TITLE VII AND ACADEMIC FREEDOM: THE AUTHORITY OF THE EEOC TO INVESTIGATE COLLEGE FACULTY TENURE DECISIONS

Title VII authorizes the Equal Employment Opportunity Commission (EEOC) to investigate and prevent employment discrimination.[1] In recent years, the EEOC has been increasingly active in investigating charges of employment discrimination brought by professors who have been denied tenure.[2] Colleges and universities, seeking to protect the tenure deliberations of their peer review committees from disclosure, claim that academic freedom insulates these deliberations from outside inspection.[3] Circuit courts have reached conflicting conclusions as to whether academic freedom shields tenure decisions from EEOC investigation. In a 1983 decision, *EEOC v. University of Notre Dame Du Lac*, the Seventh Circuit recognized a "qualified academic freedom privilege" to prevent the threat of "unrestricted intrusions" into academic affairs by the EEOC.[4] The Third Circuit, however, rejected this same proposed privilege in a 1985 decision, *EEOC v. Franklin & Marshall College*, to avoid the possibility of "unchecked discrimination in education."[5] Thus, courts lack a generally accepted rule for balancing academic freedom with the EEOC's ability to investigate potential employment discrimination.

The concept of academic freedom, which the United States Supreme Court recently characterized as a "special concern" of the first amendment,[6] suggests that courts should be hesitant to intervene in tenure decisions. The Court, in broad language, has stated that one aspect of academic freedom is the freedom of a university to determine for itself, without governmental intrusion, who may teach.[7] The doctrine is based in part on the fear that governmental interference in the selection of teachers will inhibit the free exchange of ideas, which is the basis of a democratic society.[8]

Courts can prevent outside interference in the selection of tenured professors by recognizing an evidentiary privilege for tenure deliberations.[9] A university often selects its permanent faculty, and thus determines who may teach, by means of the peer review

---

[1] 42 U.S.C. § 2000e-5 (1982).

[2] *See, e.g.*, EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986) (White, J., dissenting); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983); EEOC v. University of Pittsburgh, 643 F.2d 983 (3d Cir. 1981), *cert. denied*, 454 U.S. 880 (1981); EEOC v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974).

[3] *Franklin & Marshall*, 775 F.2d at 113; *Notre Dame*, 715 F.2d at 333.

[4] *Notre Dame*, 715 F.2d at 337, 340.

[5] *Franklin & Marshall*, 775 F.2d at 114–15.

[6] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion) (citing Keyishian v. Board of Regents, 395 U.S. 589, 603 (1967)).

[7] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[8] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250.

[9] For the purposes of this note, the terms "tenure deliberations" and "peer review materials" include both the written peer review evaluations of a tenure candidate, and the discussions and votes of the peer review committee concerning that candidate. For a description of the information a peer review committee relies on in making a tenure decision, see *supra* notes 69–71 and accompanying text.

system.[10] To encourage candid evaluations of a tenure candidate, a university assures decisionmakers and evaluators in the peer review system that their statements will be confidential.[11] Proponents of an evidentiary privilege for tenure deliberations argue that protection of tenure deliberations from discovery promotes free debate and thereby helps to ensure that only the best candidates are granted tenure.[12] Better tenured professors, in turn, will generate a broader exchange of ideas, which is the goal of academic freedom.[13] Thus, academic freedom, which protects a university from governmental intrusions, and the confidentiality of the peer review system, which is designed to advance only the most qualified professors, weigh in favor of denying the EEOC access to tenure deliberations.

Opposing the confidentiality of the peer review system is Title VII, which broadly prohibits employment discrimination based on "race, color, religion, sex, or national origin."[14] Proper enforcement of Title VII mandates that the EEOC investigate college and university employment decisions. Congress indicated that Title VII prohibitions apply to colleges and universities to the same extent as other employers when it removed a provision in the original Civil Rights Act of 1964 which specifically exempted institutions of higher education.[15] The Supreme Court, furthermore, has noted that the congressional policy of equal employment opportunity is of the highest priority.[16] Thus, the text and legislative history of Title VII, coupled with the Court's recognition of the importance of equal employment opportunity, require that the EEOC investigate tenure decisions.

Disclosure of tenure deliberations may be necessary if the EEOC is to investigate college tenure decisions effectively. To investigate the typical claim of an aggrieved professor, the EEOC must be able to determine whether the decisionmakers harbored a discriminatory motive.[17] Without access to the deliberations of the peer review committee and its evaluations of the candidate, the EEOC may be unable to determine the motivation behind the committee's decision to deny tenure.[18] Foreclosing an EEOC

---

[10] *See* J. RAPP, EDUCATION LAW § 6.07[4] (1986). Courts have noted that the peer review system is the most effective method of granting tenure. *See, e.g.*, Johnson v. University of Pittsburg, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977). There are other methods of evaluating faculty for tenure or promotions. J. RAPP, *supra*, at § 6.07[4]. Regardless of the particulars of the system a college uses, disclosure of evaluations may chill candid evaluations and hinder decisionmaking. *See* Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1551 (1981) [hereinafter Note, *A Proposed Academic Freedom Privilege*]. Therefore, although this note focuses on the peer review system, the analysis is applicable to other systems of evaluating professors.

[11] For an example, see the system of LaGuardia Community College and the City of New York in Gray v. Board of Higher Educ., 92 F.R.D. 87, 92 (S.D. N.Y. 1981).

[12] *See, e.g.*, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983).

[13] *See* Note, *A Proposed Academic Freedom Privilege, supra* note 10, at 1552.

[14] 42 U.S.C. § 2000e-2 (1982).

[15] Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (current version at 42 U.S.C. § 2000e-1).

[16] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (citing Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968) (cited with approval in *Franklin & Marshall*, 775 F.2d at 114)).

[17] For a discussion of the elements of a typical Title VII claim, see *infra* notes 88–104 and accompanying text.

[18] Courts have recognized that without access to the deliberations of the peer review committee, the evaluations upon which the deliberations were based, and the identity of the committee members, a professor in a private action may be unable to obtain evidence of discriminatory intent. *See, e.g.*, Gray v. Board of Higher Educ., 692 F.2d 901, 905, 906 n.10 (1982).

investigation will remove the EEOC from Title VII's enforcement scheme.[19] More importantly, an EEOC investigation serves to aid a plaintiff in the difficult task of uncovering evidence of discriminatory intent in a subsequent private action under Title VII.[20] Thus, the importance of the EEOC's role in Title VII's enforcement scheme, and the necessity of obtaining evidence of discriminatory intent suggest that courts should require the disclosure of tenure deliberations.

In deciding, therefore, whether to enforce an EEOC administrative subpoena requesting peer review materials, courts must weigh conflicting interests. First, a court must consider Title VII's goal of eliminating discriminatory employment practices. Second, a court must recognize the difficulty of obtaining evidence of discriminatory intent and the EEOC's role in uncovering this evidence for use in a subsequent private action. Next, the court must review precedent indicating that the state should not interfere with academic institutions' decisionmaking processes. Finally, the court must analyze the impact that disclosure may have on the peer review system.

In balancing these conflicting interests, a court must also consider that the conflict arises in the context of an administrative agency investigation. Unlimited EEOC access to tenure deliberations has the benefit of efficiency because requiring resort to a federal court to determine whether tenure deliberations deserve special treatment delays an investigation.[21] Allowing the EEOC automatic access to tenure deliberations without an examination of its need for this information, however, may unnecessarily infringe on the integrity of the peer review process. Furthermore, an administrative agency proceeding, because of its informal procedures, potentially affords the party under investigation fewer safeguards than does the court system.[22] Courts, therefore, must be willing to supervise EEOC investigations of tenure decisions.

This note discusses the impact that recognition of a privilege based on academic freedom has on aggrieved professors and the EEOC, and examines the justifications for providing protection to the peer review system. Part I of this note analyzes the concept of academic freedom.[23] Part II discusses the scope of Title VII,[24] first reviewing the elements of a typical tenure denial claim under Title VII,[25] then analyzing the power that the EEOC possesses in enforcing Title VII, and the limits a federal court can place on this power.[26] Part III contrasts the conflicting approaches of the circuits in enforcing EEOC subpoenas requesting confidential peer review materials.[27] This note concludes

---

[19] For a discussion of the EEOC's function in the enforcement scheme of Title VII, see *infra* notes 115–48 and accompanying text.

[20] *See infra* note 120 and accompanying text.

[21] *See* EEOC v. Franklin & Marshall College, 775 F.2d 110, 115 (3d Cir. 1985).

[22] The judiciary has expressed the concern that EEOC investigations into tenure decisions may become fishing expeditions. EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 339 (7th Cir. 1983); *see also Franklin & Marshall*, 775 F.2d at 120 (Aldisert, J., dissenting). This concern arises in part because in an EEOC investigation there is no complaint to limit the scope of discovery. *Id.* at 121 (Aldisert, J., dissenting). In addition, the EEOC cannot provide the safeguards a federal district court can, such as a protective order. FED. R. CIV. P. 26(c). *But see* the procedural safeguards Title VII provides to parties under investigation discussed *supra* notes 143–54 and accompanying text.

[23] *See infra* notes 29–83 and accompanying text.

[24] *See infra* notes 84–154 and accompanying text.

[25] *See infra* notes 88–114 and accompanying text.

[26] *See infra* notes 115–54 and accompanying text.

[27] *See infra* notes 155–285 and accompanying text.

that academic freedom should not insulate tenure deliberations from administrative and judicial review, and suggests that academic freedom is better served by allowing the EEOC and aggrieved professors to challenge most tenure decisions with full access to confidential peer review materials.[28] Because there may be situations where a college does not base its tenure decision on peer review evaluations, however, courts should not automatically order the disclosure of these materials. Rather, courts should supervise EEOC investigations of tenure decisions and, where a college does not base its tenure denial on peer review evaluations, be willing to limit the EEOC's usually broad investigatory power by denying it access to these materials.

I. Tracing the Concept of Academic Freedom

The Supreme Court has recognized an important societal interest in fostering academic freedom.[29] Academic freedom, the Court has stated, is essential to a free society because the uninhibited flow of ideas is the foundation of the decisionmaking process.[30] The Court has indicated that there are two aspects of academic freedom: one individual, and one institutional.[31] First, to allow for a continuing exchange of ideas, the Court has recognized that teachers should be free to teach potentially controversial subjects without political interference.[32] As an extension of this core concept of academic freedom, the Court has suggested that a university, as an academic institution, may be protected from governmental interference in decisions concerning academic matters.[33] The Court, therefore, has equated academic freedom with protecting both the individual teacher in the classroom and the university as an institution. This latter aspect of academic freedom is what colleges assert protects tenure decisions from outside review.[34]

The Supreme Court developed the aspect of academic freedom[35] which protects individual teachers in cases which involved state statutes prohibiting subversive activi-

---

[28] *See infra* notes 286–341 and accompanying text.

[29] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[30] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250; *see also* Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). In *Wieman*, Justice Frankfurter stated that:

> To regard teachers . . . as the priests of our democracy is . . . not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make . . . possible an enlightened and effective public opinion.

344 U.S. at 196 (Frankfurter, J., concurring).

[31] *Compare Sweezy*, 354 U.S. at 250 (individual aspect of academic freedom) *with Bakke*, 438 U.S. at 312 (institutional aspect of academic freedom). *See* Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817, 848–51 (1983); Note, *A Proposed Academic Freedom Privilege*, *supra* note 10, at 1546; Comment, *Academic Freedom vs. Title VII: Will Equal Opportunity be Denied on Campus?*, 42 Ohio St. L.J. 989, 1004 (1981) [hereinafter Comment, *Academic Freedom vs. Title VII*].

[32] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250.

[33] *Bakke*, 438 U.S. at 312; *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

[34] *See, e.g.*, EEOC v. Franklin & Marshall College, 775 F.2d 110, 113 (3d Cir. 1985); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 333–34 (7th Cir. 1983); Gray v. Board of Higher Educ., 692 F.2d 901, 903 (2d Cir. 1982); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981); Rollins v. Farris, 108 F.R.D. 714, 715 (E.D. Ark. 1985).

[35] The Supreme Court cannot be credited with creating the general concept of academic freedom. Commentators have traced the idea that teachers should be free to teach, and students free to learn, to nineteenth century Germany. *See* R. Hofstadter & W. Mertzer, The Development of Academic Freedom in the United States 383 (1955).

ties.[36] In the 1957 decision of *Sweezy v. New Hampshire*,[37] the Court suggested in dicta that a teacher's freedom to teach may be entitled to special protection under the Constitution.[38] There, a teacher refused on first amendment grounds to answer questions in a state investigation concerning a lecture he had given.[39] In striking down the contempt citation against the teacher, Justice Warren, in a plurality opinion, observed that the investigation into the teacher's lecture invaded both the teacher's academic freedom and his right to political expression.[40] Justice Warren stated that teachers and students should be free to engage in the exchange of ideas without state interference.[41] Although Justice Warren recognized that the uninhibited acquisition and transfer of knowledge was essential to academic freedom, the plurality decision, which did not trace academic freedom to a specific constitutional guarantee, rested on other grounds.[42]

In the 1967 decision of *Keyishian v. Board of Regents*, the Supreme Court again indicated in dicta that academic freedom may protect teachers from state interference.[43]

---

[36] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250. Previously, in protecting teachers from unwarranted state interference, the Court did not mention academic freedom as a concern weighing in favor of protection. In the 1923 decision of Meyer v. Nebraska, for example, the Court struck down, on substantive due process grounds, a state statute which prohibited teachers from teaching the German language in schools. 262 U.S. 390 (1923). The Court reasoned that the statute interfered not only with a teacher's right to carry on his or her profession, but also with the right of students to learn, and the right of parents to determine children's education. *Id.* at 400. Similarly, in early cases involving loyalty oaths, the Court did not introduce academic freedom as an element weighing in favor of protecting teachers, but instead focused on due process considerations. *See, e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (reversed on due process grounds dismissal of teacher who refused to testify in investigation); Wieman v. Updegraff, 344 U.S. 183 (1952) (overturned on due process grounds statute requiring loyalty oath as a prerequisite to employment); Adler v. Board of Education, 342 U.S. 485 (1952) (upheld on due process grounds statute requiring dismissal after notice and hearing of teachers affiliated with subversive organizations).

