plaintiff is part of a protected class, is relatively straightforward for most cases. It is not usually difficult to make the case that a plaintiff is in a protected class of sex, race, color, national origin, or religion. *Saint Francis College v. Al-Khazraji* (1987) exemplified that this is not always true, however. Although the court discussed its discrimination claim under a Section 1981 analysis, the case showed that establishing protected class is not always uncomplicated. The defendants argued that the professor could not sue under Section 1981 because he was an ethnic Arab, taxonomically a Caucasian, and therefore not a member of a protected class. The Court disagreed, and explained that Congress did not intend to limit Section 1981 on the basis of discrimination for belonging to a particular ethnic group. Rather, the Court reasoned, Congress intended to "protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" (*Saint Francis College v. Al-Khazraji*, 1987, p. 613).

Courts that discuss a *prima facie* case typically discuss the standards by which the elements will be assessed. A court's effort to determine whether a plaintiff is qualified for tenure can pose greater problems. Judges in different courts have differing perspectives; when assessing seemingly similar facts, different courts may arrive at different decision. Compounding this issue is that qualifications may be determined by internal peer review, external peer review, and administrative assessment of subjective factors that are demonstrated in a tenure dossier that spans many years' worth of a plaintiff's teaching, research, and scholarship. It is this category, particularly, in which judges expressed great deference to the expertise necessary in an institutional judgment.

> "Wherever the responsibility lies within the institution, it is clear that courts must be vigilant as not to intrude into such determinations, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure" (*Kunda v. Muhlenberg College*, 1980, p. 548).

Meticulous documentation as to the assessment of a candidate's qualifications is crucial for supporting an institution's ultimate tenure decision.

If an institution's reasons for not awarding tenure to a candidate are inconsistent or lack substance, a plaintiff may be able to prove that the proffered reasons are pretextual. In *Roebuck v. Drexel University* (1988), the court noted multiple inconsistencies with the defendant university's explanations for the professor's service ratings. While some reviewers deemed his service to be an excellent match for the needs of the university, other reviewers did not. The court explained that cumulatively, the evidence could "cast into doubt the credibility of [Institution's] assertions, and that the reasons proffered by the University were mere pretexts" (p.730).

In order to ascertain whether various aspects of the tenure decision were made for appropriate reasons, it may be necessary for a plaintiff to obtain the materials that support his review. In *University of Pennsylvania v. EEOC* (1990), the U.S. Supreme Court ruled that Title VII requirements for disclosure of materials pertains to universities and held that the EEOC could subpoena universities who refused to voluntarily provide tenure review materials. Even after the Supreme Court's ruling, some universities have asserted that tenure review materials are confidential (AAUW, 2004). The professor in *State ex*

rel. James v. Ohio State University (1980) had to file a motion to compel to obtain his tenure related materials, even though the university's own promotion and tenure guidelines explained that the related materials were not exempted from the Ohio Public Records Act.

Poskanzer (2002) encouraged institutions to conduct thorough, fair tenure reviews and to have nothing to hide. To that point, the court in *State ex rel. James v. Ohio State University* (1994) explained: [I]t is ironic that the university here argues that academic freedom is challenged by the disclosure of the documents. It seems the antithesis of academic freedom to maintain secret files upon which promotion and tenure decisions are made, unavailable even to the person who is the subject of the evaluation (p. 913).

Breach of contract. Cases selected for this study revealed that courts are not interested in placing within their purview the administration or governance of institutions of higher education. Accordingly, courts have demonstrated the priority of discerning the agreement between the parties. Contracts are enforceable promises, with rights that emanate from government documents, statutes, regulations, faculty handbooks, institutionally adopted terms and conditions, common practices, and employee contracts (White, 2010). To determine the plaintiff's rights in *Kakaes v. George Washington University* (1996), the court's lengthy discernment of a notice provision began: "A proper understanding of this somewhat esoteric dispute requires familiarity with the applicable provisions of the Faculty Code" (p. 129).

In upholding the law, courts require that institutions comply with any and all contractual commitments to faculty. Provisions of a contract must be implemented in a

consistent and fair manner. As explained in *Craine v. Trinity College* (2002), a "university cannot claim the benefit of the contract it drafts but be spared the inquiries designed to hold the institution to its bargain …. The principle of academic freedom does not preclude us from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract" (p. 540).

Allegations related to contract were found in a number of opinions and were often included with other claims. Divisions among claims are not discrete as to the use of contract interpretation to determine a plaintiff's rights, because reviewing discrimination claims may require interpreting the agreement of the parties, or claiming rights to due process may require examining the contract to ascertain the process due under the tenure review procedures.

Breach of contract allegations are often rooted in procedural irregularities, thus highlighting the need for institutions to not only have clear, thorough procedures, but also to provide adequate training to those who must enact and enforce such policies and procedures. The AAUP advocates for all terms and conditions of faculty employment to be clearly stated in writing. Other scholars have advised that the wording of tenure documents in all policies and handbooks should be specific (Kaplin & Lee, 2006; Leap, 1995) and that tenure criteria should be based on merit and free of bias (Hendrickson, 1999).

Differences by Court, Time, or Institutional Status

As can be seen in Tables 1 and 2, the three major categories of problematic policies and procedures, including infringing upon a professor's rights, discriminating

against an employee, and breaching a contract with an employee arose in both federal and state courts, and the claims can be intertwined. As discussed, an interpretation of state antidiscrimination laws can be considered to be subsumed within the court's interpretation of the Title VII claims. In *Brown v. Trustees of Boston University* (1989), the court ruled that the district courts exercise of pendent jurisdiction over the contract claim was proper. Because the district court had federal question jurisdiction over Brown's Title VII claim, it was proper to exercise jurisdiction over the state law claim because "the state law claim alleging violation of the anti-discrimination clause of the contract exactly paralleled the federal Title VII claim [and] lay within the district court's discretion" (p. 356).

