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The First Amendment Threat to Academic Tenure

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THE FIRST AMENDMENT THREAT TO ACADEMIC TENURE

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Many people have questioned the need for academic tenure. Both higher education literature[1] and the popular press[2] are filled with articles concerning the subject. This article addresses whether tenure continues to be needed as we move into the new millennium. Specifically, the argument that contemporary First Amendment protections make tenure superfluous is examined.[3] Part I describes the history of tenure. The purpose of tenure is

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1. *See, e.g.*, RICHARD CHAIT & ANDREW T. FORD, BEYOND TRADITIONAL TENURE: A GUIDE TO SOUND POLICIES AND PRACTICES (1982); RICHARD T. DE GEORGE, ACADEMIC FREEDOM AND TENURE: ETHICAL ISSUES (1997); BARDWELL L. SMITH ET AL., THE TENURE DEBATE (1973); Mary Burgan, *Considering Tenure: Keep the Teacher at the Heart of Education*, 76 EDUC. REC. 34 (1995); Constance Hawke, *Tenure's Tenacity in Higher Education*, 120 EDUC. L. REP. 621 (1997).

2. *See, e.g.*, Editorial, *Accountability Takes Rightful Place with Paychecks, Academic Freedom*, FT. LAUDERDALE SUN-SENTINEL, Oct. 2, 1996, at 26A; Ralph Reiland, *Should Colleges and Universities Abolish Academic Tenure? Yes: Let the Magic of the Market Place Invigorate the Sheltered Elites in the Ivory Tower*, INSIGHT MAG., Nov. 25, 1996, at 24.

3. Several arguments have been made in support of, and counter to, tenure. Many are economic. Only the First Amendment aspect of tenure is discussed herein. For a discussion of the economic aspects of tenure, see Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique, in* DE GEORGE, *supra* note 1, at 156-75; Richard McKenzie,

examined in part II. Part III examines the law of tenure. Part IV identifies the First Amendment argument in opposition to tenure. In part V the reasons the First Amendment does not obviate the need for tenure are presented.

I. HISTORY OF TENURE

The idea of protecting academic inquiry from external influences is of medieval origin. Walter Metzger documented the history of academic tenure in a report published in 1973.[4] According to Metzger, the roots of tenure can be traced back as early as 1158, when Holy Roman Emperor Frederick Barbarossa issued an edict protecting scholars.[5] Other nations followed Barbarossa's lead.[6] During the Middle Ages, Catholic popes appointed scholars to important positions and government leaders bestowed privileges upon them.[7] These privileges, however, were dependent upon the good will of the bestowing power.[8] Not content with the transient nature of their security, scholars sought a degree of independence and security of a more permanent nature.[9] They did this by creating the progenitors of the modern university.[10] Several different types of institutions were created, including *communitas*, *collegium*, *societas*, and *consortium*.[11] In time, they acquired the right to elect their own officers and to create their own governing rules.[12] These institutions obtained legal status.[13] Like corporations in the United States today, they could sue and be sued as a group.[14] Membership in the body was determined by the body itself and was dependent upon qualifications such as earning degrees, the exhibition of certain skills, and the acquisition of a license.[15] Continued membership was dependent upon "adherence to collegial comities."[16] In Metzger's words, "tenure as

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In Defense of Academic Tenure, 152 J. INST. & THEORETICAL ECON. 325-41 (1996).

4. Walter P. Metzger, *Academic Tenure in America: A Historical Essay, in* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: A REPORT AND RECOMMENDATIONS 93-159 (1973) [hereinafter COMMISSION].

5. *Id.* at 94.

6. *Id.*

7. *Id.* at 94-95.

8. *Id.* at 95.

9. *Id.* at 95-96.

10. *Id.* at 96. Charles Haskins points out that while the Greeks and Romans educated their youth, they did not have "universities." CHARLES HOMER HASKINS, THE RISE OF UNIVERSITIES 1 (1957). "A great teacher like Socrates gave no diplomas; if a modern student sat at his feet for three months, he would demand a certificate, something tangible and external to show for it." *Id.*

11. Metzger, *supra* note 4, at 96.

12. *Id.*

13. *Id.* at 96-97.

14. *Id.* at 96.

15. *Id.* at 101.