[37] 354 U.S. 234 (1957).

[38] *Id.* at 250, 254–55.

[39] *Id.* at 244.

[40] *Id.* at 250.

[41] *Id.* Justice Warren stated:

> We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression — areas in which government should be extremely reticent to tread. 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 . . . . 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.

Id.

[42] *Id.* at 253–55. The Court in *Sweezy* determined that it was unclear whether New Hampshire's Subversive Activities Act directed the attorney general to obtain the particular information he was seeking. *Id.* at 254. Therefore, rather than hold the statute unconstitutional, the Court struck down the contempt citation because it found that the attorney general who conducted the investigation had exceeded his statutory authority. *Id.* at 254–55.

[43] 385 U.S. 589, 603 (1967). Prior to *Keyishian*, the Court had made it clear that although academic freedom might be an important value, it was not an absolute value. Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("An educational institution is not a constitutional sanctuary from

There, in declaring that a statute forbidding membership in subversive organizations was unconstitutionally vague,[44] the Court characterized academic freedom as a "special concern" of the first amendment.[45] Permitting state interference with academic affairs, the Court reasoned, potentially would allow the state to select the truth authoritatively, and would deny individuals the right to determine the truth out of a range of conflicting ideas.[46] Thus, although the Court has acknowledged the importance of protecting a teacher's right to teach, and has suggested that this aspect of academic freedom enjoys a special status under the Constitution, the Court has not decided a case on these grounds.[47]

The Court has also indicated its support for a more expansive notion of academic freedom.[48] This aspect of academic freedom, the Court has suggested, would protect not only a teacher's right to teach, but also a university's right to make decisions governing academic life.[49] In his concurrence in *Sweezy*, Justice Frankfurter argued that academic freedom extended beyond merely excluding the government from intervening in a teacher's ability to teach.[50] Instead, Justice Frankfurter identified four areas, "'the four essential freedoms' of a university," in which an academic institution should be free to exercise its discretion without state interference.[51] According to Justice Frankfurter, a university is free to decide on academic grounds its curriculum, how courses should be taught, which students ought to be admitted, and who is qualified to teach.[52]

---

inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.").

[44] *Keyishian*, 385 U.S. at 604.

[45] *Id.* at 603.

[46] *Id.* The Court stated that:

> 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 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.'

Id. (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[47] *Id.* at 603–04; *Sweezy,* 354 U.S. at 250, 254–55.

[48] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[49] *See Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

[50] *Id.* at 262–63 (Frankfurter, J., concurring).

[51] *Id.* at 263 (Frankfurter, J., concurring) (quoting CONFERENCE OF SENIOR SCHOLARS FROM THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (1957)).

[52] *Id.* Justice Frankfurter stated that:

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

Id. (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA, *supra* note 51, at 10–12). Professor Finkin feels that this quotation exemplifies the connection between "academic freedom," which at its core protects the teacher in his or her classroom, and "institutional freedom," which insulates an institution in general from government interference. Finkin, *supra* note 31, at 843.

The Court supported Justice Frankfurter's more expansive notion of academic freedom in its 1978 decision of *Regents of the University of California v. Bakke*, where the Court invalidated quota-based affirmative action admissions programs.[53] In the plurality opinion, Justice Powell stated that although academic freedom was not a specifically enumerated constitutional right, the Court nonetheless viewed academic freedom as a "special concern" of the first amendment.[54] Justice Powell reasoned that academic freedom not only protects an individual teacher's right to teach, but also protects a university's right to select its student body.[55] According to Justice Powell, the University of California therefore had a strong interest, based on academic freedom, in its admissions program which encouraged a diverse student body.[56] Justice Powell determined, however, that the particular program of the University, which recognized only race as providing diversity, was not a necessary means to the University's goal of a diverse student body.[57] In striking down the University's quota-based admissions program, Justice Powell, writing for the plurality, therefore concluded that academic freedom did not prevent judicial review of a university's decisions concerning academic life.[58] Academic freedom, Justice Powell stated, allowed the University some discretion in decisions concerning academic matters, but did not allow it to infringe on an individual's fourteenth amendment rights.[59]

Consequently, although it frequently has endorsed the concept of academic freedom, the Supreme Court has not defined clearly how important a value academic freedom is, and which activities fall within its scope.[60] The Court has indicated a willingness to protect the freedom of a teacher to acquire and exchange ideas,[61] yet has not decided a case based on this individual aspect of academic freedom.[62] Moreover, in recognizing one of the institutional aspects of academic freedom[63] — a college's freedom to choose

---

[53] 438 U.S. 265 (1978). In Griswold v. Connecticut, Justice Douglas also used academic freedom and its relation to the first amendment to buttress his argument for recognizing the right of privacy:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community. Without these peripheral rights, the specific rights would be less secure.

381 U.S. 479, 482–83 (1965) (citations omitted).

[54] *Bakke*, 438 U.S. at 312. Justice Powell relied on Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), discussed *supra* notes 43–46 and accompanying text.

[55] *Bakke*, 438 U.S. at 312. Justice Powell relied on the four essential freedoms of a university which Justice Frankfurter identified in his concurrence in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), discussed *supra* notes 50–52 and accompanying text.

[56] *Bakke*, 438 U.S. at 314–15.

[57] *Id.* at 315–16.

[58] *See id.*

[59] *Id.* at 316, 319–20.

[60] *Compare Keyishian*, 385 U.S. at 603 *and Sweezy*, 354 U.S. at 250 (academic freedom protects individual teacher) *with Bakke*, 438 U.S. at 312, 316 *and Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (academic freedom protects college as institution); *see supra* notes 36–59 and accompanying text; *see also* Note, *A Proposed Academic Freedom Privilege*, *supra* note 10, at 1548.

[61] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250; *see supra* notes 37–47 and accompanying text.

[62] *See supra* notes 37–47 and accompanying text.

[63] The institutional aspects of academic freedom, which Justice Frankfurter identified in his concurrence in *Sweezy*, include a college's freedom to decide, on academic grounds, whom it admits, what shall be taught, how it shall be taught, and who shall teach. *Sweezy*, 354 U.S. at 263 (discussed *supra* at notes 50–52 and accompanying text).

its student body — the Court indicated that this institutional aspect of academic freedom should yield to other constitutional interests.[64] Therefore, it is unclear from Supreme Court precedent whether academic freedom protects tenure decisions and, if academic freedom does protect these decisions, how much restraint a court should exercise in reviewing a college's decision about who may teach.

A. *The Relationship Between Academic Freedom, Tenure, and the Peer Review Process*

Commentators strongly support the Supreme Court's recognition of academic freedom and regard the freedom to teach, conduct research, and publish findings without political interference as the cornerstone of our educational system.[65] Commentators, moreover, urge that tenure protects teachers' academic freedom by allowing them to teach without the fear of arbitrarily losing their jobs.[66] Therefore, commentators reason, tenure is essential to ensure academic freedom.[67]

Colleges usually determine who receives tenure by means of the peer review system.[68] Under the peer review system, a committee of senior faculty members within the candidate's department and other university departments prepare written evaluations of the candidate.[69] The committee may also solicit evaluations of the candidate's publications from scholars outside the college.[70] Based on these evaluations and other materials,[71] the peer review committee makes a tenure recommendation which it submits to the president of the college and the trustees, who then make the ultimate decision to grant or deny tenure.[72]

The theory underlying the peer review system is that a candidate's fellow professors are in the best position to observe and judge the candidate's ability and potential.[73]

---

[64] *See Bakke*, 438 U.S. at 312 (discussed at *supra* notes 53–59 and accompanying text).

[65] *See, e.g.*, Lovejoy, *Academic Freedom*, in 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 384, 384 (1930), *reprinted in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION (W. Mertzer ed. 1971) ("Academic freedom is the freedom of the teacher . . . to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political . . . authority."); Murphy, *Academic Freedom — An Emerging Constitutional Right*, in ACADEMIC FREEDOM: THE SCHOLAR'S PLACE IN MODERN SOCIETY 23 (H. Baade & E. Everett eds. 1964) (Freedom to teach and learn is at the core of all intellectual freedom.).

[66] *See* Jones, *The American Concept of Academic Freedom*, in ACADEMIC FREEDOM AND TENURE 231 (L. Joughin ed. 1969); The American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* ACADEMIC FREEDOM AND TENURE, *supra*, at 46–53 [hereinafter *1940 AAUP Statement*]; *see also* J. RAPP, *supra* note 10, at § 6.06[5][a]. The Supreme Court has examined the rights tenured faculty have, and has held that tenure is a property right, which a state cannot deprive an individual of without due process. Perry v. Sinderman, 408 U.S. 593, 601 (1972).

[67] *See* Jones, *supra* note 66, at 231; *1940 AAUP Statement*, *supra* note 66, at 35–37; *see also* J. RAPP, *supra* note 10, at § 6.06[5][a].

[68] *See supra* note 10.

[69] Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 475–82 (1980).

[70] For an example, see the system of the University of Wisconsin in Namenwirth v. Board of Regents of the University of Wisconsin System, 769 F.2d 1235, 1238 (7th Cir. 1985).

[71] In a tenure decision, the peer review committee also usually examines materials which, unlike peer review evaluations, colleges do not consider confidential, such as student evaluations of the candidate, grade surveys, and enrollment data. *See, e.g.*, *Franklin & Marshall*, 775 F.2d at 112.

[72] *See* Yurko, *supra* note 69, at 475.

[73] J. RAPP, *supra* note 10, at § 6.07[4].

Evaluators in the system are assured that their evaluations and the deliberations of the peer review committee will be confidential.[74] This assurance of confidentiality promotes candid evaluations and is intended to result in tenure grants to the best candidates.[75]

Although courts have stated that the peer review system is the most effective method for determining who receives tenure,[76] some commentators criticize the system.[77] Merit should be the only consideration in granting tenure; these commentators, however, argue that under the peer review system this is not necessarily the case.[78] Indeed, courts have noted that the subjective esteem of one's colleagues may be an essential element in a tenure decision.[79]

Notwithstanding its possible drawbacks, colleges assert that courts should give the peer review system special treatment, and protect peer review materials from disclosure in order to further the goals of academic freedom.[80] Colleges argue that the Court

---

[74] For an example, see the system of LaGuardia Community College and the City of New York in Gray v. Board of Higher Educ., 92 F.R.D. 87, 92 (S.D.N.Y. 1981).

[75] *See, e.g.*, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983).

[76] *See, e.g.*, *id.*; Johnson v. University of Pittsburg, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977).

[77] *See* commentators cited *infra* note 78. *See generally* THE HIDDEN PROFESSORIATE: CREDENTIALISM, PROFESSIONALISM, AND THE TENURE CRISIS (A. Wilke ed. 1979); Case Comment, *An Academic Freedom Privilege in the Peer Review Context: In Re* Dinnan *and* Gray v. Board of Higher Education, 36 RUTGERS L.J. 286, 298 (1983) [hereinafter Comment, *Academic Freedom Privilege*].

[78] *E.g.*, L. LEWIS, SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS 13 (1975) ("[T]he principle of merit . . . does not guide academic men any more than it does those in other occupations."); Solomon & Heeter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME L. REV. 41, 72 (1976) ("Women and minorities tend to be excluded from the academic profession not always intentionally . . . . Fearing 'Bogi-Man' candidates who 'won't fit in,' [university] departments invoke the so-called merit principle which assures their exclusion.").

Commentators have criticized the peer review system in other areas where decisionmakers utilize the system. Grant giving agencies, university administrators, and independent researchers have begun to reevaluate the peer review system as a means of determining who receives federal funds for scientific research. *Peer Review System Plans Being Reevaluated*, Boston Globe, June 23, 1987, at 1, col. 2. These groups point out that the system encourages research in established areas, and deters new, creative thought. *Id.* at 5, col. 1. The system is biased against radically new research, these groups claim, because specialists in established fields, who make up peer review committees, are generally skeptical of unusual ideas. *Id.* These ideas, however, often lead to breakthroughs in scientific research. *Id.* The tendency of established scholars generally to eschew untried ideas and deny grants to unconventional researchers may also be a reason behind their denying tenure to minorities and women, who potentially may bring different perspectives to university departments. *See infra* note 297; *see also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 977 (1982).

[79] *See, e.g.*, Namenwirth v. Board of Regents of the Univ. of Wisconsin Sys., 769 F.2d 1235, 1243 (7th Cir. 1985) ("[W]inning the esteem of one's colleagues is . . . an essential part of securing tenure."). Because of the presence of subjective standards, a number of courts have deferred summarily to the peer review committee's evaluation of a candidate. *See infra* notes 106–07 and accompanying text.