In federal courts, authorities can differ when interpreting the same or similar questions. A split in authorities among federal circuit courts regarding access to peer review materials was discussed by the court in *Dixon v. Rutgers, The State University of New Jersey* (1988). In that case, the university argued that for purposes of academic freedom interests, peer review materials should be protected by a qualified privilege. The court explained that four circuit courts had, at that time, considered forms of the proposed qualified privilege. Two of the circuit courts had adopted the qualified privilege, and two others had rejected it. Thus, the results arising in courts in which materials are privileged would likely differ when compared with results from courts in which materials are not deemed privileged, particularly as to a plaintiff's ability to meet the burden of proof.

State courts' interpretations of policies and policies can differ widely based on state statute. A tenure denial would be examined differently in states with automatic

tenure statutory provisions versus states without such statutes. In *State ex rel. Chapdelaine v. Torrence* (1975), a Tennessee statute provided that tenure was automatic upon completion of a probationary period coupled with reemployment. In analyzing the plaintiff professor's claims, the court would not allow for a "common law" interpretation of tenure, because a statutory law was firmly in place.

Changes in statutes over time would likely affect the outcome of tenure litigation. In *Ford v. Nicks* (1984), male and female, husband and wife faculty members alleged wrongful termination on the basis of sex, as well as retaliation for protesting against the institution's employment practices. The male professor was found to have proven a Title VII case of discrimination, and Tennessee law at that time granted automatic tenure to any professor at a state university who successfully completed five years of employment. The female professor was found to have presented a *prima facie* case of discrimination, but the trial court misapplied the burden of persuasion, and the case was remanded. On remand and subsequent appeal of the case, the court in *Ford v. Nicks* (1989) determined that the female professor had proven her case of discrimination and should be awarded reinstatement. However, the district court's award of a full professorship with tenure was reversed on the basis of facts related to the timing of the female's hiring and when her claims arose, and the abolishment of the system of automatic tenure.

Institutional status can have an effect on the claims that can be brought and the result of the claims. For example, in *Sawyer v. Mercer* (1980), the plaintiff professor claimed that he acquired tenure when the college did not provide notice in a timely manner, and he completed the four year probationary period. In response, the college

argued that tenure was not automatic, and that the Board had to act in an affirmative decision. Although there was a state statute in existence regarding the parameters of an automatic grant of tenure for public college teachers, the Tennessee Supreme Court ruled that the college was not bound by the state statutes relating to tenure, because the college was a private institution. The employment relationship was a function of state contract law, which the Court interpreted to award tenure to the professor.

Remedies

A denial of tenure can mean the loss of a job, rejection, and alienation. A negative tenure decision alters lives, splits colleagues, and places a cloud on working environments. Those who were once friends can become adversaries. No matter who prevails, the costs are great (Franke, 2001; Leap, 1995; Poskanzer, 2002). The lifestyle and career costs are evident in the case of *Ford v. Nicks* (1984). There, the male plaintiff professor, after dismissal from the institution, attempted to find other employment, was unsuccessful at attempts to secure academic employment, and ultimately began to work in real estate. His wife, the female plaintiff professor, also attempted unsuccessfully to locate employment at other educational institutions following her dismissal from the institution. She, too, began to work in real estate and then secured employment with a nonacademic agency.

A particular problem arises for courts when fashioning a remedy becomes necessary for a plaintiff who succeeds in a tenure denial lawsuit (Leap, 1995). Because the academic profession does little to fashion relief for wrongful denial of tenure, and may not recognize that that a denial was wrongful, courts are placed in the position of

fashioning adequate relief. Courts look to law for determining appropriate relief (Ancell, 1978). In reality, true relief for plaintiffs who may have gone through years of litigation and unemployment can be particularly challenging to obtain. Even when reinstatement is granted, the working environment may then pose special challenges in terms of departmental and colleague acceptance.

As the findings demonstrate, equitable and legal remedies were granted in both federal and state courts. Equitable remedies ranged from making promotion with tenure available if the professor completed a master's degree, to various levels of reinstatement, to grants of tenure. Legal remedies included damages, costs or attorney's fees, and back pay. In fashioning remedies, courts often express principles of fairness. In *Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut* (1973), a plaintiff had to go to great expense to combat the conduct of a university defendant. The court explained that it sought to

> assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants (*Stolberg v. Members of the Board of Trustees for State Colleges of State of Connecticut*, 1973, p. 490).

Violation of a liberty or property interest calls for due process. A notable property interest case, *Soni v. Board of Trustees of University of Tennessee* (1975) declared that

because a professor had de facto tenure, he was entitled to a full hearing before dismissal. The court ordered a new hearing, but not tenure.

Violation of a contractual agreement that grants automatic tenure if certain criteria are met requires a grant of tenure. The defendant institution tried to assert a common law tenure theory in *Sawyer v. Mercer*, (1980), but where a contract was specific, the court deemed that the professor had acquired tenure. Statutes can also dictate that tenure be granted upon the fulfillment of requisites (*Ford v. Nicks*, 1984).

Title VII violations may require reinstatement and other make-whole relief. This study affirmed that awarding tenure is considered appropriate if there were no other options for making the plaintiff whole. The award of tenure is rare. In *Kunda v. Muhlenberg College* (1980), the court awarded promotion and tenure, which was unprecedented at that time, and reasoned that an award of tenure was the only way to make the plaintiff whole. Based on a specific finding of the district court, the court found that the plaintiff had not been recommended for tenure because she lacked an advanced degree, and had not been counseled that the degree was the limiting factor. The remedy granted by the court was reinstatement, back pay, and promotion with tenure to be granted upon the completion of a master's degree. The court sought to place the plaintiff in the position she would have been in "but for" the unlawful discrimination had occurred. The dissent opined that tenure should not have been granted, because there was no proof that had the plaintiff met the requisites of obtaining her advanced degree, she would have then been granted tenure.