16. *Id.*

privilege was a declaration of opposition to any academic sanction from any nonacademic source."[17] Conformity to peers, not individuality, was stressed in the early European university.[18] Even though this early form of tenure was more an institutional privilege than an individual one, banishment from the institution was taken very seriously, and scholars were first afforded due process.[19]

This academic tradition made its way to England and subsequently, to the United States.[20] The Reformation, the desire for control of the academy by monarchs and governments, and other events transformed the academy.[21] One change was the loss of its independent corporate character.[22] America's first academic institutions, which came into being in the seventeenth and eighteenth centuries, were modeled after the Anglo-version of the academy.[23] As a result, early American colleges lacked the autonomy of the early European universities.[24] Instead, early American colleges were governed externally.[25] In addition, teachers in these institutions were not highly regarded scholars as were those in the early European bodies; rather they were lower status teachers who served at the will and pleasure of college presidents.[26] During this period, the employment relationship between a professor and a university was defined by contract.[27] Most contracts covered a period of three years, and renewal of a contract was determined by the college president.[28] One notable exception to the contract system was the establishment of endowed chairs at Harvard College in the late eighteenth century.[29] These positions were de facto tenured.[30] The distinction between the highly prestigious endowed chairs and the lesser respected and more vulnerable professors created a class system at Harvard that appears to be the origin of the system of academic ranks in universities

17. *Id.*
18. *Id.* at 101-02.
19. *Id.* at 102-03. Metzger notes that the act of removing a master was referred to as a *privatio* (privation) or *exilium* (banishment), not dismissal. *Id.* at 103. This reflects the attitude that a master was not an employee of the university, rather, he was "a corporate director." *Id.*
20. *Id.* at 107.
21. *Id.* at 107-10.
22. *Id.* at 111.
23. *Id.* at 113.
24. *Id.* at 111-13.
25. Kathryn M. Moore, *Introduction: Academic Tenure in the United States*, 31 J.C. & U. PERSONNEL ASS'N 1, 3 (1980).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

that continues today.[31] The early American universities also lacked the investigative spirit that is now present in the academy. "The early American college was concerned largely with preserving current knowledge and promoting morality. The faculty of these colleges would hardly be characterized, either then or now, as an independent group of scholars searching for new arrangements in science and society and considering new systems of values."[32]

An important date in the history of tenure is 1913, when a group of professors at John Hopkins University formed the American Association of University Professors (AAUP).[33] The goals of the early AAUP included the development of a set of standards for the tenure and termination of professors and the establishment of a committee to investigate allegations of breaches of academic freedom.[34] Central to the AAUP's philosophy is the belief in academic freedom of thought and action.[35] The AAUP issued its first report in 1915.[36] It has issued several subsequent reports, the most influential being its 1940 *General Report on Academic Freedom and Academic Tenure*.[37] The AAUP's position was, and continues to be, that tenure is necessary to protect academic freedom.[38] Its standards provide that professors are to remain in a probationary period no longer than seven years, that all professors, tenured and nontenured, be afforded full academic freedom, and that tenure be terminated only for adequate cause or financial exigency.[39] In short, the AAUP sought to reestablish the autonomy of the professorate.[40] The AAUP's efforts have had a significant impact on tenure in higher education.[41] Tenure became well established during what Moore refers to as the golden age of tenure, 1955-1965.[42] This was a consequence of the increased authority of academics resulting from a significant increase in the market demand for them.[43]

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31. *Id.*
32. Harold T. Shapiro, *The Privilege and Responsibility: Some Reflections on the Nature, Function, and Future of Academic Tenure*, Address Before ACE & AAUP Joint Conference (Aug. 24-26, 1983), *in* ACADEME, Nov.-Dec. 1983, at 3a, 5a.
33. Moore, *supra* note 25, at 4.
34. *Id.*
35. *See id.*
36. *Id.* at 5.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 6.
42. *Id.* at 7.
43. *Id.* at 6.

II. TENURE AND ACADEMIC FREEDOM

The AAUP's intent in promoting tenure was not to establish a profession of ivory tower elites financially disassociated from the general public.[44] Instead, the AAUP posits that tenure serves the public by protecting academic freedom.[45] The public is best served by having professors (experts in their disciplines) who are free to research, instruct, and comment without concern for the popularity of their ideas.[46] The ability to explore new concepts, challenge the status quo, and present controversial or new ideas is thought to contribute to the technological and social progress of the community.[47] As such, the tenure debate should not be reduced to a discussion of whether individuals should possess tenure.[48] Instead, the dialogue should focus on the utility of academic freedom and whether tenure is needed to preserve it.[49]

III. THE LAW OF TENURE

Academic tenure has been defined as "an arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or physical disability, subject to *dismissal* for *adequate cause* or unavoidable termination on account of financial exigency or change of institutional program."[50] Many states and private institutions have adopted this definition of tenure or one substantially similar to it.[51]

In most institutions, tenure is awarded after certain criteria have been met.[52] Length of service (commonly six years), teaching ability, research productivity, collegiality, and service to the university and community are often factors in the tenure decision.[53] The process of obtaining tenure varies, but it usually involves several layers of review by faculty, ad-

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44. *See* Richard T. De George, *The Justification of Academic Tenure, in* DE GEORGE, *supra* note 1, at 9.