Commentators urge that subjective systems are fundamentally flawed because vague selection criteria allow for both conscious and unconscious bias. *E.g.*, Bartholet, *supra* note 78, at 955, 977. A solution to this problem is for courts to use disparate impact theory, discussed *infra* note 88, to examine both subjective and objective selection devices. Bartholet, *supra* note 78, at 947–48, 980. The Supreme Court, however, has limited disparate impact theory to only those cases which involve a single, objectively scored test or requirement. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 & n.7.

[80] EEOC v. Franklin & Marshall College, 775 F.2d 110, 113 (3d Cir. 1985), *cert. denied*, 106 S.

developed the concept of academic freedom to enable teachers to research and teach a broad range of topics because the open exchange of ideas is critical in a democratic society.[81] Colleges reason that the best tenured professors will encourage the broadest possible exchange of ideas, and thereby further the goals of academic freedom.[82] Therefore, because the loss of confidentiality may chill candid peer review evaluations and result in less qualified candidates receiving tenure, colleges maintain that courts should protect the confidentiality of the peer review system.[83]

II. Applying Title VII to Tenure Decisions

Giving colleges special treatment may hinder the enforcement of Title VII which, by prohibiting employment discrimination based on race, color, religion, sex, or national origin, embodies policies of equal employment opportunity.[84] Although it initially exempted educational institutions from Title VII's requirements in 1964,[85] Congress deleted this exemption when it amended Title VII in 1972.[86] Consequently, Title VII regulates employment practices in public and private academic institutions.[87]

Ct. 2288 (1986) (White, J., dissenting); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 333 (7th Cir. 1983); Gray v. Board of Higher Educ., 692 F.2d 901, 903 (2d Cir. 1982); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981); Rollins v. Farris, 108 F.R.D. 714, 715 (E.D. Ark. 1985).

[81] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). For a discussion of the policies behind academic freedom, see *supra* notes 29–33 and accompanying text.

[82] *See* Note, *A Proposed Academic Freedom Privilege*, *supra* note 10, at 1552.

[83] *See* cases cited *supra* note 80.

[84] 42 U.S.C. § 2000e-2 (1982). Title VII's ban on employment discrimination extends to hiring, discharge, and any discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a). Any benefit which is "part and parcel of the employment relationship" qualifies as a term, condition, or privilege of employment under Title VII. Hishon v. King & Spaulding, 467 U.S. 69, 75 (1984). Thus, even if an employee has no express or implied contractual right to a benefit, and the employer is free to deny or grant the benefit, the employer still may not violate Title VII in its treatment of the benefit. *Id.*

[85] Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (current version at 42 U.S.C. § 2000e-1).

[86] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04 (1972) (current version at 42 U.S.C. § 2000e-1). Congress found that nothing in the legislative history of Title VII supported the exemption, nor was there any national policy weighing in favor of singling out academic institutions for preferential treatment. H.R. Rep. No. 238, 92d Cong., 2d Sess. 19, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2155. The House Committee noted that:

> [D]iscrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

Id. at 20, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 2139.

[87] 42 U.S.C. § 2000e. The prohibitions of Title VII currently cover employment agencies and labor organizations, 42 U.S.C. § 2000e-2, state and local governments, 42 U.S.C. § 2000e, the federal government, 42 U.S.C. § 2000e-16, and private employers engaged in an industry which affects commerce with more than 15 employees, 42 U.S.C. § 2000e.

A. *Elements of Title VII Cases*

Most professors who claim they were denied tenure on grounds prohibited by Title VII have brought claims of disparate treatment.[88] In a claim of disparate treatment, the plaintiff must prove the employer acted with a discriminatory motive in making an employment decision which affected the plaintiff.[89] An examination of the elements and order of proof in a disparate treatment claim illustrates the potential impact of denying a plaintiff access to tenure deliberations.

To succeed in a claim of disparate treatment, a plaintiff ultimately must show that the employer intentionally discriminated.[90] Because direct evidence of an employer's discriminatory state of mind is often unavailable, the Supreme Court has allowed plaintiffs to raise an inference of discriminatory intent by establishing a prima facie case,[91] the elements of which vary slightly according to the particular facts of each case.[92] In general, the plaintiff must show (i) that he or she belongs to a protected class; (ii) that

---

[88] *See, e.g.*, EEOC v. Franklin & Marshall College, 775 F.2d 110, 111 (3d Cir. 1985); Namenwirth v. Board of Regents, 769 F.2d 1235, 1240 (7th Cir. 1985); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 332 (7th Cir. 1983); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981); Lynn v. Regents of the Univ. of California, 656 F.2d 1337, 1340 (9th Cir. 1981); Kunda v. Muhlenberg College, 621 F.2d 532, 541 (3d Cir. 1980). The other type of claim which the Supreme Court has recognized a plaintiff can bring under Title VII is one of disparate impact. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In contrast to a claim of disparate treatment, a plaintiff in a claim of disparate impact does not have to prove the employer's discriminatory intent. *Id.* at 432. The plaintiff must prove only that a particular employment selection procedure has a disparate impact on a class protected by Title VII. *See id.* at 431; *see also* Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047, 1050–51 (1983). This proof usually consists of a statistical comparison of the representation of a given protected class in the employer's workplace with representation of that class in the relevant labor pool. *See* Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973). Once the plaintiff establishes that a disparate impact exists, the burden shifts to the employer to demonstrate that the employment qualifications are a business necessity. *Griggs*, 401 U.S. at 431. Courts have applied the business necessity rule strictly in business contexts. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (requirement that candidate be a certain weight and height).

Professors, however, have been unsuccessful in using disparate impact theory against colleges. Because the Supreme Court has limited disparate impact theory to objectively scored tests or requirements, *see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 & n.7, professors have been unable to use this theory to challenge the peer review system, which is a subjective, multi-layered decisionmaking process. *See supra* notes 68–72 and accompanying text. Even where professors have challenged a single, objective requirement, they have been unsuccessful under disparate impact theory, both because of a lack of meaningful statistics, Davis v. Weidner, 596 F.2d 726, 732 n.5 (7th Cir. 1979), and because courts have determined that qualifications required by colleges, such as a Ph.D, are a business necessity, Campbell v. Ramsay, 631 F.2d 597, 598 (8th Cir. 1980); Scott v. University of Delaware, 455 F. Supp. 1102, 1126 (D. Del. 1978), *aff'd in part, vacated and remanded in part*, 601 F.2d 76 (3d Cir. 1979).

[89] Tepker, *supra* note 88, at 1060.

[90] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973); Tepker, *supra* note 88, at 1060.

[91] Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978); *see* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 299–300 (1982). In *Furnco*, the Court explained that the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

[92] *McDonnell Douglas Corp.*, 411 U.S. at 802 n.13.

he or she has been affected adversely by an employer's decision; (iii) that he or she was qualified for the position sought; and (iv) that the position remained open after the employer rejected him or her.[93] Lower courts have followed this type of general test for establishing a prima facie case in cases involving allegations of disparate treatment in academic institutions.[94] The Court has characterized the plaintiff's burden of establishing a prima facie case as "not onerous."[95]

After the plaintiff establishes a prima facie case, the burden shifts to the employer to come forward and "articulate some legitimate, nondiscriminatory reason" for the decision.[96] To overcome the inference of discriminatory motive that the plaintiff's prima facie case creates, the defendant employer needs to raise a genuine issue of fact concerning the plaintiff's allegations.[97] A defendant's proffered reasons for the employment decision must be reasonably clear and specific.[98] This showing is required in order to clarify the issues and give the plaintiff a fair opportunity to demonstrate that the employer's allegedly legitimate reasons are merely a pretext for employment discrimination.[99]

Once the employer has offered a legitimate, nondiscriminatory reason for its employment decision, the plaintiff then has an opportunity to show that the employer's articulated reasons are a pretext for hiding its discriminatory motive.[100] Comparing the employer's treatment of the plaintiff with its treatment of other similarly situated employees is an effective method[101] for revealing whether the employer's reasons for its decision are pretextual.[102] This method of showing pretext is premised on the belief that for an employer's reasons to be valid they must be applied evenly to both protected and

---

[93] *Id.* at 802. In *McDonnell Douglas Corp.*, the Court articulated the elements of a prima facie case alleging disparate treatment in an employer's hiring practices. *Id.* There, the Court held that the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

[94] *See, e.g.*, Lynn v. Regents of the Univ. of California, 656 F.2d 1337, 1341 (9th Cir. 1981); Smith v. University of North Carolina, 632 F.2d 316, 340 (4th Cir. 1980); *see also* disparate treatment cases cited *supra* note 88.

[95] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[96] *McDonnell Douglas Corp.*, 411 U.S. at 802.

[97] *Burdine*, 450 U.S. at 254–55.

[98] *Id.* at 258.

[99] *Id.* The plaintiff always bears the ultimate burden of persuasion. *Id.* at 259. At this stage, the defendant bears only the burden of production. *Id.* at 258.

[100] *McDonnell Douglas Corp.*, 411 U.S. at 804–05; *see* Brodin, *supra* note 91, at 300–01.

[101] Other methods of proving pretext include introducing direct proof of discriminatory intent, or statistical evidence demonstrating a pattern of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 804–05.

[102] *Id.* Courts have determined that examining professors similarly situated to the complainant is an effective way to discern whether a tenure denial is based on reasons prohibited by Title VII. EEOC v. Franklin & Marshall College, 775 F.2d 110, 116 (3d Cir. 1985); Kunda v. Muhlenberg College, 621 F.2d 532, 546 (3d Cir. 1980); EEOC v. University of New Mexico, 504 F.2d 1296, 1302, 1305–06 (10th Cir. 1974). In Kunda v. Muhlenberg College, for example, a plaintiff prevailed in a sex discrimination case against a college by showing that the college deviated from procedures used with male candidates. 621 F.2d at 546.

non-protected classes.[103] If the plaintiff can show that his or her employer treated more favorably a member of a non-protected class who is similarly situated to the plaintiff, the plaintiff has proven a Title VII violation.[104]

In cases against academic institutions, plaintiffs initially had difficulty convincing courts that a peer review committee's reasons for a decision were a pretext for hiding a discriminatory motive.[105] Because courts have little expertise in this area, and were fearful of making promotion and tenure decisions for a university, they were reluctant to find a pretext.[106] Courts, therefore, often deferred to the peer review committee's reasons for its decision.[107] Courts have begun, however, to retreat from this deferential treatment of colleges.[108]

Where courts have attempted to examine critically a college's reasons for denying tenure, colleges have claimed that academic freedom protects tenure deliberations.[109] If granted, the privilege prevents plaintiffs and courts from examining the actual basis for a tenure decision.[110] In the context of a Title VII claim, once a college provides legitimate, nondiscriminatory reasons for its decision, the privilege will prevent a professor's challenging these reasons effectively.[111] The professor will be unable to examine peer review materials concerning his or her own candidacy to obtain direct evidence of the decisionmakers' intent.[112] In addition, the professor will be unable to obtain comparative information on other tenure candidates to prove pretext.[113] Therefore, in disparate treatment

---

[103] *See McDonnell Douglas Corp.*, 411 U.S. at 804.

[104] *See id.*

[105] *See, e.g.*, Faro v. New York Univ., 501 F.2d 1229, 1231–32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); Green v. Board of Regents, 474 F.2d 594, 596 (5th Cir. 1973) ("The University's standards are matters of professional judgment.").

[106] *See, e.g.*, Smith v. University of North Carolina, 632 F.2d 316, 345–46 (4th Cir. 1980) ("Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion."); Lewis v. Chicago State College, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969) ("A professor's value depends on his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards."). Courts are usually suspicious of subjective employment criteria in a business context. *See generally* Tepker, *supra* note 88, at 1058–62.

[107] *See supra* note 105; *see also* Bartholet, *supra* note 78, at 961–62.

[108] *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532, 545 (3d Cir. 1980) ("academic institutions and decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination"); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979) ("Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions.").

[109] *See, e.g.*, EEOC v. Franklin & Marshall College, 775 F.2d 110, 113 (3d Cir. 1985); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 333–34 (7th Cir. 1983); Gray v. Board of Higher Educ., 692 F.2d 901, 903 (2d Cir. 1982); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981); Rollins v. Farris, 108 F.R.D. 714, 715 (E.D. Ark. 1985).

[110] *See Gray*, 692 F.2d at 905. Although *Gray* was a 42 U.S.C. § 1981 case, the same disparate treatment analysis of Title VII applies. *Id.* at 905 & n.8.

[111] *See id.*

[112] *See id.*

[113] *See id.*

cases, where a plaintiff must prove discriminatory intent, recognizing a privilege for tenure deliberations may preclude the plaintiff from proving his or her case.[114]

B. *The Scope of the EEOC's Authority*

Title VII empowers the EEOC to prevent employment discrimination and implement the Title's provisions.[115] The EEOC has the authority to investigate instances of employment discrimination.[116] If, as a result of its investigation, the EEOC finds there is reasonable cause to believe that discrimination has taken place, the EEOC has the power to bring about a voluntary conciliation agreement between an employer and its employee.[117] If this fails, after a finding of reasonable cause[118] the EEOC also may institute an action in federal court.[119] The EEOC also aids

---

[114] *See id.* Even if a plaintiff is successful in overcoming a college's privilege argument, a number of defenses still remain open to the college. A defense which may be especially effective in the peer review context is the "same decision" defense. *See* Brodin, *supra* note 91, at 263. Supreme Court precedent indicates that in an individual disparate treatment case an employer does not violate Title VII if the employer can show that it would have reached the same decision without the discriminatory element. *Id.*; see *supra* notes 88–104 for a discussion of individual disparate treatment cases. The justification for this "same decision" standard of causation is that a court should not give the plaintiff a windfall by putting him or her in a better position than he or she would have been in had the impermissible element been absent. Brodin, *supra* note 91, at 317. Under this same decision, or "but for" standard, as long as a majority of peer review committee members, discounting those motivated by racial or gender-based bias, voted against the plaintiff, no violation of Title VII occurs. *See id.* at 293.