In *Brown v. Trustees of Boston University* (1989), another Title VII discrimination case, the court affirmed a district court's grant of tenure and other compensatory damages to the plaintiff. Explaining the rarity of a grant of tenure, the court stated: "Courts have quite rarely awarded tenure as a remedy for unlawful discrimination" (*Brown v. Trustees of Boston University*, 1989, p. 359). The court stated that tenure was to be awarded only when there was no dispute as to a professor's qualifications. "

In *Ford v. Nicks* (1984) the male plaintiff professor had been discharged, after four years, in retaliation for helping his wife in her sex discrimination claim against the institution. The court upheld an order reinstating the professor, with tenure, to the institution which automatically granted tenure after five years of teaching. Thus, contract rights can intertwine with discrimination claims for determining the appropriate award.

Through fashioning remedies, courts wield considerable power to affect academic policy and rules surrounding employment decisions. Moreover, courts wield considerable power to affect the lives of faculty members for whom tenure denial is an issue.

Recommendations from the Study: Research Question Three

Research Question 3 asked the following: *What steps might colleges and universities take in the tenure process to minimize tenure denial litigation and the possibility of an unfavorable decision in a tenure denial lawsuit?*

This study identified three main categories of problematic institutional behaviors, the result of which courts ruled in favor of plaintiffs: (a) Infringement upon rights; (b)

Discrimination; and (c) Breach of contract. Steps that minimize these issues will help to minimize tenure denial litigation and the possibility of an unfavorable decision in a tenure denial lawsuit. The ability to establish and implement preventive measures that address problems in the above categories requires that administrators and faculty decision-makers know *how* to do so. In reality, knowing the law, staying current on the law, and knowing how to implement legal procedures is a monumental task for which administrators and faculty are likely ill-prepared. Accordingly, Kaplin & Lee (2006) suggested employing experienced administrators and legal counsel who know and understand the impact of laws and tenure.

Similarly, hiring a risk manager places a high importance on regular and ongoing reviews of laws, policies, and procedures affecting the institution (Hamill, 2003). Risk managers can focus on the avoidance of problems that can lead to a lawsuit and be the contact point from which other actions emanate. Furthermore, a risk manager can bring to a higher level the process of monitoring policies, procedures, and employment decisions as they progress, and providing ongoing training for those involved in the process or who will be involved in the future.

With guidance and advice from counsel and risk managers, those who have responsibility for oversight of tenure decisions should discuss and analyze prior tenure denial litigation and related studies to extrapolate useful information (ACE Report, 2000). Information gleaned can be shared through administrative and faculty professional development training regarding pertinent laws, policies, and institutional regulations. Online training formats that can be kept current might prove particularly

useful for such development. As well, formalized systems of networking and mentoring might help to facilitate the conveyance of such information. Administrators and faculty members should have time allowance in their schedules not only to serve on review committees, but to be trained and well-prepared to serve on review committees. For higher education programs that train administrators and prepare higher education faculty members, a course in higher education law should be required.

Maintaining a good relationship between counsel and administrators is crucial for keeping open the channels of communication. It is important that institutional and departmental missions are clearly communicated to counsel, and that legal frameworks are proactively developed with an eye towards honoring the institutional mission and priorities. Prior to any employment action, the decision should be considered in light of all legal and procedural standards. To these measures for managing risk, the following suggestions are added:

- Design policies and procedures for the institution that comply with all antidiscrimination, contractual, procedural, and statutory requisites.
- Assure policies and procedures are clearly and concisely written. Faculty handbooks should be written with the presumption that they are legally binding and should include provisions the institution expects to follow meticulously.
- Keep procedures up-to-date in any and all handbook or contractual formats.
- Advise and inform all involved in the tenure process of institutional policies, procedures, including tenured faculty and tenure-track faculty. Tenure-track faculty should receive this information early in their career.

- Be knowledgeable of departmental needs and institutional mission when conducting a hiring search. Inform search committees of the criteria needed for the position. Link hiring policies with tenure policies.
- Ensure diversity in hiring and review committees.
- Provide appropriate training for administrators and faculty on procedural fairness, due process, and assessment procedures.
- Provide professional development opportunities for all faculty members and administrators on topics such as discrimination, harassment, and retaliation.
- Follow established procedures. If exceptions are necessary, document the exceptions and explain fully.
- Provide all requisite materials, as required by law.
- Clarify standards of review that will be used in the tenure process.
- Honor a tenure applicant's rights; avoid retaliation for assertion of those rights.
- Monitor the possibility of a hostile, retaliatory, patronizing, or discriminatory work environment. If any is detected, correct immediately. Proactively identify all appropriate consequences for those who offend varied levels of institutional policy.
- Require regular, written evaluations for all tenure-track faculty members. Use specific performance measures to identify a candidate's progress in research, teaching, and service. Communicate both positive and negative aspects about a candidate's tenure progress and prospects.
- Make sure evaluations of teaching, research, and service are equally applied.

- For a negative decision, treat a rejected tenure candidate with sensitivity and respect. Faculty and administrators should fully communicate and explain their decision
- For a negative decision, offer support services such as assistance in seeking new positions, time for travel to interviews, and mentoring.
- In consideration of the above recommendations, identify the persons who would best provide the requisite information, and who must be included as recipients of the information.

Recommendations for Further Research

In order to gain a full understanding of the cultural and historical aspects of tenure and pertinent current legal issues, this interdisciplinary study included scholarly background and processes from both the legal and educational disciplines. Any study of tenure, promotion, or retention that would further enhance, extend, or continue this scholarship would likely combine the disciplines in varying degrees. For the sake of presentation, the recommendations set forth below are divided into legal analysis studies related to tenure, promotion, and retention issues, and qualitative case studies, which suggest in-depth study to help tell more about the nuanced stories that exist behind the litigation.