45. *Id.*

46. *See id.* at 13-14.

47. *Id.*

48. *Id.* at 13.

49. *See* McGee & Block, *supra* note 3, at 159-75 (critically discussing the relationship between tenure and academic freedom); Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?, in* DE GEORGE, *supra* note 1, at 176-96 (critically discussing the philosophical aspects of academic freedom).

50. COMMISSION, *supra* note 4, at 256.

51. *See id.* at 1-2.

52. *See Report of the AAL Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 484 (1992).

53. At many institutions, tenure and promotion to the next highest academic rank occur simultaneously. The criteria for tenure and promotion may be different.

ministrators, and external authorities.[54] The award of tenure is a university's recognition of a faculty member's competence, and it creates a rebuttable presumption of outstanding performance.[55]

A. *Establishing and Terminating Tenure*

In addition to being an academic status, tenure is a legal status.[56] The legal aspects of tenure differ between private and public institutions.[57] In the private sector, tenure is secured through contract.[58] Accordingly, in a private institution, the termination of tenure and other adverse employment actions raise contract and regulatory issues. In the public sector, tenure is secured through contract,[59] statutory,[60] administrative,[61] and constitutional law.[62] The termination of a tenured professor raises the same issues in a state institution as it does in a private institution, including important constitutional issues.[63] There are two constitutional provisions important in this analysis, the right to free speech found in the First Amendment and the right to due process found in the Fifth and Fourteenth Amendments.[64] These amendments protect tenure substantively and procedurally.

B. *First Amendment Protection*

Although the text of the First Amendment refers only to "speech,"[65] the Supreme Court has interpreted it as protecting some forms of expression.[66]

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54. William H. Daughtrey, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233, 242 (1991).

55. William Van Alstyne, *Tenure: A Summary, Explanation, and Defense*, AAUP BULL. 328, 329 (1971).

56. Hawke, *supra* note 1, at 625-33.

57. Daughtrey, *supra* note 54, at 251.

58. Hawke, *supra* note 1, at 630.

59. *Id.*

60. FLA. STAT. § 240.245 (1997).

61. FLA. ADMIN. CODE U.C. 6C-5.940.

62. U.S. CONST. amends. V, XIV. There is a large body of law concerning the contract aspects of tenure, including whether faculty handbooks, university manuals, and other documents establish tenure systems. For a discussion of the law of this area, see Ralph D. Mawdsley, *Litigation Involving Higher Education Employee and Student Handbooks*, 109 EDUC. L. REP. 1031-49 (1996).

63. State regulations, including an institution's rules, statutes, and judicial review standards (*e.g.*, arbitrary and capricious standards that apply to much administrative action) all must be considered in all personnel decisions made in state colleges and universities. The statutory and regulatory aspects of university employment are beyond the scope of this article.

64. The Fifth Amendment secures the right of due process against the federal government, and the Fourteenth Amendment does the same against the state governments.

65. U.S. CONST. amend. I.

66. *See* Kingsley v. Regents of N.Y., 360 U.S. 684 (1959); *see also* Hurtley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) (stating that the Constitution protects expression in parades beyond just "written or spoken words");

The First Amendment protects academic endeavors whenever they fall under the expression umbrella.[67] Academic freedom has been defined as including the freedom to decide who may teach, who may be a student, what content may be taught, and what instructional methods may be employed.[68] Although the Supreme Court has never adopted this precise formulation of academic freedom, one Justice referred to it in a concurring opinion.[69]

The Supreme Court has stated that society at large benefits from having free thought and expression in the nation's universities and colleges.[70] In *Sweezy v. Wyman*, a 1957 case, the Court posited:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[71]

In *Keyishian v. Board of Regents*,[72] issued ten years later, the Court went further and indicated that academic freedom holds a special place in First Amendment free speech jurisprudence.

> 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 . . . . "The vigilant protection of

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Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (stating that "[i]n the realm of private speech *or expression*, government regulation may not favor one speaker over another") (emphasis added); Texas v. Johnson, 491 U.S. 397, 404 (1989) (stating that conduct is protected as speech whenever the person engaging in the conduct intends to express an idea); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 690 (1959) (holding that the First Amendment protects motion pictures).

67. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 256 (1989).

68. 354 U.S. 234, 263 (1957) (citation omitted) (Frankfurter, J., concurring).

69. *Id.*

70. *Id.* at 250.

71. *Id.*

72. 385 U.S. 589 (1967).

> constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[73]

Accordingly, the First Amendment can stand alone in protecting faculty from pernicious university decisions in some circumstances. Tenured or not, a faculty member cannot be terminated for expressing unpopular opinions.[74] This protection is at its peak in the classroom,[75] but also includes extracurricular speech.[76] For example, *Pickering v. Board of Education* involved a teacher who sent a letter that disagreed with the position held by the school board and superintendent of schools on school funding.[77] The school discharged him for providing inaccurate information to the public, impugning the integrity of the school board members, creating controversy and conflict, and creating a disruptive environment.[78] The *Pickering* Court established a balancing test for First Amendment claims arising in the academy that continues today.[79] The public's interest in the content of the teacher's speech was weighed against the institution's interest in harmony, order, and efficiency.[80]

Applying this test, the Supreme Court recognized the need for harmony in the workplace, but nonetheless found that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[81] Accordingly, the Supreme Court reversed the school board's termination of the teacher.

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73. *Id.* at 603 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960); United States v. Associated Press, 52 F. Supp. 362, 372 (1949), respectively) (citations omitted)) (alteration in the original).

74. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968); *see* Waters v. Churchill, 511 U.S. 661, 674 (1994) (stating that "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters, [and] . . . the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be published"); Jeffries v. Harleston, 52 F.3d 9, 12 (2d Cir. 1995) (stating that "the First Amendment protects a government employee who speaks out on issues of public interest from censure by his employer unless the speech *actually* disrupted the employer's operations").

75. Dube v. State Univ. of New York, 900 F.2d 587 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991).

76. *Pickering*, 391 U.S. at 568.

77. *Id.* at 564.

78. *Id.* at 566-67.

79. *Id.* at 568.

80. *Id.*

81. *Id.* at 574 (footnote omitted).

C. *Due Process Protection*

The due process clauses mandate fair treatment of citizens by federal and state governments. They provide that life, liberty, and property shall not be deprived without *due process of law*.[82] Under due process analysis, tenure is treated as a property right.[83] Due process has two aspects, substantive and procedural. The former limits the reasons for which tenure can be revoked. In the tenure termination context, substantive due process is concerned with the underlying reason, motivation, or policy decision that has led to the termination of tenure. As such, most First Amendment violations also implicate substantive due process. Procedural due process requires that a faculty member whose employment is threatened be provided with notice of an impending action, a fair hearing, and a fair judge.[84] Due process does not preclude an adverse employment action from occurring. On the contrary, the due process clauses presume lawful deprivations.[85] What they demand, however, is fairness. Accordingly, tenure is not a guarantee of lifetime employment. But tenure does limit the circumstances under which a professor may be terminated, and it proscribes the procedures that must be employed in the termination process. Generally, there are two reasons tenure may be terminated: administrative necessity and just cause.[86]

Administrative necessity refers to academic or financial circumstances that demand elimination of a faculty line or academic program.[87] Elimination of a faculty line due to dwindling enrollment in an academic program is an example. Financial exigency is also a valid reason to terminate the faculty of the program.[88] One court defined financial exigency as an "imminent financial crisis" that threatens the survival of the institution.[89] The same court stated that termination of tenured faculty during such a crisis is lawful only if no lesser alternatives exist.[90] Of course, universities must act in good faith.[91] Pretextual terminations will

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82. U.S. CONST. amends. V, XIV.

83. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Board of Regents v. Roth, 408 U.S. 564, 575 (1972). Liberty interests exist as well, but are outside the scope of this article.

84. Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 569 (1991).

85. *Id.*

86. *Id.* at 586-87.

87. *Id.* at 587-88.

88. Bignall v. North Idaho College, 538 F.2d 243, 249 (9th Cir. 1976).

89. Linn v. Andover Newton Theological Sch., Inc., 874 F.2d 1, 4-5 (1st Cir. 1989).

90. Jimenez v. Almodovar, 650 F.2d 363, 368 (1st Cir. 1981) (using the term "unavoidable" termination).

91. *See id.*

be reversed by the courts.[92] Generally, nontenured faculty members must be terminated before tenured faculty in these circumstances, unless good cause can be established for doing otherwise.[93]

In addition to administrative necessity, tenured faculty members also may be terminated for just cause, often termed "good cause" or "adequate cause" in administrative regulations, collective bargaining agreements, and other higher education laws.[94] Substantive due process and other constitutional provisions, such as the First Amendment's Free Speech Clause, limit the authority of the state in defining just cause. That is, just cause cannot be defined to include what is otherwise protected by the Constitution. What behaviors may constitute just cause? Incompetence has been recognized as just cause.[95] Academic dishonesty, fraud, and immorality may also justify terminating tenure.[96]

Insubordination justifies termination, so long as the alleged insubordinate behavior impairs the individual's ability to perform lawful duties or seriously disrupts the functioning of the university. In *Garrett v. Mathews*,[97] a tenured faculty member of the University of Alabama was terminated for insubordination.[98] The professor refused to post his office hours, keep his office hours, provide his chair with a list of his publications, open mail from his chair, and accept telephone calls from his chair.[99] The trial court found these acts to be adequate justification to terminate the plaintiff's tenure.[100]

Unlawful discrimination and harassment of students, employees, or peers also justify discipline.[101] Of course, if termination is justifiable, then a lesser form of discipline is likely to be legitimate as well. For example, a tenured faculty member who is found to be incompetent may be subjected to a plan to improve performance or may be suspended pending improvement.