A solution to this "same decision" problem is to divide the issues of liability and remedy. *Id.* at 323. Under the "motivating factor" test an employer violates Title VII if an impermissible bias was even a motivating factor in its decision. *Id.* Because the plaintiff would not have received the job or promotion anyway, the plaintiff is not entitled to affirmative relief, such as backpay or reinstatement. *Id.* at 323–24; see *infra* note 119 for a discussion of Title VII remedies. The plaintiff, however, would be entitled to partial attorneys' fees and an injunction prohibiting future discriminatory employment practices. Brodin, *supra* note 91, at 323.

[115] 42 U.S.C. § 2000e-5(a) (1982). Section 2000e-5(a) provides in part: "[t]he Commission is empowered . . . to prevent any person from engaging in any unlawful employment practices . . . ." *Id.*

[116] 42 U.S.C. § 2000e-5(b). Section 2000e-5(b) provides in part:

> Whenever a charge is filed . . . alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve notice of the charge . . . on such employer . . . and shall make an investigation thereof . . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal means of conference, conciliation, and persuasion.

Id.

[117] *Id.* For the relevant text of section 2000e-5(b), see *supra* note 116.

[118] Title VII trials are *de novo*, and courts will not review an EEOC finding of reasonable cause. *E.g.*, Georator Corp. v. EEOC, 592 F.2d 765, 767 (4th Cir. 1979). Indeed, a number of courts have determined that a reasonable cause finding is irrelevant in a subsequent action. *E.g.*, King v. Georgia Power Co., 295 F. Supp. 943, 948–49 (N.D. Ga. 1968).

[119] 42 U.S.C. § 2000e-5(f). Because of the EEOC delays in enforcement, the usual requirement that a plaintiff exhaust his or her administrative remedies does not apply to EEOC proceedings. M. Zimmer, C. Sullivan, & R. Richards, Employment Discrimination 395 (1982). Therefore, Title VII does not require a plaintiff to postpone filing a complaint in court until EEOC enforcement procedures are complete; instead, to bring a Title VII action, a plaintiff must wait a minimum of 180 days after filing a charge and request a right to sue letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28 (1986). After receiving this letter, the plaintiff then has 90 days within

plaintiffs in private actions under Title VII by providing plaintiffs with the results of its investigation.[120]

An EEOC investigation begins when the EEOC receives charges[121] that an employer has violated Title VII.[122] After issuing notice[123] of the charge to the employer, the EEOC begins its investigation.[124] If the employer refuses to comply with the EEOC's requests for information, the EEOC has the power to issue an administrative subpoena,[125] and seek enforcement of that subpoena in a federal district court.[126]

Upon application by the EEOC, the district court determines whether to enforce the subpoena.[127] Because Title VII allows the EEOC access only to evidence which is relevant to the charge,[128] the EEOC's power to subpoena employment records is linked

---

which to bring his or her claim. 42 U.S.C. § 2000e-5(f)(1). Failure to bring a claim within this period precludes a private action under Title VII. *See* M. Zimmer, C. Sullivan, & R. Richards, *supra*, at 395.

Jurisdiction for a private action or an action by the EEOC is proper in the district where the discrimination took place, where the employer's records are kept, where the employee would have worked if the alleged discrimination had not taken place, or where the employer's principal place of business is located. 42 U.S.C. § 2000e-5(f)(3). Title VII affords federal courts the power to grant a wide range of relief, including reinstatement and back pay. 42 U.S.C. § 2000e-5(g); *see, e.g.* Kunda v. Muhlenberg College, 621 F.2d 532, 535, 549 (3d Cir. 1980) (female instructor reinstated as associate professor with backpay and tenure upon completion of master's degree).

[120] Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

[121] Title VII requires only that the charges be in writing and under oath. 42 U.S.C. § 2000e-5(b). EEOC regulations, however, require that a charge contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (1986).

[122] 42 U.S.C. § 2000e-5(b). Charges must be filed within 180 days of the alleged violation. 42 U.S.C. § 2000e-5(c). Either an aggrieved individual, a person on behalf of the aggrieved individual, or a member of the EEOC may file charges. 42 U.S.C. § 2000e-5(b). The charges may be either of individual discrimination (disparate treatment), *see* 42 U.S.C. § 2000e-5(b), or of a pattern or practice of discrimination (systemic disparate treatment), 42 U.S.C. § 2000e-6(e).

Title VII embodies federalism concerns by requiring that an aggrieved person first file charges with a state antidiscrimination agency, if one exists, before filing charges with the EEOC. 42 U.S.C. § 2000e-5(c). If a state antidiscrimination agency exists, a different statute of limitations applies. 42 U.S.C. § 2000e-5(c), 5(d); *see* M. Zimmer, C. Sullivan, & R. Richards, *supra* note 119, at 388–89.

[123] 42 U.S.C. § 2000e-5(b). After receiving the charge, the EEOC must notify the employer within ten days, specifying the "date, place and circumstances of the alleged unlawful employment practices." *Id.* The purpose of the notice requirement is to give the employer fair notice of the impending EEOC investigation and to allow it to inquire into its records and voluntarily comply with Title VII. EEOC v. Shell Oil Co., 466 U.S. 54, 79 (1984). The notice also alerts the employer so that it will not inadvertently destroy potentially relevant records. *Id.*

[124] 29 C.F.R. § 1601.15.

[125] 42 U.S.C. § 2000e-9. An employer has two chances to appeal at the agency level. 29 C.F.R. § 1601.16(b). After being served with an EEOC subpoena, an employer has five days within which to petition the General Counsel. *Id.* If unsuccessful, the employer may petition the Commission, which makes a final agency determination on whether to revoke the subpoena. *Id.*

[126] 42 U.S.C. § 2000e-9. Section 2000e-9 makes the investigatory powers of 29 U.S.C. § 161 (1982), which belong to the National Labor Relations Board, available to the EEOC. The section thus authorizes the EEOC to require attendance and testimony at its hearings, provides for a petition to revoke an EEOC subpoena, and grants federal district courts jurisdiction to enforce EEOC subpoenas. 42 U.S.C. § 2000e-9.

[127] 29 U.S.C. § 161(2) (1982). An EEOC administrative subpoena enforcement proceeding is a summary proceeding. EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 308 (7th Cir. 1981).

[128] 42 U.S.C. § 2000e-8(a) allows the EEOC access to "evidence that relates to unlawful employment practices . . . and is relevant to the charge under investigation."

to the initial charge.[129] Therefore, unlike in the usual administrative subpoena enforcement proceeding, where a district court must determine only that the investigation is within the agency's authority, that the subpoena is not too indefinite, and that the material requested is reasonably relevant,[130] in an EEOC subpoena enforcement proceeding a court also must examine the validity of the charge.[131]

The Supreme Court has set a liberal standard both for determining the validity of a charge and for identifying which information is relevant to the charge and therefore within the scope of an EEOC subpoena.[132] In *EEOC v. Shell Oil Co.*, the Court held that the EEOC may request and obtain any information which is relevant to a charge of discrimination regardless of the strength of the evidentiary foundation of the charge.[133] Furthermore, although noting that the EEOC can obtain only information relevant to the charge under investigation, the Court held that this relevance limitation is not constraining.[134] The Court indicated that the term "relevant" in section 2000e-8[135] gives the EEOC "access to virtually any material that might cast light on the allegations against the employer."[136]

In reaching this conclusion, the Court expressed the concern that requiring the EEOC to show that its charge has merit before it could obtain enforcement of a subpoena would allow employers a potentially powerful defense to an EEOC investigation.[137] An employer who did not wish to comply with an EEOC subpoena would be able to challenge the sufficiency of the charge and delay the enforcement proceedings.[138] Furthermore, the Court reasoned, the purpose of an investigation is to determine whether the allegations in a charge are true, and therefore requiring the EEOC to substantiate the charges before its investigation would be inconsistent with Title VII's enforcement goals.[139] The Court concluded that the EEOC should not be hindered in its enforcement of Title VII.[140] Therefore, because the EEOC need not demonstrate that a charge is

---

[129] EEOC v. Shell Oil Co., 466 U.S. 54, 65 (1984).

[130] *See, e.g.*, United States v. Powell, 379 U.S. 48, 57–58 (1964) (IRS investigation); United States v. Morton Salt Co., 338 U.S. 632, 652–53 (1950) (FTC investigation).

[131] *Shell Oil Co.*, 466 U.S. at 72 n.26.

[132] *See id.* at 68–69, 72–73.

[133] *Id.* at 71–72 & n.26. In *Shell Oil Co.*, the EEOC brought a charge of a pattern or practice of discrimination which broadly stated that the employer had discriminated against blacks and women, identified the job categories from which they had been prohibited, and set as the date when the discrimination began the enactment of the Civil Rights Act of 1964. *Id.* at 73. The employer responded to an EEOC subpoena requesting the company's employment records by claiming that the EEOC had not provided sufficient facts to justify a court's enforcing the subpoena. *Id.* at 59. In holding that the subpoena was enforceable, *id.* at 73, the Court stated that, for a charge to be valid, the charge does not need to be "well-founded," *id.* at 72 n.26, and the allegations in the charge do not need to be precise. *See id.* at 72–73. In addressing the requisite specificity of the allegations in a charge, the *Shell Oil* Court reasoned that where the EEOC is investigating a pattern or practice of discrimination the charges must be broad and vague. *Id.* at 71–73. The Court allowed this permissive standard because in pattern or practice discrimination the EEOC may bring a self-generated charge based on statistics, and consequently cannot single out a specific instance of discrimination. *Id.*

[134] *Id.* at 68–69.

[135] 42 U.S.C. § 2000e-8(a). For the text of section 2000e-8(a), see *supra* note 128.

[136] *Shell Oil Co.*, 466 U.S. at 68–69.

[137] *See id.* at 72.

[138] *See id.*

[139] *Id.* at 71.

[140] *Id.*

well-founded,[141] and because the concept of relevancy is broad during an EEOC investigation,[142] the EEOC has the authority to subpoena expeditiously a wide range of information.

Although the EEOC has broad investigatory powers, Title VII places limits on the EEOC's use of the information it obtains.[143] Title VII protects information gathered during an investigation from disclosure before litigation by subjecting Commission members to criminal penalties for publicizing this information.[144] An EEOC regulation, however, allows the Commission to disclose information to the party bringing the charges "where disclosure is deemed necessary for securing appropriate relief."[145] The Supreme Court, in the 1981 decision of *EEOC v. Associated Dry Goods Corp.*, upheld the validity of this regulation, and ruled that the EEOC may disclose the contents of its file on a charge to the charging party.[146] The Court pointed out that EEOC regulations requiring the charging party to execute a written agreement not to disclose information obtained from the EEOC prevent public disclosure before litigation.[147] Therefore, under EEOC regulations, although the charging party may not publicly disclose the information, it has access to all information the EEOC collects during an investigation.[148]

In enforcing an EEOC subpoena, however, a district court has the power to impose limits on an EEOC investigation and deny the EEOC access to confidential materials under Rule 501 of the Federal Rules of Evidence, which codifies the courts' ability to recognize evidentiary privileges.[149] The Supreme Court has recognized that Rule 501 is intended to afford the courts the flexibility to develop rules of privilege on a case-by-case basis.[150] The Court, however, has indicated that it does not favor evidentiary privileges and has cautioned that privileges run counter to the principle that parties should

---

[141] *Id.* at 72 & n.26. The Court stated that "any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error." *Id.* at 72 n.26.

[142] *Id.* at 68–69. In judging whether information the EEOC requested is relevant to charges against academic institutions, courts have also upheld the EEOC's broad investigatory powers. EEOC v. University of Pittsburgh, 643 F.2d 983, 985–86 (3d Cir.) (employment records of teachers in four other professional schools held relevant to charge of sex discrimination with respect to salaries in nursing school), *cert. denied*, 454 U.S. 880 (1981); EEOC v. University of New Mexico, 504 F.2d 1296, 1299–1302 (10th Cir. 1974) (employment records of all faculty in engineering school held relevant to individual charge of national origin discrimination).

[143] 42 U.S.C. § 2000e-8(e).

[144] *Id.* Section 2000e-8(e) reads in part: "[a]ny officer or employee of the Commission who shall make public . . . any information in violation of this subsection shall be gı ilty of a misdemeanor . . . ." *Id.*

[145] 29 C.F.R. § 1601.22 (1986).

[146] 449 U.S. 590 (1980). In *Associated Dry Goods Corp.*, the Court deter nined that the charging party is not included in the term "public" to whom section 2000e-8(e) p ohibits disclosure of the information the EEOC obtains during its investigation. 449 U.S. at 598. The Court reasoned that allowing disclosure in connection with contemplated litigation would expedite the EEOC's informal investigation and strengthen its ability to negotiate because it could provide the parties with specific facts. *Id.* at 601. The Court also noted that disclosure would aid the charging party in determining whether to bring a civil suit. *Id.* at 601–03.

[147] *See id.* at 597–98; EEOC, COMPLIANCE MANUAL § 83.3(b).

[148] 29 C.F.R. § 1601.22 (1986).

[149] FED. R. EVID. 501. Federal courts have used this rule to limit access to peer review materials. *See, e.g.*, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 334–35 (7th Cir. 1983); Zaustinsky v. University of California, 96 F.R.D. 622, 624 (N.D. Cal. 1983).