Legal Analysis Studies of Case Law

Future studies of case law related to tenure, promotion, and retention litigation could add to the discussion by:

- Changing or adding to any of the delimiters – a review of litigation arising out of community colleges or professional schools, for example, could add insight to tenure processes, requirements, and fairness in other genres.
- Clustering and analyzing decisions by court—a comparative study of judicial decisions by circuit or by state could extend knowledge as to courts' views about judicial deference to academia, the nuances of summary judgment analyses, or burdens of proof in different circuit courts.
- Studying trial court cases, particularly those that were not further appealed—a depth of factual analysis could be gleaned beyond what is available at the appellate level.
- Analyzing litigation for institutions with Collective Bargaining Agreements versus those that do not have such agreements—particular interest could be given to quantifying the percentage of suits brought in institutions that have bargaining as compared with those that do not, the content of the suits, the level of judicial deference given when collective bargaining is in force, and how the process of shared governance is affected by the bargaining agreement.
- Comparing and contrasting the language of judicial deference used in corporate case decisions with the language of judicial deference used in academic cases—results could add to insight about judicial perspectives of board functions, and similarities and differences between board functions in corporate and academic contexts.

- Reviewing tenure denial litigation and remedies to assess the extent to which remedies drive litigation and the level to which litigation proceeds when certain remedies are at stake—results could be particularly instructive to administrators and counsel as to the potential purposes, costs, and benefits of litigation.

Legal Analysis Studies of Statutory Law

Legal analysis can also be conducted on statutory law. State legislators, especially, may be influenced by public opinion, constituent pressures, and costs related to the funding of higher education. To extend the present study, a study of legislation affecting tenure could be conducted:

- Comparing statutory language state by state—the statutes could be parsed, interpreted, and followed as to their influence on judicial deference, shared governance, and litigation.
- Following a particularly public case and determining whether the outcome of the cases subsequently influenced changes in legislation—a review of the legislative history of a bill could indicate the catalysts for change in tenure governance policies.

Qualitative Case Studies

Qualitative studies provide depth and could help legal and educational scholars to understand the story underlying litigation. Studies could be conducted:

- Assessing an institution’s tenure, promotion, and retention training for faculty (or administrators) as to laws, policies, and procedures.

- Evaluating the perceived versus the actual level of faculty (or administrative) preparedness and training as to tenure, promotion, and retention laws, policies, and procedures.
- Assessing the standard of review implemented at each level of the tenure review process.
- Comparing the hiring criteria for a particular tenure-track candidate with the criteria applied to the candidate's subsequent tenure review.
- Following an individual plaintiff through the litigation process to help reveal the gamut of expectations, emotions, difficulties, and successes faced during the process of litigation.
- Focusing on cases that did not reach trial, in order to shed light on plaintiffs' reasons for not fully pursuing litigation, settlement offers, and the subsequent effects on plaintiffs' perceptions (e.g., whether they "won" or "lost," attitudes towards their peers and institutions, careers, and lives).
- Focusing on cases that did not reach trial, in order to shed light on institutional perspectives on the effects of settlement on the tenure process, related policies and procedures, public perceptions, and institutional finances.
- Comparing an institution that went through tenure litigation with a similar institution (and similar tenure claim) that reached a settlement, so as to reveal differences in costs and benefits (e.g., financial, emotional, time commitment, and perceptions).

- Following a single case through the system, each time it was appealed, sent back to the trial court, and perhaps appealed again (or rehearing denied, appeal denied). Obtaining the briefs filed and any supporting documents could be particularly meaningful to assess nuances of policies and procedures with which the court grappled.
- Tracking a particularly noteworthy case through "the court of public opinion" as it progresses through the judicial system, with the goal of identifying public opinion through editorials and articles, and identifying any institutional changes that resulted from the pressures that formed outside the ivory tower.
- Examining at a single institution how tenure and promotion policies have changed over time. One aspect of the study could include the change in requirements for presenting a tenure dossier. Another aspect could show how the materials submitted have changed, such as categories assessed, type of documentation, amount of documentation, and specificity.
- Studying tenure dossier requirements pre- and post-litigation, for an institution that had been through litigation.
- Following an entire tenure review process, to show the perspectives of both the faculty and administrative reviewers, and to gain insight as to how and why the reviewers made the decisions they made.
- Analyzing how administrators and senior faculty members transmit the institutional expectations to junior track faculty members.

- Comparing tenure, promotion, and retention processes at institutions with Collective Bargaining Agreements to processes at institutions that do not have such agreements.
- Following two tenure litigants, one who prevailed and one who did not, to compare the futures of the candidates.

Conclusion

This study analyzed the influence of the judiciary on academic decision-making, as examined through tenure denial litigation. By looking only at cases in which institutions did not wholly prevail, it identified policies and procedures used in making tenure decisions that courts found particularly problematic. The uniqueness of the tenure decision, with its multi-layered complexity and shared governance structure, makes judicial review of such decisions challenging.

The research questions of this study were considered primarily from the perspective of the institution, with the objective of identifying what those who serve in administrative or senior faculty roles can do to prevent litigation, or to successfully defend institutional decisions, should litigation arise. Faculty may also benefit from the study by learning more about their rights, responsibilities, and roles in the process of tenure decisions. While many policies and procedures that courts find problematic arise from diverse situations and allegations in the context of tenure litigation, they can be broadly classified into three categories: (a) Infringement upon rights; (b) Discrimination; and (c) Breach of contract. Thus, courts are most likely to insert their decisions when those made in academia are contrary to law.

The data from this study supported that courts are empowered to uphold the law, not to be surrogates for the principles of the academic community. In fact, courts exhibited great deference to academia for faculty personnel decisions. The crux of determining why courts rule against an institutional tenure decision lies within the difference between academic decision-making, for which the professional judgment and expertise of academicians is crucial, and decisions made in academia that are procedural and unrelated to the goals of academic freedom, and contrary to law. To the former, courts are highly deferential; to the latter, courts are not.