IV. TENURE QUESTIONED

Several arguments have been made favoring the abolition or restructuring of tenure.[102] One argument cuts to the core of academic freedom. It has

92. *See* Phillips, *supra* note 84, at 591.
93. *See Jimenez*, 650 F.2d at 368.
94. *See* Phillips, *supra* note 84, at 589-91.
95. Agarwal v. University of Minn., 788 F.2d 504, 508 (8th Cir. 1986).
96. Mueller v. University of Minn., 855 F.2d 555, 558-59 (8th Cir. 1988).
97. 474 F. Supp. 594 (N.D. Ala. 1979), *aff'd on different grounds*, 625 F.2d 658 (5th Cir. 1980).
98. *Id.* at 597.
99. *Id.*
100. *Id.* at 599.
101. *See* Phillips, *supra* note 84, at 589-90 & n.122.
102. There have been proposals to totally eliminate tenure, use multiyear employment contracts, encourage early retirement, and implement post-tenure review. Hawke, *supra* note 1, at 624. Several state and private institutions are experimenting with these options. *Id.*

been asserted that tenure has outlived its usefulness in the United States because today, unlike many years ago, the First Amendment's free speech provision protects academic freedom.[103] C. Peter Magrath, for example, stated that the introduction of First Amendment protections has resulted in an uncoupling of academic freedom and tenure.[104] However, this theory has one major flaw: it rests upon the untrue assumption that the First Amendment and tenure are coextensive and coequal in protecting academic freedom.

V. WHY TENURE IS NECESSARY

While it is true that contemporary interpretation of the First Amendment has broadened the free speech protection of faculty members beyond what it was many years ago, it does not protect academic freedom as effectively as tenure. For the First Amendment to be as effective as tenure, faculty must be as willing to pursue First Amendment causes of action as they are termination of tenure decisions. Also, the scope of First Amendment protection of academic freedom would have to parallel or exceed the scope of protection provided by tenure. Both of these requirements are unmet in several regards. First, First Amendment protection of academic freedom does not extend to all faculty members. Second, the First Amendment's scope is limited to expression, and accordingly, many research, curricular, and administrative activities that are protected by tenure are not protected by the First Amendment. Third, enforcement of a First Amendment claim by a tenured faculty member is procedurally and substantively more difficult than a claim for unlawful termination. Fourth, nontenured faculty are not as likely to enforce their rights as are their tenured counterparts.

A. *Unprotected Faculty*

The First Amendment limits the authority of the federal government, and through incorporation, the authority of the states, but it does not apply to private relationships. Faculty at private institutions do not enjoy either First Amendment or due process protection except in the rare case where state

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Two states, Florida and Arizona, have created tenureless universities. Robin Wilson, *Tenure: Contracts Replace the Tenure Track for a Growing Number of Professors*, CHRON. HIGHER EDUC., June 12, 1998, at A12. Other public and private universities have abolished tenure for new faculty hires. *Id.* Florida is one of several states that now require post-tenure review throughout their state university systems. *See* Daniel Hall, *Sustained Performance Review: A Threat to Academic Freedom?*, 62 EDUC. FORUM 25, 29 (1997).

103. C. Peter Magrath, *Eliminating Tenure Without Destroying Academic Freedom*, CHRON. HIGHER EDUC., Feb. 28, 1997, at A60.

104. *Id.*

action can be established.[105] However, private universities must comply with their own procedures,[106] and at least one court has held that they must provide "fundamentally fair" procedures, regardless of contractual obligations.[107] The court did not identify the constitutional source of this obligation.[108] The fact that private faculty are excluded from First Amendment protection calls into question the effectiveness of the First Amendment in protecting academic freedom since twenty-nine percent of all university and college faculty are employed by private institutions.[109]

B. *Unprotected Academic Activities*

While the First Amendment clearly protects classroom speech, it does not protect all academic activities. Whether an expression is conduct or pure speech is important in First Amendment analysis. Pure speech will usually receive greater protection than conduct, but in either case, the courts will employ the *Pickering* public concern balancing test. Examples of pure speech related to academics but not protected by the First Amendment can be found. In *Williams v. Alabama State University*, a 1997 case, the Eleventh Circuit Court of Appeals found that a nontenured professor's repeated criticisms of a book written by a university administrator and used at the university did not involve a sufficiently important public concern to outweigh the administration's interest in terminating his employment.[110] A similar result had been reached in *Ballard v. Blount*[111] fourteen years earlier. In *Ballard*, a professor's claim that his criticism of a syllabus raised a public concern entitling him to First Amendment protection was rejected.[112] The court found his contention that the public has an interest in having quality syllabi to be unpersuasive.[113] The court opined that if it extended First Amendment protection to his speech, then all faculty speech

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105. In the rare case against a private college, a plaintiff may be able to satisfy the state action requirement. For example, a private university was found to be a state actor where the university was chartered by the state, received state funds, and the rules at issue in the case were the result of state pressure. Albert v. Carovano, 824 F.2d 1333, 1339-41 (2nd Cir. 1987).