[150] Trammel v. United States, 445 U.S. 40, 47 (1980).

have free access to all relevant evidence.[151] Therefore, the Court has concluded that courts should construe Rule 501 strictly.[152] To recognize a privilege, a court must balance the public good which the privilege would accomplish against the litigant's interest in discovering potentially relevant information.[153] During an EEOC subpoena enforcement proceeding, therefore, a court has a limited power to protect sensitive information from disclosure to the EEOC.[154]

III. Judicial Approaches to Academic Freedom as a Protection of the Peer Review System

In private actions, colleges have claimed that peer review materials are entitled to protection during discovery to preserve the candidness of evaluations.[155] Courts, therefore, were confronted with the need to balance a professor's interest in obtaining discovery of tenure deliberations against a college's interest in maintaining the confidentiality of its peer review system.[156] Recently, however, colleges have claimed that forcing

---

[151] *Id.* at 50.

[152] *Id.* (citing Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). This approach is similar to the Court's approach before Rule 501 was enacted. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth").

[153] *See Trammel*, 445 U.S. at 50. Professor Wigmore has proposed a more detailed test for recognizing an evidentiary privilege. 8 J. Wigmore, Evidence in Trials at Common Law § 2285 (McNaughton rev. ed. 1961). Before a privilege can protect a relationship, a court must find four factors:

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. (emphasis in original).

[154] *See, e.g.*, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 334–35 (7th Cir. 1983); Zaustinsky v. University of California, 96 F.R.D. 622, 624 (N.D. Cal. 1983) *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To limit the use of peer review materials once disclosed, a court can issue a protective order under Rule 26(c) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(c); *see Notre Dame*, 715 F.2d at 340; Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1385 (5th Cir. 1980); *see also* DeLano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?*, 14 J.C. & U.L. 121, 150–51 (1987) (proposing that courts adequately can protect colleges' interests in confidentiality with protective orders).

[155] Keyes v. Lenoir College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). The question of the confidentiality of peer review materials also arose in the following cases: Lynn v. Regents of Univ. of California, 656 F.2d 1337, 1345 (9th Cir. 1981); Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1384 (5th Cir. 1980); Lever v. Northwestern Univ., No. 84 C 11025 (N.D. Ill. May 21, 1987) (LEXIS, Genfed library, Dist file); Rubin v. Regents of the Univ. of California, 114 F.R.D. 1, 2 (N.D. Cal. 1986); Jackson v. Harvard Univ., 111 F.R.D. 472, 475 (D. Mass. 1986); Paul v. Stanford Univ., 39 EPD ¶ 35,918 (N.D. Cal. 1986); *Zaustinsky*, 96 F.R.D. at 624–25.

[156] Courts have reached conflicting conclusions as to how to strike this balance. *E.g.*, *Lynn*, 656 F.2d at 1347 (professor's interest in disclosure outweighs university's interest in confidentiality where university's defense is based on information professor seeks); *Jepsen*, 610 F.2d at 1384 (same); *Keyes*, 552 F.2d at 581 (same); *Zaustinsky*, 96 F.R.D. at 625 (professor's interest in disclosure outweighs university's interest in confidentiality where professor demonstrates "ability to establish a prima facie case"); McKillop v. Regents of the Univ. of California, 386 F. Supp. 1270, 1278 (N.D. Cal. 1975) (university's interest in confidentiality "decisively outweighs" professor's interest in disclosure).

disclosure of peer review materials implicates academic freedom.[157] Therefore, colleges argue, court enforced discovery requests for peer review materials not only chill candid evaluations of tenure candidates, but also represent impermissible government intrusion in areas where a college should be free to exercise its discretion.[158]

The recent cases of *Gray v. Board of Higher Education, City of New York*[159] and *In re Dinnan*[160] demonstrate that courts disagree over the viability of a privilege based on academic freedom in civil cases. In both of these cases, members of peer review committees claimed that academic freedom should protect the peer review process from judicial intrusion. In *Gray*, the Second Circuit Court of Appeals adopted a qualified privilege which involves a balancing of the parties' right to discovery against society's interest in protecting certain relationships.[161] Applying this balance, the *Gray* court held that the plaintiff, a black assistant professor, could discover the tenure committee's votes.[162] The court reasoned that the plaintiff would have no chance in proving his case — which required a showing of discriminatory intent — without evidence of who voted for and against him.[163] A plaintiff, according to the court, must have a "full and fair opportunity" to obtain evidence to prove discriminatory intent.[164] The court suggested, however, that if the peer review committee had given the plaintiff a meaningful statement of the reasons for its denying him tenure, and had provided him with an adequate intramural grievance procedure,[165] the balance would have shifted toward confidentiality.[166]

In contrast, in *In re Dinnan*, the Court of Appeals for the Fifth Circuit rejected a professor's proposed academic freedom privilege.[167] There, a college professor, Dinnan, refused to testify in a case brought by an associate professor who claimed that the college had denied her a promotion for discriminatory reasons.[168] Dinnan claimed that an academic freedom privilege sheltered from discovery his vote in the plaintiff's application for promotion.[169] The district court issued a contempt sanction against Dinnan, and he appealed.[170] The Fifth Circuit noted that privileges contravene the public policy of getting to the truth, and that a "compelling justification" must be present for a new

---

[157] Gray v. Board of Higher Educ., 692 F.2d 901, 903 (2d Cir. 1982); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981); Rollins v. Farris, 108 F.R.D. 714, 715 (E.D. Ark. 1985).

[158] *See* cases cited *supra* note 157.

[159] 692 F.2d 901 (2nd Cir. 1982).

[160] 661 F.2d 426 (5th Cir. Unit B Nov. 1981).

[161] *Gray*, 692 F.2d at 904–05. The court stated that:

> Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Id. at 903 (quoting Gray v. Board of Higher Educ., 92 F.R.D. 87, 90 (S.D.N.Y. 1981)).

[162] *Id.* at 902, 905.

[163] *Id.* at 906.

[164] *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255–56 (1981)).

[165] *Id.* at 907 (quoting AAUP brief at 23).

[166] *Id.* at 908.

[167] *See Dinnan*, 661 F.2d at 431.

[168] *Id.* at 427.

[169] *Id.*

[170] *Id.*

privilege.[171] The court reasoned that a decisionmaker who has acted for legitimate reasons ought to have nothing to fear in revealing his or her vote and the reasons for it.[172] Thus, the court rejected the professor's argument that academic freedom insulated the peer review process from judicial intrusion.[173] In civil cases, therefore, courts have reached conflicting conclusions as to whether academic freedom possibly may extend to protect tenure deliberations from disclosure.[174]

Just as they are in civil actions, courts are in conflict over the viability of an academic freedom privilege in EEOC investigations.[175] In the 1983 decision of *EEOC v. University of Notre Dame Du Lac*, for example, the Court of Appeals for the Seventh Circuit recognized a qualified academic privilege.[176] This qualified evidentiary privilege, the court determined, protects a university against disclosure of the names and identifying characteristics of faculty who participated in the tenure review process.[177] Furthermore, the court held that the EEOC must demonstrate through its investigation that there is "substance" to the charge before it obtains even edited files.[178] If the EEOC needs more information than the edited files provide, the Seventh Circuit stated, it must make a substantial showing of "particularized need."[179]

In *Notre Dame*, the University denied a black assistant professor, Brookins, tenure in the Economics Department.[180] Brookins brought charges of individual discrimination against the University.[181] The EEOC subsequently requested complete personnel records of the charging party, Brookins, and of all other faculty in the Economics Department at that time.[182] The University refused to comply with the EEOC's administrative subpoena *duces tecum*.[183] After denying the University's petition to revoke, the EEOC applied to the district court for enforcement.[184] The district court limited the subpoena's scope to cover only those faculty eligible for tenure during the time Brookins was employed, and ordered the University to comply.[185] The University, contending that the court should allow it to delete identifying characteristics from the files and that the court should compel the EEOC to execute a non-disclosure agreement with respect to the files, appealed this order.[186]

---

[171] *Id.* at 431.

[172] *Id.* at 432.

[173] *Id.* at 432–33.

[174] *Compare* Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982) (adopting qualified academic freedom privilege) *with In re* Dinnan, 661 F.2d 426 (5th Cir. Unit B Nov. 1981) (rejecting academic freedom privilege).

[175] *Compare* EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985) (rejecting academic freedom privilege), *cert. denied,* 106 S. Ct. 2288 (1986) (White, J., dissenting) *with* EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983) (adopting qualified academic freedom privilege).

[176] *Notre Dame,* 715 F.2d at 337.

[177] *Id.*

[178] *Id.* at 337 n.4.

[179] *Id.* at 338.

[180] *Id.* at 332.

[181] *Id.*

[182] *Id.* at 333.

[183] *Id.*

[184] *Id.* For a discussion of this enforcement procedure, see *supra* notes 127–131 and accompanying text.

[185] *Id.* at 334.

[186] *Id.*

The Seventh Circuit adopted a qualified privilege to protect the University under Rule 501[187] of the Federal Rules of Evidence.[188] The court observed that Rule 501 allows courts to recognize new evidentiary privileges "governed by the principles of common law."[189] The court cited the 1980 Supreme Court decision of *United States v. Trammel* for the proposition that courts have the "flexibility to develop rules of privilege on a case-by-case basis."[190] To recognize a new privilege, the court stated, a court must balance the requesting party's need for truth against the societal importance of the relationship the privilege would protect and the likelihood that the privilege would protect the relationship in the case at hand.[191] The court then proceeded to weigh Brookins' need for the information against the importance of a confidential peer review process,[192] noting that the University was not claiming total confidentiality.[193]

To apply the balancing test, the court began by outlining the constitutional dimensions of academic freedom, noting that academic freedom is a special concern of the first amendment,[194] and that the four essential freedoms of a university include the freedom to determine who may teach.[195] The court then reasoned that a confidential peer review process is essential to assure both academic excellence and freedom.[196] To ensure that only the best teachers receive tenure, the court reasoned, evaluators must be free to discuss objectively and frankly a candidate's academic qualifications and ability to work with students, other faculty, and the university administration.[197] The Seventh Circuit, therefore, was concerned that removing the protection of confidentiality from these discussions would chill free debate and potentially result in less qualified teachers receiving tenure.[198]

To further support its conclusion that confidentiality is essential to the peer review process, the court analogized peer review committee decisions to jury deliberations and executive branch decisions.[199] The court observed that in the jury deliberation context, the Supreme Court recognizes a privilege in order to encourage free debate.[200] Similarly, the court added, Congress has recognized a qualified privilege to promote executive branch discussions.[201] The court determined that frank discussions in the peer review process were as important to society as free debate in these two other decisionmaking processes, and that therefore a similar privilege should protect tenure deliberations.[202]

---

[187] FED. R. EVID. 501. For a discussion of Rule 501, see *supra* notes 149–54 and accompanying text.

[188] *Notre Dame*, 715 F.2d at 334–35.

[189] *Id.* (quoting FED. R. EVID. 501).

[190] *Id.* at 335 (citing Trammel v. United States, 445 U.S. 40, 47 (1980)). For a discussion of *Trammel*, see *supra* notes 150–53 and accompanying text.

[191] *Id.* at 335 (quoting Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061–62 (7th Cir. 1982)).

[192] *Id.* at 335–37.

[193] *Id.* at 335.

[194] *Id.* (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978)).

[195] *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

[196] *Id.* at 336.

[197] *Id.*

[198] *See id.*

[199] *Id.*

[200] *Id.* (citing Clark v. United States, 289 U.S. 1, 13 (1933) (confidentiality of jury deliberations)).

[201] *Id.* (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (limited executive branch privilege)).

[202] *Id.* at 336–37.