Judicial deference to academia, complexity of the tenure process, and challenges of litigation notwithstanding, the fact that few tenure litigation cases reach the appellate level and fewer still are won by plaintiffs raises the distinct possibility that institutions are, in a vast majority of instances, developing and implementing tenure, promotion, and retention plans that are grounded in solid law and policy. Knowledge gained from previous tenure, promotion, and retention litigation scholarship, combined with input and training from general counsel, risk managers, and the AAUP, have surely aided administrators and faculty in their understanding of the tenure process. Yet, the many (and unknown number) of cases that arise and are settled before ever reaching court and cases that are brought to court indicate that there remains much work to be done. Though institutions largely prevail in tenure denial litigation and few cases proceed to the appellate level, higher education institutions must continue to be attentive to laws, policies, procedures, and training to pursue fairness and compliance with the law.

Litigation represents extreme forms of academic community conflict that cultural, managerial, or legal policies of an institution failed to prevent. Higher education administrators and faculty, particularly those who are in decision-making and leadership roles, need to gain a better understanding of the risks involved in the tenure process. Measures taken to avoid or mitigate litigation can help build community within the institution. By carefully considering and planning for decisions that are based in both law and policy, institutions can be strengthened. Counsel, administrators, and faculty must work together towards this goal.

This study sought to improve what is known about the law's effect on higher education by better understanding the flaws in the tenure process that require judicial intervention. It is hoped that information gleaned from this study can contribute meaningfully to the dialog in the education and legal communities. Knowing more about fair policies and procedures can improve higher education institutions' ability to protect traditional values and build a positive community.

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APPENDICIES

Appendix A

Study Case List

Federal

U.S. Supreme Court

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State and D.C.

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Brown v. North Dakota State University, 372 N.W.2d 879 (N.D. 1985).

Craine v. Trinity College, 791 A.2d 518 (Conn. 2002).

Dixon v. Rutgers, The State University of New Jersey, 541 A.2d 1046 (N. J. 1988).

Kakaes v. George Washington University, 683 A.2d 128 (D.C. 1996).

Sawyer v. Mercer, 594 S.W.2d 696 (Tenn. 1980).

Shoucair v. Brown University, 917 A.2d 418 (R.I. 2007).

Skudrzyk v. Reynolds, 856 P.2d 462 (Alaska 1993).

State ex rel. Chapdelaine v. Torrence, 532 S.W.2d 542 (Tenn. 1975), *cert. denied*, 425 U.S. 953 (1976).

State ex rel. James v. Ohio State University, 637 N.E.2d 911 (Ohio 1994).

University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983).

Appendix B

Tables

Table 1

Overview of Selected Tenure Denial Litigation Cases Heard in Federal Appellate Courts