106. Fellheimer v. Middlebury College, 869 F. Supp. 238, 242 (D. Vt. 1994); Bennett v. Wells College, 641 N.Y.S.2d 929, 932 (App. Div. 1996).

107. Psi Upsilon v. University of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991).

108. *See id.*

109. NATIONAL CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., PUB. NO. NCES 98-015, DIGEST OF EDUCATION STATISTICS 1997, at 239 tbl.225 (1997) (reporting data from fall 1970 to fall 1993).

110. 102 F.3d 1179, 1183 (11th Cir. 1997).

111. 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086 (1984).

112. *Id.* at 163-64.

113. *Id.*

would be entitled to protection, and the court was not willing to cast the net that wide.[114] The *Pickering* test is fact sensitive, and no bright line of demarcation between protected and unprotected speech can be drawn. However, it appears that nearly all speech concerning the appropriate use of resources and the expenditure of state monies is entitled to protection.[115] Also, speech concerning academic matters can implicate public concern when substantial issues, such as accreditation, the ability to prepare students for the workplace or graduate school, or general concerns about the performance of students, are involved.[116] The pure speech that is not protected by the First Amendment, such as in the *Williams* and *Ballard* cases, would likely be protected by tenure. Ironically, it appears that in this context the First Amendment and tenure have an inverted relationship. The fact that the issues are not "significant" leads to the conclusion that the First Amendment does not apply. Yet, it is the same insignificance of these matters that would likely prevent the university from establishing just cause for dismissal of a tenured faculty member.

Academic conduct, such as freedom to assess student performance and issue grades, is entitled to even less protection than is pure speech. While the Supreme Court has stated that grading is an expert function of professors with which the courts will not lightly interfere,[117] it has not had occasion to define the relationship between the individual faculty member and the institution in this context. Two lower court decisions are informative. In *Lovelace v. Southeastern Massachusetts University*,[118] a 1996 First Circuit Court of Appeals case, a nontenured faculty member whose contract was not renewed filed a First Amendment claim against the University.[119] He claimed that his contract was not renewed because he had refused to lower his grading standards.[120] While the court found grading to be expression, it also opined:

> [M]atters such as course content, homework load, and grading policy are core university concerns . . . . To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The

114. *See id.*

115. *See Pickering*, 391 U.S. at 571; United Carolina Bank v. Board of Regents, 665 F.2d 553, 561-62, 564 (5th Cir. 1982).

116. Maples v. Martin, 858 F.2d 1546, 1553 (11th Cir. 1988).

117. Board of Curators v. Horowitz, 435 U.S. 78, 89-91 (1978).

118. 793 F.2d 419 (1st Cir. 1986).

119. *Id.* at 425.

120. *Id.*

> First Amendment does not require that each nontenured professor be made a sovereign unto himself.[121]

In an earlier Sixth Circuit case that involved facts similar to *Lovelace*, a comparable but more developed analysis of the law can be found. In *Parate v. Isobar*,[122] an untenured professor claimed that his grading standards and personality differences had caused administrators not to renew his employment contract.[123] Like the First Circuit, the Sixth Circuit recognized grading as expression.[124] The court stated that "to compel the professor to alter [a] grade would severely burden a protected activity."[125] Central to the court's rationale was its conclusion that grading is central to the professorial function and that it would interfere with instruction, a protected activity, to allow universities to compel professors to issue particular grades.[126] The court noted that while a professor may not be ordered to assign a particular grade to a student, the "professor does not escape the reasonable review of university officials in the assignment of grades,"[127] and therefore, a university may change a student's grade when a professor refuses. The court did not address the circumstances under which administrative grade changes are justified, nor did it consider the impact administrative grade changes might have on academic freedom. This decision cannot be read as granting carte blanche to administrators over grading since administrative grade changes could discourage free expression by altering interpersonal relations with students and colleagues.[128] It is unclear whether the Sixth Circuit's analysis will be adopted nationally.