The court then examined the interests favoring disclosure of peer review materials.[203] The court recognized that the University could use the academic freedom privilege as a "shield to hide evidence of discrimination,"[204] and that the peer review committee's ability to make prejudicial decisions would jeopardize academic freedom itself.[205] Nonetheless, the court held that the University's interest in academic freedom outweighed the claimant's interest in obtaining complete files.[206]

To implement the qualified academic freedom privilege, the court remanded the case with instructions that the district court allow the University to delete from the peer review materials the names and identifying characteristics of all of the evaluators.[207] The Seventh Circuit next instructed the district court to compare the edited files with the originals to determine whether the deletions were reasonably necessary to protect the evaluators' identities.[208] If the EEOC seeks further information, the court stated, the EEOC must make a "substantial showing of 'particularized need.'"[209] The court explained that the district court, in evaluating the EEOC's evidence, must apply a balancing test to determine whether the EEOC's need for the identities and other information outweighed the policy behind the privilege.[210] For the EEOC to tip the balance in its favor, the court reasoned, the EEOC would have to conduct thorough discovery of all nonconfidential sources, and then show a "compelling necessity" for the edited peer review information it requests.[211] The court emphasized that this particularized need standard is stricter than a mere relevance standard.[212]

The Seventh Circuit applied the particularized need standard to hypothetical situations to demonstrate its effect.[213] Disclosure of an evaluator's identity, the court postulated, might be justified if the EEOC made a particularized showing that legitimate nondiscriminatory reasons did not support an evaluation or that an evaluator was likely to have displayed racial animus against the applicant.[214] If the University could show that it based the dismissal on reasons separate from the deliberations of the peer review committee, however, the court stated that disclosure would not be justified.[215] The court also authorized the district court to issue protective orders to prevent disclosure of the peer review materials.[216]

The qualified academic privilege, and the procedures for obtaining the information protected by this privilege, the court reasoned, struck the correct balance between the University's interest in preserving the integrity of the peer review process and the EEOC's need to investigate adequately charges of discrimination in tenure decisions.[217] In so

---

[203] *Id.* at 337.
[204] *Id.*
[205] *See id.* at 337.
[206] *Id.*
[207] *Id.* at 338.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.* at 339.
[214] *Id.*
[215] *Id.*
[216] *Id.* at 339–40. A district court may issue a protective order when a secret is disclosed in discovery and the disclosing party can show "good cause" for its need for protection. *Id.* at 340.
[217] *Id.* at 339.

holding, the court expressed the concern that EEOC investigations could become fishing expeditions without some clear limitations, and that allowing unlimited access to these peer review records potentially could jeopardize other confidential relationships.[218]

In contrast to the Seventh Circuit's approach in *Notre Dame*, in *EEOC v. Franklin & Marshall College* the Court of Appeals for the Third Circuit refused to recognize a qualified academic privilege, and held that the EEOC is entitled to all peer review materials which are relevant to charges that a college has violated Title VII.[219] The court concluded that the standard of relevance allows the EEOC access to "virtually any material that may cast light on the allegations against the employer."[220] This standard allows the EEOC to obtain the confidential files not only of the charging party, but also of all other candidates for tenure during the time of the charging party's employment.[221]

In *Franklin & Marshall*, Professor Montbertrand, who had been denied tenure in the College's four person French department, brought charges before the EEOC claiming the College discriminated against him based on his French national origin.[222] After the College's Professional Standards Committee[223] and the College's Grievance Committee both upheld his tenure denial, the claimant filed charges with the EEOC.[224] In response to an EEOC subpoena, the College allowed the EEOC to review the minutes of the tenure review committee's consideration of the claimant and of other candidates for tenure.[225] The College refused, however, to provide the EEOC with documents concerning the claimant and other candidates which it considered confidential.[226] These documents consisted of tenure recommendation forms, letters of recommendation, and miscellaneous documents.[227] The College claimed that disclosure of this information would result in less than honest evaluations and cause confrontations among the faculty.[228] Consequently, the EEOC applied to the district court for enforcement.[229] The EEOC agreed to accept this information with names and identifying characteristics deleted, and the district court ordered the College to comply.[230]

---

[218] *Id.* at 339–40. The court also suggested that production of all the Economics department's files could infringe on the privacy rights of third parties, who may have claims for a privilege under the Family Educational Rights and Privacy Act of 1974. *Id.* at 340 n.8.

[219] EEOC v. Franklin & Marshall College, 775 F.2d 110, 114, 116 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986) (White, J., dissenting).

[220] *Id.* at 116 (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 68–69 (1984)).

[221] *Id.* at 117.

[222] *Id.* at 111–12.

[223] *Id.* at 112. The Professional Standards Committee is responsible for all tenure review decisions. *Id.* at 111. The Committee was composed of the Dean of the College and five other members elected by the faculty. *Id.*

[224] *Id.* at 112. Prior to instituting charges, Montbertrand requested and received a statement of the reasons for the denial of tenure which read: "'[t]enure was not recommended because deficiencies in the areas of scholarship were not sufficiently offset by performance in other areas.'" *Id.* (quoting Letter from the President of the College to Professor Montbertrand (Jan. 21, 1981), Appendix, at 101a).

[225] *Id.*

[226] *Id.* at 112–13.

[227] *Id.*

[228] *Id.* at 114.

[229] *Id.* at 113. For a discussion of an EEOC subpoena enforcement procedure, see *supra* notes 127–31 and accompanying text.

[230] *Franklin & Marshall*, 775 F.2d at 113.

The College appealed the district court's order, and requested that the circuit court recognize a qualified academic privilege.[231] The College argued that a district court would be justified in enforcing a subpoena requesting confidential peer review material and comparative data on other tenure candidates only after the EEOC made an initial showing that the charges had merit.[232] This qualified academic privilege, the College maintained, struck the proper balance between the college's need for academic freedom and the EEOC's need for evidence in its investigation.[233]

In rejecting the College's argument, the *Franklin & Marshall* court relied on Title VII's legislative history and an analogy to *EEOC v. Shell Oil Co.*[234] The court acknowledged that academic freedom was a special concern of the first amendment, and that among the "'four essential freedoms'" of a university was the freedom to decide, on academic grounds, who may teach.[235] The court disagreed, however, with the College's argument that academic freedom protected its peer review committee's deliberations from disclosure. First, the court examined the 1972 amendment to Title VII which deleted the exemption for educational institutions, and rejected the College's confidentiality argument.[236] The court read the amendment to suggest that Congress intended courts and the EEOC to examine critically university employment decisions.[237] To conduct such an examination, the court concluded, the EEOC must have access to all material relevant to the decision.[238] Although acknowledging that disclosing confidential peer review material might burden the tenure review process, the court reasoned that the potential impact on tenure review did not outweigh the threat of discrimination in educational institutions.[239]

The Third Circuit then analogized to *EEOC v. Shell Oil Co.* to defeat the College's argument that the EEOC must raise an inference of discrimination before obtaining confidential material.[240] The court noted that under the standard set by the Supreme Court in *Shell Oil Co.*, a district court does not need to determine that the charge is "well-founded, verifiable, or based on reasonable suspicion" before it enforces an EEOC subpoena.[241] Rather, the court stated, a district court needs to determine only that the charge is valid, that the requested material is relevant to the charge, and that the charge is not too indefinite.[242] Therefore, the court concluded, the EEOC did not have to

---

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.* at 114–16. For a discussion of *EEOC v. Shell Oil Co.*, see *supra* notes 132–42 and accompanying text. For a discussion of the legislative history of Title VII, see *supra* notes 85–86 and accompanying text.

[235] *Id.* at 114 (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). For a discussion of these two cases, see *supra* notes 48–59 and accompanying text.

[236] *Franklin & Marshall*, 775 F.2d at 115. For a discussion of the legislative history of Title VII as it concerns colleges, see *supra* notes 85–86 and accompanying text.

[237] *Franklin & Marshall*, 775 F.2d at 115 (quoting Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979)).

[238] *Id.*

[239] *Id.*

[240] *Id.* at 115–16.

[241] *Id.* at 116 (citing EEOC v. Shell Oil Co., 466 U.S. 54, 72 n.26, 77 n.33 (1984)).

[242] *Id.* (citing *Shell Oil Co.*, 466 U.S. at 72 n.26).

demonstrate the merit of its claim before obtaining enforcement of the subpoena for peer review materials.[243]

Having determined that a privilege based on academic freedom would not protect peer review materials, and that the EEOC's access to these materials was dependent upon the relevance of the materials, the court examined the EEOC's request in this particular case.[244] The College claimed that nonconfidential evidence and summary charts prepared by the College provided sufficient evidence for the EEOC to discern whether the College's reasons for dismissal were a pretext for hiding a discriminatory motive.[245] Confidential materials, the College argued, were not relevant to the investigation.[246] The court held, however, that in the investigatory stage the standard of relevance is broad,[247] and that the EEOC should have access to "virtually any material that might cast light on the allegations against the employer."[248] The subject of an EEOC investigation, the court reasoned, should not be able to choose which information is necessary for the investigation.[249] The materials which the College claimed were privileged, the court noted, might contain evidence of pretext or evidence of direct discriminatory intent with respect to the charging party, Montbertrand.[250]

After concluding that the EEOC should have access to materials pertaining to the charging party, the court added that the EEOC should be able to obtain information on other tenure candidates.[251] The court reasoned that confidential material on other candidates would provide useful comparative data and might show that the college granted tenure to faculty less qualified than the complainant.[252] Consequently, the court explained, a mere comparison of objective qualifications, based on nonconfidential material on other candidates, would not be sufficient.[253] The court stressed that the EEOC must examine the peer review material.[254] Although the peer review committee used subjective criteria in its decision, the Third Circuit found that this would not entitle the information to any special treatment.[255]

---

[243] *Id.* at 115.

[244] *Id.* at 117.

[245] *Id.* at 115. For a statement of the College's reasons for dismissal, see *supra* note 224.

[246] *Franklin & Marshall,* 775 F.2d at 115.

[247] *Id.* at 116 (citing EEOC v. University of Pittsburgh, 643 F.2d 983, 986 (3d Cir.), *cert. denied,* 454 U.S. 880 (1981)).

[248] *Id.* (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 68–69 (1984)).

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.* (citing Namenwirth v. Board of Regents of Univ. of Wisconsin Sys., 769 F.2d 1235, 1240–41 (7th Cir. 1985)).

[253] *Id.*

[254] *Id.*

[255] *Id.* at 116 n.2. The court compared a peer review committee's decision to deny or grant tenure to an employment decision in any context by reasoning:

> The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet, especially in the blue-collar context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities. . . . Indeed, subjective esteem is more important in certain blue-collar contexts, where, for example, lives may depend on the employee's performance and good judgment . . . . And because all lawyers and judges are trained in academia, courts are better equipped

The court nonetheless warned that the task of the EEOC and the courts is not to second guess the peer review committee's subjective evaluation of the candidates' academic credentials.[256] The purpose of the investigation, the court explained, is to determine whether an evaluator's subjective opinion contained impermissible non-academic bias.[257] This approach, the court reasoned, would leave colleges and universities free to make tenure decisions without governmental direction so long as the decisions were made on academic and not discriminatory grounds.[258]

The *Franklin & Marshall* court expressly rejected the approach of the Seventh Circuit in *Notre Dame* — which permits the EEOC access to edited peer review materials only after the EEOC has shown that the charge has merit — as inconsistent with Congress's intent in amending Title VII to include colleges.[259] Because the EEOC agreed to accept the peer review materials with names and other identifying characteristics deleted, the court did not address the issue of whether the College had a sufficiently compelling interest in protecting the confidentiality of its peer review system to delete names.[260]

Disagreeing with the majority's conclusion that the EEOC should have unrestricted access to all relevant peer review materials, Judge Aldisert, in a dissenting opinion, characterized the case as one involving an "automatic and unbridled EEOC subpoena [search]."[261] The dissent refuted the majority's view that the 1972 amendment demonstrated Congress's intent to eliminate academic freedom in Title VII cases.[262] Judge Aldisert argued that Congress was not contemplating peer review decisions when it deleted the exemption for academic institutions.[263] Congress, he asserted, did not intend "a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties."[264]

The dissent also rejected the majority's use of *Shell Oil Co.*,[265] which held that the EEOC does not need to demonstrate that a charge has merit before obtaining enforcement of a subpoena.[266] Judge Aldisert contended that colleges and universities are not like "garden variety private employers."[267] Confidentiality is essential to the peer review

---

> to scrutinize academic decisionmaking than decisionmaking in the perhaps less familiar blue-collar context.

Id. (quoting *Namenwirth,* 769 F.2d at 1244–45 (Swygert, J., dissenting) (citations omitted)).

[256] *Id.* at 117 (citing Kunda v. Muhlenberg College, 621 F.2d 532, 547–48 (3d Cir. 1980)).

[257] *Id.*

[258] *Id.* The court stated that:

> The scope of the EEOC's role is to determine whether or not there is evidence to support a charge that an employment decision was based upon reasons protected by federal statute. The oft times difficult decision to promote or to grant tenure shall be left exclusively to this nation's colleges and universities so long as the decisions are not made, in part large or small, upon statutorily impermissible reasons.

Id.

[259] *Id.* at 114. For a discussion of *Notre Dame,* 715 F.2d 331 (7th Cir. 1983), see *supra* notes 176–218.

[260] *See Franklin & Marshall,* 775 F.2d at 117.

[261] *Id.* at 117 (Aldisert, J., dissenting).

[262] *Id.* at 119 (Aldisert, J., dissenting).

[263] *Id.* (Aldisert, J., dissenting).

[264] *Id.* at 120 (Aldisert, J., dissenting).

[265] *Id.* at 117, 120 (Aldisert, J., dissenting).

[266] For a discussion of *Shell Oil Co.,* see *supra* notes 132–42 and accompanying text.

[267] *Franklin & Marshall,* 775 F.2d at 120 (Aldisert, J., dissenting) (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 681 (1980) ("principles developed for use in the industrial setting cannot be

process, Judge Aldisert observed, because it ensures objective and frank evaluations.[268] Therefore, he argued, the EEOC should be required to make a showing that the charges have merit before obtaining enforcement of a subpoena requesting confidential peer review materials.[269]

If the EEOC had to make an initial factual showing of merit during a subpoena enforcement proceeding, Judge Aldisert reasoned, a court could determine whether ordering disclosure of these materials was necessary.[270] Relevance at the administrative subpoena level, according to the dissent, is a limitless concept because there is no complaint to provide a standard for the scope of discovery.[271] Although relevance is an acceptable standard when the EEOC is investigating business decisions, Judge Aldisert stated, a less lenient standard must apply when the EEOC is investigating tenure decisions, because the investigation of tenure decisions implicates the confidentiality of the peer review process.[272]

In an EEOC investigation of a tenure decision, Judge Aldisert therefore advocated the use of a balancing test, which would weigh the interests of the EEOC and the charging party in a thorough investigation against society's interest in protecting the confidentiality of the peer review system.[273] Applying the balancing test to the facts in *Franklin & Marshall*, the dissent concluded that the charging party's interest in obtaining his own files with the names of his evaluators deleted outweighed the College's interest in complete confidentiality.[274] Judge Aldisert argued, however, that before the EEOC could obtain confidential information on third parties it should be required to demonstrate, on the basis of the information obtained on the charging party, that the charge has merit.[275]

To prove a charge has merit and thus obtain information on third parties, the dissent stated, the EEOC would not be required to establish that the charge was well-founded, but rather would need to demonstrate whether "*any* factual predicate underlying the claim whatsoever is present."[276] This approach, Judge Aldisert noted, would protect the privacy rights of other candidates for tenure by requiring the district court to exercise its discretion prior to disclosure, and put a "modest burden" on the EEOC

'imposed blindly on the academic world'")(citation omitted). In *Yeshiva University*, the Court held that because faculty are management employees, the National Labor Relations Act did not apply to them. 444 U.S. at 686–90.