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979).	Female instructor at public institution alleged wrongful denial of tenure and termination based on sex.	Retaliation; Sex discrimination; Breach of contract/Title VII State contract law.	Consequences of tenure denial extended through expiration of terminal contract year; Professor's claims should be determined by referencing how institution actually makes tenure decisions, not by how guidelines say they should; Generally accepted tenure process included a review of reconsideration requests in final year.	Affirmed district court's grant of summary judgment as to equal pay claim; Reversed summary judgment as to Title VII claims; Remanded for further proceedings.
Abramson v. William Paterson College of New Jersey, 260 F.3d 265 (3rd Cir. 2001).	Associate professor at public institution alleged wrongful denial of tenure and termination based on Orthodox Jewish religious beliefs and practices.	Hostile work environment; Religious discrimination; Unlawful retaliation/ Title VII; New Jersey Law Against Discrimination.	Excessive monitoring of conferences and absences, charging sick days on religious holidays, criticism of unavailability on holy days, scheduling meetings on religious holidays, and faith based statements could lead a jury to conclude professor was negatively affected; Changing nature of proffered reasons tended to show pretext.	Reversed district court's grant of summary judgment for institution on all claims; Remanded for further proceedings.
Brennan v. King, 139 F.3d 258 (1st Cir. 1998).	Male assistant professor at private institution alleged wrongful denial of tenure and termination based on sexual orientation and being HIV Positive.	Discrimination; Breach of contract/ADA; Rehabilitation Act; State contract law.	Discrimination claims were not barred because contract of employment did not require submission of tenure dispute to arbitration.	Affirmed district court's grant of summary judgment in favor of institution on breach of contract; Reversed summary judgment as to professor's federal discrimination claims; Remanded for further proceedings.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989).	Female assistant professor at private institution alleged wrongful denial of tenure based on sex.	Discrimination; Violation of Collective Bargaining Agreement/Title VII; State anti-discrimination statute; State contract law.	Conduct and comments by persons involved in tenure review process indicated a discriminatory attitude.	Affirmed district court's ruling in favor of professor on sex discrimination charge; Affirmed order of reinstatement as professor with tenure; Vacated ruling granting an injunction as to other professors, due to overbreadth.
Ford v. Nicks, 741 F.2d 858 (6th Cir. 1984).	Male associate professor and female assistant professor, husband and wife faculty members at public institution alleged wrongful termination based on sex, and retaliation for protesting against employment practices and assisting in battle for reinstatement.	Discrimination; Retaliation/Title VII.	At trial, male professor had proven a Title VII violation by a preponderance of evidence; Female professor had presented a *prima facie* case of discrimination, but trial court misapplied the burden of persuasion from plaintiff to defendant; Tennessee law in existence at time of case granted automatic tenure to any professor at a state university who successfully completed five years of employment at institution.	Affirmed district court's ruling in favor of male professor in total awarding tenure and back pay; Remanded court's finding in favor of female professor on her discrimination claim because of improper burden shifting to institution.
Ford v. Nicks , 866 F.2d 865 (6th Cir. 1989).	Female assistant professor at public institution alleged wrongful termination based on sex.	Discrimination/Title VII.	Institution was inconsistent as to facts regarding professor's lack of qualifications; Institution's application of policies and procedures was inconsistent; Institution did not accurately state its policy; Reinstatement proper; Abolishment of system of automatic tenure made grant of tenure improper.	Affirmed district court's finding of discrimination and award of reinstatement; Reversed award of full professorship with tenure; Remanded for further proceedings.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988).	Female professor at public institution alleged wrongful denial of tenure on the basis of sex.	Discrimination/Title VII; § 1983.	Evidence showed certain decision-makers in tenure process intentionally discriminated against professor by requiring more scholarship, selecting outside reviewers in an inconsistent manner, and choosing negative evaluations.	Affirmed district court's finding of Equal Protection and Substantive Due Process violations; Affirmed award of punitive damages against chairs; Reversed dismissal of Title VII claim and directed judgment entered in favor of professor; Remanded for further determination of appropriate equitable relief; Directed that reinstatement with tenure should be ordered only if professor could not receive fair consideration of her tenure application.
Harris v. Ladner, 127 F.3d 1121 (D.C. Cir. 1997).	Female assistant professor, who was black, of Guyanese descent, and a faculty member at private institution, alleged wrongful denial of tenure and promotion on the basis of race.	Discrimination; Equal Protection and Due Process violations; Breach of contract; tort violations/§ 1981; U.S. Const. Amend. V and XIV; State contract and tort law.	Professor's right to reconsideration was not a collateral review, but rather a continuation of the original application process; statute of limitations did not bar the action.	Reversed district court's dismissal of professor's nonconstitutional claims; Affirmed dismissal of constitutional claims; Remanded for further proceedings.
Hill v. Ross, 183 F.3d 586 (7th Cir. 1999).	Male professor at public institution alleged wrongful denial of tenure on the basis of sex.	Discrimination; Equal Protection/Title VII; U.S. Const. Amend. XIV.	Fact issues existed as to whether the institution used sex as a sole factor in its hiring decision, where department set a target percentage for hiring that it could not explain and left position vacant rather than hiring professor.	Reversed district court's grant of summary judgment for institution; remanded for further proceedings.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Jones v. University of Central Oklahoma, 13 F.3d 361 (10th Cir. 1993).	Male professor at public institution alleged wrongful denial of tenure on the basis of race.	Discrimination; Due Process; Breach of contract; tort violations/Title VII; § 1983; State contract and tort law.	Existence of a formal procedure for tenure decisions does not automatically preclude the professor from relying on an unwritten tenure policy; district court was required to consider state law in its analysis.	Reversed district court's grant of summary judgment for institution; Remanded for further proceedings.
Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980).	Female instructor at private institution alleged wrongful denial of tenure and promotion on the basis of sex.	Discrimination/Title VII.	Institution did not counsel professor as to the necessity of obtaining master's degree for acquiring tenure; Tenure requirements were not addressed by Faculty Handbook.	Affirmed in entirety district court's order in awarding professor reinstatement, back pay, and promotion with tenure to be granted upon the completion of master's degree.
Lynn v. Regents of the University of California, 656 F.2d 1337 (9th Cir. 1981).	Female assistant professor at public institution alleged wrongful denial of tenure and merit salary increases on the basis of sex.	Discrimination/Title VII.	Testimony, evidentiary documents, and statistical data revealed a general pattern of discrimination that favored men and disfavored women's issues and those who concentrated on such issues; District court reviewed professor's tenure file for evidentiary purposes but denied access to professor, which violated her due process.	Reversed district court's grant of summary judgment for institution; Remanded for further proceedings.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Mumford v. Godfried, 52 F.3d 756 (8th Cir. 1995).	Male probationary faculty member at public institution alleged wrongful denial of tenure and discharge in violation of free speech rights, and tortious interference with contracts and prospective business advantage.	Violation of free speech rights and contract/§ 1983; U.S. Const. Amend. I; State common law and tort claims.	Professor's speech on departmental issues could be fairly considered as relating to a matter that was a community concern and should not have been excluded from First Amendment protection.	Affirmed district court's dismissal of professor's common law and tort claims; Affirmed summary judgment dismissal of due process claim; Reversed summary judgment dismissal of First Amendment claim; Remanded for further proceedings.
Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988).	Male assistant professor at private institution alleged wrongful denial of tenure on the basis of race.	Discrimination/§ 1981; Title VII.	Professor's service responsibilities, for which he was hired, were noted favorably and yet devalued by some in tenure review process; Racial animus by university officials included inconsistent application of tenure guidelines.	Reversed district court's grant of judgment notwithstanding the verdict on professor's § 1981 claim; Affirmed the grant of a new trial on the § 1981 claim; Vacated the Title VII judgment with instruction to await jury verdict on retrial; Remanded for further proceedings.
Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).	Male associate professor at private institution alleged wrongful denial of tenure and termination based on Arab race, national origin, and Muslim religion.	Discrimination/§ 1981	Legislative history of § 1981showed Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics; Congress intended § 1981 to forbid such discrimination; Distinctive physiognomy not essential to qualify for race discrimination protection under § 1981.	Affirmed Court of Appeals; Held professor's action not time barred; Persons of Arabian ancestry could bring claims for racial discrimination under statute governing equal rights