The status of research is also important in this context. Some commentators have concluded that research is an expressive activity entitled to First Amendment protection.[129] However, the Supreme Court has not ruled on

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121. *Id.* at 426 (citation and footnote omitted).
122. 868 F.2d 821 (6th Cir. 1989).
123. *Id.* at 823-26.
124. *Id.* at 828.
125. *Id.*
126. *Id.* at 828-30.
127. *Id.*
128. *Id.* at 829. In some circumstances, an administrative grade change may not only be academically sound, but legally required. A low grade that is the result of race or sex discrimination is an example. On the other side, however, is a grade change that bears a close nexus to speech. For example, a student refuses to acknowledge subject matter on an exam with which he disagrees. The information is generally accepted in the discipline, but controversial. The student suffers a low grade as a result of his refusal to include the information in the final exam answer even though the material was part of the course curriculum. It would be injurious to free speech for an administration that agrees with the student's political position to administratively change the grade upward.
129. June Coleman, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PACIFIC L.J. 1331, 1386 (1996); Gary L.

this issue. The decision may rest on the nature of the individual research project, that is, the degree to which a researcher is engaged in expression as opposed to conduct, the degree to which the inquiry itself involves expression, and whether the final product of the research is itself expressive, for example, a published article or report. Some commentators have opined that even if a research activity is mostly conduct, it may be protected by the First Amendment.[130] Under the so-called precursor theory, research activity that leads to protected expression is treated as expression itself.[131] So, if a researcher intends to publish the results of the work, the First Amendment would protect the research conduct to a greater extent than if the research were conducted with no expressive product.[132] However, the Supreme Court could reject precursor theory and define "expression" more narrowly. The result of such an interpretation of the First Amendment would be to exclude most research activity from First Amendment protection. Regardless of what direction the Supreme Court takes when it finally addresses this issue, it is likely that some research will remain unprotected. Again, tenure fills in a very wide gap. These are only a few examples of academic activities that are not fully protected by the First Amendment. Other curricular, service, and research activities also are without First Amendment protection, but are equally important to academic freedom.

C. *Willingness to Litigate: Legal Burdens*

Tenure status impacts litigation both substantively and procedurally. The substantive aspects (for example, good cause for termination) were discussed above. The opponents of tenure often overlook that tenure also impacts litigation procedure. An untenured faculty member who believes she has been discriminated against in violation of the First Amendment bears the burden of proof at trial. This burden includes both the burden of production and the burden of persuasion. On the other hand, a tenured faculty member who suffers adverse employment action only bears the burden of production. That is, the faculty member need only assert that the termination was unlawful. Then the burden of establishing good cause for termination falls on the defendant. This burden shifting is important in preserving the tenure right. Because employment decisions are multivariate and often subtle, it is not difficult for employers to justify employment decisions when there are few legal limitations on the reasons for which employees may be terminated.

Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 418-19 (1987).

130. Coleman, *supra* note 129, at 1386; Francione, *supra* note 129, at 418-19.

131. Coleman, *supra* note 129, at 1389.

132. *Id.*; Francione, *supra* note 129, at 430.

While this empowerment of employers is sensible in a free market, it makes proving unlawful termination difficult. This is why burden shifting is also employed in race, age, and gender discrimination cases.[133] In these cases, the burden to establish a prima facie case first rests with the employee.[134] To satisfy this burden, the employee must show that he suffered an adverse employment action and falls into a protected class.[135] The burden then shifts to the employer to proffer a legitimate nondiscriminatory reason for the action.[136] If the employer can show a nondiscriminatory reason, the burden of proving that the employer had a discriminatory motive shifts to the employee.[137] Just as it would be difficult for a minority employee to prove discriminatory motive at the outset, it would be equally difficult for a tenured professor who has been terminated to prove the negative proposition that good cause for termination did not exist. After all, an employee may be unaware of the subjective motives of administrators. In addition, it is likely that much of the evidence supporting a university's decision to terminate a faculty member is within its control. Accordingly, the burden falls on the university to establish good cause for termination of a tenured professor. The untenured faculty member, on the other hand, faces the difficult burden of proving that it was First Amendment protected expression that had motivated administrators to act. Again, this is difficult to prove because of the multivariate nature of employment decisions.

Tenured faculty also enjoy the right to a pretermination hearing.[138] The Supreme Court has held that due process requires a limited pretermination hearing of public employees whose employment may be terminated only upon a showing of good cause.[139] The purpose of the hearing is to determine whether cause for termination exists.[140] The employee must be provided with an opportunity to respond to the allegations at a pretermination hearing,[141] with a more extensive fact-finding hearing to be conducted after termination.[142] Untenured faculty members do not enjoy the right to a pretermination hearing.