[268] *Franklin & Marshall*, 775 F.2d at 120 (Aldisert, J., dissenting) (citing EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983)).

[269] *Id.* at 118–19 (Aldisert, J., dissenting).

[270] *Id.* (Aldisert, J., dissenting).

[271] *Id.* at 121 (Aldisert, J., dissenting).

[272] *Id.* at 120 (Aldisert, J., dissenting) ("Discovery expeditions into records of commerce and industry implicate only money and time; they do not implicate confidential evaluations of professional performance uttered by intimate peers with the expectation of privacy.").

[273] *Id.* at 121 (Aldisert, J., dissenting). This is the test used by the *Gray* court. *Gray*, 692 F.2d 901, 903 (2d Cir. 1983). For a discussion of *Gray*, see *infra* notes 161–66 and accompanying text.

[274] *See Franklin & Marshall*, 775 F.2d at 121 (Aldisert, J., dissenting).

[275] *Id.* (Aldisert, J., dissenting).

[276] *Id.* (Aldisert, J., dissenting) (emphasis in original) (citing EEOC v. Shell Oil Co., 446 U.S. 54, 72 n.26 (1984)). Judge Aldisert here suggests that the EEOC must meet only a rational basis type test. Earlier in his dissent, however, he proposed a more stringent standard, and argued that the EEOC must present a "compelling necessity for rooting through confidential files of other faculty members." *Id.* at 117–18.

to show merit.[277] Thus, Judge Aldisert's dissent proposed adopting a balancing approach to extend the concept of academic freedom to provide special protection to peer review materials and evaluators.

Courts, therefore, have not resolved uniformly whether academic freedom should protect peer review materials from disclosure during an EEOC investigation. The Seventh Circuit in *Notre Dame* has recognized a qualified academic freedom privilege to limit the EEOC's access to confidential peer review materials.[278] Under the approach of the Seventh Circuit, the EEOC must demonstrate that its charge has substance in order to obtain peer review materials with the names and identifying characteristics of the evaluators deleted. The EEOC must make a showing of particularized need to obtain the identities of the evaluators.[279] This standard, the Seventh Circuit reasoned, adequately protects a college's interest in granting tenure to the best candidates, which grants, in turn, further the goal of academic freedom: the uninhibited acquisition and transfer of knowledge.[280]

In contrast, the Third Circuit in *Franklin & Marshall* has refused to recognize a qualified academic freedom privilege.[281] Instead, the Third Circuit has held that the EEOC has the authority to subpoena all information which is relevant to the charge of discrimination.[282] Because the standard of relevance is broad at the investigatory stage, the *Franklin & Marshall* court reasoned, the EEOC may obtain confidential peer review materials.[283] The court determined that a college's interest in a confidential peer review system did not outweigh the EEOC's interest in obtaining specific information concerning a tenure decision.[284] Allowing the EEOC access to peer review materials, the Third Circuit reasoned, furthered the purposes of Title VII.[285] Thus, courts have not reached a consensus on how to balance academic freedom against the EEOC's ability to investigate tenure decisions.

IV. Balancing Discovery with Confidentiality

Courts are split on the issue of whether to recognize a privilege based on academic freedom to protect the peer review system during an EEOC investigation.[286] Protecting tenure deliberations from disclosure potentially conflicts with Title VII's mandate that the EEOC investigate employment decisions.[287] The following analysis suggests that courts do not threaten academic freedom by allowing the EEOC to investigate tenure decisions, and that compelled disclosure of the basis for certain tenure decisions may be

---

[277] *Id.* at 118, 121 (Aldisert, J., dissenting).

[278] EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983); *see supra* notes 176–218 and accompanying text.

[279] *Notre Dame*, 715 F.2d at 338; *see supra* notes 209–15 and accompanying text.

[280] *Notre Dame*, 715 F.2d at 335–36; *see supra* notes 194–98, 205–06 and accompanying text.

[281] EEOC v. Franklin & Marshall College, 775 F.2d 110, 114 (3d Cir. 1985).

[282] *Franklin & Marshall*, 775 F.2d at 115–16; *see supra* notes 219–60 and accompanying text.

[283] *Franklin & Marshall*, 775 F.2d at 116; *see supra* notes 244–55 and accompanying text.

[284] *Franklin & Marshall*, 775 F.2d at 115; *see supra* notes 234–39 and accompanying text.

[285] *See Franklin & Marshall*, 775 F.2d at 115; *see also supra* notes 234–39 and accompanying text.

[286] EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d. Cir. 1985); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

[287] *See* 42 U.S.C. § 2000e-5 (1982).

essential in order to preserve the goals of both academic freedom and Title VII.[288] Although an absolute privilege should not protect tenure deliberations, courts nonetheless must be cautious about ordering the disclosure of these materials. Because the loss of confidentiality in the peer review process may impair tenure decisionmaking and, therefore, adversely affect academic excellence, courts should not automatically give the EEOC access to peer review materials. Instead, courts should examine a college's reasons for tenure denial before ordering disclosure and, where a college does not base its decision on confidential materials, deny the EEOC access to these materials.[289] Making the privilege contingent upon a college's reasons for tenure denial represents the appropriate balance between a college's interest in confidentiality and the EEOC's interest in disclosure. The suggested approach offers a clear framework for judging when to disclose peer review materials, furthers the purposes of Title VII by allowing the EEOC to investigate tenure decisions effectively, and provides a modicum of protection to the peer review system.

Careful consideration of the purpose of academic freedom indicates that recognition of a privilege for tenure decisions may be detrimental to academic freedom. Teachers play an important role in the open exchange of ideas and opinions, which is the cornerstone of a free society.[290] Academic freedom is intended to allow teachers to engage in this exchange free from outside, authoritarian control.[291] The core of academic freedom, therefore, involves protecting an individual teacher's right to teach.[292] Thus, in cases where there have been attempts to suppress ideas on campus, the Supreme Court has intervened to protect an individual teacher's academic freedom to teach.[293]

Academic freedom also may involve protecting the academic decisions of a college, as an institution, from outside interference.[294] A court that is willing to protect a college's academic decision, however, still must examine the grounds for the college's decision to protect the core values of academic freedom.[295] A college can suppress ideas by granting

---

[288] In the context of civil actions in which the EEOC is not involved, other commentators have concluded that an absolute privilege should not protect peer review materials; these commentators, however, have not proposed a test for recognizing a privilege similar to that proposed in this note. *See, e.g.*, Note, *Academic Freedom vs. Title VII, supra* note 31, at 1004; Comment, *Academic Freedom Privilege, supra* note 77, at 344; Note, *The Challenge to Antidiscrimination Enforcement on Campus: Consideration of an Academic Freedom Privilege*, 57 ST. JOHN'S L. REV. 546, 561 (1983); DeLano, *supra* note 154, at 137.

[289] Courts have used a similar approach in private actions in which the EEOC was not involved. Lynn v. Regents of the Univ. of California, 656 F.2d 1337, 1347 (9th Cir. 1981); Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1384–85 (5th Cir. 1980); Keyes v. Lenoir Ryne College, 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied,* 434 U.S. 904 (1977); *see supra* note 156.

[290] *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); *see also* Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[291] *See Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250.

[292] *See Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250; *see also* O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 277 (1984). For a discussion of *Sweezy* and *Keyishian*, see *supra* notes 37–47 and accompanying text.

[293] *See supra* notes 37–47 and accompanying text.

[294] *See supra* notes 48–59 and accompanying text.

[295] *See* Gray v. Board of Higher Educ., 692 F.2d 901, 909 (3d Cir. 1982); *In re* Dinnan, 661 F.2d at 431; *see also* commentators cited *supra* note 288. In *Gray*, the court noted that "academic freedom is illusory when it does not protect faculty from censurious practices but rather serves as a veil for those who might act as censors." 692 F.2d at 909.

tenure in accordance with a preferential bias for one class of teachers.[296] For example, by discriminatorily denying tenure to a woman whose field is women's studies, a college will inhibit the growth of this field.[297] Therefore, allowing colleges free rein to determine who may teach by recognizing an absolute privilege for peer review materials may defeat the purpose of academic freedom, which is to encourage a broad exchange of ideas.[298]

Although absolute confidentiality potentially will frustrate the purpose of academic freedom, colleges have a sufficient interest in a confidential peer review system to warrant some protection. The assurance of confidentiality encourages evaluators to give candid and frank critiques of a tenure candidate's qualifications.[299] By promoting honest evaluations, confidentiality aids in the selection of the best tenure candidates.[300] A confidential peer review system, therefore, promotes academic excellence.[301] Academic excellence, in turn, furthers the open exchange of ideas, which is the ultimate goal of academic freedom.[302] Courts, therefore, must recognize that colleges have a interest in confidentiality, and that providing some, but not absolute protection to the peer review system may further the goals of academic freedom.

Once it is established that an absolute privilege does not protect peer review materials, courts may consider disclosing the information. Due to the potential harm of disclosure, however, courts should set a standard for when the materials may be released.

---

[296] *Gray*, 692 F.2d at 909; *In re* Dinnan, 661 F.2d at 430.

[297] In *Lynn v. University of California*, for example, the Ninth Circuit noted that the University denied the plaintiff tenure in part because of its disdain for women's studies as a topic worthy of scholarly work. 656 F.2d 1337, 1343 (9th Cir. 1981).

According to the classical economic view, employment discrimination, similar to that present in *Lynn*, should be self defeating. *See e.g.*, R. Posner, Economic Analysis of Law, 9–10, 615–16. Irrationally restricting the potential pool of employees by discriminating against certain classes of people theoretically will raise an employer's costs. *Id.* at 616. Other employers, who hire from a free market, will not bear this burden. *Id.* They will provide needed services at a lower cost and eventually will put the biased employer out of business. *Id.* Thus, a college which discourages women's studies, for example, by denying tenure to women, will suffer because it will lose students and tuition to more egalitarian colleges.

The classical economic approach of allowing the market to cleanse itself, however, has not solved the problem of employment discrimination. First, there are more qualified applicants than available positions. Bowen, *Academia's New "Gypsies"*, Time, Jan. 12, 1987, at 65. Consequently, academic decisionmakers can exclude minorities and women irrationally and still have enough qualified professors to fill positions. *See* R. Posner, *supra*, at 615. Second, under a phenomenon commentators have labeled the "taste for discrimination," employment decisionmakers, employees, and consumers may be willing to "pay" more to avoid increased contact with others not like themselves. *Id.* Therefore, although economic analysis would suggest that discrimination is not in a college's best economic interests and that the market therefore would cleanse itself without Title VII, the overabundance of qualified candidates, and the taste for discrimination allow a college to hire from an artificially restricted market without suffering economically.

[298] *See supra* note 291. Justice Frankfurter recognized the tension between protecting a teacher from outside control and allowing a college to exercise uninhibited discretion in academic matters. *See Sweezy*, 354 U.S. at 263 (Frankfurter, J., dissenting). To reconcile this tension between the individual and institutional aspects of academic freedom, he required that a college make its decision *on academic grounds* in order to receive the protection afforded by academic freedom. *Id.* (Frankfurter, J., dissenting); *see supra* notes 50–52 and accompanying text. A discriminatory decision, of course, would not qualify as a decision "on academic grounds."

[299] *See, e.g.*, EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983).

[300] *Id.*

[301] *Id.*

[302] *See supra* notes 81–83 and accompanying text.

One approach — that adopted by the Third Circuit in *Franklin & Marshall* — allows peer review materials to be released whenever they might be relevant to the charge.[303] By allowing the EEOC to obtain peer review materials without inquiring into a college's basis for the allegedly biased decision, the Third Circuit's approach may infringe unnecessarily on a college's interest in a confidential peer review system. The *Franklin & Marshall* approach does not require a district court to weigh the EEOC's need for confidential peer review materials by examining the college's reasons for tenure denial.[304] Instead, the decision focuses only on whether these materials are relevant to the EEOC's investigation, and defines relevant information as "any material that might cast light on the allegations against the employer."[305] Moreover, the decision holds that courts should not allow colleges control over the scope of an EEOC investigation.[306] The decision thus indicates that courts should determine relevance only by referring to the allegations contained in the charge, and not also by examining a college's defenses to those allegations. Therefore, according to the approach of the Third Circuit in *Franklin & Marshall*, a court may order disclosure regardless of a college's proffered reasons for its tenure decision.

Under the Third Circuit's approach there are cases where the EEOC may obtain confidential peer review materials needlessly. Such a case might arise where, for example, a faculty member is falsely accused of missing classes. If the peer review committee claims that it based its denial on this accusation, the EEOC will not need confidential peer review materials to show pretext; a simple examination of nonconfidential materials will suffice.[307] Thus, allowing the EEOC access to all information which is relevant to the charges, without examining the college's reasons for denial, may infringe unnecessarily on the integrity of a college's peer review committee.