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Sola v. Lafayette College, 804 F.2d 40 (3rd Cir. 1986).	Female assistant professor at private institution alleged wrongful denial of tenure, wrongful discharge, and breach of contract arising from discrimination on the basis of sex.	Discrimination, breach of contract, tort violations/Pennsylvania Human Relations Act; State contract and tort laws.	No facts supported professor's claims that she was denied contractual protections; No facts supported that gender played a role in institution's decision; Affirmative action claims were deemed raised in brief and at oral argument and should have been considered by district court.	Affirmed district court's grant of summary judgment for institution on professor's claims of wrongful discharge (public policy) and breach of contract (handbook, gender),; Vacated dismissal of claim for breach of contract (affirmative action); Remanded.
Soni v. Board of Trustees of University of Tennessee, 513 F.2d 347 (6th Cir. 1975).	Male associate professor at public institution alleged wrongful nonrenewal of contract and tenure denial without a hearing.	Violation of due process/State law.	State law that existed at that time prohibited a grant of tenure to aliens, but professor was told he would be treated like any other professor; Professor was later terminated without due process hearing; System of practice gave rise to expectation of continued employment.	Affirmed district court's decision ordering hearing and back pay from date of termination; Held that monetary judgment against institution was not barred by 11th Amendment.
Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983).	Male assistant professor at public institution alleged wrongful denial of tenure in retaliation for expression of speech.	Retaliation/§ 1983; U.S. Const. Amend. I.	Professor's speech was constitutionally protected; limits existed on a public institution's freedom to prohibit or regulate professor's criticism.	Affirmed district court's assessment of nominal damages, costs, and attorney's fees; Reversed award of back pay and prejudgment interest.
Stewart v. Rutgers, The State University, 120 F.3d 426 (3rd Cir. 1997).	Female assistant professor at public institution alleged wrongful denial of tenure on the basis of race.	Discrimination/§ 1981; § 1983.	Evidence existed from which jury could conclude tenure denial was racially motivated; Noted inconsistencies and procedural errors in review of professor's bid for tenure, which was "arbitrary and capricious" and "could not have been reached by reasonable evaluators."	Reversed district court's grant of summary judgment for institution; Remanded for new trial.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Stolberg v. Members of Board of Trustees for State Colleges of State of Connecticut, 474 F.2d 485 (2nd Cir. 1973.	Male assistant professor at public institution alleged wrongful denial of tenure and revocation of contract in retaliation for expression of speech.	Retaliation/§ 1983; U.S. Const. Amend. I.	College president acted inappropriately towards professor; Under existing regulations, teachers who satisfactorily completed three years in probationary status were entitled to tenure; Competence was never questioned; Institution's actions contributed to award of attorney's fees. (NOTE: Professor was awarded tenure at the end of trial. Though he prevailed, he appealed seeking additional remedies.)	Affirmed district court's award of compensatory damages and denial of damages for humiliation, distress, and injury to reputation; Affirmed denial of punitive damages; Reversed denial of attorney's fees; Remanded for determination of reasonable attorney's fees.
United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553 (5th Cir. 1982).	Male professor at public institution alleged wrongful denial of tenure and lost professorship based on constitutional and contract violations.	Constitutional violations; Breach of Contract//§ 1983; U.S. Const. Amend. I and XIV; Texas Penal Code.	Institution was aware that professor's criticism was being voiced in a nonprivate manner; Institution failed to offer any evidence of falsity of professor's criticisms. (NOTE: District court awarded tenure, reinstatement, and relief, but professor died during proceedings mooting the tenure issue; Decedent's estate became plaintiff of record.)	Affirmed district court's holding that professor's termination violated First Amendment rights; Affirmed award of attorney's fees against Board, president, and individual defendants; Reversed award of back pay against Board of Regents and president; Reversed claim under Texas Penal Code.

Table 1 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990).	Female associate professor at private institution, following tenure denial, brought complaint before the EEOC that alleged unlawful discrimination based on race, sex, and national origin. EEOC then brought action seeking to enforce subpoena after institution refused to release confidential tenure review files of professor and certain male faculty.	Discrimination/Title VII.	Professor's charge stated sexual harassment and that her qualifications were "equal to or better than" those of five named male faculty members who received more favorable treatment; Professor was not given reasons and alleged a few reasons were pretext for discrimination; Disclosure of files was necessary.	Affirmed judgment of Court of Appeals and refused to recognize a privilege for tenure documents.

Table 2

Overview of Selected Tenure Denial Litigation Cases Heard in States' Highest Appellate Courts

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Board of Trustees of University of Kentucky v. Hayse, 782 S.W.2d 609 (Ky. 1989).	Male assistant professor at public institution alleged wrongful denial of tenure and promotion and wrongful termination based on departmental disputes and constitutional rights violations.	Procedural flaws; Constitutional violations/§ 1983; U.S. Const. Amend. I, V, and XIV.	University had the burden to persuade jury that professor's termination was not based on impermissible factors.	Vacated lower court's judgment notwithstanding the verdict in favor of institution; Reinstated jury's judgment in favor of professor for damages; Vacated separate judgment that denied injunctive relief against institution; Remanded case to decide merits of controversy; Required institution to consider professor's tenure under the rules and regulations at the time tenure was denied.
Brown v. North Dakota State University, 372 N.W.2d 879 (N.D. 1985).	Female college teacher at public institution alleged wrongful denial of tenure in violation of regulations promulgated by State Board of Higher Education.	Breach of contract/State contract law.	Issues of fact existed regarding the exact nature of professor's duties and responsibilities while employed at institution; Issues were crucial to contract interpretation.	Reversed lower court's grant of summary judgment in favor of institution and remanded for further proceedings.

Table 2 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Craine v. Trinity College, 791 A.2d 518 (Conn. 2002).	Female professor at private institution alleged wrongful denial of tenure based on sex discrimination and violation of contract and tort principles.	Discrimination; Breach of contract; negligent misrepresentation; negligent infliction of emotional distress/Title VII, State antidiscrimination laws; State contract and tort law.	Professor proved *prima facie* case of sex discrimination but failed to meet burden that tenure denial was motivated by discrimination; Institution failed to comply with faculty manual regarding tenure; Professor was given poor instructions as to requirements to achieve tenure.	Reversed lower court's denial of institution's motion for judgment notwithstanding the verdict on the claim of sex discrimination; Affirmed denial of institution's motion for judgment notwithstanding the verdict on professor's claim for contract and tort issues; Remanded with direction to modify the judgment accordingly.
Dixon v. Rutgers, The State University of New Jersey, 541 A.2d 1046 (N.J. 1988).	Female assistant professor at public institution alleged wrongful denial of tenure and promotion on the basis of sex.	Disparate treatment/New Jersey Law Against Discrimination.	Comparing confidential promotion packet of female professor who was denied tenure with packets of male faculty members who were granted tenure was deemed relevant to professor's discrimination claim.	Rejected institution's request to create a qualified privilege to protect confidentiality of peer review materials, but provided protective orders to limit access to materials in order to accommodate competing interests.
Kakaes v. George Washington University 683 A.2d 128 (D.C. 1996).	Male assistant professor at private institution alleged unlawful denial of tenure based on breach of contractual obligations.	Breach of contract/State contract law.	Court considered whether institution had failed to provide timely notification to professor prior to any tenure decision, as required by Faculty Code; Letter professor received indicated final decision had not yet been reached.	Reversed lower court's grant of summary judgment for institution; Remanded for further proceedings.