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133. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 804.
138. *See Loudermill*, 470 U.S. at 546.
139. Gilbert v. Homar, 117 S.Ct. 1807, 1811 (1997); *Loudermill*, 470 U.S. at 546.
140. *See Gilbert*, 117 S. Ct. at 1811 (citing *Loudermill*, 470 U.S. at 545-46).
141. *Loudermill*, 470 U.S. at 543.
142. *Id.* at 546.

D. *Willingness to Litigate: Personal Burdens*

The differences in procedure for tenured versus nontenured faculty discussed above are likely to affect a faculty member's willingness to litigate or otherwise enforce a legitimate First Amendment claim against a university. Personal burdens, opinions, and beliefs may also discourage individuals from pursuing a legal remedy. In spite of a common belief to the contrary, people are generally reluctant to become embroiled in litigation. Researchers have found, for example, that only a small percentage of colorable tort claims are ever litigated.[143] There are many reasons for this, including unfamiliarity with legal rights and how to enforce them, aversion to litigation, attribution of fault,[144] unwillingness to devote the time and energy required for litigation, the expense of enforcement,[145] social pressures,[146] and difficulty in proving a claim.

An untenured faculty member may also be dissuaded from litigating a First Amendment claim by the expenses of litigation. A contract professor whose contract is not renewed or who has only a few months remaining on a terminated contract does not have the same financial interest in enforcing his rights as does a tenured professor. While a claim might be pursued as a matter of principle, academic freedom is too important to the public to be wedded to such motivations of individuals. Adjunct instructors are even

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143. *See* Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443, 448 (1987) (discussing several studies). One researcher found that only 10% of persons injured through negligence file claims, and only 6.7% of malpractice victims make claims. *Id.* (citing PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 19-21, 23 (1985)); *see also* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991) (describing theoretical models and surveying the law); ELIZABETH M. KING & JAMES P. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS (1988) (describing theoretical models and surveying the law).

144. Hensler presents a "fault and equity" model in her text. HENSLER ET AL., *supra* note 143, at 146. Pursuant to this model, two critical elements must be present before an individual will file a claim: (1) attribution of cause and fault, and (2) individual's perception of some inequity in the situation. *Id.*

145. Several economic models have been developed that attempt to predict whether an individual will sue following an injury, as well as whether parties will settle their disputes using alternative methods. *See id.* at 148 & n.6.

146. *See* Abel, *supra* note 143, at 452-61 (discussing social factors influencing the willingness of tort victims to sue). Researchers have found, for example, that employers pressure employees not to sue, middle economic class neighbors are less likely to sue each other than are lower economic class neighbors, and rural residents are less likely to sue than urban residents. *Id.* In another study, researchers found that neighbors in a New England town avoided litigating their disputes for fear of antagonizing their neighbors and losing control of the situation. Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 172-73 (1984), *cited in* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 10-11 & n.31 (1986).

more unlikely to pursue a First Amendment remedy. They possess less financial interest in their continued employment than do visiting or full-time contract professors. For the reasons stated above, the time, expense, and difficulty experienced by an untenured faculty member in litigating termination have larger implications than that of a tenured faculty member. This problem is greater than individuals not enforcing their legal rights. In an era of perceived excessive litigiousness and legalism, some people welcome procedural barriers that may discourage litigation. Regardless of whether this attitude is justified generally, it is inappropriate in academic freedom cases because a public concern is at issue. Members of the public at large do not have standing to challenge an encroachment of academic freedom by administrators in denying or revoking tenure, but the individual faculty member does. So, while the First Amendment has proven to be critical in the development of the substantive aspects of academic freedom, its direct enforcement is not the best method of protecting those principles. For that, tenure is more effective.

The decreased probability of enforcement by untenured faculty is made more significant by that group's representation in the academy. Untenured faculty comprise thirty-five percent of the total full-time higher education instructor population in the United States,[147] and untenured part-time and full-time faculty account for fifty-eight percent of the total higher education faculty population of the United States.[148]

VI. CONCLUSION

While the First Amendment plays an important role in protecting free speech on campuses, it does not obviate the need for the protections of tenure. Plans to eliminate tenure in favor of contract systems are particularly distressing. As shown above, the First Amendment leaves a considerable number of university and college professors without a remedy and many important academic activities completely unprotected. On the other hand, the First Amendment does not discriminate between tenured and untenured faculty. Thus, it protects academic freedom in some instances where tenure does not. Accordingly, the First Amendment should not be used as a reason to eliminate tenure, instead the two should be understood to compliment one another in creating an environment where faculty can feel a measure of legal protection from oppression of expression, ideas, and research.

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147. NATIONAL CTR. FOR EDUC. STAT., *supra* note 109, at 257 tbl.240 (including data from 1995-96).

148. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT ON THE STATUS OF NON-TENURE TRACK FACULTY (1993) (visited Jan. 28, 1999) <http://www.aaup.org/rbnonten.htm#back1>.