Another approach — that adopted by the Seventh Circuit in *Notre Dame* — makes edited peer review files available once the EEOC has demonstrated that there is substance to its charge, but requires the EEOC to show a particularized need to obtain the evaluators' names and identifying characteristics.[308] By requiring the EEOC to make a strong showing of need to obtain disclosure of complete peer review materials, the *Notre Dame* approach may foreclose EEOC investigations of tenure decisions. Obtaining testimony from the peer review committee members and evaluators may be necessary to uncover evidence of discriminatory intent,[309] which is a crucial element in a professor's typical claim.[310] To obtain the identities of these decisionmakers, and thus the ability to depose

---

[303] For a discussion of *Franklin & Marshall College*, see *supra* notes 219–60 and accompanying text.

[304] *See supra* notes 219–60 and accompanying text.

[305] *See supra* notes 240–55 and accompanying text.

[306] *Franklin & Marshall*, 775 F.2d at 116. The *Franklin & Marshall* court stated that "an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation." *Id.*

[307] Rollins v. Farris, 108 F.R.D. 714, 719 (E.D. Ark. 1985); *see* Gray v. Board of Higher Educ., 692 F.2d 901, 905 (2d Cir. 1982). In this example, the EEOC would need to examine only nonconfidential data, such as the candidate's attendance records, to determine that the college's reason for tenure denial — missed classes — was not the real reason for the decision, and thereby confirm the inference that the college was motivated by discriminatory bias. For a discussion of pretext analysis, see *supra* notes 100–04 and accompanying text.

[308] *See supra* notes 176–79 and accompanying text.

[309] *Gray*, 692 F.2d at 906 n.10.

[310] See *supra* notes 88–104 and accompanying text for a discussion of disparate treatment claims.

them,[311] under the *Notre Dame* particularized need standard the EEOC must show either that a legitimate reason did not support an evaluation or that it was likely discriminatory animus motivated an evaluator.[312] An examination of this required showing illustrates that the EEOC rarely could meet this burden with edited peer review files, and thus would be unable to discover the decisionmakers' intent. The EEOC will have great difficulty in determining the basis for an evaluation without access to any identifying characteristics of the evaluator. Furthermore, because direct evidence of discriminatory bias will be rarely apparent on the face of an evaluation,[313] the EEOC will have difficulty demonstrating an unidentified evaluator's likely motivation. The EEOC, therefore, usually will be unable to show a particularized need for complete peer review materials, and consequently this approach will deny the EEOC an opportunity to investigate central figures in a tenure decision. Therefore, because the *Notre Dame* standard essentially requires the EEOC to uncover discriminatory intent without the information most valuable in a determination of a decisionmaker's state of mind, this standard places too great a burden on the EEOC.

Subjected to such a burden, the EEOC will be unable to find reasonable cause.[314] As a result, the EEOC will be unable either to effect a voluntary conciliation agreement with the college,[315] or to file a complaint in a civil action.[316] More importantly, foreclosing an EEOC investigation will make the EEOC unable to aid a professor in the difficult task of obtaining evidence of discriminatory intent in a subsequent private action under Title VII.[317] The approach of the Seventh Circuit in *Notre Dame*, therefore, may foreclose EEOC investigations and hamper the enforcement of Title VII.

A third approach — that suggested by the dissent in *Franklin & Marshall* — involves a balancing of the EEOC's interest in a thorough investigation and a college's interest in a confidential peer review system.[318] In rejecting the majority's approach, the *Franklin & Marshall* dissent correctly recognized that controlling an EEOC investigation by a broad relevance standard does not protect a college's confidentiality interests adequately.[319] The dissent's application of the balancing approach, however, is problematic because it limits the EEOC's access to comparative data on other tenure candidates on the basis of the confidentiality interests of these other candidates.[320] Rather than argue that other candidates have an absolute right to protect their files from disclosure, the dissent reasoned that other candidates' interest in confidentiality outweighs the EEOC's interest in disclosure of comparative data absent a showing of merit.[321]

Where a college bases its tenure decision on peer review evaluations, however, the EEOC's interest in the peer review files of other candidates will outweigh these candi-

---

[311] For a discussion of the investigatory power of the EEOC, see *supra* note 126.

[312] *See supra* notes 213–14 and accompanying text.

[313] Sweeney v. Board of Trustees, 569 F.2d 169, 175 (1st Cir.), *rev'd on other grounds*, 439 U.S. 24 (1978), *opinion on remand*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). In *Sweeney*, the court noted that because decisionmakers in the college setting have a high level of sophistication, direct evidence of discriminatory intent would be rare. *Id.*

[314] *See supra* notes 117–20 and accompanying text.

[315] *See supra* note 117 and accompanying text.

[316] *See supra* note 119 and accompanying text.

[317] *See supra* note 120 and accompanying text.

[318] *See supra* note 273 and accompanying text.

[319] *See supra* notes 271–72 and accompanying text.

[320] *See supra* note 275 and accompanying text.

[321] *See supra* notes 274–75 and accompanying text.

dates' confidentiality interests. Rarely will there be direct evidence of discriminatory intent in the charging party's evaluations.[322] Therefore, in order to determine whether the peer review committee's reason for tenure denial is a pretext, the EEOC must examine similarly situated candidates to determine whether they were treated in the same manner as the charging party.[323] This would require that the EEOC have access to peer review materials on other candidates. Furthermore, because the charging party must sign an agreement not to disclose any information the EEOC obtains during an investigation, and because the EEOC itself is prevented from disclosing this information to anyone other than the charging party,[324] the infringement on the confidentiality interests of other candidates is slight. Therefore, other candidates' interests in retaining the confidentiality of their files do not outweigh the EEOC's interest in examining these materials, both because this information is essential in determining pretext, and because disclosure is limited to the charging party and the EEOC. Thus, the *Franklin & Marshall* dissent gives insufficient weight to the EEOC's interest in disclosure, and exaggerates the infringement that disclosure causes on the privacy of others.

Requiring a strong showing of discrimination before allowing the EEOC access to complete peer review files is too restrictive a standard, and will limit unduly the role of the EEOC in achieving Title VII's goal of equal employment opportunity. Granting the EEOC access to all information vaguely relevant to a charge without regard to a college's defense is too lenient a standard, and will infringe on a college's confidentiality interests needlessly. To protect a college's interests, courts should be willing to intervene in EEOC investigations of tenure decisions and, unlike the *Franklin & Marshall* approach, examine critically the EEOC's need for peer review materials before ordering disclosure. To further Title VII's goals, rather than compel the EEOC to demonstrate its need for peer review materials with incomplete files — as the *Notre Dame* decision and the *Franklin & Marshall* dissent require — courts should determine the EEOC's need by examining the reasons a college offers for its denial of tenure.[325] Where the EEOC can demonstrate without disclosure that the college's reasons are pretextual, courts should protect peer review materials.[326]

Courts should protect confidential peer review materials where a college admits that a professor is academically qualified for tenure, but claims that some factor apart from the professor's subjective qualifications was responsible for its decision to deny tenure. To discover whether the college's reasons for denial are a pretext in this situation, the EEOC need only examine whether the college denied tenure to other candidates who were similarly situated. For example, if a college claimed that it denied a professor tenure because of a current lack of funding for a tenure position, and not because of negative peer review evaluations, then the EEOC could determine pretext by investigating whether the college granted other professors tenure during periods of similar financial circumstances.[327] Because this investigation need not concern confidential peer

---

[322] Sweeney v. Board of Trustees, 569 F.2d 169, 175 (1st Cir. 1978); *see supra* note 313.

[323] For a discussion of this method of showing pretext, see *supra* notes 100–04 and accompanying text.

[324] *See supra* notes 143–48 and accompanying text.

[325] For a list of courts utilizing this approach, see *supra* note 289.

[326] *Id.*

[327] In the future colleges may deny tenure more frequently based purely on economic reasons. *See* Bowen, *Academia's New "Gypsies"*, TIME, Jan. 12, 1987, at 65. The job market for Ph.D's is shrinking, while colleges continue to graduate new professors, particularly in the humanities. *Id.*

review evaluations or the committee's deliberations concerning those evaluations, these should be protected. A court which examined the college's reasons for denying tenure thus could protect a college's confidentiality interests and refine the scope of an EEOC investigation by denying the EEOC access to peer review materials without substantially hindering the investigation.

Although requiring a court to examine the college's reasons for tenure denial may delay an EEOC investigation, the college's interest in an effective peer review system warrants the delay. Delays may cause the charging party to request a right to sue letter and commence his or her own private action before the EEOC enforcement procedure is complete.[328] Delays in an investigation therefore may encourage professors, after waiting the statutory period, to circumvent the EEOC's enforcement procedure in favor of filing a complaint in federal district court.[329] The suggested approach burdens an EEOC investigation more than the approach of the Third Circuit in *Franklin & Marshall College*, which minimizes possible delays in an EEOC investigation by allowing a district court in a subpoena enforcement proceeding to treat peer review materials similarly to ordinary business personnel files.[330] The delay caused by the proposed approach, however, is not as severe as that caused by the approach of the Seventh Circuit in *Notre Dame*, which requires a court to supervise an EEOC investigation continuously.[331] According to the *Notre Dame* court, a court first must determine whether the charge has substance. Next, the court must examine the edited peer review materials to make sure that the deletions are reasonably necessary. Finally, the court must determine whether the EEOC has demonstrated a particularized need for the identities of the peer review evaluators.[332]

The delay caused by the suggested approach will not impede the EEOC unduly and is necessary to protect the integrity of the peer review process. A professor bringing a charge has an interest in waiting for the results of an investigation because the EEOC will allow him or her access to all the information which it collects.[333] The professor may use this information to determine whether to bring a private action under Title VII, and, once this action is commenced, may use this information to augment discovery.[334] Because the suggested approach allows for the disclosure of confidential files which will be critical in a private Title VII action, professors will tolerate the delay while a court examines the college's reasons for tenure denial to gauge the merits of his or her claim before bringing a private action.

Although implementation of this suggested approach requires that a court have some evidence of the college's reasons for the tenure denial, and some assurance that the college will not later claim some other reasons,[335] this is an insubstantial drawback.

Smaller faculty budgets and less federal funding have required colleges to cut back on hiring. *Id.* Public universities in particular have suffered; the State of Utah, for example, plans to eliminate 95 faculty positions over the next three years. *Id.*

[328] *See supra* note 119.

[329] *See id.*

[330] *See supra* notes 219–21 and accompanying text.

[331] *See supra* notes 176–216 and accompanying text.

[332] *See id.*

[333] *See supra* notes 145–48 and accompanying text.

[334] *See supra* note 120 and accompanying text.

[335] Zaustinsky v. University of California, 96 F.R.D. 622, 626 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985); *see also Gray*, 692 F.2d at 906.

Because this approach allows for a privilege, it will encourage colleges to provide their reasons early in the EEOC investigation. Furthermore, a court may make the recognition of a privilege contingent upon the college's disclaiming a defense which would require disclosure of peer review materials to defeat.[336]

Tenure decisionmakers, like all employment decisionmakers, may be biased, and thus this process must be subject to investigation. The Supreme Court, in holding that the EEOC is entitled to all information relevant to a valid charge, regardless of the evidentiary strength of that charge,[337] has upheld the EEOC's broad investigatory power. Despite this recognized power, courts still must supervise EEOC investigations to protect a college's confidentiality interests during subpoena enforcement proceedings.[338] Thus, where the EEOC can establish pretext without confidential peer review materials, a court should not enforce an EEOC's subpoena requesting these materials. In addition, courts should be willing to bolster the protection afforded by Title VII and EEOC regulations which restrict disclosure of information the EEOC obtains by issuing a protective order.[339] Thus, although requiring that colleges be subjected to EEOC investigations, courts still should protect colleges' interests in a confidential peer review system.

The suggested approach places a reasonable burden on the peer review process and considers the weights of the relevant interests. Professors are accustomed to being accountable for their opinions when grading students' work and critiquing the work of other professors.[340] Courts should require that professors be equally accountable for tenure evaluations.[341]

V. Conclusion

Congress has granted the EEOC broad investigatory powers, and has indicated that colleges are subject to Title VII and EEOC investigations to the same extent as other employers. The Supreme Court has held that during an investigation the EEOC may subpoena any information which may "shed light" on the charges of discrimination against a business employer. The Third Circuit, applying this standard of relevance to an EEOC investigation of a college tenure decision, held that the EEOC could obtain confidential peer review materials. The Seventh Circuit, in contrast, bypassed the relevance standard in the context of a tenure decision by recognizing a qualified privilege to protect peer review materials based on academic freedom. Thus the circuits are split on determining the availability to the EEOC of confidential peer review materials.

Shielding tenure decisions from investigation will jeopardize academic freedom. Recognizing that EEOC access to all potentially relevant information, however, may unnecessarily infringe on a college's interest in a confidential peer review system, this note proposes a threshold test to ensure that confidentiality will be breached only when necessary. Pursuant to this proposal, courts should intervene in an EEOC investigation and examine a college's reasons for denying tenure before ordering disclosure of peer review materials. Only where a college bases its decision to deny tenure on peer review

---

[336] *See Gray*, 692 F.2d at 906.
[337] *See supra* notes 132–42 and accompanying text.
[338] *See supra* notes 127–31, 149–54 and accompanying text.
[339] *See supra* note 154 and accompanying text.
[340] *See* Note, *Academic Freedom vs. Title VII*, *supra* note 31, at 1003.
[341] *Id.*

evaluations, and these materials are therefore necessary in an EEOC investigation, should a court order disclosure. This approach furthers the purposes of Title VII by allowing the EEOC to investigate tenure decisions effectively, and still provides a modicum of protection to a college's interest in a confidential peer review process during an EEOC investigation.

IEUAN G. MAHONY