Table 2 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
Sawyer v. Mercer, 594 S.W.2d 696 (Tenn. 1980).	Male assistant professor at private institution alleged unlawful denial of tenure based on breach of contractual obligations.	Breach of contract; State contract law.	Institution (private college) was not bound by state statutes relating to tenure; Employment contract controlled relationship and was not ambiguous.	Affirmed lower court's decree and awarded professor tenure; Remanded for entry of decree.
Shoucair v. Brown University, 917 A.2d 418 (R.I. 2007).	Male assistant professor at private institution alleged unlawful denial of tenure based on retaliation and discrimination on the basis of ethnicity.	Retaliation; Discrimination/Fair Employment Practices Act.	Claim for retaliation was supported by evidence; Alternative reasons for tenure denial were refuted; Professor supported tenure qualification with recommendations from respected authorities in the field.	Affirmed lower court's judgment as to award of compensatory damages and back pay; Vacated award of punitive damages; Remanded to strike punitive damages; No reinstatement granted.
Skudrzyk v. Reynolds, 856 P.2d 462 (Alaska 1993).	Male professor at public institution alleged unlawful denial of tenure claiming substantial unfairness in the process.	Substantial unfairness/State law.	State's appellate procedure rules required agency to clearly indicate that a decision was a final order and that a claimant had 30 days to appeal, to meet statutory deadlines; President's letter denying tenure to professor did not indicate that it was a final decision or that it had to be timely filed within 30 days.	Vacated lower court's order ruling that professor's suit was an administrative appeal and refusing to relax limitations period in statute; Remanded for further proceedings.
State ex rel. Chapdelaine v. Torrence, 532 S.W.2d 542 (Tenn. 1975).	Male assistant professor at public institution alleged unlawful denial of tenure and wrongful dismissal based on contractual obligations.	Breach of contract/State contract law; State statute.	Under statute, tenure was automatic upon completion of probationary period coupled with reemployment; President misunderstood and misapplied law; Court would not allow a "common law" of tenure when statutory law was clearly in place; Professor was terminated without conformity to tenure law.	Affirmed lower court's salary award; Remanded, peremptory writ of mandamus to issue to direct Board of Regents to pay salary award plus interest; Concurred with lower court's holding denying reinstatement.

Table 2 Continued

Citation	Basis of Suit	Claims/Law	Facts and Issues Pertinent to Disposition	Disposition
State ex rel. James v. Ohio State University, 637 N.E. 2d 911 (Ohio 1994).	Male assistant professor at public institution, following denial of tenure, brought action in mandamus to compel university to provide access to promotion and tenure records.	Motion to compel/Ohio Public Records Act.	Institution's statement in promotion and tenure guidelines explained that related materials were not exempted from the Ohio Public Records Act.	Held promotion and tenure records maintained by state supported higher education institutions are subject to disclosure requirements of the Ohio Public Records Act.
University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983).	Male professor at public institution alleged unlawful denial of tenure based on Alaska Public Meetings Act.	Failure to comply with statutory obligations; Alaska Public Meetings Act.	Failure to hold open meetings of the tenure committee was not harmless error; Plain meaning of statute disfavored institution's position; Tenure decision was void.	Affirmed lower court's judgment as modified; Reinstated professor for term; Ordered that professor would have option of applying for tenure following reappointment term; Ordered that application for tenure by professor should be considered by the then-current tenure committee and not by the committee who served at time professor initially applied; Ordered that professor could update tenure file to current standards.

VITA

Julee Tate Flood received her Bachelor of Science and Master of Science degrees from the University of Florida, majoring in Animal Science. For many years thereafter, Dr. Flood's roles included parent, educator, program administrator, and small business co-owner. During these years, Dr. Flood also completed a Master of Public Administration degree, which was awarded by the University of Maine.

In the fall of 2000, Dr. Flood began studies at Franklin Pierce Law Center (now the University of New Hampshire School of Law), pursuing the degree of Juris Doctor. During law school, she served as a judicial intern to the Honorable Chief Justice (retired) Daniel E. Wathen of the Maine Supreme Judicial Court and the Honorable Justice (retired) James E. Duggan of the New Hampshire Supreme Court. She also served as a judicial extern to the Honorable Judge Jeffrey R. Howard of the First Circuit Court of Appeals. After graduating in the top five percent of her law class, she served as a judicial law clerk to the Honorable Justice (retired) Richard E. Galway of the New Hampshire Supreme Court, the Honorable Justice Gary R. Wade of the Tennessee Supreme Court, and the Honorable Judge Robert N. Hunter of the North Carolina Court of Appeals. She also was an adjunct instructor in the University of Tennessee's College of Law and Duke University's paralegal studies program.

In the fall of 2010, Dr. Flood began her pursuit of a Doctor of Philosophy degree in Higher Education Administration at the University of Tennessee's Department of Educational Leadership and Policy Studies in the College of Education, Health, and Human Sciences. On April 2, 2012, she successfully defended this dissertation. Dr. Flood will teach Education Law in the summer of 2012 and plans thereafter to serve in higher education law and policy.